



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.06.2018

CORAM:

WEB COPY

THE HONOURABLE MR.JUSTICE S.S. SUNDAR

C.R.P(PD) (MD).No.1898 of 2013 and
M.P. (MD)No.1 of 2013

Dr.N.C.Kothari
Priyanka C.T.Scan Centre & Diagnostic Centre,
Opposite to Swaroop Cinema Station Road,
G.E.Road, Durg - 491 001
Chattisgarh,
Represented through its Owner .. Petitioner/Petitioner/Defendant

Vs.

M/s Mednob Health Care, Madurai
Represented by its Managing Partner,
Mr.M.A.Khan, Door No.176 - A,
Vakkil New Street, Simakkal,
Madurai - 625 001. .. Respondent/Respondent/Plaintiff

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order passed in I.A.No.344 of 2012 in O.S.No.459 of 2011, dated 12.03.2013 on the file of the II Additional Sub Judge, Madurai.

For Petitioner : Mr.C.Karthik
For Respondent : Mr.D.Senthil

ORDER

This civil revision petition has been filed praying to set aside the fair and decreetal order passed in I.A.No.344 of 2012 in O.S.No.459 of 2011, dated 12.03.2013 by the learned II Additional Sub Judge, Madurai.

2.The defendant in the suit in O.S.No.459 of 2011 on the file of II Additional Sub Court, Madurai, is the Revision Petitioner in this Civil Revision Petition.

3.The respondent in this Civil Revision Petition filed a suit in O.S.No.459 of 2011, on the file of the II Additional Sub Judge, Madurai, for recovery of a sum of Rs.2,25,000/- being the amount payable by the defendant to the plaintiff for the supply of spare parts of CT Scan machine possessed by him.

4.The case of the plaintiff in brief in the plaint is that some spare parts, which were required for the CT scan machine possessed by the defendant, were supplied to him at his request. It is also stated that an agreement was entered into between the

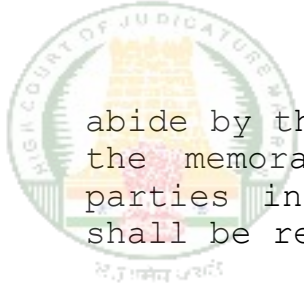


plaintiff and the defendant on 18.07.2010 in this regard. It is further stated that as per the agreement, the plaintiff supplied the spares and set the machine to function and that after confirming the functioning of the machine, the completion of work was acknowledged by the defendant. It is further stated that the defendant however gave a complaint that there is some problem in the console supplied by the plaintiff. Thereafter, immediately a Service Engineer was sent by the plaintiff and it was further stated that the Service Engineer confirmed the fact that there is no problem in the console supplied by the plaintiff to the defendant. However, it is further stated in the plaint that the problem with the CT Scan was due to the defect in the 'gantry' and the plaintiff is not responsible for replacing the gantry. Though the agreement between the plaintiff and defendant is not regarding the supply of gantry, it is stated that at the request of defendant, the plaintiff arranged for procuring the spare from outside at a cost of Rs.2.25 lakhs and fitted in the machine. The plaintiff has further stated that the defendant did not pay the amount to the value of the goods supplied to him or the service charges despite several reminders. Hence, the suit was filed for recovery of a sum of Rs.2,25,000/- towards the cost of "Gantry" supplied by plaintiff.

5.Immediately, after the suit is filed, the revision petitioner filed an interlocutory application in I.A.No.344 of 2012 in O.S.No.459 of 2011 praying to dismiss the suit by relegating the parties to the arbitration proceedings as per the terms of the memorandum of understanding, dated 18.07.2010. It is the case of the defendant that there is an arbitration agreement in the memorandum of understanding which is entered into between the plaintiff and the defendant, and that therefore, the suit is not maintainable in view of Section 8 of Arbitration and Conciliation Act.

6.The Trial Court found that there is an arbitration clause to the memorandum of understanding signed between the plaintiff and defendant and that the Civil Court can take cognizance of the suit, in view of the fact that the agreement clearly shows that the plaintiff is responsible only to replace if there is any fault with new console and that the present suit filed by the plaintiff cannot be rejected on the basis of arbitration clause in the Memorandum of understanding. Aggrieved by the order of dismissal of the application filed by the petitioner/defendant, the present revision petition has been filed by the defendant.

7.Learned counsel appearing for the petitioner/defendant states that the contention of the plaintiff before the lower Court is that the problem in the CT Scan machine was only with the gantry and not console, cannot be accepted, in view of the letter given by the Service Engineer of the plaintiff to the defendant pointing out that the CT Scan machine could not function due to problem in console. It is admitted that the console was supplied and installed by the plaintiff. It is further contended that the parties have to



abide by the terms of the agreement and that as per the clause 12 of the memorandum of understanding any dispute arisen between the parties in relation to the terms of memorandum of understanding, shall be referred to the arbitrators.

8. Per contra, the learned counsel appearing for the respondent/plaintiff submits that the plaintiff is responsible as per the memorandum of understanding only to replace the console or to service the console. After lengthy argument the learned counsel for the respondent/plaintiff would only point out that the issue as to whether the problem with the CT Scan was due to the defective console or any other part is contentious and it cannot be decided at this stage.

9. The fact that the plaintiff has supplied the console is not in dispute. The arbitration clause in the agreement reads as follows:

"12. That in case any dispute arises between the first and the second party in relation to the terms of this MOU, the same shall be referred to two arbitrators (one appointed by the first party and the other by the second party) who in turn will appoint a neutral umpire. The arbitrators and the umpire so appointed will go through the representation made by both the parties and the judgment/verdict given by the umpire shall be binding on both without prejudice."

10. As rightly pointed out by the learned counsel appearing for the respondent, the warranty offered by the plaintiff was only in respect of the console. However, the defect whether it is in console or gantry cannot be decided by this Court and it should be either by the Civil Court or by the arbitrator. Learned counsel appearing for the revision petitioner referred to Section 16 of the Arbitration Act. Further he also relied upon the judgment of the Honourable Supreme Court in the case of, **Hindustan Petroleum Corporation, Ltd., Vs. Pinkcity Midway Petroleums** reported in (2003) 6 Supreme Court Cases 503. In the said judgment, the Honourable Supreme Court has held in Paragraph Nos. 15 and 16 as follows:

"15. The question then would arise: what would be the role of the Civil Court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand? Learned counsel for the appellant contends that it is a matter which should be raised before the arbitrator who is competent to adjudicate upon the same and the Civil Court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case. While learned counsel appearing for the respondent contends that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be decided

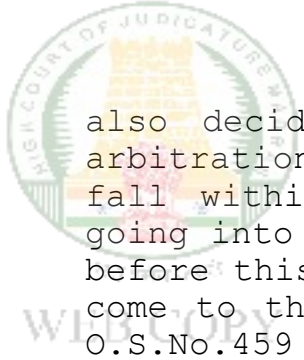


by the Civil Court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument, in our opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution Bench of this Court in *Konkan Railway (supra)* with reference to the power of the arbitrator under Section 16 has laid down thus : (SCC p, 405, para 21)

"21.It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction." (emphasis supplied)

16.It is clear from the language of the Section, as interpreted by the Constitution Bench judgment in *Konkan Railway (supra)* that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the Arbitral Tribunal concerned. Therefore, in our opinion, in this case the courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by the Arbitral Tribunal as contemplated in Clause 40 of the Dealership Agreement and as required under Sections 8 and 16 of the Act."

<https://hcservices.ecourts.gov.in/hcservices/>
11. From the nature of dispute, this Court is able to see that the dispute can be referred to arbitrator, by virtue of Section 16 of the Arbitration and Conciliation Act. Since, the arbitrator can



also decide the jurisdictional issue or as to the existence of arbitration agreement or as to the scope of dispute whether it will fall within the jurisdiction of arbitration, this court, without going into merits of the contentions which are raised by the parties before this Court, as to the reason why the CT Scan machine struck, come to the conclusion that the petition in I.A.No.344 of 2012 in O.S.No.459 of 2011 is to be allowed and the matter should be referred to the arbitrator.

12.In view of the above, the order passed by the Court below in I.A.No.344 of 2012 in O.S.No.459 of 2011 is set aside and the interlocutory application stands allowed and the learned II Additional Sub Judge, Madurai, is directed to refer the dispute to the Arbitrator in terms of memorandum of understanding signed by the plaintiff and defendant.

11.This Civil Revision petition is accordingly disposed of. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

/True Copy/

Sub Assistant Registrar

To

The II Additional Subordinate Judge, Madurai.

+1 CC to Mr.C.KARTHIK, Advocate in SR.No.70136

+1 CC to Mr.D.SENTHIL, Advocate in SR.No.70151

TM

RJ/RSK/SAR-1/16/07/2018 - 5P/4C

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