HIGH COURT OF GUJARAT

SAURASHTRA CHEMICALS LTD
Versus
UNION OF INDIA

Date of Decision: 30 April 2008

Citation: 2008 LawSuit(Guj) 2636

Hon'ble Judges: M R Shah

Eq. Citations: 2008 AIR(Guj) 148, 2008 3 GLR 2561, 2008 2 GLH 419, 2008 3 GCD 1690, 2008 71 AllIndCas 905, 2008 3 ArbLR 439

Subject: Arbitration, Civil, Constitution

Acts Referred:
Constitution Of India Art 227, Art 226
Arbitration And Conciliation Act, 1996 Sec 34, Sec 8

Final Decision: Petition allowed

Advocates: Bipin I Mehta, Nanavati Associates, Prabhav Mehta

M. R. Shah, J.

[1] By way of this petition under Article 227 of the Constitution of India, the petitioner - original plaintiff has prayed for an appropriate writ, order and/or direction quashing and setting aside the order dtd.24/10/2005 passed below Ex.53 by the learned 2nd Additional Senior Civil Judge, Porbandar in Regular Civil Suit No. 316 of 1993 in allowing the application Ex.53 submitted by the respondents herein - original defendants by directing both the parties to refer the dispute / matter to the arbitrator as per Clause 34 of the Siding Agreement which is produced at Mark 4/1 appointed by the defendants and to produce its report of arbitrator within six months.

[2] The petitioner herein - original plaintiff ('the plaintiff' for short) filed Special Civil Suit No. 14 of 1990 in the Court of learned Additional Civil Judge (S.D.), Porbandar against the respondents herein - original defendants ('the defendants' for short) on 23/3/1990, which was subsequently renumbered as Regular Civil Suit No. 316 of 1993, praying for declaration of the Western Railway Authorities to restrain to add 26 minutes in computation of time for the placement of wagons from Porbandar Station to the

plaintiff's plant being illegal, unauthorised and further restraining by a permanent injunction from adding 26 minutes in the computation timing for determining the siding charges and further praying for a declaration that the petitioner is entitled to the use of steam engine and/or diesel for the purpose of hauling wagons from Porbandar Station to the plaintiff's siding and other consequential reliefs.

[3] It appears that Written Statement came to be filed by the defendants in the year 1991. It appears and it is the case of the plaintiff that in the written statement nowhere the defendants have contended that the dispute is required to be referred to the arbitrator. Issues came to be framed by the trial court in the aforesaid Regular Civil Suit No. 316 of 1993 at Ex.20. It also appears from the record that the defendants submitted application Ex.52 on 26/2/2004 under Order VI Rule 17 praying for amendment of the Written Statement to contend that in view of the Clause 34 of the Agreement dtd.22/9/1990, the suit is not maintainable and the dispute should be referred to the arbitrator. Simultaneously on the very day the defendants submitted application Ex.53 under Section 8 of the Arbitration and Conciliation Act, 1996 ('Arbitration Act' for short) praying for direction to refer the dispute to the arbitrator. The plaintiff submitted objection/reply to the application Ex. Nos.52 as well as 53 objecting to the amendment as well as application regarding the dispute to the arbitrator. It also appears that the defendants submitted application Ex.45 under Section 34 of the Arbitration Act and the plaintiff submitted his reply/objection vide Ex.45. By the impugned order below Ex. Nos.41, 52 and 53, the learned 2nd Additional Senior Civil Judge, Porbandar dismissed the application Ex. Nos. 41 and 52 and allowed the application Ex.53 and passed the impugned order directing to refer the dispute to the arbitrator. Being aggrieved by and dissatisfied with the impugned order passed by the trial court below application Ex.53 referring the dispute of the Regular Civil Suit No. 316 of 1993 to the arbitrator, the petitioner - original plaintiff has preferred the present petition under Article 226 of the Constitution of India.

[4] Mr. Prabhav Mehta, learned advocate appearing on behalf of the petitioner has vehemently submitted that the learned trial court has materially erred in referring the dispute to the arbitrator after a period of almost 14 years of filing of the suit and that too, after filing the written statement as well as framing of the issues. It is submitted that once the defendants have participated in the proceedings by filing written statement, the learned trial court was not justified in referring the dispute to the arbitrator, more particularly when the issues were also framed by the trial court and in the first written statement even there was no reference to arbitration clause and it was never contended to refer the dispute to the arbitrator. It is submitted that only with a view to delay the trial, the defendants submitted the application which was not maintainable.

[5] Mr. Prabhav Mehta, learned advocate appearing on behalf of the petitioner - original plaintiff has relied upon the following decisions;

i. Rachappa Guruadappa, Bijapur v. Gurusiddappa Nuraniappa and Ors. ;

ii. Smt. Saroj Kumari v. Stae of U.P. ;

iii. P. Anand Gajapathi Raju and Anr. v. P.V.G. Raju (dead) and Ors. and

iv. Rashtriya Ispat Nigam Ltd. and Anr. v. Verma Transport Co. .

Relying upon the above decisions of the Hon'ble Supreme Court, Mr. Prabhav Mehta, learned advocate appearing on behalf of the petitioner -- original plaintiff has requested to allow the present Special Civil Application and quash and set aside the impugned order passed below Ex.53 whereby the trial court has referred the dispute to the Arbitrator.

[6] The petition is opposed by Mr. Bipin I. Mehta, learned advocate appearing on behalf of the respondents - original defendants. Mr. Bipin Mehta has submitted that earlier Ms. Megha Jani, learned advocate was appearing on behalf of the defendants, however, he has instruction to appear on behalf of the respondents and therefore, he was permitted to make submissions. Mr. Bipin Mehta, learned advocate appearing on behalf of the respondents - original defendants has submitted that in view of the Clause 34 of the Agreement dtd.22/9/1990, the suit is not maintainable and the dispute was required to be referred to the arbitrator appointed by the defendants and therefore, the trial court has rightly passed the impugned order referring the dispute to the arbitrator considering the provisions of the Arbitration Act. Therefore, it is requested to dismiss the present Special Civil Application.

[7] Heard the learned advocates appearing on behalf of the respective parties.

[8] At the outset, it is required to be noted that the suit came to be filed by the plaintiff way back in the year 1990, which was subsequently renumbered as Civil Suit No. 316 of 1993; written statement came to be filed by the defendants in the year 1991; in the written statement, the defendants have nowhere contended that the dispute was requirted to be referred to the arbitrator in view of Clause 34 of the Agreement dtd.22/9/1990; issues came to be framed by the trial court vide Ex.20 in the year 2002; in the year 2004 for the first time and after a period of almost 14 years of filing the suit, the defendants submitted application Ex.52 under Order VI Rule 17 praying for amendment of written statement to contend that in view of Clause 34 of the Agreement dtd.22/9/1990, the suit is not maintainable and the dispute should be referred to the arbitrator. Simultaneously, the defendants submitted application Ex.53

under Section 8 of the Arbitration Act praying for direction to refer the dispute to the arbitrator and the learned trial court by the impugned order has allowed the application Ex.53 directing to refer the dispute to the arbitrator. It is surprising to note that common order came to be passed by the learned trial court below application Ex. Nos. 41, 52 and 53 and the learned trial court dismissed the application Ex. Nos. 41 and 52 and allowed the application Ex.53. As stated above, the application Ex.52 was under Order VI Rule 17 for amendment of the written statement to contend that in view of Clause 34 of the Agreement dtd.22/9/1990, the suit is not maintainable and the dispute should be referred to the arbitrator and the learned judge has rejected the said application, meaning thereby the defendants were not permitted to amend the written statement to contend that in view of Clause 34 of the Agreement dtd.22/9/1990, the suit is not maintainable and the dispute should be referred to the arbitrator. Still, the learned trial court has passed the order to refer the dispute to the arbitrator, after a period of 14 years of filing the suit and after written statement was filed and issues were framed. Looking to the impugned order passed by the learned trial court, it appears that the impugned order has been passed by the trial court in one paragraph only. In rest of the paragraphs, the learned trial court has narrated the facts and submissions made on behalf of the respective parties and in one paragraph without discussing the decisions cited at bar, the learned trial court has passed the impugned order. The relevant observations of the learned trial court reads as under:

> I have gone through the above cited rulings, the facts of those rulings and facts of present suit are quite different. Looking to the provisions of Section 34 and the prayer of the different in application Ex.53, this application deserves to be allowed. In view of my above discussion, I pass the following combined order for above three application as under.

[9] The learned trial court has allowed the application submitted under Section 8 of the 1996 Act while referring the dispute to the arbitrator. Section 8 of the 1996 Act reads follows;

> Section 8. Power to refer parties to arbitration where there is an arbitration agreement.--
>
> 1. A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
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> 2. The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

3. Notwithstanding that an application has been made under Sub-section(1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

[10] As held by the Hon'ble Supreme Court in the case of Rashtriya Ispat Nigam Limited , Section 8 confers power on the judicial authority and he must refer the dispute which is subject matter of an arbitration agreement, if an action is arising before him, subject to fulfillment of the condition precedent. It is further observed by the Hon'ble Supreme Court in the said decision that such powers, however, shall be exercised if a party so applies not later than when submitting his first statement on the substance of the dispute. In para 36, the Hon'ble Supreme Court has observed and held as under:

36. The expression Sfirst statement on the substance of the dispute contained in Section 8(1) of the 1996 Act must be contradistinguished with the expression 'written statement'. It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, needed is a finding on the part of the judicial authority that the party has waived its right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived its right or acquiesced itself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act, may not be held wholly unmaintainable. We would deal with this question in some detail, a little later.

Considering the aforesaid decision of the Hon'ble Supreme Court, filing of the written statement can be said to be submitting to the jurisdiction of the judicial authority and it must be construed that the party has waived its right to invoke arbitration clause and therefore, after filing the written statement, the application on behalf of the defendants to refer the dispute to the arbitrator under Section 8 of the Act of 1996 is wholly unmaintainable.

[11] In the case on hand as stated above, the suit came to be filed in the year 1990; written statement came to be filed in the year 1991 without even raising contention with respect to arbitration clause and maintainability of the suit and without raising contention to refer the dispute to the arbitrator; issues came to be framed in the year 2002; the application for amendment came to be submitted to contend the arbitration clause and referring the dispute to the arbitration; application Ex.53 also came to be dismissed by the trial court, still, the learned trial court has referred the dispute to the arbitrator after a period of 14 years of filing the suit, allowing the application under

Section 8 of the 1996 Act which was not maintainable. Thus, the trial court has committed a grave error in allowing the application under Section 8 of the 1996 Act referring the dispute of the civil suit to the arbitrator and hence the impugned order passed by the trial court below application Ex.53 referring the dispute to the arbitrator requires to be quashed and set aside.

[12] For the reasons stated hereinabove, the petition succeeds. The impugned order passed by the learned 2nd Additional Senior Civil Judge, Porbandar below Ex.53 in Regular Civil Suit No. 316 of 1993 dtd.24/10/2005 is hereby quashed and set aside. Rule is made absolute accordingly. In the facts and circumstances of the case and as the suit is of the year 1990, the learned trial court is directed to give priority to the Regular Civil Suit No. 316 of 1993 and decide and dispose of the same as early as possible. There shall be no order as to costs.