

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.02.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

Application No.2185 of 2002
in
C.S.No.852 of 1999

1.Jain Book Manufacturers
Partnership firm,
rep by its Partners.

2.Amritylal P.Jain

Both at No.19/2, Rajshree New Jawali Bazaar,
Hubli.

.. Applicants

Vs.

Tamil Nadu Newsprint and
Papers Limited,
No.39, Mount Road,
Guindy, Chennai-32.

.. Respondent

This application has been preferred under Order XIV Rule 8 read with
Section 151 of CPC read with Section 8 of the Arbitration and Conciliation
Act, 1996 seeking to refer the parties in C.S.No.852 of 1999 to arbitration.

For Applicant : Mrs.Chitra Sampath, Senior Counsel
for Mr.Baskaran

For Respondent : Mr.Sivakumar for M/s.Shivakumar and Suresh

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ORDER

This is an application under Section 8 of the Arbitration and Conciliation Act, 1996 (Act 26 of 1996) (hereinafter referred to as 'A and C Act' for brevity).

2 This application has been taken out by defendant Nos.1 and 3 in the main suit. In other words, defendant Nos.1 and 3 are applicant Nos.1 and 2 herein. The sole plaintiff in the main suit is the sole respondent herein, i.e., in this application.

3 The parties in this application are referred to by their respective ranks in the main suit for the sake of convenience and clarity.

4 Plaintiff has filed the main suit inter-alia for recovery of a sum of Rs.1,22,19,173.75 and interest at the rate of 36% p.a. on Rs.68,84,501/- from the date of suit, totalling 1,91,03,674.75. Case of the plaintiff is that they are manufacturers of news print, writing, printing paper and other allied products and that the plaintiff appointed defendant No.1 (to be noted, defendant No.1 is the partnership firm) as its indenter for the State of Karnataka. However, it is the case of defendant Nos.1 and 3 (as would unfurl from the pleadings in this application) that they were appointed as Indenter for Goa and parts of Maharashtra also. There is some disagreement between the parties to this lis on this aspect of the matter, but it may not be necessary to delve into this aspect of the matter considering the limited scope of this application.

5 There was a letter dated 11.10.1985 from the plaintiff to defendant No.1 regarding appointment of defendant No.1 as indenter for Karnataka. In and by this letter, I am informed that the plaintiff stipulated that on confirmation of the acceptance of the offer by defendant No.1, defendant No.1 has to enter into a formal agreement later. It is also brought to my notice that defendant No.1 had agreed to deposit a sum of Rs.6 lakhs as security deposit.

6 It is not in dispute that in response to this letter dated 11.10.1985 from the plaintiff, defendant No.1 sent a reply dated 18.10.1985. In this letter, after setting out some details and confirming that defendant No.1 will furnish security deposit of Rs.6 lakhs, defendant No.1 had stated that they will sign the dealership agreement after paying the full deposit. To be noted, in this letter, defendant No.1 inter-alia wanted to pay the security deposit of Rs.6 lakhs in parts and it is also set out in this letter that they have tendered (under cover of this letter) Rs.2 lakhs as part payment.

7 Thereafter, a dealership agreement was sent to defendant No.1 by plaintiff. It is the specific case of defendant No.1 that this dealership agreement was signed on 7.1.1987 and forwarded to the plaintiff under cover of a letter dated 19.1.1987. It unfurls from this covering letter dated 19.1.1987 that first defendant had expressly stated that they have signed the dealership agreement and are sending the same under cover of this letter dated 19.1.1987. It is the further specific case of defendant No.1 that the aforesaid agreement, i.e., dealership agreement dated 7.1.1987 had not been referred to by plaintiff in the plaint. In the hearing, Mrs.Chitra Sampath, learned senior

counsel leading Mr.Baskaran, counsel on record submits that this dealership agreement dated 7.1.1987 was not duly signed, engrossed and returned to defendant No.1. This dealership agreement dated 7.1.1987 being the fulcrum of this application is hereinafter referred to as 'said dealership agreement' for the sake of convenience and clarity.

8 However, it is argued by Mrs.Chitra Sampath, learned senior counsel that the parties acted on the terms of the said dealership agreement and a contract had come into existence by conduct of parties. It is also the specific case of defendant Nos.1 and 3 that clause 20 of the said dealership agreement is the dispute resolution clause and that it provides for dispute resolution through arbitration. To be noted, clause 20 of the said dealership agreement contains six sub-clauses. I deem it appropriate to extract clause 20 (with six sub clauses) of the said dealership agreement, which reads as follows :

“20.If at any time, any question or difference or dispute whatsoever arise between company and INDENTOR arising out of or in connection with this agreement, the parties thereto shall use their best efforts to settle such question or difference or dispute amicably by mutual negotiations.

20.1.Should Agreement be not reached, either party may forthwith give the other, Notice in writing, of the existence of such question or difference or dispute and the same shall be referred to arbitration by two arbitrators, one of whom will be nominated by COMPANY and the other by INDENTOR and the two arbitrators shall take an undertaking from the parties to respect and co-operate with them.

20.2.The said Arbitrators will before entering upon arbitration appoint an umpire to decide on questions or differences or disputes on which the two arbitrators may differ.

20.3.The opinion of the two Arbitrators together with the opinion of the umpire on issues referred to the umpire by the said arbitrator as the aforementioned shall constitute the award which will be final and binding on both COMPANY and INDENTOR for all disputes relating to his self account supplies in his own account of Indentor firm.

20.4.All arbitration proceedings can be held at Madras Or at HUBLI or at any other place suitable and convenient to both the parties, and where the records are available.

20.5.In giving their ruling the arbitrators/umpire shall act amicable compositerus with faith and confidence from both the parties.

20.6.Only persons having the ability to converse fluently in English language will be appointed at arbitrators/umpire even the retired Judges or authority of General Manager level and a person with similar trade knowledge can also be appointed as arbitrator with the consent of both the parties.”

9 On the basis of the above submissions, learned senior counsel submitted that there is a valid arbitration agreement between the parties and that it is necessary that the parties should be referred to arbitration. In other words, it is the specific submission of learned senior counsel for defendant Nos.1 and 3 that in the light of clause 20 of dealership agreement (extracted supra), the prayer in the instant application under Section 8 of A and C Act should be acceded to.

10 Refuting and disagreeing with the aforesaid submissions, Mr.Sivakumar, learned counsel of M/s.Shivakumar and Suresh (Law firm) for the plaintiff submitted that clause 20 of the said dealership agreement which has been referred to supra is not an arbitration agreement within the meaning

of Section 7 of A and C Act. It is the specific submission of Mr.Sivakumar that though an arbitration agreement within the meaning of Section 7 of A and C Act can be in the form of a clause in an agreement, that agreement should necessarily be signed by both parties. Obviously, it has to be in writing. This position is very clear from Section 7 of A and C Act captioned 'Arbitration Agreement'. A plain reading of Section 7 of A and C Act makes it clear that an arbitration agreement may either be a separate agreement or in the form of clause in a contract, but irrespective of whether it is in the form of a clause in a contract or by way of a separate agreement, it should be in writing and it should be signed by both parties. If it is not signed by both parties, there should be exchange of letters or other modes of communication which provide a record of the agreement. So submitting, learned counsel Mr.Sivakumar draws my attention to sub-clauses (a) and (b) of sub-section (4) of Section 7 of A and C Act. I deem it appropriate to extract entire section 7 of A and C Act, which reads as follows :

“7.Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2)An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3)An arbitration agreement shall be in writing.

(4)An arbitration agreement is in writing if it is contained in--

(a)a document signed by the parties;

(b)an exchange of letters, telex, telegrams or

other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or

(c)an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5)The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

11 It is pointed out by learned counsel for plaintiff that there is no dispute on behalf of defendant Nos.1 and 3 that the said dealership agreement dated 7.1.1987 was never signed by plaintiff. My attention was drawn to the specific submission of learned senior counsel that the plaintiff had not signed / engrossed the said dealership agreement and sent it back to defendant No.1. This is also buttressed by the photocopy of the said dealership agreement which has been placed before me as part of typed set of papers filed by defendant Nos.1 and 3, as a bare perusal of the same reveals that it has been signed only by defendant No.1.

12 As alluded to supra, defendant No.1 is a partnership firm and this agreement has been signed by defendant No.3, one of the partners on behalf of partnership firm. The other contracting party, i.e., plaintiff has not signed. There is no signature of plaintiff in the said dealership agreement dated 07.01.1987. In other words, there is no disagreement with regard to this agreement between the parties. There is no disagreement on this aspect of

the matter in the hearing before me too. Therefore, arbitration agreement that is being propounded by defendant Nos.1 and 3 does not fall under Section 7(4)(a) of A and C Act.

13 This takes us to the question as to whether it qualifies as arbitration agreement under Section 7(4)(b) of A and C Act. In response to this, Mr.Sivakumar, learned counsel points out that two pre suit notices through counsel were issued to defendant No.1 dated 09.07.1998 and 10.05.1999. It is also pointed out that both these pre suit notices which have been placed before me as plaint document Nos.17 and 24 were duly received by defendant Nos.1 and 3. This is not disputed in the hearing before me. It is also not in dispute that defendant No.1 replied to these pre suit notices through counsel vide reply notices dated 27.7.1998 and 05.07.1999. To be noted, these two dates have been wrongly mentioned as 28.7.1998 and 7.7.1999 in the plaint and the same have been placed before me as plaint document Nos.18 and 25. With regard to these two pre suit notices dated 09.07.1998 and 10.05.1999 and with regard to two replies to pre suit notices dated 27.07.1998 and 05.07.1999, there is no dispute whatsoever before me between the two learned counsel. It is pointed out that in the two reply notices from defendant No.1, there is no whisper or reference to the said dealership agreement.

14 Therefore, this case does not qualify even as a case of an arbitration agreement within the meaning of Section 7(4)(b) of A and C Act is the submission made before me.

15 To buttress his submission in this regard, Mr.Sivakumar, learned counsel pressed into service a decision of Hon'ble Supreme Court in ***Karnataka Power Transmission Corporation Limited and another Vs. Deepak Cables (India) Limited*** reported in ***(2014) 11 SCC 148***. In this judgment, the Supreme Court after referring to the line of authorities pertaining to Section 7 of A and C Act culled out and laid down principles pertaining to interpretation of the term 'arbitration agreement' as occurring in Section 7 of A and C Act. This has been culled out and so laid down in paragraph 21 of the said judgment. However, paragraph 8 of the said judgment is also relevant as it gives insight into the case law. I deem it appropriate to extract paragraphs 8 and 21 of the aforesaid case, which read as follows :

“8. From the aforesaid provision, it is graphically clear that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. To elaborate, it conveys that there has to be intention, expressing the consensual acceptance to refer the disputes to an arbitrator. In the absence of an arbitration clause in an agreement, as defined in sub-section (4) of Section 7, the dispute/disputes arising between the parties cannot be referred to the Arbitral Tribunal for adjudication of the dispute.

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21.In *Jagdish Chander [Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719]*, the Court, after referring to the earlier decisions, culled out certain principles with regard to the term “arbitration agreement”. The said principles basically emphasise on certain core aspects, namely, (i) that though there is no specific

form of an arbitration agreement, yet the intention of the parties which can be gathered from the terms of the agreement should disclose a determination and obligation to go to arbitration; (ii) non-use of the words “arbitration” and “arbitral tribunal” or “arbitrator” would not detract from a clause being interpreted as an arbitration agreement if the attributes or elements of arbitration agreement are established i.e. (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them; and (iii) where there is specific exclusion of any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it would not be an arbitration agreement. In this context, the two-Judge Bench [*Jagdish Chander v. Ramesh Chander*, (2007) 5 SCC 719] has given some examples and we think it apt to reproduce the same: (SCC p. 725, para 8)

“8. (iii) ... For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.”

16 From a reading of Section 7 of A and C Act, particularly Section 7(4)(b) of A and C Act and principles laid down elucidatively by Supreme Court with regard to ingredients for constituting 'arbitration agreement' within the meaning of A and C Act, it emerges very clearly that there is no arbitration

agreement between the parties at lis in the instant case as the said agreement, i.e., dealership agreement dated 07.01.1987 has not been signed by both contracting parties. There is no exchange of communication between parties at lis, which evidences record of said dealership agreement dated 07.01.1987. Owing to the narrative supra, I have no hesitation in coming to the conclusion that there is no arbitration agreement between the parties in the instant case within the meaning of Section 7 of A and C Act.

17 As there is no arbitration agreement between the parties at lis in the instant case, prayer in this application under Section 8 of A and C Act does not deserve to be acceded to.

18 It is made clear that there can be no two opinions about the obtaining basic legal position that arbitration is a creature of contract between the parties, unlike courts which are a creature of Statute. Arbitration and arbitral tribunal being a creature of contract between the parties, the intention of the parties, consensus of the parties and reducing of the same into writing as adumbrated in various sub sections of Section 7 of A and C Act is imperative and sine qua non for an arbitration agreement to come into existence. In other words, the intention of contracting parties is supreme, as arbitration itself is a creature of contract.

19 In the light of the discussion supra, I am convinced that this application under Section 8 of A and C Act seeking reference to arbitration deserves to be dismissed and I do so.

20 Application No.2185 of 2002 stands dismissed. In the light of the trajectory of the litigation, parties are left to bear their respective costs and there shall be no order as to costs.

08.02.2018

Index : Yes
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M.Sundar, J.

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