

Civil Revision

Present: **The Hon'ble Justice Jyotirmay Bhattacharya**

C.O. No.2440 of 2009
Judgment On: 16-04-2010.

Smt. Anannya Chowdhury & Anr
-Vs-
Ranjit Kr. Bose & Anr

POINTS:

REFERENCE TO ARBITRATOR- High Court previously disposed of the application under Section 11 of the Arbitration and Conciliation Act when eviction suit was pending- Tenant filed petition before the Rent Controller under section 21 of the Premises Tenancy Act- Landlord raised objection of hearing the same by Rent Controller in view of arbitration clause-Whether the matter to be referred to the Arbitrator- Arbitration and Conciliation Act, 1996 S.8

FACTS:

The petitioners are the tenants in respect of a ground floor shop room under the respondents. It was decided that any dispute regarding the contents or construction or dispute arising out of the same shall be settled by joint arbitration of two arbitrators, one to be appointed by landlords and the other to be appointed by tenants, whose award shall be binding on both the parties. Initially when a dispute cropped up between the parties regarding rent, the tenants approached the Rent Controller for depositing the rent before the Rent Controller. The landlords objected to the maintainability of the said proceeding by referring to the aforesaid arbitration clause contained in the said tenancy agreement. The said objection was ultimately sustained. Being aggrieved by the order of the District Judge, the tenants preferred an appeal before the Division Bench of this Hon'ble Court which disposed of the said appeal. The propriety of the said order passed by the learned Trial Judge is under challenge in this application at the instance of the defendants (tenants).

HELD:

The learned Trial Judge rejected the petitioners' application under Section 8 of the Act under the impression that since the Hon'ble High Court while disposing of the application under Section 11 of the Arbitration and Conciliation Act, did not refer the said dispute to arbitrators, despite having knowledge, about the pendency of the eviction suit between the parties. The learned Trial Judge was not correct in making such observation as neither party prayed for referring the present dispute regarding the eviction suit to arbitrator for its arbitration nor this Hon'ble Court, while dealing with the application under Section 11 of the said Act had any occasion to consider the arbitrability of such dispute as per the arbitration agreement between the parties. As such, the learned Trial Judge committed an illegality in rejecting the petitioners' application on the said ground. Paras-20&21

There is no substance in the contention of the plaintiffs regarding their objection against the arbitrability of the dispute involved in the said eviction suit, as it is the plaintiffs who themselves objected to the entertainability of the tenants' application under Section 21 of the West Bengal Premises Tenancy Act, 1997 before the Rent Controller by referring to the very same arbitration clause contained in the tenancy agreement. The plaintiffs cannot take contradictory stand against the defendants in different stages of various proceedings concerning the said tenancy dispute.

Para-23

CASES CITED:

1. Hindustan Petroleum Corporation Ltd. –Vs- Pinkcity Midway Petroleums 2003(6) SCC 503.
2. Agrigold Exims Ltd. –Vs- Sri Lakshmi Knits & Wovens & Ors. (2003)7 SCC 686.

3. Branch Manager, Magma Leasing & Finance Ltd. & Anr. –Vs- Potluri Madhavalata & Anr. (2009)10 SCC 103.
4. Nataraj Studio Pvt. Ltd. –Vs- Navrang Studies & Anr. AIR 1981 SC 537.
5. Sanwarmal Kejriwal –Vs- Vishwa Co-operative Housing Society and Ors. AIR 1990 SC 1563.
6. Ing Vysya Bank Ltd. –Vs- Modern India Ltd. & Anr., judgment delivered on 30.1.08.(Unreported, Supreme Court)
7. Carno Ltd. –Vs- Sumangal Holdings, judgment delivered on 25.4.2007.(Unreported, Bombay High Court)
8. Central Warehousing Corporation –Vs- Fort Point Automatic Pvt. Ltd., judgment delivered on 16.12.2009.(Unreported, Special Bench Bombay High Court)
9. Kaiser-I-Hind Pvt. Ltd. & Anr. –Vs- National Textile Corporation (Maharashtra North) Ltd. & Ors.(2002)8 SCC 182

For the Petitioners: Mr. Jaydip Kar,
Mr. Sakya Sen,
Ms. Debasri Dutta.

For the Opposite: Mr. Santanu Mukherjee,
Parties Mr. Rabindra Narayan Dutta,
Mr. Arun Kr. Ghosh,
Mr. Shibashis Ghosh,
Mr. Prabhat Kr. Maharaj,
Mr. Hare Krishna Halder,
Mr. Koushik Bhattacharya.

THE COURT:

1) The petitioners are the tenants in respect of a ground floor shop room measuring about 600 sq. ft. in the front portion of the premises No.HA-3 Bidhannagar, Salt Lake City, Kolkata – 700097 under

the opposite parties. The terms and conditions of such tenancy of the defendants are contained in the tenancy agreement executed between the parties on 1st July, 2003. The said tenancy agreement contains an arbitration clause to the following effect :-

“Clause 15: That any dispute regarding the contents or construction of this agreement or dispute arising out of the same shall be settled by joint arbitration of two arbitrators, one to be appointed by landlords and the other to be appointed by tenants. The decision of such arbitrators or umpires appointed by them shall be final and parties hereto. Such arbitration will be in accordance with the Arbitration and Conciliation Act, 1996.

2) Initially a dispute was cropped up between the parties as the landlords refused to accept rent from the tenants since July, 2007. Under such circumstances, the tenants approached the Rent Controller for depositing the rent before the Rent Controller as per Section 21 of the West Bengal Premises Tenancy Act, 1997. The landlords objected to the maintainability of the said proceeding by referring to the aforesaid arbitration clause contained in the said tenancy agreement. The said objection was ultimately sustained and the said proceeding was, thus, disposed of by holding inter alia that this cause is not fit to be considered and/or continued to be treated under Section 21 of the said Act and if such proceeding is continued then such continuation would be bad in law, as the matter is being perused through respective arbitrators as per their agreement. The said order was passed by taking note of the fact that the parties have already appointed their respective arbitrators for resolving the said dispute in the meantime.

3) Subsequently, the tenants filed an application under Section 9 of the Arbitration and Conciliation Act seeking injunction for protecting their possession of their tenancy and for enjoying various amenities annexed to the said tenancy uninterruptedly. Such application was filed as the landlords allegedly were creating various types of obstructions in the use and enjoyment of the said tenancy and/or various amenities annexed to such tenancy by the tenants. The said proceeding being Misc. Case No.413 of 2005 was disposed of by the learned District Judge vide Order No.19, whereby the landlords were directed to maintain status quo in respect of the disputed property till 8th August, 2007 and the tenants were directed to refer the dispute to the arbitrators to be appointed in terms of the said arbitration clause contained in the said agreement with a further rider that if the tenants fail to appoint any arbitrator in terms of the said agreement, the order of status quo will remain vacated automatically from 9th August, 2007. The said application was, thus, allowed.

4) Being aggrieved by the said order, the tenants preferred an appeal being FMA No.1453 of 2007 before the Division Bench of this Hon'ble Court which disposed of the said appeal on 11th October, 2007.

5) Subsequently an application for modification of the said order was filed by the landlords and the said application was disposed of by giving some additional protection to the parties regarding user of the two passages by them separately. An undertaking was given on behalf of the landlord for giving access to the tenants and the CESC officials to the meter room whenever such access will be needed. The other dispute such as making over the key to the tenants twice everyday so that they can open the shutter fixed at the passage and close the same at the end of the day, was left open to be considered by the arbitrator.

6) Subsequently the dispute between the parties took a different shape when the landlords failed to nominate any arbitrator from their side after they stepped down their appointed arbitrator.

7) Under such circumstances, the tenants filed an application under Section 11 of the Arbitration and Conciliation Act for appointment of an arbitrator for resolution of the dispute between the parties before this Hon'ble Court. While considering the said application the learned Single Judge found that an arbitration clause existed between the parties in the tenancy agreement and the dispute between the parties is capable of resolution as per the said agreement. While coming to the said conclusion His Lordship took note of various proceedings between the parties concerning diverse disputes between them relating to the said tenancy, wherein the existence of the arbitration clause was recognized by different forums. Attention was also drawn to His Lordship about the eviction notice given by the landlords to their tenants as well as the eviction suit filed against the tenants in the meantime. By considering the reliefs claimed by the landlords in the said eviction suit, His Lordship observed that the dispute regarding arrear rent as well as the dispute regarding the landlord's claim for realisation of the arrear of the proportionate and enhanced municipal taxes are live issues as the parties are still fighting on those issues and as such, His Lordship directed the said application for appointment of arbitrator to be placed before the Hon'ble Chief Justice and/or the Judge designate for appointing arbitrators for deciding those live issues, by them.

8) Subsequently, by consent of parties, a learned Advocate of this Hon'ble Court was appointed as an arbitrator by the Hon'ble Judge designated, on 19th February, 2009.

9) The said arbitration proceeding is still continuing before the learned arbitrator.

10) Another problem was created when the tenants' application under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the dispute involved in the eviction proceeding, to the arbitrators for its settlement, was rejected by the learned Trial Judge. The learned Trial Judge held that the tenants are estopped from praying for such a reference under Section 8 of the said Act as no such relief was granted by this Hon'ble Court earlier while dealing with the tenant's application under Section 11 of the said Act.

11) The propriety of the said order passed by the learned Trial Judge on 10th June, 2009 in T.S. No.89 of 2008 is under challenge in this application at the instance of the defendants (tenants).

12) Heard Mr. Kar, learned Advocate for the petitioners and Mr. Mukherjee, learned Advocate appearing for the opposite parties.

13) By citing several decisions of the Hon'ble Supreme Court, Mr. Kar submitted that when an arbitration agreement admittedly exists between the parties for resolution of their dispute concerning the said tenancy by way of arbitration, the Court has no option but to refer the said dispute to the arbitrator for its resolution as per Section 8 of the said Act, if such a request is made by the defendant to the Court before filing his defence in the suit or before expiry of the date fixed for submission of his first statement in the suit. The decisions which were cited by Mr. Kar, are as follows :-

10. In the case of Hindustan Petroleum Corporation Ltd. –Vs- Pinkcity Midway Petroleums reported in 2003(6) SCC 503.
 11. In the case of Agrigold Exims Ltd. –Vs- Sri Lakshmi Knits & Wovens & Ors. reported in (2003)7 SCC 686.
 12. In the case of Branch Manager, Magma Leasing & Finance Ltd. & Anr. –Vs- Potluri Madhavalata & Anr. reported in (2009)10 SCC 103.
- 14) Relying upon the aforesaid decisions Mr. Kar submitted that the learned Trial Judge acted illegally by rejecting the petitioners' said application by the impugned order as the Hon'ble Supreme Court uniformly held in all these decisions that reference of such dispute to arbitrator should compulsorily be made, when the conditions under Sections 5 and 8 of the said Act are fulfilled.
- 15) On the contrary, Mr. Mukherjee cited some decisions to support his contention that when a Special Act created a particular forum for deciding certain specified dispute between the landlord and tenant concerning the tenancy, it is only that particular forum which is specified under the Tenancy Act, is only competent to decide the issues involved in the eviction suit and no other forum far less any forum created by way of agreement between the parties is competent to decide such dispute involved in the eviction suit.
- 16) The decisions which were cited by him are as follows :-

1. In the case of Nataraj Studio Pvt. Ltd. –Vs- Navrang Studies & Anr. reported in AIR 1981 SC 537.
2. In the case of Sanwarmal Kejriwal –Vs- Vishwa Co-operative Housing Society and Ors. reported in AIR 1990 SC 1563.
3. An unreported decision of the Hon'ble Supreme Court in the case of Ing Vysya Bank Ltd. –Vs- Modern India Ltd. & Anr., judgment delivered on 30.1.08.
4. An unreported decision of the Bombay High Court in the case of Carno Ltd. –Vs- Sumangal Holdings, judgment delivered on 25.4.2007.
5. Another unreported decision of the Special Bench of the Bombay High Court in the case of Central Warehousing Corporation –Vs- Fort Point Automatic Pvt. Ltd., judgment delivered on 16.12.2009.

17) By referring to the said decisions Mr. Mukherjee pointed out that it was uniformly held in all those decisions that recourse to arbitration under the terms of arbitration clause contained in the agreement of live and license cannot be taken, as exclusive jurisdiction is conferred upon the Court of Small Causes to try such eviction suit by the Small Causes Court exclusively as per Section 41(1) of the Presidency Small Causes Court Act, 1982. Accordingly, Mr. Mukherjee supported the impugned order and prayed for rejection of this revisional application.

18) Let me now consider the submission of the learned Counsel of the parties in the facts of the instant case.

19) Admittedly, there is an arbitration agreement between the parties for resolution of any dispute concerning their tenancy by arbitration. The defendants have applied for reference of their dispute involved in the said eviction suit for arbitration under Section 8 of the said Act. Such application was filed by the defendants before the learned Trial Judge before filing his written statement in the said suit. As such, apparently such a reference to arbitration cannot be avoided in view of Section 5 read with Section 8 of the Arbitration and Conciliation Act, 1996.

20) The learned Trial Judge rejected the petitioners' said application under the impression that since the Hon'ble High Court while disposing of the earlier application under Section 11 of the said Act, did not refer the said dispute to arbitrators, despite having knowledge, about the pendency of the eviction suit between the parties, the petitioners' application under Section 8 filed before the Court can not be allowed.

21) In my view the learned Trial Judge was not correct in making such observation as neither any party prayed for referring the present dispute regarding the eviction suit to arbitrator for its arbitration nor this Hon'ble Court, while dealing with the said application under Section 11 of the said Act had any occasion to consider the arbitrability of such dispute as per the arbitration agreement between the parties. As such, the learned Trial Judge in my view committed an illegality in rejecting the petitioners' application on the said ground.

22) But even holding as such, the petitioners' prayer for such reference cannot be allowed straightway without dealing with the aforesaid submission of the Counsel of the respective parties. On consideration of the decisions cited by Mr. Kar, this Court finds that the Hon'ble Supreme

Court uniformly held in those decisions that Section 8 of the said Act is preemptory in nature. It was further held in those cases that where there exists an arbitration agreement between the parties, the Court is under an obligation to refer the parties to arbitration in terms of the arbitration agreement. Considering the provision contained in Section 16 of the said Act, it was held by the Hon'ble Supreme Court in those decisions that Section 16 of the said Act makes it clear that if any objection is proposed to be raised as to the applicability of the arbitration clause to the facts of any case, the same will be raised before the Arbitral Tribunal concerned and the said Tribunal is required to decide the arbitrability of the said dispute by the Tribunal.

23) Apparently I do not find any substance in the contention of the plaintiffs regarding their objection against the arbitrability of the dispute involved in the said eviction suit, as it is the plaintiffs who themselves objected to the entertainability of the tenants' application under Section 21 of the West Bengal Premises Tenancy Act, 1997 before the Rent Controller by referring to the very same arbitration clause contained in the tenancy agreement. The plaintiffs cannot take contradictory stand against the defendants in different stages of various proceedings concerning the said tenancy dispute.

24) Mr. Mukherjee contended that the provision of the Special Act cannot be overridden by the Arbitration and Conciliation Act, 1996, particularly when both Section 6 of the West Bengal Premises Tenancy Act, 1997 and Section 5 of the Arbitration and Conciliation Act start with a non-obstante clause and the West Bengal Premises Tenancy, 1997 received the Presidential Assent and as such, the provision of the Tenancy Act will prevail over arbitration agreement.

25)) However, Mr. Kar rightly pointed out that such contention of Mr. Mukherjee cannot be considered by this Court effectively at this stage, without looking into the proposal sent by the State Government to the Hon'ble President of India seeking his assent to the said Act. According to Mr. Kar as per Article 254 of the Constitution of India, the supremacy of Parliamentary legislation over the State legislation will not prevail when Presidential assent is given to the State legislation knowing fully well that the provisions of both Acts are repugnant to each other. In support of such submission he also relied upon the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of Kaiser-I-Hind Pvt. Ltd. & Anr. –Vs- National Textile Corporation (Maharashtra North) Ltd. & Ors. reported in (2002)8 SCC 182. This issue cannot be decided at this stage, as the context in which such Presidential assent was granted to the tenancy legislation cannot be ascertained without further materials in this regard, such the State Government's request to the Hon'ble President for grant of such assent and the manner in which such request was considered by the Hon'ble President before grant of such assent.

26) I do not think it necessary to consider this part of the submission of the learned Counsel of the parties as I feel that this is not a stage when such objection regarding arbitrability of the present dispute can be considered. This conclusion is arrived at by this Court by following the decision of the Hon'ble Supreme Court in the case of Agri Gold Exims Ltd. –Vs- Sri Lakshmi Knits & Wovens and Ors (supra).

27) In view of the aforesaid decisions of the Hon'ble Supreme Court, this Court in the case of Hindustan Petroleum Corporation Ltd. (supra), Agri Gold Exims Ltd. (supra) and Branch Manager, Magma Leasing and Finance Ltd. & Anr. (supra), this Court feels that in the facts of the instant

case the Court has no other alternative but to refer the said dispute to the arbitrators to be appointed by the parties as per the arbitration agreement. It is, however, made clear that if any dispute is raised regarding arbitrability of such dispute before the Arbitration Tribunal, such dispute will be decided by the Arbitration Tribunal.

28) The petitioner's prayer for such reference under Section 8 of the said Act stands allowed. The learned Trial Judge is, thus, directed to refer the said dispute to the learned arbitrator who has already been appointed by the Hon'ble Judge designated on the petitioner's earlier application under Section 11 of the said Act.

29) Thus, this revisional application is, thus, disposed of with the above observations.

30) Urgent xerox certified copy of this order, if applied for, be given to the parties, as expeditiously as possible.

(Jyotirmay Bhattacharya, J.)

Later

On the prayer of the learned Advocate of the opposite party, this Court directs that the operation of this order will remain stayed for a period of four weeks from date.

(Jyotirmay Bhattacharya, J.)