

Delhi High Court

Shri Chand Construction And ... vs Tata Capital Housing Finance ... on 4 March, 2020

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 4th March, 2020
+ CS(OS) 179/2019

SHRI CHAND CONSTRUCTION AND APARTMENTS
PRIVATE LIMITED & ANR. Plaintiffs
Through: Mr. Rajat Aneja, Adv.
Versus
TATA CAPITAL HOUSING FINANCE LTD Defendant
Through: Mr. Manish Sharma, Adv.
CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.11823/2019 (of the defendant under Section 8 of the Arbitration
& Conciliation Act, 1996)

1.

The counsel for the plaintiffs, notwithstanding the notice issued of the application on 28th August, 2019 and opportunity for filing reply having been given, has not filed the reply.

2. The counsels were heard on 6th November, 2019 and orders reserved.

3. The plaintiffs have sued the defendants for recovery of damages for loss by the defendants of the title deeds of the immovable property of the plaintiff deposited with the defendants by way of equitable mortgage.

4. The suit came up first before this Court on 1st April, 2019, when subject to the reservation expressed in the order, the suit was entertained and summons thereof ordered to be issued.

5. The defendant appeared before the Joint Registrar on 20th May, 2019 and stated that complete set of documents and three pages of the plaint had not been received. It was further stated that there is an arbitration clause in the agreement between the parties and an application for referring the parties to arbitration would be filed. The Joint Registrar adjourned the proceedings to 1st August, 2019, granting time of four weeks to the defendant to file written statement and application if any.

6. On 1st August, 2019 also, there was no written statement of the defendant on record; the defendant complained that deficient copies as directed to be supplied had not been supplied by the plaintiffs till then. Per contra, the counsel for the plaintiffs contended that since the counsel who had appeared for the defendant on 20th May, 2019 had neither got his appearance recorded nor filed vakalatnama, the plaintiffs did not know to whom to supply the complete paper book.

7. The Joint Registrar adjourned the proceedings to 20th May, 2019, directing the deficient copies to be supplied during the course of the day. The Joint Registrar further noted that though the counsel for the defendant on

20th May, 2019 had sought time to make an application under the Arbitration & Conciliation Act, 1996, but no such application even had been filed.

8. The suit came up before this Court on 21st August, 2019, by when also written statement of the defendant was not on record. For the reasons stated in the order dated 21st August, 2019, the right of the defendant to file written statement was closed and the plaintiffs directed to file affidavits by way of examination-in-chief and the suit posted before the Joint Registrar on 15th October, 2019 for recording of evidence of the plaintiffs.
9. The defendant preferred FAO(OS) No.179/2019 to the Division Bench against the order closing its right to file written statement and the Division Bench vide order dated 27th September, 2019 has set aside the order closing the right of the defendant to file written statement and granted time till 11th October, 2019 to the defendant to file written statement.
10. In the meanwhile, this application filed by the defendant came up before this Court on 28th August, 2019 when, as aforesaid, notice thereof was ordered to be issued, pleadings therein directed to be completed and the application posted for hearing for today.
11. The counsel for the defendant has contended that there is an arbitration clause in the agreement between the parties, copy of which has been filed by the plaintiffs themselves and copy of which has also been filed by the defendant along with the application and in accordance therewith, the parties are to be referred to arbitration.
12. The counsel for the plaintiffs has opposed the application contending that the defendant, by its conduct aforesaid has disentitled itself from applying under Section 8 of the Arbitration Act. It is contended that the defendant, by filing an appeal to the Division Bench against the order dated 21st August, 2019 closing its right to file written statement, has opted to proceed with the suit by filing a written statement and cannot now be heard to claim arbitration. Reliance is placed on *Booz Allen & Hamilton Inc. Vs. SBI Home Finance Ltd.* (2011) 5 SCC 532 where one of the questions framed by the Supreme Court was as under:

"(iii) Whether the application under Section 8 was liable to be rejected as it was filed nearly 20 months after entering appearance in the suit?" and the Supreme Court in paragraph 19 held as under:

"19. Though Section 8 does not prescribe any time limit for filing an application under that section, and only states that the application under Section 8 of the Act should be filed before submission of the first statement on the substance of the dispute, the scheme of the Act and the provisions of the section clearly indicate that the application thereunder should be made at the earliest. Obviously, a party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the court cannot subsequently turn round and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement.

Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit.

When plaintiffs file applications for interim relief like appointment of a receiver or grant of a temporary injunction, the defendants have to contest the application. Such contest may even lead to appeals and revisions where there may be even stay of further proceedings in the suit. If supplemental proceedings like applications for temporary injunction on appointment of Receiver, have been pending for a considerable time and a defendant has been contesting such supplemental proceedings, it cannot be said that the defendant has lost the right to seek reference to arbitration. At the relevant time, the unamended Rule 1 of Order VIII of the Code was governing the filing of written statements and the said rule did not prescribe any time limit for filing written statement. In such a situation, mere passage of time between the date of entering appearance and date of filing the application under Section 8 of the Act, can not lead to an inference that a Defendant subjected himself to the jurisdiction of the court for adjudication of the main dispute. The facts in this case show that the plaintiff in the suit had filed an application for temporary injunction and appointment of Receiver and that was pending for some time. Thereafter, talks were in progress for arriving at a settlement out of court. When such talks failed, the appellant filed an application under Section 8 of the Act before filing the written statement or filing any other statement which could be considered to be a submission of a statement on the substance of the dispute. The High Court was not therefore justified in rejecting the application on the ground of delay."

13. Per contra, the counsel for the defendant has referred to Sharad P. Jagtiani Vs. Edelweiss Securities Ltd. 208 (2014) DLT 487 wherein I have held a preliminary objection in the written statement qua Section 8 of the Arbitration Act, even in the absence of a separate application under Section 8, to be sufficient invocation of Section 8 of the Arbitration Act and to Parasramka Holding Pvt. Ltd. Vs. Ambience Pvt. Ltd.

MANU/DE/0119/2018 following the same and has argued that since the Division Bench has extended the time for filing written statement, the right of the defendant to, in the written statement also, in preliminary objection take a plea of Section 8 of the Arbitration Act is preserved and the defendant cannot be debarred from invoking arbitration.

14. Both counsels have also referred to paragraphs 7,9 and 10 of the order dated 27th September, 2019 of the Division Bench which are as under:

"7. Counsel for the Appellant/Defendant informed the JR on 20th May, 2019 itself that there was an arbitration clause in agreement and that he was proposing to file an application for referring the matter to arbitration. He reiterated this before the JR on 1st August, 2019 as well. Although no such application had been filed till then, it now transpires that the application under Section 8 of the Arbitration and Conciliation Act, 1996 has subsequently been filed by the Appellant/Defendant on 20th August 2019, one day before the matter was taken up by the learned Single Judge. This explains why the learned Single Judge did not find the said application on record since it was yet to be numbered. The Court is now informed that the said application has since been listed before the learned Single Judge and is now coming up from 1st October, 2019.

9. In the circumstances the Court is of the view that the limitation period of 90 days could not be said to have begun on 26th April, 2019 since on that day admittedly a complete copy of the plaint was not served on the Defendant. Consequently, the question of the striking off the defence of the Defendant and subjecting him to cost of Rs.1,00,000/- for accepting the written statement, as has been directed in the impugned order, did not arise. The Court accordingly sets aside the impugned order dated 21st August, 2019 of the learned Single Judge in so far as it strikes off the defence of the Defendant and directs that the written statement would be taken on record only subject to payment of Rs.1,00,000/- as costs.
10. Learned counsel for the Appellant/Defendant states that after the impugned order of the learned Single Judge he applied for and obtained a certified copy of the plaint on 4th September, 2019. He undertakes to file the written statement positively on or before 11th October, 2019, with an advance copy to the learned counsel for the Plaintiff. It is made clear that no further time beyond 11th October 2019 would be granted to the Appellant/Defendant for this purpose. The written statement if filed by the above date will be taken on record."
15. While the counsel for the plaintiffs contends that the arguments of the counsel for the defendant before the Division Bench unequivocally was the intention of the defendant to file the written statement and to proceed with the suit, the counsel for the defendant, with reference to paragraph 7 of the judgment dated 27th September, 2019 of the Division Bench aforesaid contends that Division Bench also has taken note of the pendency of Section 8 application and thus there cannot be any inference as is being sought to be drawn by the counsel for the plaintiffs.
16. I have considered the rival contentions.
17. Section 8 of the Arbitration & Conciliation Act mandates a judicial authority, before which an action is brought in a matter which is the subject matter of Arbitration Agreement to, if a party to the agreement applies "not later than the date of submitting his first statement on the substance of the dispute", refer the parties to arbitration. It cannot possibly be disputed that the defendant has filed this application before the date of submitting its first statement on the substance of the disputes. In *Krishan Radhu Vs. The Emmar MGF Construction Pvt. Ltd.* MANU/DE/3422/2016, it was held that in the context of a civil suit, the words "first statement on the substance of the dispute" used in Section 8(1) of the Act would obviously mean the written statement. Although in *Rashtriya Ispat Nigam Ltd. Vs. Verma Transport Company* AIR 2006 SC 2800, it was held that the expression must be contra-distinguished with the expression written statement, it further goes on to hold that what is needed is a finding of the judicial authority that the party has waived his right to invoke the arbitration clause. I do not find that to be the case here.
18. In this respect, the legislative change in the Arbitration Act may be noticed. While the erstwhile Section 34 of the Arbitration Act, 1940 used the terminology "at any time before filing a written statement or taking any other steps in the proceedings", the words "or taking any other steps in the proceedings" in the 1996 Act have been done away with and this Court, in spite of the said legislative change, cannot apply the test of whether anything done by the applicant amounted to taking any other steps in the proceedings. Supreme Court, in *Greaves Cotton Ltd. Vs. United Machinery and Appliances* (2017) 2 SCC 268, also took note of this legislative change and held that an application for seeking extension of time for filing written statement

would not constitute the "first statement on the substance of the issue" as it did not reply to the allegations in the plaint. Further reference in this regard may be made to Vijay Anand & Associates Vs. Ashraf & Co. Pvt. Ltd. MANU/DE/1200/2001, Everest Electric Works Vs. Himachal Futuristics Communications Ltd. MANU/DE/1494/2004, Varun Seacon Ltd. Vs. Bharat Bijlee Ltd. AIR 1998 Guj 99 and Sohani Granites Pvt. Ltd. Vs. Binny Ltd. MANU/AP/0524/2002. The argument of the counsel for the plaintiffs, in my view, is an argument of the defendant "taking any other steps in the proceedings". The only test which the legislature now requires the applicant to satisfy, to make an application or take a plea under Section 8 of the Arbitration Act, is that it should not be later than the date of submitting his written statement and which admittedly has not happened till now or had happened till the date of filing of this application.

19. The contention of the counsel for the plaintiffs, that the Act of the defendant filing the appeal shows an intention to file the written statement rather than having the application under Section 8 of the Arbitration Act decided, shows an election by the defendant to proceed with the suit and to give up the arbitration, is also not found to be correct. The defendant could not have taken a chance, of not impugning the order closing its right to file written statement, in the hope of having the application under Section 8 of the Arbitration Act allowed and availing of legal remedies, in any case, cannot be a test to be applied vis-à-vis Section 8 of the Arbitration Act as aforesaid, in view of the legislative change in the Act.
20. I thus do not find any merit in the opposition by the plaintiffs to the application under Section 8 of the Arbitration Act.
21. However since the hearing on 6th November, 2019, a Co-ordinate Bench of this Court, in judgment dated 19th February, 2020 in CS(COMM) No.735/2018 titled SSIPL Lifestyle Pvt. Ltd. Vs. VAMA Apparels (India) Pvt. Ltd., noticing the amendment to Section 8 with effect from 23rd October, 2015 introducing the words "...not later than the date of submitting his first statement on the substance of the dispute...", has held that the arbitration clause can be waived under dual circumstances--one by filing a statement of defence and secondly by unduly delaying the filing of application under Section 8 of the Arbitration Act, by not filing the same till the date by which the statement of defence could have been filed; then there can be no reference to arbitration.
22. However applying the aforesaid law also, once the Division Bench has extended the time for filing written statement, it has to be held that the time for filing application under Section 8 of the Arbitration Act also stands extended and my opinion aforesaid stands.
23. However the arbitration clause, to which the counsel for the defendant / applicant has drawn attention, is as under:

"12.18 DISPUTE RESOLUTION If any dispute, difference or claim arises between the parties hereto in connection with this Agreement or the security hereof or the validity, interpretation, implementation or alleged breach of this Agreement or anything done or omitted to be done pursuant to this Agreement or otherwise in relation to the security hereof, the parties shall attempt in the first instance to resolve the same through negotiation / conciliation. If the dispute is not resolved through negotiations / conciliation within thirty days after commencement of discussions or such longer period as the parties agree to in writing then the same shall be settled

by arbitration to be held in Chennai / Delhi / Mumbai in accordance with the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and shall be referred to a person to be appointed by TCHFL. In the event of death, refusal, neglect, inability, or incapability of the person so appointed to act as an Arbitrator, TCHFL may appoint a new arbitrator. The award of the arbitrator shall be final and binding on all parties concerned.

Notwithstanding anything contained hereinabove, in the event due to any change in the legal status of TCHFL or due to any change or amendment in law or notification being issued by the Central Government or otherwise, TCHFL comes under the purview of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the "DRT Act"), which enables TCHFL to enforce the security under the SARFAESI Act or proceed to recover dues from the Borrower under the SARFAESI Act and / or the DRT Act, the Arbitration provisions hereinbefore contained shall, at the option of TCHFL, cease to have any effect and if arbitration proceedings are commenced but no award is made, then at the option of TCHFL such proceedings shall stand terminated and the mandate of the arbitrator shall come to an end from the date when such law or its change / amendment or the notification, becomes effective or the date when TCHFL exercises its option of terminating the mandate or arbitrator, as the case may be. Provided that neither a change in the legal status of TCHFL nor a change / amendment in law or issuance of notification as referred to in this sub paragraph above, will result in invalidating an existing award passed by an Arbitrator pursuant to the provisions of this Agreement.

The Borrowers liability hereunder shall not be affected, terminated or prejudiced by the death, insolvency or any incapacity of the Borrower, but such liability shall continue in full force and effect and shall be binding on the Borrowers successors provided in the title and as the case may be."

(emphasis added)

24. I have enquired from the counsel for the defendant, whether by any change or amendment in law or notification issued by the Central Government or otherwise, the defendant comes under the purview of Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) or the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (DRT Act).
25. The counsel for the defendant states that the defendant comes under the purview of the SARFAESI Act. He however states that it was not so on the date of entering into the agreement containing the arbitration clause but is a subsequent development. Later, he states that SARFAESI Act provisions became available to the defendant prior to the agreement dated 29th March, 2017.
26. I have enquired from the counsel for the defendant, that once the defendant has come under the purview of the SARFAESI Act, whether not the second part of the clause aforesaid in the agreement would apply, ceasing the effect of the arbitration clause.

27. The counsel for the defendant states that the arbitration clause will cease to have effect only as far as the claim of the defendant against the plaintiffs is concerned but will continue to have effect as far as the claims of the plaintiffs against the defendant are concerned.
28. On enquiry, whether there can be a valid arbitration clause providing for arbitration of claims of one of the party and providing for the remedy of the Court or any other fora for claims of the other party, the counsel for the defendant is unable to cite any law.
29. Section 7 of the Arbitration Act defines an arbitration agreement as meaning 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. In my view, the words "all or certain disputes" permit classification of disputes but do not permit classification of claims. The said words, in my view, do not allow a provision providing for claims of one of the parties arising in respect of a defined legal relationship to be adjudicated by arbitration but the claim of the other party arising in respect of the same legal relationship to be adjudicated by any other mode. The same would be contrary to the public policy prohibiting splitting up of claims and causes of action as enshrined in the provisions of the CPC and would result in multiplicity of proceedings, with claims of one of the parties to a legal relationship being decided by one forum and the claims of the other party to the same legal relationship being decided by another forum and possibility of conflicting findings. Such cannot be the interpretation of the words "all or certain disputes". The said words have to be interpreted as permitting the parties to specify the disputes of a particular nature/class to be submitted to arbitration, whether the said dispute arises from the claim of one or the other party.
30. In *Wellington Associates Ltd. Vs. Kirit Mehra* (2000) 4 SCC 272, finding that it was not the intention of the parties that arbitration is to be the sole remedy, it was held that there was no arbitration agreement. Similarly, *Jagdish Chander Vs. Ramesh Chander* (2007) 5 SCC 719 also holds that where there is merely a possibility of the parties agreeing to arbitration in future, as contrast from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement. This Court also in *Jagatjit Jaiswal Vs. Karmajit Singh Jaiswal* 2007 SCC OnLine Del 1519 finding the Dispute Resolution Committee by an agreement to be having an option to either act as arbitrator or as an expert, applying the aforesaid dicta of the Supreme Court and citing some judgments of other High Courts, held that there was no arbitration agreement.
31. Reference may also be made to:
 - (A) *Union of India Vs. Bharat Engineering Corporation* 1977 SCC OnLine Del 45 (DB) holding, in the context of Arbitration Act, 1940, that there can be no arbitration agreement which only one party can invoke and to constitute an arbitration agreement, either party to the agreement should be able to demand arbitration; it was held that law does not contemplate an arbitration agreement which is contingent or conditional or confers an option;
 - (B) *Bhartia Cutler Hammer Ltd. Vs. AVN Tubes Ltd.* 1991 SCC OnLine Del 322 holding that where power of invoking arbitration is given to one of the parties only and the other party has no right to invoke the arbitration provision, such a clause cannot be called an arbitration agreement;

(C) A.V.N. Tubes Ltd. Vs. Bharatia Culter Hammer Ltd. 46 (1992) DLT 453 (DB) dismissing the appeal preferred against the aforesaid judgment in Bhartia Culter Hammer Ltd. supra; (D) Dharma Prathishthanam Vs. Madhok Construction Pvt. Ltd. (2005) 9 SCC 686 holding that one party cannot usurp the jurisdiction of the Court and proceed to act unilaterally; a unilateral appointment and a unilateral reference, both will be illegal;

(E) Emmsons International Ltd. Vs. Metal Distributors (UK) 116 (2005) DLT 559, the contract wherein entitled the sellers only, to refer any dispute arising under the contract to arbitration in accordance with the rules and regulations of London Metal Exchange or to institute proceedings against the buyers in any Court of competent jurisdiction, holding such clause to be void; and, (F) Lucent Technologies Inc. Vs. ICICI Bank Limited 2009 SCC OnLine Del 3213 holding that a unilateral right conferred on one of the parties by the clause "Governing Law and Jurisdiction" is void and not enforceable as an arbitration agreement.

32. However, Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. Vs. Jade ElevatorComponents (2018) 9 SCC 774 without noticing any of the earlier judgments strikes a different note. In that case finding the agreement to be providing that the disputes should be settled by arbitration or by the Court, it was held that there being an option and the option of arbitration having been exercised, the arbitration should proceed.
33. Even if Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. supra were to be applied, the plaintiffs herein having exercised the option of approaching the Court, the suit has to continue in the Court and the parties cannot be referred to arbitration.
34. Even otherwise, the dispute resolution clause aforesaid is contained in a Loan Agreement dated 18th April, 2017 between the parties whereunder the defendant loaned monies to the plaintiffs and the plaintiffs agreed to re- pay the same. Clause 2.4 of the Loan Agreement required the plaintiffs to furnish security and further provided that upon full and final payment by the plaintiffs to the defendant of all amounts, the defendant shall release the security in favour of the plaintiffs. It is not in dispute that the plaintiffs have repaid all the dues of the defendant but the defendant has been unable to return the security deposited by the plaintiffs with the defendant and the claim of the plaintiffs in the present suit is only for damages for not so returning the security in the form of title deeds of immovable property of the plaintiffs. The said dispute cannot be said to be covered by Clause 12.18 of the Dispute Resolution clause reproduced above of the Loan Agreement.
35. In this context, the introduction in Section 8 of the Arbitration Act by the amendment with effect from 23rd October, 2015 of the words "unless it finds that prima facie no valid arbitration agreement exists", the Court while adjudicating an application under Section 8 Arbitration Act is entitled to adjudicate the question of validity of the Arbitration Agreement. The Arbitration Agreement in the present case in view of admission of the defendant of the defendant coming within the purview of the SARFAESI Act, is not found to be valid.
36. The application is thus dismissed.

RAJIV SAHAI ENDLAW, J.

MARCH 04, 2020 gsr/bs