

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION No. 407 OF 2016

Nimmi Hemant Mota & Anr. ... Applicants
Vs.
Edelweiss Global Wealth Management ... Respondent

Mr. Jaydeep Deo i/b. L.D. Shah & Co., Advocate for the applicants.
Mr. Naushad Engineer with Nasser Ali Rizvi i/b. M/s. Thakore
Jariwala & Associates, Advocate for the respondent.

CORAM : MRS.MRIDULA BHATKAR, J.
RESERVED ON : 24th April, 2017
PRONOUNCED ON : 5th June, 2017

ORDER:

In this Civil Revision Application, the judgment and order dated 26th April, 2016 passed by the learned Judge, City Civil Court in Notice of Motion No. 3547 of 2014 is challenged. The respondent-company has filed Summary Suit No. 151 of 2014 to recover the refundable Security Deposit amount of Rs.18,00,000/- along with the interest of 10% p.a. from the defendants, i.e. present applicants. In the said suit, the applicants filed a Notice of Motion No. 3547 of 2014 requesting the Court to invoke its power under section 8 of the Arbitration and Conciliation Act 1996 and to refer the matter to the Arbitral Tribunal. The said Notice of Motion was rejected by the trial Court. Hence, this Civil Revision Application.

2. The learned counsel for the applicants has submitted that the learned Judge of City Civil Court ought to have taken into account that in the Leave and License Agreement dated 7th November, 2007 between the applicants and respondent, Clause 29 states about the arbitration and therefore, the applicants preferred Notice of Motion and requested the Court to refer the matter to the Arbitration. He argued that the learned trial Judge has failed to appreciate the catena of judgments of the Hon'ble Supreme Court as well as this High Court wherein the principles in view of the mandate under section 8 of Arbitration and Conciliation Act have been laid down. The learned counsel further argued that the Summary Suit is not maintainable in the eyes of law in view of the Arbitration Clause in the Agreement and Section 8 of the Arbitration and Conciliation Act. He further argued that the applicants have taken appropriate and timely steps in the Summary Suit requesting to refer the matter to the Arbitrator. He further submitted that if this Application is not allowed, then the applicants will be subjected to great injustice, as the applicants have very good case on merits and it will lead to closing down his defence. In support of his submission the learned counsel relied on following decisions:

(i) Sundaram Finance Ltd. & Anr. vs. T. Thankam, reported in

(2015) 14 SCC 444.

(ii) Judgment of Single Judge of High Court of Bombay at Nagpur in Milind Dattatraya Mahajan & Ors. vs. Pramod Deshraj Budhraj & Anr., in Arbitration Appeal No. 18 of 2015 decided on 29th February, 2016.

3. The learned counsel for the respondent while meeting with the arguments of the learned counsel for the applicants has supported the order passed by the learned Judge of the City Civil court dismissing the Notice of Motion. He submitted that the applicants did not file an Application for leave to defend within 10 days from the service of summons for judgment, which he ought to have filed. There was considerable gap between the last date of filing the affidavit and the application for leave to defend and taking out Notice of Motion of referring the matter under section 8 of the Arbitration and Conciliation Act. He submitted that the applicants are playing tactics to protract the trial and it will defeat the very object of the Summary suit. He submitted that Order XXXVII is a complete code itself and it has to be strictly followed. He relied on the decision of the Division Bench of this Court in the case of **Noble Resources and Trading India Pvt. Ltd. vs. Shree Satpuda Tapi Parisar Sahakari Sakhar**

Karkhana Ltd. & Ors. in Appeal No. 134 of 2013 decided on 10th June, 2014. and on the decision of the Single Judge of this Court in the case of **Gaurav Singhania vs. Matrix Agri Science Pvt. Ltd.**, reported in 2011 (6) Mh. L.J. 304.

4. The chronology of the events are to be taken into account before dealing with the merits of the matter. In the Summary Suit, the original plaintiff/respondent filed summons for judgment on 7th April, 2014, which was duly served upon the applicants on 24th May, 2014. Thus, it was necessary for the applicants to file affidavit-in-reply and application for leave to defend within 10 days, i.e., till 3rd June, 2014. However, it was not filed. Then on 1st July, 2014, an order was passed for ex-parte evidence on 20th August, 2014. On 20th August, 2014, the respondent filed the compilation of documents, affidavit of service and prayed that the judgment be passed in that matter. However, the advocate for the respondent appeared and filed application for adjournment and therefore, the matter was adjourned by the Court for hearing of summons for judgment with reply for application to 28th October, 2014. On 20th September, 2014 the applicants filed the Notice of Motion and on 24th September, 2014 the applicants sought production and got leave to register Notice of

Motion under section 8 of the Arbitration and Conciliation Act 1996. Thereafter, on 28th October, 2014 the matter was already scheduled for hearing of summons for judgment. On 16th December, 2014 reply was filed in Notice of Motion by the respondent/original plaintiff. On 4th February, 2015 and 20th February, 2015, the matter was adjourned and on 5th August, 2015 when the matter was called out, the applicants/original defendants failed to appear before the Court and ultimately the Notice of Motion was dismissed for default. On 15^h September, 2015 summons for judgment was argued and it was placed for order to 7th October, 2015. On 7th October, 2015, the applicants/original defendants did not appear in the morning, however, at 2.45 p.m. they tendered Notice of Motion No. 3811 of 2015 to recall the order of dismissal of Notice of Motion No. 3547 of 2014. The respondent/original plaintiff opposed the Notice of Motion by filing reply. On 18th December, 2015 and on 4th January, 2016 it was argued. On 12th January, 2016 Notice of Motion No. 3547 of 2014 was restored. Thereafter on 26th April, 2016 it was argued and rejected with reasoned order. 2½ months thereafter, i.e., on 12th July, 2016 present Civil Revision Application is filed.

5. Though Summary Suit is filed, it is the duty of the Civil Court to

refer the matter to the Arbitration once it is pointed out subject to timely steps taken by the parties. Even non-filing of leave to defend shall not come in the way of the Court to refer the matter to the Arbitrator once such clause is found in the Arbitration Agreement. However, if the party is found to be inert or deliberately slow in taking steps and such clause is not pointed out at the first instance of appearance, then the Court may not refer the matter to the arbitrator. The arbitration is a special enactment and object of this Alternate Dispute for Redressal is to settle the dispute amicably and speedily between the parties. Similarly, under Order 37, the aggrieved party can approach the Court for recovery of the money by adopting the summary procedure wherein a time frame is specifically mentioned. In the present case, it appears that the applicants/original defendants should have pointed out the arbitration clause and requested to refer the matter to the Arbitrator at the first instance.

6. In **Sundaram Finance Ltd.** (*supra*), while dealing with the scope of Section 8 of the Arbitration and Conciliation Act, the Supreme Court has held that “Once an application in due compliance with Section 8 of the Arbitration Act is filed, the approach of the Civil Court should be not to see whether the Court has jurisdiction. It

should be to see whether its jurisdiction has been ousted. There is lot of difference between two approaches.

7. In **Milind Dattatraya Mahajan** (*supra*), Summary suit was filed under Order 37 for recovery of the amount wherein four cheques were bounced. In the said suit, the defendants moved an application for referring the matter to arbitrator under section 8 of the Arbitration and Conciliation Act and the Hon'ble Judge formulated points for determination - (i) whether in the absence of an application for leave to defend, as contemplated by sub-rule (5) of Rule 3 of Order XXXVII of Code of Civil Procedure, the application under section 8 of the Arbitration and Conciliation Act, 1996 could be entertained and decided by the trial Court?; (ii) whether the suit is exclusively based upon the dishonour of the cheques and not on the enforcement of the agreement wherein arbitration clause was mentioned? The learned Judge answered point no. 1 that even in absence of any application for leave to defend, the application under sub-section (1) of Section 8 of Arbitration and Conciliation Act would be maintainable. It is also held that once it is held that there exists a valid and enforceable agreement of arbitration between the parties, the parties are required to be referred to the arbitration in terms of sub-section (1) of section

8 of the Arbitration and Conciliation Act. In the said case, the learned Single Judge while dealing with the sufficient cause to condone the delay in seeking leave to defend as specifically observed that “If the application under section (1) of Section 8 of the Arbitration and Conciliation Act is not filed at the first opportunity in the Summary Suit, the defendants shall run the risk of waiver of such objection.

8. In the case of **Noble Resources and Trading India Pvt. Ltd.** (*supra*), a Summary Suit was filed and then the Notice of Motion was filed under section 8 of the Arbitration and Conciliation Act in the Summary Suit. The Division Bench of this Court held that “It is also pertinent to note that when the plaintiff took out summons for judgment after stay of the order dated 16th November, 2012 of the learned trial Judge, the defendants chose not to file reply to the summons for judgment and, therefore, also it can safely be said that there were no disputes to be referred for arbitration”.

9. In the case of **Gaurav Singhania** (*supra*), the Single Judge of this Court held that the Application for leave to defend was filed almost after 90 days of the summons being served upon the respondents and that application was without any application for

condonation of delay.

10. In view of the ratio laid down in **Sundaram Finance Ltd.** (*supra*) and **Milind Dattatraya Mahajan** (*supra*), the issue before this Court is not res integra, as arbitration clause is mentioned in the agreement and the suit is based on agreement, then it is mandatory on the part of Civil Court to refer the matter to the Arbitral Tribunal, even though Summary Suit under Order XXXVII of Code of Civil Procedure is filed by one of the parties. Thus, taking recourse of Order XXXVII of Code of Civil Procedure by filing Summary suit shall not come in the way of referring the matter to the arbitrator under section 8 of the Arbitration and Conciliation Act. However, the facts of the case and conduct of the parties also are to be taken into account while referring the matter to the arbitrator in a Summary suit.

11. From this chronology of events, it is apparent that the applicants were not vigilant in defending the said Summary Suit, as they have not filed the affidavit-in-reply seeking leave to defend till today. Moreover, the applicants appeared in the said matter on 1st July, 2014 and at that time, the applicants should have taken out the application under section 8 of the Arbitration and Conciliation Act. On

20th August, 2014 again they appeared and still the applicants did not bother to move the application under section 8 of the Arbitration and Conciliation Act. Notice of Motion was taken out on 24th September, 2014. Thereafter, it appears that the said Notice of Motion was not pursued for one year and on 5th August, 2015 Notice of Motion was dismissed. Thereafter another Notice of Motion was taken out for restoration after one month and earlier Notice of Motion was restored subsequently. It was dismissed on 26th April, 2015 and Civil Revision Application was not filed immediately but it was filed after 2½ months. Considering the purpose and nature of the Summary Suit, I am constrained to interfere that the applicants/defendants have failed to take requisite steps immediately. It further shows that the applicants were negligent in pursuing the matter before the trial Court and, therefore, the benefit under section 8 of the Arbitration and Conciliation Act cannot be granted to the applicants at this stage.

12. In view of this, Civil Revision Application fails and hence dismissed.

(MRIDULA BHATKAR, J.)