SUPREME COURT OF INDIA

Greaves Cotton Limited.

Vs.

United Machinery and Appliances

C.A.No.12066 of 2016

(J.Chelameswar and Prafulla C.Pant,JJ.,)

14.12.2016

JUDGMENT

Prafulla C.Pant,J.,

SLP.(Civil)No.34016 of 2015

1. Leave granted.

2. This appeal is directed against order dated 16.09.2015, passed by the High Court of Judicature at Calcutta in GA No. 2998 of 2015 (in CS No. 2 of 2015), whereby said Court has rejected the application moved under Section 5 read with Section 8 of the Arbitration and Conciliation Act, 1996, to get the dispute referred to arbitral tribunal.

3. Brief facts of the case are that appellant Greaves Cotton are manufacturers of, inter alia, diesel engines. Respondent United Machinery and Appliances are manufacturers of diesel generator sets. An agreement containing arbitration clause was executed between them for supply of diesel engines by the appellant to the respondent for using the same in the diesel gensets. Arbitration clause contained in Article 10.1 of agreement dated 02.07.2007 (copy Annexure P-1) reads as under: -

> "10.1 Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Agreement or the validity or the breach thereof shall be referred to a Sole Arbitrator to be appointed by Greaves. The decision of the Arbitrator shall be final and binding upon the parties. The venue of arbitration shall be Mumbai. The arbitration proceedings shall, in all other aspects, be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any subsequent statutory enactment in place thereof."

The plaintiff-respondent filed civil suit (CS No. 2 of 2015) seeking decree for an amount of Rs.4,92,76,854/- towards the loss and damages suffered by it on account of alleged breach of contract on the part of defendant-appellant. The High Court, in its original side, issued

summons in the suit on 06.01.2015 to the appellant. On the other hand, the appellant sent communication to the respondent claiming that it was the respondent who has to pay outstanding dues of Rs.1,04,53,103/- to the appellant. The appellant, in response to the summons, on 07.07.2015 moved an application (copy Annexure P-6) before the High Court seeking extension of time for eight weeks to file written statement and invoked the arbitration clause contained in the agreement dated 02.07.2007 by sending a letter dated 08.07.2015 (copy Annexure P-7) to the respondent, in response to which, vide communication dated 13.07.2015 (copy Annexure P-7), it denied the claim of the appellant, and objected to invocation of arbitration clause on the ground of pendency of civil suit before the High Court. Thereafter, the appellant moved Application GA No. 2998 of 2015 (copy Annexure P-10) under Section 5 read with Section 8 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act"), in the suit seeking reference of the disputes between the parties forming the subject-matter of the suit, for arbitration, which is rejected by the High Court on the ground that the appellant has, by moving application for extension of time to file written statement, waived its right to seek arbitration. Hence, this appeal through special leave.

4. We have heard learned counsel for the parties.

5. Before further discussion, it is just and proper to refer to relevant provisions of law applicable to the case. Section 5 of the 1996 Act provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in the said Part of the Act. Sub-section (1) of Section 8 of the 1996 Act, as it existed prior to 23.10.2015, provided that a judicial authority before which an action is brought in a matter which is the subject of an arbitration 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.

6. The issue before us for consideration is whether filing of an application for extension of time to file written statement before a judicial authority constitutes - 'submitting first statement on the substance of the dispute' or not.

7. For appreciating the intention of the Legislature, it is necessary for us to examine the change in law brought about by the 1996 Act. *In Manna Lal Kedia and ors. v. State of Bihar and ors*[1]. , comparing the provisions contained in Section 34 of the Arbitration Act, 1940 and Section 8 of the 1996 Act, High Court of Patna has opined as follows: -

> "10. In terms of the Section 34 of the old Act a party was required to apply for reference of the dispute to the arbitrator before filing written statement or taking any other step in the proceeding. The words "or taking any other step" were interpreted to include even application for adjournment, for filing written statement. This obviously created anomalies, not only frustrating the objects of arbitration but also resulting in injustice in many cases. In order to bring about change in this regard in the New Act in Section 8 (1), provision has been made to the effect that the party intending to go in for arbitration must do so in his "first statement on the substance of the dispute" and

not later than that. In other words, only if in the first statement on the substance of the dispute he does not make such prayer that he is debarred from making that prayer later. Section 8(1) of the New Act is, thus, an Improvement upon the provisions of Section 34 of the old Act "

8. In *Rashtriya Ispat Nigam Ltd. and another v. Verma Transport Co.*[2], interpreting the expression "first statement on the substance of the dispute", this Court has held as under: -

> "36. The expression "first 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 "

9. This Court in Rashtriya Ispat Nigam Ltd. (supra) further held as under: -

> "42. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtained in each case. In the instant case, the court had already passed an ad interim ex parte injunction. The appellants were bound to respond to the notice issued by the Court. While doing so, they raised a specific plea of bar of the suit in view of the existence of an arbitration agreement. Having regard to the provisions of the Act, they had, thus, shown their unequivocal intention to question the maintainability of the suit on the aforementioned ground."

10. In *Booz Allen and Hamilton Inc. v. SBI Homes Finance Limited and others*[3], while dealing with the question, this Court, in paragraph 19 of the judgment, has laid down the law on the similar issue as under: -

> "19. Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under Section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide:
>
> (i) whether there is an arbitration agreement among the parties;
>
> (ii) whether all the parties to the suit are parties to the arbitration agreement;
>
> (iii) whether the disputes which are the subject-matter of the suit fall within the scope of arbitration agreement;

(iv) whether the defendant had applied under Section 8 of the Act before submitting his first statement on the substance of the dispute; and

(v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration."

11. This Court in Booz Allen and Hamilton Inc. (supra), has further observed in paragraph 25 as under: -

"25. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit by a defendant prior to the filing of the written statement will be construed as "submission of a statement on the substance of the dispute", if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waives his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment / appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him."

12. In view of the law laid down by this Court, as above, we find it difficult to agree with the High Court that in the present case merely moving an application seeking further time of eight weeks to file the written statement would amount to making first statement on the substance of the dispute. In our opinion, filing of an application without reply to the allegations of the plaint does not constitute first statement on the substance of the dispute. It does not appear from the language of sub-section (1) of Section 8 of the 1996 Act that the Legislature intended to include such a step like moving simple application of seeking extension of time to file written statement as first statement on the substance of the dispute. Therefore, in the facts and circumstances of the present case, as already narrated above, we are unable to hold that the appellant, by moving an application for extension of time of eight weeks to file written statement, has waived right to object to the jurisdiction of judicial authority.

13. From the order impugned, it also reflects that before disposing of application under Section 8 of the 1996 Act the High Court has not looked into questions as to whether there is an agreement between the parties; whether disputes which are subject-matter of the suit fall within the scope of arbitration; and whether the reliefs sought in the suit are those that can be adjudicated and granted in arbitration. In view of the above, we think it just and proper to request the High Court to decide the application afresh in the light of law laid down by this Court in para 19 of the judgment in Booz Allen and Hamilton Inc. v. SBI Homes Finance Limited and others (supra) except the point, which has already been answered in the present case by us.

14. Accordingly the appeal is allowed. The impugned order, passed by the High Court is set aside. The High Court is requested to decide the application (GA No. 2998 of 2015 in CS No. 2 of 2015) in the light of observation, as above. No order as to costs.

Judgment Referred.

[1]*AIR 2000 Pat 0091*
[2]*(2006) 7 SCC 0275*
[3]*(2011) 5 SCC 0532*