$~38

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision : 08.05.2024*

\+ **FAO (COMM) 86/2024**

JAIBHAGWAN ..... Appellant

Through: Mr.Anil Sehgal, Mr.Vinay Partap, Advocates.

versus

SRIRAM FERTILIZERS AND CHEMICALS & ANR. ..... Respondents

Through: Mr.Prem Prakash, Mr.Aditya Harsh and Ms.Deepali Nanda, Advocates for R1.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J. (*Oral*)

1. The appellant has filed the present appeal impugning an order dated 23.02.2024 (hereafter *the impugned order*) passed by the learned Commercial Court allowing the application of respondent no.1 under Section 8 of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) in CS (COMM) No.193/2019 captioned *Shri Jai Bhagwan v. President/ Vice President Shriram Fertilizers and Chemicals & Ors*.

2. The appellant had instituted the aforesaid suit for recovery of ₹6,47,262/- (Rupees Six Lacs Forty-Seven Thousand Two Hundred and Sixty-Two only) and in the alternative prayed that a mandatory injunction

directing that defendants no. 1 to 3 (as arrayed in the suit initially) be directed to supply the goods in respect of the amount already adjusted. The persons arrayed as defendant nos. 2 and 3 when the suit was instituted have been deleted from the array of parties but the pleadings and the prayers made were not amended.

3. The appellant and respondent no.1 (arrayed as defendant no.1 in the suit) had entered into a Dealership Agreement whereby, the appellant was appointed as a sole distributor in respect of the agri-products including Urea and SSP. The appellant claims that for the past eight years he has been acting as a sole distributor for respondent no.1 in the territory of Samalkha, Haryana. The appellant claimed that he had issued blank cheques to respondent no.1 and it was the usual practice for respondent no.1 to fill the amounts and particulars in the cheque and present the same as recovering the amount payable by the appellant.

4. The appellant claims that he had remitted an amount of ₹4,44,000/- to respondent no.1 on 27.04.2018 for purchase of 80 MT of Urea. Respondent no.1 also raised an invoice on 28.04.2018, but had supplied only 20MT Urea of aggregate value of ₹1,10,754/-. The appellant claims that he discovered that an additional amount of ₹2,97,000/- was debited from his bank account on 15.05.2018. The appellant states that on enquiring from respondent no.1, he found that respondent no.1 had supplied the goods worth ₹6,30,242/- (60MT Urea and 50MT SSP) directly to respondent no.2 (M/s.Bhagwati Trading Co, Sanoli Khurd, District Panipat, Haryana). The appellant claims that respondent no.1 is not entitled to recover any amount in respect of the said supplies as the appellant had not issued any such instructions. The

appellant also claims that respondent no.2 (arrayed as defendant no. 4 in the suit as originally filed and subsequently arrayed as defendant no.2) has denied the receipt of the goods that were stated to be supplied by respondent no.1.

5. It is relevant to refer to the reliefs sought in the suit by the appellant and the same are set out below: -

> 'A) In the first instance pass a money decree for recovery of Rs. Rs.6,47,262/- (Rupees Six Lakhs Forty-seven Thousand two hundred sixty two Only) alongwith 18% pendent-lite and future interest in favour of the plaintiff and against the defendant no. 1 to 3 or in the alternative issue mandatory injunction to the Def. no. 1 to 3 to supply goods as per the amount already adjusted i.e. Rs.6,47,262/- with upto payment of interest.
> plaintiff.
>
> OR
>
> B) Pass a money decree for recovery of Rs.6,47,262/ (Rupees Six Lakhs forty seven Thousand two hundred sixty two Only) alongwith 18% pendent-lite and future interest in favour of the plaintiff and against the defendant no. 4 in the event of Def. no. 1 to 3 successfully proving that they had supplied 60 MT Urea and 50 MT SSP to the Def. no. 4 and which is duly received by them. The Def no. 1 to 3 have also to prove that the said materials was supplied to the Def. no. 4 on the instructions of the plaintiff or on behalf of the plaintiff.
> Cost of the litigation be also awarded in favour of the plaintiff and against the defendants.'

6. It is relevant to note that the original defendant nos.2 & 3 were deleted, and therefore, the reference to defendant nos.1 to 3 in the relief clause required to be read as defendant no.1 (respondent no.1 in the present appeal).

7. It is apparent from the above that the action instituted by the appellant for the recovery of ₹6,47,262/- from respondent no.1 is premised on the basis that it had received the amount from the appellant, but had not provided the value for the same. It is in this context that the appellant claims a decree for recovery of ₹6,47,262/- and in the alternative, a decree for a mandatory injunction against respondent no.1 to supply the goods for the said amount, which is claimed to be adjusted.

8. The learned Commercial Court found that there is no dispute that the Dealership Agreement entered into between the appellant and respondent no.1 includes an arbitration clause. The said clause is set out below:-

> "15. Arbitration/Governing Law -- Any dispute or difference or claim arising out of or in relation to this contract, including tie construction, validity, performance or breach thereof, shall be settled and decided by arbitration in accordance with the Rules of Arbitration of the Arbitration and Conciliation Tribunal of the Federation of Commerce and Industry (FACT) and the award made in pursuance thereof shall be binding on the parties.
> This Agreement is executed at New Delhi and any disputes related to it will be subject to exclusive jurisdiction of the Courts at New Delhi, and shall be governed by the laws of India.'

9. We find no infirmity with the decision of the learned Commercial Court's finding that the disputes raised by the appellant against respondent no.1 fall within the scope of the Arbitration Agreement (clause 15 of the Dealership Agreement).

10. Mr Sehgal, the learned counsel appearing on behalf of the appellant

submits that the parties could not be referred to arbitration, as – (a) the subject matter in the suit also included a claim against respondent no.2 (arrayed as original defendant no.4 in the suit); and (b) there is no Arbitration Agreement between the appellant and respondent no.2.

11. He relies upon the decision of the Supreme Court in ***Sukanya Holdings (P) Ltd v. Jayesh H. Pandya & Anr : (2003)5 SCC 531*** and the decision of the Division Bench of this Court in ***Ameet Lal Chand Shah & Ors v. Rishabh Enterprises & Anr :2017 SCC OnLine Del 7865*** in support of his contention that the parties could not be referred to arbitration.

12. We are not persuaded to accept the said contention. The reliance of the appellant on the decision in ***Sukanya Holdings (P) Ltd v. Jayesh H. Pandya & Anr.*** *(supra)* is misplaced. It is apparent from a plain reading of the suit that the cause of action against respondent no.2 is separate from the cause for action against respondent no.1. The appellant's relief against respondent no.1 is to recover the amount paid or value thereof. The appellant's relief against respondent no.2 is for the goods supplied to respondent no.2; however, the said relief has been couched with the caveat that it be pressed in the event that respondent no.1 is successful in proving that it had supplied 60MT Urea and 50MT SSP to respondent no.2, "at the instructions of the plaintiff or on behalf of the plaintiff". It is clear that the cause of action, if any, against respondent no.2 is different from the cause of action against respondent no.1. The same is premised on the assumption that goods were supplied by respondent no.1 to respondent no.2 on behalf of the appellant. The dispute with respondent no.1 falls within the scope of the Arbitration Agreement.

13. In ***Sukanya Holdings (P) Ltd v. Jayesh H. Pandya & Anr***. (*supra*) the Court found that the cause of action could not be split. The Court had observed that "Where, however, a suit is commenced – 'as to a matter' which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8". The Court also found that the causes of action could not be bifurcated into two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the Court. However, in the present case, there are separate causes of action, which have been clubbed by the appellant. It would not be permissible for the appellant to circumvent its agreement with respondent no.1 to refer the disputes to arbitration in the said manner.

14. The decision of this Court in ***Ameet Lal Chand Shah & Ors. v. Rishabh Enterprises & Anr.*** *(supra)* was successfully appealed before the Supreme Court and the said decision was set aside in ***Ameet Lalchand Shah and Others vs Rishab Enterprises and Another: 2018(15) SCC 678***. It is inappropriate for the learned counsel to cite decision that have been set aside by a superior court.

15. In ***Ameet Lal Chand Shah & Ors.*** (*supra*), the Supreme Court had distinguished the applicability of ***Sukanya Holdings (P) Limited*** (*supra*). The Supreme Court noted that Section 8 of the A&C Act was amended by virtue of the Arbitration & Conciliation (Amendment) Act, 2015 and noted that the said amendments required to be seen in the background of the recommendations as made by the Law Commission in its 246th Report. The relevant extract of the said decision is as under:

"29. Amendment to Section 8 by the 2015 Act, are to be seen in the background of the recommendations set out in the 246th Law Commission Report. In its 246th Report, Law Commission, while recommending the amendment to Section 8, made the following observation/comment:

LC Comment:

> "The words "such of the parties … to the arbitration agreement" and proviso (*i*) of the amendment have been proposed in the context of the decision of the Supreme Court in *Sukanya Holdings (P) Ltd.* v. *Jayesh H. Pandya* [*Sukanya Holdings (P) Ltd.* v. *Jayesh H. Pandya*, (2003) 5 SCC 531] in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference is to be rejected only where such parties are *necessary* [**Ed.** : Emphasis in original.] parties to the action — and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (*ii*) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that

there shall be a conclusive determination as to whether the arbitration agreement is null and void.

(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 *or a copy accompanied by an affidavit calling upon the other party to produce the original arbitration agreement or duly certified thereof in circumstances where the original arbitration agreement or duly certified copy is retained only by the other party*."

(emphasis supplied)

LC Comment:

"In many transactions involving government bodies and smaller market players, the original/duly certified copy of the arbitration agreement is only retained by the former. This amendment would ensure that the latter class is not prejudiced in any manner by virtue of the same." (Ref : 246th Law Commission Report, Government of India)

30. The language of amendment to Section 8 of the Act is clear that the amendment to Section 8(1) of the Act would apply notwithstanding any prayer, judgment, decree or order of the Supreme Court or any other court."

16. It is material to note that the Supreme Court had highlighted that the Law Commission had proposed the amendment to Section 8 of the A&C Act in view of the decision of the Supreme Court in ***Sukanya Holdings (P) Ltd v. Jayesh H. Pandya & Anr***. (*supra*). The Law Commission of India had highlighted that the application to refer the parties to arbitration could not be denied where the parties were added to circumvent the arbitration agreement.

17. Since the disputes raised against respondent no.1 are squarely covered under the Arbitration Agreement, it is not permissible for the appellant to circumvent the same by drafting pleadings to include a cause of action against another party.

18. We find no infirmity with the decision of the learned Commercial Court in allowing respondent no. 1's application under section 8 of the A&C Act, however, we clarify that the impugned order will not preclude the appellant from instituting a separate action against respondent no.2, if otherwise, maintainable in accordance with law.

19. The appeal stands dismissed with the above observations.

20. In view of the above, we dispose of the present appeal by leaving it open for the appellant to take appropriate steps for appointment of an Arbitral Tribunal in accordance with law.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MAY 08, 2024
M

Click here to check corrigendum, if any