

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.7048 OF 2008

Ikea Trading (I) Limited

..Petitioner

Versus

Maneesh Sohanlal Johari and Anr.

..Respondents

Mr. Pradeep Sancheti, Senior Advocate a/w Yuvraj Choksy & Pranjali Agrawal i/by M/s. Khaitan & Co., for the Petitioner.

Mr. R. D. Soni i/by M/s. Ram & Co., for the Respondent No.1.

CORAM : NITIN W. SAMBRE, J.

DATE : 10th MARCH, 2022

P.C.

1. Impugned in this petition is the order dated 11th December, 2006 passed below Exh.45 permitting the prayer of the respondent/plaintiff for hearing of amendment application expeditiously and also order passed below Exh.41 wherein the application for amendment came to be allowed on 18th September, 2007 by the 5th Joint Civil Judge, Senior Division, Pune.

2. Facts necessary for deciding this petition are as under :-

The respondent No.1 initiated Special Civil Suit No.619 of 2003 with following reliefs :-

“A] The Hon’ble Court be pleased to give the Judgment and decree of Rs.43,40,565=55 [Rs.

Forty Three Lacs Forty Thousand Five Hundred Sixty Five and paise Fifty Five only] against the Defendant, more particularly stated in the PARTICULARS OF CLAIM, together with further interest @ 18% per annum from 2nd May 2000, [i.e. date of agreement], till full and final payments of entire amount.

B] In the interest of justice and as per terms and conditions of the Purchase agreement dated 5th Jan. 2000, if necessary, an Arbitrator be appointed and claim of the Plaintiff be referred to the appointed Arbitrator.”

3. The prayers in the plaint are based on business agreement dated 2nd May, 2000.

4. The respondent No.1/plaintiff moved an application under Section 9 of the Arbitration Act seeking directions to the defendant/petitioner to furnish security of the claim of amount of Rs.44,00,000/-.

5. The petitioner/defendant to the suit took out application under Section 8 of the Arbitration Act praying therein reference of the suit claim to arbitration in accordance with clause 18 of the general purchase agreement.

6. The said application was resisted by the respondent/plaintiff vide reply dated 3rd April, 2004.

7. Application Exh.41 was taken out by the respondent/ plaintiff for amendment of plaint seeking addition of certain pleadings based on business transaction, fraud practiced by the petitioner/defendant on the respondent/plaintiff and deletion of pleadings in relation to the prayer for appointment of arbitrator.

8. The said application came to be allowed with an observation that since the amendment does not change the subject matter of the suit or the relief claim or substitutes the cause of action, the Civil Court has every right to decide said application before referring the matter to arbitration.

9. The suit claim is based on purchase agreement dated 5th January, 2000 in relation to manufacturing of certain items. It is claimed that the defendant terminated the said agreement sometime in May, 2000 resulting into initiation of Special Civil Suit No.619 of 2003 by the respondent No.1/plaintiff. Since the petitioner is of the opinion that there exist an arbitration clause, so also the respondent plaintiff, the application under Section 9 of the Arbitration Act moved by the respondent/plaintiff is still pending adjudication.

10. In this background, contentions of Mr. Pradeep Sancheti, learned senior counsel for the petitioner are, the

orders impugned are not sustainable, as both the parties have come out with a prayer for referring the dispute to arbitrator by appointing an arbitrator. So as to substantiate his claims, he has relied on the pleadings in the plaint clause 18.1 and 18.2 of the purchase agreement dated 5th January, 2000 which provides for the resolution of dispute by arbitration. According to him, even if the registered office of the petitioner is in New Delhi and the contract was executed in Pune, once the parties agreed that the place of arbitration shall be in Paris, it was obligatory for the Civil Court to forthwith refer the matter to arbitration in accordance with the arbitration agreement. His further contention is, even if the proceedings are referred to arbitration, as is rightly so prayed by the respective parties in the case in hand, still the Civil Court will have jurisdiction to decide the application of the petitioner preferred under Section 8 of the Arbitration Act. So as to substantiate his claim, he has drawn support from the judgment of the Apex Court in the matter of **Arcelor Mittal Nippon Steel India Ltd. Vs. Essar Bulk Terminal Ltd.** reported in **AIR 2021 SC 4350**. According to him, in view of similar request by the parties to the suit, since the matter is to be referred to arbitration, the Trial Court ought not to have entertained the application for amendment or the prayer for expeditious hearing of the amendment application.

11. He has also drawn support from the judgment of the Delhi High Court in the matter of **Leighton India Contractors Private Ltd. Vs. Dlf Ltd. and others** reported in **AIR 2021 (NOC) 276**, so as to claim that even if arbitrator is seized with the arbitration proceedings, still Civil Court can exercise powers under Section 9 of the Arbitration Act. In addition, he has drawn support from the judgment of the Apex Court in the matter of **Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums** reported in **(2003) 6 SCC 503** and would urge that since there exists an arbitration clause, it is obligatory for the Civil Court to refer the parties to arbitration in terms of the agreement agreement. He would further urge that once the matter stood referred to the arbitration, the civil action before the Civil Court stands disposed of and in that eventuality Civil Court ought not to have exercised the powers. So as to substantiate said claim, he has drawn support from the judgment of the Apex Court in the matter of **P. Anand Gajapathi Raju and Ors. Vs. P. V. G. Raju and Ors.** reported in **(2000) 4 SCC 539**. He would further urge that the arbitration agreement even after termination of the contract will subsist and will not perish and the parties are governed by arbitration agreement. He would raise his claim based on the judgment of the Supreme Court in the matter of **Branch Manager, Magma Leasing and Finance Limited and**

Anr. Vs. Potluri Madhavalata and Anr. reported in **(2009) 10 SCC 103.**

12. The star and foremost contention of Mr. Pradeep Sancheti is, even if for the sake of argument, it is presumed that though admitting that Civil Court has power to decide amendment application, Civil Court has not considered whether it can permit deletion of the admissions and thereby change the entire nature of claim in the suit proceedings.

13. While opposing the aforesaid contention, Mr. R. D. Soni, learned counsel for the respondent/plaintiff would urge that the plaintiff has every right to seek amendment, as the trial in the suit is yet to commence. According to him, the petitioner is yet to file written statement and resist claim in the suit, before which certain deletion of pleadings is sought, which is rightly so granted by the Trial Court keeping in mind the fact that such amendment does not any way prejudice the petitioner or results in changing the nature of claim in the suit. As such, according to him, the petition is liable to be rejected.

14. I have considered rival submissions.

15. As far as claim of learned senior counsel, Mr. Pradeep Sancheti as regards powers of the Civil Court to

grant interim measures during pendency of the proceedings before the Civil Court or even if matter is referred to arbitration is not disputed proposition of law as can be inferred from the judgments which are relied on by him.

16. The only issue which warrants consideration, in my opinion is, the whether the grant of amendment in the matter is justified or not.

17. If we appreciate contentions of Mr. Pradeep Sancheti, learned senior counsel appearing for the petitioner/defendant, he has claimed that by way of granting amendment the Civil Court ought not to have considered prayer for amendment and rather should be referred the dispute to arbitration in view of arbitration clause. In addition, he has claimed that the Court below committed an error by granting amendment, as the amendment has resulted into deletion of certain admissions which has changed the nature of entire claim in the suit.

18. At the outset, it is required to be noted that unless and until matter is referred to arbitration, it cannot be said that the Civil Court has no control over the matter. Unless it is brought to the notice of the Civil Court that there exists an arbitration agreement, till then and the Civil

Court accepts such prayer for referring the matter to arbitration, the Civil Court continues to have jurisdiction over the proceedings pending before it. In the case in hand, it appears from the plaint that respondent No.1/plaintiff is in agreement that there exists an arbitration agreement and as such, has prayed for referring the claim to arbitration, which pleadings are permitted to be deleted by the order impugned. Whether such deletion is permissible in law, particularly, when the respondent No.1/plaintiff has admitted about existence of arbitration agreement, is not dealt with by the Trial Court. Apart from above, when there is request by both the parties to the suit for referring the matter to arbitration, whether the Civil Court was justified in allowing amendment, is also not dealt with in the order impugned.

19. Apart from above, the fact remains that the prayer of the petitioner for referring the matter to arbitration, so also prayer of the respondent No.1/plaintiff for ordering the interim measures under Section 9 of the Arbitration Act is pending adjudication.

20. In these background, it was expected of the Trial Court to expressly deal with the aforesaid issues, particularly, whether the amendment changes the nature of relief claimed in the suit and amounts to permitting deletion of the admissions. The Trial Court while passing

the order impugned has not dealt with the said issue in detail.

21. In the aforesaid background, it is appropriate, in my opinion, to quash and set aside order impugned passed below Exh.41 on 18th September, 2007.

22. It is directed that the said application Exh.41 be decided afresh keeping in mind the fact that the rival parties are claiming that there exist an arbitration agreement.

23. The petition as such stands allowed in above terms.

[NITIN W. SAMBRE, J.]