15.10.2020

dns/gd

FMA 923 of 2020
(FMAT 328 of 2020)
with
CAN 1 of 2020 (CAN 2857 of 2020) (file not here)
with
CAN 2 of 2020
with
CAN 3 of 2020
(Via Video Conference)

Kotak Securities Limited
Vs.
Amit Biswas and Anr.

Mr. Mainak Bose
Mr. Deep Nath Roy Chowdhury
Mr. Ayan Chakraborty
Ms. Shalini Mukherjee
..for the Appellant

Mr. Samrat Sen
...for the Respondents

The appeal is directed against an order of February 14, 2020 passed by the Commercial Court at Alipore, rejecting a petition under Section 8 of the Arbitration and Conciliation Act, 1996.

The respondents herein being the plaintiffs in the suit, sought a strange decree of declaration and consequential injunction though the quantum of loss allegedly suffered was indicated in the relief of declaration claimed. There is also a further relief claimed by way of damages.

The substance of the allegations in the suit is that the appellant herein, who was engaged as a share-broker by the plaintiffs, indulged in wrongful transactions on behalf of the plaintiffs by relying on forged and fabricated powers-of-attorney shown to have been executed by the plaintiffs.

It appears that several share transactions were conducted by the plaintiffs with the defendant as the share transfer agent or broker. Certain shares were purchased or sold on behalf of the plaintiffs by the defendant following which a claim arose and the plaintiffs' moneys lying in the account of a bank associated with the defendant were sought to be appropriated as a consequence of the transactions. There is no dispute that the relationship between the parties was covered by the routine arrangement at the National Stock Exchange, implying thereby that the rules, bye-laws and regulations of the National Stock Exchange would govern the transactions and would apply to the parties.

Upon the defendant receiving the summons or becoming aware of the suit, it applied for the reference of the entire subject-matter of suit to arbitration in accordance with the admitted arbitration agreement contained in the National Stock Exchange bye-laws. Such prayer was sought to be resisted by the plaintiffs on the ground that the plaintiffs had alleged fraud being perpetrated by the defendant and the serious case of fraud as made out required the attention of a civil court and the adjudication could not be conducted by any private arbitral forum.

It is evident from the impugned judgment that the plaintiffs relied on two Supreme Court judgments reported at (2010) 1 SCC 72 *(N. Radhakrishnan v. Maestro Engineers)* and (2016) 10 SCC 386 *(A. Ayyasamy v. A. Paramasivan)* to assert that when a serious case of fraud was made out, the court would be slow in referring the disputes to arbitration, notwithstanding there being an arbitration agreement between the parties.

Ordinarily, prior to the 1996 Act coming into force and the arbitration regime being under stricter supervision of the court, several classes of disputes were considered not to be arbitrable. With the relaxation of the court's authority over all matters in arbitration upon the 1996 Act coming into effect and with additional emphasis being placed on alternative dispute resolution by the introduction of Section 89 in the Code of Civil Procedure, 1908, the number of so-called non-arbitrable disputes have shrunk. By and large, criminal offences, matrimonial disputes and special cases like rent control legislations which require the courts to render a finding, are the situations in which a private agreement of arbitration between the parties is overlooked. Several classes of disputes that were hitherto regarded as non-arbitrable, are now permitted to be adjudicated by way of arbitration. It must be noticed that Section 8 of the 1996 Act has undergone a sea change by the 2015 amendment. The emphasis now is on adjudication by arbitration, if the parties have so agreed.

The *N. Radhakrishnan* judgment referred to several previous judgments and in a sense appears to have departed from one of the earlier judgments which was to the effect that where a party against whom a charge of fraud had been brought could resist an application for reference to arbitration so that such party could have its conduct vindicated in open court. Indeed, in another Supreme Court judgment, noticed in *A. Ayyasamy*, the dictum in *N. Radhakrishnan* was questioned. Though the leading opinion in *A. Ayyasamy* finds *N. Radhakrishnan* to be in order, the supplemental opinion raises doubts on the veracity of the dictum in *N. Radhakrishnan*. Again, paragraph 25 in *A. Ayyasamy* indicates certain situations where the court would not refer the disputes to arbitration. Despite referring to cases of forgery or fabrication or fraud being some of the types of cases which may not be referred to arbitration, the following three paragraphs indicate that albeit charges of forgery or fabrication or fraud being there, when such charges would not go to the root of the matter, the agreement to go to arbitration entered into between the parties ought to be respected. But if the nature of the case of forgery or fabrication or fraud pertains to the general transactions and not to the foundational document or the basis of the relationship between the parties, the court may still refer the disputes to arbitration. It must be remembered that by merely chanting fraud or fabrication or forgery, a substantive agreement to go to arbitration cannot be defeated. That was the mantra of Section 8 of the Act of 1996 which has been reinvigorated by the amendment of 2015.

In the present case, the plaintiffs claim that the powers-of-attorney used by the defendant to enter into transactions on behalf of the plaintiffs were forged. It does not appear that any prejudice would be occasioned to the plaintiffs if the issue is decided before the arbitrators in preference to the same being done before an ordinary civil court. It will be open to the parties to seek expert opinion just as the same can be done before a civil court. Further, the questioned documents may be sent to an expert institution for its opinion, just as it could be done in course of a civil suit. There is no additional advantage that the plaintiffs will enjoy in the adjudication being before a civil court nor any logistic disadvantage that the plaintiffs would suffer in the adjudication being undertaken before the arbitrators in an arbitral reference.

For the reasons aforesaid, the judgment and order impugned dated February 14, 2020 do not appeal and are hereby set aside. In view of the admitted arbitration agreement between the parties, the parties are referred to arbitration in accordance therewith. As a consequence, the suit before the commercial court, being Title Suit No.54 of 2019, stands disposed of without the merits therein being addressed as that is the consequence of a request for an arbitral reference being allowed.

There is an order of injunction subsisting in favour of the plaintiffs for a considerable period of time. Such injunction restrains the defendant from giving any further effect to the disputed powers-of-attorney for the purpose of entering into any further transactions on behalf of the plaintiffs. Such injunction will continue for a period of three months from today. In the meantime, it will be open to the parties to apply before the arbitral tribunal for continuation or variation or modification or vacating of such injunction.

FMA 923 of 2020 together with the interlocutory applications therein are disposed of.

There will be no order as to costs.

(Sanjib Banerjee, J.)

(Arijit Banerjee, J.)