

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.02.2017

CORAM

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
AND
THE HONOURABLE MR.JUSTICE N. AUTHINATHAN

O.S.A.NO.313 of 2013
and M.P.1/2013

Tidel Park Limited,
No.4, Rajiv Gandhi salai,
Taramani
Chennai
Rep. By its Managing Director,
Mr.P.Shanmugasundaram .. Appellant/plaintiff

Vs.

1.M/s.ArKay Energy (Rameswarm) Limited,
GF, 1A, Prince Villa,
15, Rajamannar Salai,
T.Nagar, Chennai-17.
2.M/s. Kanumuri Holdings Private Limited,
Plot No.30A, Road No.1,
Film Nagar, Jubilee Hills,
Hyderabad-600 033. Respondents

Appeal filed under Order 36, Rule 9 of O.S. Rules read with
Clause 15 of the Letters Patent against the judgment and decree
dated 17.01.2013 passed by the learned single Judge made in
A.No.4804 of 2011 in C.S.No.389 of 2011.

For Appellant : Mr.Jose John for
M/s.King & Partridge

For Respondent : Mr.ARL.Sundaresan
Senior Counsel for
Mrs.AL.Gandhimathi
for R-1

J U D G M E N T

Judgment of the Court was made by N.AUTHINATHAN, J

The appellant/plaintiff /first respondent in A.No.4804 of 2011 in C.S.389 of 2011 preferred this original side appeal against the order and decree, dated 17.01.2013, in A.No.4804 of 2011 in C.S.No.389 of 2011,.

2.The first defendant set up a power generation plant at Valathur Village, Ramnad District, Tamil Nadu. The plaintiff agreed to make contribution in equity of the first defendant to the extent of Rs.90 lakhs. If the plaintiff decides to transfer the whole or part of the equity shares held by it, the first offer will be made to the second defendant or his nominee. The second defendant has also agreed to purchase shares from the plaintiff. The plaintiff and the defendants 1 & 2 entered into a tripartite shareholders' agreement on 10.11.2005, whereby the plaintiff agreed to contribute and participate as a captive consumer. The first plaintiff guaranteed and issued return of 16% on the investment. (Clause (6) of the Shareholders' Agreement). The parties agreed that the Courts in Chennai shall have jurisdiction on any matter arising out of or under the shareholder's agreement. As per the Shareholder's agreement, the plaintiff agreed to disinvest shares hold by it the first defendant in favour of the second defendant or any nominee of it. The second defendant agreed to pay the value for the dis-invested shares. The plaintiff and the first defendant agreed to execute power supply agreement for supply of power to the plaintiff.

3.The plaintiff became a captive consumer and agreed to purchase power from the first defendant. The plaintiff and the first respondent entered into a power supply agreement, dated 10.11.2005. The plaintiff is a captive consumer. They agreed to purchase power from the first defendant from the date of commencement of supply. They agreed to make payment against invoices. It is alleged that the first defendant committed default in supplying the contracted demand of power and they have terminated the power of supply by a letter dated 19.01.2001. The power supply agreement provides for settlement of disputes by arbitration. The arbitration clauses in the agreement are as follows:

"Article Arbitration

X.1 All disputes or differences between the parties arising out or in connection with this Agreement shall be first tried to be settled through mutual negotiation.

X.2 In the event that any dispute could not be resolved between the parties pursuant to article X.1, then such dispute shall be referred to and finally resolved by arbitration in accordance with the India Arbitration and Conciliation Act, 1996 (the "Act") and rules therein shall be applied to the extent that they are not repugnant to the Act.

X.3 This agreement and the rights and obligations of the parties hereunder shall remain in full force and effect pending the award in such arbitration proceedings.

X.4 The place of the Arbitration shall be Chennai, India and the language of the arbitration shall be English."

However, the plaintiff has filed the present suit for the following reliefs.

a) declaring that the first defendant has defaulted to supply the contracted demand of power and that they are therefore liable to pay the difference in rate between Arkay Energy billing and TNEB Tariff ("Discount") amounting to Rs.4,85,32,773/- [as in paragraph 26 (a) + (b)] for quantity of power not supplied under the Power Supply Agreement dated 10.11.2005 and consequently,

b) directing the first defendant to pay the Discount amount of Rs.4,85,32,773/- in terms of paragraph 26 [(a) + (b)] above;

c) directing the first defendant to pay interest pendente lite on the sum of Rs.4,85,32,773/- in prayer (b) from the date of filing the suit until realisation thereof;

d) declaring that the plaintiff is entitled to interest at 16% p.a on the investment of Rs.90 lakh from 05.12.2005 and for a consequent direction for payment of Rs.77,79,945/- being the money payable for interest at 16% p.a on Rs.90 lakh from 05.12.2005 until 29.04.2011, the date of filing the suit;

e)directing the first defendant to pay interest at 16% p.a pendente lite on the investment of Rs.90 lakh from 30.04.2011, the date of filing the suit, until payment by the first defendant of the value of the shares as assessed by the statutory auditor of the first defendant in terms of preliminary decree or the paid up value of the shares, ie. Rs.90 lakh, whichever is higher;

f)Pass a preliminary decree declaring that the second defendant is liable to purchase the whole of the shares in the first defendant held by the plaintiff in the terms of the shareholders agreement dated 10.11.2005, directing an inquiry by the statutory auditor of the first defendant as to the value of shares of the first defendant held by the plaintiff and fixing a date for purchase by the second defendant of the shares in the first defendant held by the plaintiff.

g)Pass a final judgment and decree directing the second defendant to pay the value of the shares as assessed by the statutory auditor of the first defendant in terms of the preliminary decree or to pay the paid up value of the shares, ie. Rs.90 lakh, in terms of clause 3 of the shareholders agreement, whichever is higher.

4.The first respondent herein filed the application in A.No.4804 of 2011 invoking Section 8 of the Arbitration and Conciliation Act, 1996 to refer the dispute that has been raised by the plaintiff /appellant under the Power Supply Agreement dated 10.11.2005 for adjudication by Arbitration under Article 10 of the Power Supply Agreement dated 10.11.2005.

5.The Managing Director of the plaintiff filed a counter affidavit. According to him, the suit reliefs are based on two agreements, dated 10.11.2005 namely Power Supply Agreement entered into between the plaintiff and the 1st defendant and a shareholders' Agreement entered into among the plaintiff and the defendants. The suit reliefs are not only confined to any matter that is specific to the power supply agreement. His case is that there cannot be separation of causes of actions and of parties under Section 8 of the Arbitration Act.

6.The learned Single Judge has held that the power supply agreement cannot be said to be a subsidiary agreement merely because there is another agreement entered into between the parties, i.e Shareholders' agreement as the terms of both the agreement are totally different and do not overlap. The learned Single Judge has taken note of the fact that the subject matter of the dispute against the first defendant/applicant is

covered by the arbitration clause and an application has been made under Section 8 of the Act, before submitting to jurisdiction of this Court and referred the dispute raised by the plaintiff under the Power Supply Agreement for Arbitration.

7. Aggrieved by the order of the learned Single Judge, the appellant/plaintiff has preferred the present appeal.

8. The learned counsel for the appellant/plaintiff has reiterated the arguments raised before the learned Single Judge and has further submitted that the learned Single Judge has committed error on placing reliance on Section 45 of the Arbitration Act, as it applies to Agreements to which the New York Convention applies. He has further submitted that the learned Judge has failed to follow the decision of the Honourable Supreme Court in Sukanya Holdings (P) Limited V. Jayesh H. Pandya and Another [2003] 5 Supreme Court Cases 531]. His further contention is that the subject matter of the suit was not the subject matter of the power supply agreement alone and that therefore, the impugned order is liable to be set aside.

9. The learned counsel for the first respondent/first defendant has submitted that the rights under the shareholders' agreement can be worked out in the suit, while the rights that have been claimed under the power supply agreement have to be worked out only by way of arbitration. As the power supply agreement provides for settlement of disputes by arbitration, the learned Judge is justified in passing the impugned order.

10. As already noticed, the plaintiff claimed reliefs A to G as against the first defendant alone on the basis of the Power Supply Agreement. It is not in dispute that the plaintiff is not entitled to claim the above reliefs as against the second defendant. Likewise, the plaintiff cannot claim reliefs F and G against the first defendant as the second defendant alone agreed to purchase the shares held by the plaintiff in the first defendant company. Merely because the plaintiff joined both the defendants in the suit because there is a cause of action against both, it cannot be said that the first defendant is prevented from invoking the arbitration clause in the power supply agreement.

11.A close reading of the plaint would reveal that causes of action against the first defendant under the power supply agreement and the cause of action against the second defendant under the shareholders' agreement are distinct. The power supply agreement provides for settlement of disputes by way of arbitration. Therefore, as pointed out by the learned Single Judge, it is mandatory to refer the parties to arbitration.

12.In Sukanya Holding's case, it has been held that the entire subject matter giving rise to the cause of action in the suit should be the subject of the arbitration agreement. We are of the considered view that the reliefs claimed by the plaintiff as against the second defendant on the basis of shareholders' agreement can be ordered to be tried separately, in terms of Order 1 Rule 3A of the Civil Procedure Code, as the causes of action alleged as against the second defendant are distinct and separable.

13.Having regard to the whole facts and circumstances of the case, we are of the considered view that the plaintiff has added second defendant as a party to the suit only to frustrate the arbitration clause in the power supply agreement. Therefore, the dictum laid down in Sukanya Holding's case cannot be made applicable to the case at hand.

14.The order of the learned Single Judge has been passed on appreciation of the facts and circumstances of the case. The conclusion reached by him deserves to be upheld, in our considered view, for the reasons stated supra. In this view, the Original Side Appeal has to fail. Accordingly, it is dismissed. No costs. M.P. is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+2cc to M/S.King & Partridge, Advocate Sr.8225

JUDGMENT IN O.S.A.NO.313 of 2013

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