Rajasthan High Court
Jitender Singh And Others vs Viyom Networks Ltd on 17 January, 2014

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR

S.B. Civil Revision Petition No. 142/2013
Jitender Singh & Ors. vs. Viyom Networks Limited

Date of Order:: 17/01/2014

Hon'ble Ms. Justice Bela M. Trivedi

Mr. Sudesh Bansal, for the petitioners.
Mr. Lokesh Atray, for the respondent.

REPORTABLE
BY THE COURT :

1. With the contents of the learned counsels for the parties, the petition is being decided finally at the admission stage itself.

2. The present revision petition has been filed by the petitioners-defendants under Section 115 of CPC challenging the order dated 08/10/2013 passed by the Additional Civil Judge (Junior Division) No.2, Jaipur Metropolitan City (hereinafter referred to as 'the Trial Court' for convenience) in civil Suit No.107/2013, whereby the Trial Court has dismissed the application filed by the petitioners-defendants under Order VII Rule 11 of CPC read with Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act').

3. The short facts, giving rise to the present petition, are that the respondent-plaintiff and the petitioner Nos.1 and 2 had entered into a lease and licence agreement dated 11/09/2007 for installation, modification, deinstallation and maintaining the equipment for providing telecommunication services upon the terrace/vacant space and on the ground space together with the space for laying cable trays and cables on the exterior portion of the building in the premises as described in the said agreement. The said agreement was signed by the petitioner Nos.1 and 2 as the Licensor and the respondent as the Licensee. As per one of the conditions being the condition No.15, the said parties had agreed to refer the disputes which may arise out of the said agreement to the arbitrator. The said condition contained in the agreement reads as under :-

15. ARBITRATION It is mutually agreed between the Parties, that in the event of any dispute, or differences in the matter of interpretation, execution or carrying out the objects and functions under this Agreement, the same shall be referred to a sole arbitrator, to be appointed by TTL. The provisions of the Arbitration and Conciliation Act of 1996, including its statutory modification and

re-enactment in force from time to time, shall apply to the proceedings which shall be conducted in English and the venue of such proceedings shall be at Jaipur the decision of such sole arbitrator shall be final and binding on both the Parties. For all matters concerning this Agreement, only the competent courts at Jaipur shall have the exclusive jurisdiction.

4. It appears that the disputes having arisen between the parties, the respondent-plaintiff has filed the suit against the present petitioners-defendants seeking permanent injunction for restraining the petitioners-defendants from causing any obstruction to the respondent-plaintiff in the use of the mobile tower or from removing the equipments placed by the respondent-plaintiff on the said mobile tower at the disputed premises. Since the respondent-plaintiff had relied upon the said lease and licence agreement dated 11th September, 2007 in the plaint itself, the petitioners-defendants relying upon Clause 15 of the agreement in question, submitted an application before the Trial Court under Order VII Rule 11 read with Section 8 of the said Act praying inter-alia to reject the plaint, or to refer the subject matter of the suit to the arbitrator. The said application was resisted by the respondent-plaintiff by filing the reply contending inter-alia that though the said agreement was entered into between the respondent on the one hand and the petitioner Nos.1 and 2 on the other hand, no such agreement was entered into with the petitioner No.3-defendant No.3, and therefore, the provisions contained in Section 8 of the said Act would not applicable. The Trial Court, after hearing the learned counsels for the parties, dismissed the said application of the petitioners vide the impugned order dated 8/10/2013, which is under challenge before this Court by way of present revision petition.

5. It has been submitted by the learned counsel Mr. Sudesh Bansal appearing for the petitioners that though the agreement was entered into by and between the petitioner Nos.1 and 2 on one hand and the respondent on the other hand, all the three petitioners, who are Defendants in the suit, had filed joint application for referring the disputes to the arbitrator under Section 8 of the said Act and that the said application having been dismissed by the Trial Court, the present revision petition has also been filed by all the three petitioners, including the petitioner No.3. Relying on the decision of the Apex Court in case of Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. & Ors.,(2013) 1 SCC 641, the learned counsel for the petitioners has submitted that if one the parties to the agreement applies under Section 8 of the said Act, the Court is required to refer the dispute to the arbitrator as contemplated under Section 8 of the said Act.

6. However, the learned counsel Mr. Lokesh Atray for the respondent has submitted that the petitioner No.3 was not the party to the agreement in question, and therefore, one of the two conditions laid down by the Apex Court in case of Yogi Agarwal vs. Inspiration Cloths & U and Ors, (2009) 1 SCC 372 that the agreement should be between the parties to the dispute, is not satisfied, and therefore, the matter could not be referred to the arbitrator under Section 8 of the said Act, as prayed for by the petitioners. He also submitted that the petitioner No.3 has filed a separate written statement in the suit, raising the dispute as regards the authority of the petitioner Nos.1 and 2 to execute the agreement in question, and therefore also, the matter could not be referred to the arbitrator.

7. At the outset, it may be stated that for referring the subject matter of the suit to the arbitrator, under Section 8 of the said Act, the existence of arbitration agreement between the parties to the suit is a condition precedent. As such it is obligatory on the part of the Court to refer the parties to arbitration in terms of their agreement, when such agreement in original or a duly certified copy thereof is produced in the Court. Beneficial reference of the decision in case of P. Anand Gajapathi vs. P.V.G. Raju, (2000) 4 SCC 539 may be made in this regard.

8. However, in the instant case, though the respondent-plaintiff has admitted and produced the agreement entered into between the respondent-plaintiff and the petitioner No.1 and 2, it has taken up the contention that since the petitioner No.3 was not the party to the agreement, the disputes cannot be referred to the arbitrator as per condition No.15 of the said agreement. The precise question therefore which falls for consideration before this Court is, whether the Court, while dealing with the application under Section 8 of the said Act, should have referred the dispute, which is the subject matter of the suit, to the arbitrator, when one of the defendants was not the signatory to the arbitration agreement. The Apex Court in case of Chloro Controls India Private Limited vs. Seven Trent Water Purification Inc. & ors. (supra) had the occasion to deal with the ambit and scope of Section 45 of the said Act, in a situation where multiple agreements were signed between the different parties, and some contained the arbitration agreement, whereas the other did not, and further where the parties were not identically common in the suit proceedings. In the said decision the Apex Court made very pertinent observations in various paragraphs, the relevant are reproduced as under :-

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, intention of the parties is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

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93. As noticed above, the legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and the Geneva Convention. The New York Convention was physically before the Legislature and available for its consideration when it enacted the 1996 Act. Article II of the Convention provides that each contracting State shall recognise an agreement and submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not concerning a subject matter capable of settlement by arbitration. Once the agreement is there and the Court is seized of an action in relation to such subject matter, then on the request of one of the parties, it would refer the parties to arbitration unless the agreement is null and void, inoperative or incapable of performance.

94. Still, the legislature opted to word Section 45 somewhat dissimilarly. Section 8 of the 1996 Act also uses the expression parties simpliciter without any extension. In significant contra- distinction, Section 45 uses the expression one of the parties or any person claiming through or under him and refer the parties to arbitration, whereas the rest of the language of Section 45 is similar to that of Article II(3) of the New York Contention. The Court cannot ignore this aspect and has to give due weightage to the legislative intent. It is a settled rule of interpretation that every word used by the Legislature in a provision should be given its due meaning. To us, it appears that the Legislature intended to give a liberal meaning to this expression.

95. The language of Section 45 has wider import. It refers to the request of a party and then refers to an arbitral tribunal, while under Section 8(3) it is upon the application of one of the parties that the court may refer the parties to arbitration. There is some element of similarity in the language of Section 8 and Section 45 read with Article II(3). The language and expressions used in Section 45, any person claiming through or under him including in legal proceedings may seek reference of all parties to arbitration. Once the words used by the Legislature are of wider connotation or the very language of section is structured with liberal protection then such provision should normally be construed liberally.

96. Examined from the point of view of the legislative object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers.

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102. Joinder of non signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCAs Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is no and the same is supported by a

number of reasons.

103. Various legal basis may be applied to bind a non-signatory to an arbitration agreement:

103.1. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2. The second theory includes the legal doctrines of agent- principal relations, apparent authority, piercing of veil (also called the alter ego), joint venture relations, succession and estoppel. They do not rely on the parties intention but rather on the force of the applicable law.

104. We may also notice the Canadian case of The City of Prince George v. A.L. Sims & Sons Ltd. wherein the Court took the view that an arbitration agreement is neither inoperative nor incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

105. We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.

9. In view of the aforestated legal position propounded by the Apex Court, it becomes clear that even non-signatory parties to the agreement can be referred to the arbitrator, on the basis of the implied or specific consent of the said party or by judicial determination.

10. So far as the facts of the present case are concerned, it is required to be noted that the agreement in question has not been disputed by the respondent-plaintiff and said agreement in original has also been produced by the respondent-plaintiff before the Trial Court. It is also not in dispute that the application under Order VII Rule 11 of CPC read with Section 8 of the said Act for referring the dispute to the arbitration was filed by all the petitioners-defendants jointly. Of course, it appears that subsequently the petitioner No.3 had filed a separate written-statement in the suit, however, she has not disputed her filing of the application under Order 8 of the said Act, along with the petitioner Nos.1 and 2. Even the present revision petition challenging the impugned order, passed by the Trial Court rejecting the said application under Order VII Rule 11 of CPC read with Section 8 of the said Act, has been challenged by all the petitioners jointly, meaning thereby, the petitioner No.3 has also consented for referring the dispute between the parties, which is the subject matter of the suit, to the arbitrator under Section 8 of the said Act. Under the circumstances, there is no impediment in referring the disputes between the parties to the arbitrator as per condition No.15 of the agreement in question.

11. At this juncture, the learned counsels for the parties has drawn the attention of the Court to the decision of the Apex Court in case of P. anand Gajapathi Raju & Ors. vs. P.V.G. Raju (Dead) and Others, (2000) 4 SCC 539, to submit that when the subject matter of the suit is referred to the arbitrator under Section 8 of the said Act, nothing further is required to be done in the suit and the suit would stand disposed of.

12. In that view of the matter, the impugned order is set aside. It is directed that both the parties shall proceed further for the appointment of Arbitrator as per the condition No.15 of the agreement in question. The parties shall also be at liberty to move the Trial Court for the disposal of the suit in view of the order passed by this Court. The petition stands allowed accordingly.

(Bela M. Trivedi) J.

Sanjay Solanki JrPA 80 Sanjay SolankiJrPA41 All corrections made in the judgment/order have been incorporated in the judgment/order being emailed.Sanjay Solanki Jr. Personal Assistant