

M/s. Kadevi Engineer Company Limited through
C.A. Mr. C. Srinivasan ... Applicants
Vs.
M/s. Patil and Co. ... Respondent

Mr. Jeetendra Ranawat a/w. Mr.Murthy i/b. Mr.Waquar Ahmad for Applicants.
Mr. N. J. Patil i/b. Mr. Mohan Shetty for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 09, 2017

P.C. :

Heard Mr. Ranawat, learned Counsel for applicants and Mr. Patil, learned Counsel for respondent at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicants, hereinafter referred to as 'defendants', have challenged the judgment and order dated 29.09.2016 passed by the learned Judge of the City Civil Court, Greater Mumbai in Summons for Judgment No.124 of 2014 in Summary Suit No.109 of 2014. By that order, the learned trial Judge granted conditional leave to defend the Suit to the defendant subject to his depositing the amount of Rs.10,00,000/- within 2 months from the date of the order. After depositing the amount, defendant was permitted to file written statement within 1 month before the Court.

3. In support of this Application, Mr. Ranawat strenuously contended that respondent, hereinafter referred to as 'plaintiff', has suppressed clauses, which are on the reverse side of the Job Work Order. In particular, plaintiff has suppressed clauses 14 and 15. Clause 14 deals with arbitration. Clause 15 deals with jurisdiction.

4. Mr. Ranawat submitted that there is agreement between the parties in terms of clause 14 which provides that if at any time any question, dispute or difference whatsoever may arise between the supplier and the purchaser in relation to or in connection with the order, the same shall be referred within the meaning of the Indian Arbitration Act of 1950 or any statutory modification thereof. He submitted that plaintiff-respondent has suppressed this clause which requires the parties to refer any question, dispute or difference between them as per provision of the Arbitration and Conciliation Act, 1996 (for short 'Act'). He, therefore, submitted that the learned trial Judge was not justified in deciding the Summons for Judgment.

5. Mr. Ranawat further submitted that clause 15 dealt with jurisdiction. It provides that the contract shall in all respects be construed and operate as an Indian contract and in conformity with the Laws of India and shall be taken to have been made in Hyderabad and be subjected to the jurisdiction of the Hyderabad Courts. In other words, the Civil Court at Mumbai will have no jurisdiction to entertain and try the Suit and consequently, even the Summons for Judgment.

6. Mr. Ranawat further submitted that plaintiff had issued NOC on 26.03.2011 wherein it is clearly stated that an amount of Rs.1,56,576/- is payable to the plaintiff and it has no other dues to be received from Kadevi. Once the plaintiff itself had accepted that no dues are payable to it, the learned trial Judge ought to have granted unconditional leave to defend. He further relied upon the decision of the Delhi High Court in the case of **Sharad P. Jagtiani Vs. M/s. Edelweiss Securities Limited, CS (OS) 461 of 2011 decided on 03.03.2014**, and in particular paragraph 14 thereof. Relying upon paragraph 14, he submitted that merely because defendants have filed reply to summons for judgment, it

cannot be said that it has submitted to the jurisdiction of the Civil Court or that it has waived the objections for referring the parties for arbitration in terms of clause 14. He has also relied upon the decision of this Court in the case of ***Rohit Ishwar Chugani and others Vs. Vinod J. Mehta, Writ Petition No.8755 of 2016 decided on 28.09.2016.***

7. On the other hand, Mr. Patil supported the impugned order. He has taken me through the impugned order and in particular paragraphs 8 and 9 thereof. In paragraph 8, the learned trial Judge has referred to the fact that defendants have suppressed the document, which was accompanying the No Objection Certificate dated 26.03.2011. In that document, it is set out that the payment to the plaintiff for any extra works and calculation as per drawing and work order given while starting the work, will be given after the confirmation from the client of all sites in continuation to his NOC letter dated 26.03.2011. The said document is duly signed by the defendants and the plaintiff. He further submitted that the Job Work Orders were placed on the address at Mumbai on 03.02.2010, 31.10.2010 and 01.11.2010 and on the basis of these Purchase Orders, plaintiff has raised invoices. The office of the plaintiff was situate at Mumbai. The Job Work Orders were placed at Mumbai and thus part of cause of action arose at Mumbai. In view of Section 20(c) of C.P.C., the Civil Court at Mumbai has jurisdiction to entertain and try the Suit. He further submitted that defendants have filed reply to the Summons for Judgment. Defendants did not agitate the contention for referring the parties to the arbitration. As defendants have submitted its first statement on substance of the dispute, it has submitted to the jurisdiction of the Civil Court and is now precluded from agitating contention based on Section 8 of the Act. He submitted that as against the claim of Rs.22,32,106/- along with interest @ 18% p.a., from the date of filing of the Suit till the payment and / or

realization, the learned trial Judge has granted conditional leave to defend to the defendants subject to depositing Rs.10,00,000/-, and therefore, no case is made out for interfering with the impugned order under Section 115 of C.P.C.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Mr. Ranawat relied upon clause 14 on the reverse side of the Job Work Order. Clause 14 reads thus,

14. Arbitration: If at any time any question, dispute or difference whatsoever may arise between the supplier and the purchaser in relation to or in connection with the order, the same shall be referred within the meaning of the Indian Arbitration Act of 1950 or any statutory modification thereof.

9. Mr. Ranawat submitted that plaintiff has suppressed clause 14, extracted hereinabove. However, no plausible explanation is coming from the defendants for not producing the conditions which are on the reverse side of the Job Work Order. Equally, no explanation is coming from the defendants for not agitating the said point based on Section 8 of the Act before the trial Court. Section 8 of the Act reads thus,

8. Power to refer parties to arbitration where there is an arbitration agreement.—

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, **if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.**

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

(emphasis supplied)

10. In the case of *Booz Allen and Hamilton Inc Vs. SBI Home Finance Ltd.*, AIR 2011 SC 2507, the Apex Court has observed that where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide (i) whether there is an arbitration agreement among the parties; (ii) whether all parties to the suit are parties to the arbitration agreement; (iii) whether the disputes which are the subject matter of the suit fall within the scope of arbitration agreement; (iv) **whether the defendant had applied under section 8 of the Act before submitting his first statement on the substance of the dispute**; and (v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration. (emphasis supplied)

11. In paragraph 17 of that report, it was observed that “Not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed by a defendant prior to the filing of the written statement will be construed as ‘submission of a statement on the substance of the dispute’, if by filing such statement / application / affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waive his right to seek reference to arbitration”. The decision in *Rashtriya Ispat Nigam Ltd vs. Verma Transport Company* - AIR 2006 SC 2800, where it was held that the expression ‘first statement on the substance of the dispute’ contained in Section 8(1) of the Act is different from the expression ‘written statement’, and refers to a submission of the party making the application under section 8 of the Act, to the jurisdiction of the judicial authority; and what should be decided by the court is whether the party

seeking reference to arbitration has waived his right to invoke the arbitration clause. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case.

12. In paragraph 19, it was further observed that “Though section 8 does not prescribe any time limit for filing an application under that section, and only states that the application under section 8 of the Act should be filed before submission of the first statement on the substance of the dispute, the scheme of the Act and the provisions of the section clearly indicate that the application thereunder should be made at the earliest. Obviously, a party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the court cannot subsequently turn round and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement. Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit.

13. As noted earlier, in the present case, defendants have filed reply to the Summons for Judgment. In the case of ***Jadavji Narsidas Shah Vs. Hirachand Chatrabuj***, AIR 1954 Bombay 174, the Division Bench of this Court has observed in paragraphs 6 and 7 thus,

“6. In the light of these decisions, let us consider the facts of this case. What Mr. Shah says is that the summons for judgment was taken out by the plaintiff and all that the defendants did was to resist that summons and asked the Court to dismiss that summons, and according to Mr. Shah the defendants did not make any application but filed this affidavit. Now that is an entirely erroneous view to take of the affidavit filed by the defendants. Under Order 37, Rule 3, the Court has, upon the application by the defendant to give leave to him to appear and to defend the suit, and it is only on such leave being given that a defendant is entitled to be heard in a summary suit. The nature of the affidavit filed by the defendants is clear.

As required by Order 37, Rule 3, they disclosed in the affidavit such facts as the Court may deem sufficient to support the application for leave to defend. They have disclosed the nature of their defence, they have attempted to satisfy the Court that they are entitled to be heard and leave to defend should be given, and, what is more, in the last paragraph of the affidavit they have in terms asked the Court that the summons for judgment be dismissed and that the defendants be granted unconditional leave to defend. What Mr. Shah says is that under our old practice when a defendant used to take out a summons for leave to defend he did apply for leave to defend and such an application would have been a step in the proceedings, but says Mr. Shah that under our new rules it is not the defendant who applies for leave to defend, but the plaintiff takes out a summons for judgment and all that the defendant does is to show cause against the summons for judgment.

The mere fact that instead of the defendant taking out a summons the plaintiff takes out a summons does not really change the substance of the matter. The substance of the matter is that when the summons for judgment comes up before the Court, it is the defendant who has to obtain leave to defend and on that leave being granted he becomes entitled to defend. Therefore it is clear that by filing this affidavit the defendants expressed an unequivocal intention that the matter should be heard by the civil Court and, gave clear effect to that intention by asking the court to give them leave to defend so that they should resist the plaintiff's claim.

7. Mr. Shah has relied on a decision reported in --'Pitchers, Ltd. v. Plaza', (Queensbury Ltd.) 1940-1 All ER101 (EJ, and Mr. Shan says that that decision lays down that if you file an affidavit to show cause against a summons for judgment and then you take out a notice of motion for stay and if the summons for judgment is not disposed of and both the notice of motion and the summons for judgment come up for decision at the same-time, the filing of the affidavit cannot be looked upon as a step in the proceedings. Mr. Shah says that in this case although the notice of motion was taken out after the summons for judgment, the summons for judgment was not disposed of and, therefore, the defendants were not too late in applying for a stay under Section 34. That is not the effect of the decision in --'Pitchers, Ltd. v. Plaza, Ltd.', (E). What the learned Judges there point out is that if at the same time as the affidavit is filed to show cause against the summons for judgment, an application is made by The defendant for stay, or if in the affidavit itself the arbitration clause is set out and an application is made for stay under Section 34, then the filing of the affidavit would not be a step in the proceedings.

Now that judgment is perfectly understandable on the principle already stated. When the defendant goes to Court to show cause against a summons for judgment and he makes his intention clear that he does not want the Civil Court to adjudicate upon his rights or liabilities, but he wants the domestic forum to decide that, then clearly the mere fact that he has filed an affidavit in reply to the summons cannot be relied upon as a step in the proceedings. But in this case the defendants file an affidavit in reply, make their intention perfectly clear, and then 12 days after that they take out a notice of motion for stay of the proceedings. Therefore when they take out the notice of a motion for stay of proceedings, they have already taken a step in the proceedings by filing their affidavit on 12-7-1953, and unequivocally expressing their intention as to which Court should decide the case. We fail to understand what possible bearing the fact that the summons for judgment was not disposed of has got to do with Section 34.”

2. It is no doubt true that that in that case the Court of considering Section 34 of the Arbitration Act, 1940 and whether the defendant, by applying for leave to defend can be said to have taken step in the proceedings, was under consideration.

3. In view of the decision of the Division Bench of this Court in **Jadavji Narsidas Shah** (*supra*), it has to be held that as defendants have submitted its first statement on the substance of the dispute, now, at this stage, it cannot invoke Section 8 of the Act. It has to be held that defendant has submitted to the jurisdiction of the Civil Court and is therefore, now precluded from raising contention based on Section 8 of the Act. In view thereof, the decision in **Jadavji Narsidas Shah** (*supra*) relied by Mr. Ranawat is not applicable to the facts of the present case.

4. Mr. Ranawat also relied upon the decision of this Court in the case of **Rohit Ishwar Chugani** (*supra*). Perusal of paragraph 5 of that judgment shows that the existence of the arbitration clause was specifically brought to the notice of the learned trial Judge. The

contention based on Section 8 was rejected by the learned trial Judge only on the ground that no application was filed annexing copy of the agreement as required under Section 8 of the Act. The said decision is also not applicable as in the present case, no such contention was agitated in the trial Court.

5. Mr. Ranawat submitted that plaintiff had also suppressed clause 15 which is on the reverse side of the Job Work Order. Clause 15 reads thus,

15. Jurisdiction: The contract shall in all respects be construed and operate as an Indian contract and in conformity with the Laws of India and shall be taken to have been made in Hyderabad and be subjected to the jurisdiction of the Hyderabad Courts.

6. As noted earlier, in the present case, Job Work Orders were placed on the address at Mumbai on various dates. On the basis of these Orders, plaintiff had raised invoices. The office of the plaintiff is situate at Mumbai. Plaintiff has complied those Job Work Orders. The learned trial Judge was, therefore, justified in holding that part of cause of action arose at Mumbai. In view thereof, I do not find merit in the contention of Mr. Ranawat that Courts at Hyderabad alone would have jurisdiction to entertain and try the Suit.

7. As far as the contention based on NOC letter dated 26.03.2011 is concerned, the learned trial Judge has referred to this aspect and has observed that along with this NOC letter, there was attachment regarding payment to the plaintiff for extra work. Perusal of this attachment shows that payment to the plaintiff - M/s. Patil and Company for any extra works and calculation as per drawing and work order given while starting the work, will be given after the confirmation from the client of all sites **in continuation to his NOC letter dated 26.03.2011.**

In view thereof, it cannot be said that by issuing NOC letter on 26.03.2011, plaintiff has accepted that no dues are payable to it.

8. As noted earlier, plaintiff has instituted Suit for recovery of Rs.22,32,106/- along with interest @ 18% p.a. As against this, the learned trial Judge has granted conditional leave to defend the Suit subject to the defendants depositing Rs.10,00,000/-. The order passed by the learned trial Judge is a discretionary order. After considering the material on record, it cannot be said that the learned trial Judge has exercised the discretion either arbitrarily, capriciously or perversely. Hence, no case is made out for interfering with the impugned order. C.R.A. fails and the same is dismissed.

9. At this stage, Mr. Ranawat orally applies for stay of this order for 6 months from today. He assures that defendants will not seek further extension of time.

10. In view thereof, notwithstanding dismissal of this C.R.A., the trial Court's order is stayed for a period of 6 weeks from today with clear understanding that defendants will not apply for further extension of time. Order accordingly.

(R. G. KETKAR, J.)

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