SUPREME COURT OF INDIA

Hema Khattar

Vs.

Shiv Khera

C.A.No.8837 of 2016

(Madan B.Lokur and R.K.Agrawal,JJ.,)

10.04.2017

JUDGMENT

R.K.Agrawal,J.,

1. Challenge in this appeal is to the legality of the judgment and order dated 28.09.2012 rendered by a Division Bench of the High Court of Delhi at New Delhi in FAO (OS) No. 470 of 2012 whereby the High Court dismissed the appeal filed by the appellants herein.

2. Factual position in a nutshell is as follows:-

> "a) An agreement to reconstruct a building situated at C-6/4, Vasant Vihar, New Delhi was executed between Hema Khattar-the appellant No. 1 herein, wife of Ashwani Khattar - the appellant No. 2 herein, carrying on business in construction under the name and style of M/s Dessignz and Shiv Khera-the respondent herein on 06.06.2009.
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> b) Pursuant to the said agreement, the building site was handed over to the appellant No. 1 herein on 09.11.2010 and thereafter the execution of the work had started. In March 2011, as per Clause 16 of the Agreement dated 06.06.2009, a spot inspection was conducted by renowned structural engineers which pointed out several structural lacunae. On coming to know about the same, the respondent further arranged inspection by various specialized agencies which confirmed the same in their reports.
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> c) Being aggrieved by the quality of construction, the respondent served a legal notice dated 19.09.2011 to the appellant No. 1 seeking damages. The respondent, vide Clause 33 of the said agreement, appointed a sole arbitrator claiming that the appellant No. 1 has not complied with the terms of the agreement whereby disputes, requiring adjudication, have arisen between the parties. In statement of claims, the respondent, besides other claims, also sought for a sum of Rs. 39.85 lakhs paid to the appellant No. 1 along with a sum of Rs. 35,000/- for the TDS deposited to her credit.

d) The appellants filed a suit for declarations, permanent injunction and recovery before the High Court being CS(OS) No. 1532 of 2012 seeking a decree that the agreement dated 06.06.2009 entered into between the appellant No. 1 and the respondent was vitiated and had been terminated by mutual consent by both the parties and any proceeding initiated pursuant to the agreement is null, non- est and void and also for recovery of an amount of Rs. 45,50,000/-.

e) It is also pertinent to mention here that it was alleged in the plaint that a formal meeting was held between the parties in which it was decided that appellant No.1 will no longer be the contractor and the agreement dated 06.06.2009 would stand terminated by mutual consent and the construction would be carried out by the sub-contractors to be appointed as per the advice of appellant No. 2 who would supervise the same without remuneration/profit.

f) The respondent filed I.A. No. 12124 of 2012 in CS(OS) No. 1532 of 2012 under Section 8 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') claiming that the subject-matter of dispute in the present suit is already pending adjudication before the Arbitral Tribunal, hence, the suit cannot be proceeded with which was denied by the appellants in their reply to the above said application.

g) Vide order dated 17.09.2012, learned single Judge of the High Court, found that the suit is bad for misjoinder of parties as well as for causes of action and gave an option to the appellants therein to elect whether they want the suit to be treated as a suit for recovery of money by appellant No. 2 herein against the respondent or a suit for declarations and injunction by appellant No. 1.

h) Being aggrieved by the order dated 17.09.2012, the appellants went in appeal and filed FAO (OS) being No. 470 of 2012 before the High Court. A division bench of the High Court, vide order dated 28.09.2012, dismissed the appeal.

i) Aggrieved by the order dated 28.09.2012, the appellants have filed this appeal by way of special leave before this Court."

3. Heard Mr. Jayant Bhushan, learned senior counsel for the appellants and Mr. Sakal Bhushan, learned counsel for the respondent and perused the records.
Point for consideration: -

4. The only point for consideration before this Court is whether in the present facts and circumstances of the case the suit is bad for misjoinder of parties as well as for causes of action?

Rival submissions:-

5. Learned senior counsel for the appellants contended before this Court that the agreement dated 06.06.2009 was executed with dishonest intention containing the arbitration clause and in any event the same has been superseded by a subsequent oral agreement between appellant No. 2 herein and the respondent.

6. Learned senior counsel further contended that the High Court erred in upholding that the cause of action with respect to relief of money is an independent cause of action from that of the relief of declarations and injunction. The High Court failed to appreciate that common trial of joint causes of action is necessary, if at all, as they raise common questions of law and facts and the course adopted by the High Court would lead to multiplicity of proceedings causing delay. Learned senior counsel finally contended that in view of the patent illegality in the orders passed by the High Court, the same are liable to be set aside.

7. Without prejudice to the aforesaid, learned senior counsel for the appellants, in the alternative submitted that the entire matter be referred to another sole arbitrator which may be appointed by this Court as according to him, in the written contract, there was a clause for arbitration and, subsequently, in the oral contract also, the terms of the earlier contract continued to remain in operation except those which were modified in the oral contract.

8. In support of the above submission, learned senior counsel for the appellants placed reliance upon a judgment of this Court in P.R. Shah, Shares and *Stock Brokers Private Limited vs. B.H.H. Securities Private Limited and Others*[1]. He has referred to paragraph 19 of the judgment which reads as under:-

> " 19. If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement. But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration."

9. Per contra, learned counsel for the respondent submitted that the suit has been filed by the two appellants jointly with respect to the two separate alleged causes of action. He further submitted that the alleged cause of action of the appellant No. 1 is based upon the agreement dated 06.06.2009 between the appellant No. 1 and the respondent in which appellant No. 2

cannot be said to have any joint interest and the alleged cause of action of appellant No. 2 is based upon an oral understanding arrived at between appellant No.2 and the respondent in which appellant No. 1 cannot be said to have any joint interest. Learned counsel for the respondent further submitted that in such circumstances, the instant suit in the present form is not maintainable in terms of Order II Rule 3 of the Code of Civil Procedure, 1908 (in short 'the Code') and the suit of the appellant No. 1 is required to be separated under Order II Rule 6 of the Code.

10. Learned counsel further submitted that in view of the existence of the arbitration clause in the agreement dated 06.06.2009 and the subject matter of dispute between the parties in the present suit is already pending adjudication before the Arbitral Tribunal, the instant suit filed by the appellant No. 1 cannot be proceeded with and the matter is required to be referred to arbitration. Learned counsel finally submitted that the judgment rendered by the division bench of the High Court upholding the decision of the learned single Judge is correct and no interference is called for in the appeal.

11. Learned counsel further submitted that the oral contract did not contain any clause for arbitration and the dispute raised by the appellant No. 2 cannot be referred to arbitration. In support whereof, he relied upon a decision of this Court in *Kvaerner Cementation India Limited vs. Bajranglal Agarwal and Another*[2] wherein this Court has held that there cannot be any dispute that in the absence of arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal.

12. Learned counsel, however, submitted that if this Court comes to the conclusion that the matter should be resolved by way of arbitration, the entire matter be referred to the sole arbitrator already appointed by the respondent.

Discussion:

13. From the materials on record, it is evident that an agreement dated 06.06.2009 was executed between the parties wherein appellant No. 1 was the contractor and the respondent as a client. The agreement impugned clearly states that there is an arbitration clause therein. Owing to the dispute among parties, the respondent, in exercise of his right under the said clause, appointed a sole arbitrator. Subsequently, notices were issued to the appellant No. 1 and the matter remained pending despite appearance before the Arbitral Tribunal. In the meantime, the appellants jointly filed a suit before the High Court for declarations, permanent injunction and recovery claiming a formal meeting was held between the parties in which it was decided that appellant No.1 will no longer be the contractor and the agreement dated 06.06.2009 would stand terminated by mutual consent and the construction would be carried out by the sub-contractors to be appointed as per the advice of appellant No. 2 who would supervise the same without remuneration/profit. The respondent filed I.A. No. 12124 of 2012 in CS(OS) No. 1532 of 2012 under Section 8 of the Act claiming that the subject-matter of dispute in the present suit is already pending adjudication before the Arbitral Tribunal, hence, the suit cannot be proceeded with. Vide order dated 17.09.2012,

learned single Judge of the High Court, found that the suit is bad for mis-joinder of parties as well as for causes of action and gave an option to the appellants to elect whether they want the suit to be treated as a suit for recovery of money by appellant No. 2 herein against the respondent or a suit for declarations and injunction by appellant No. 1. The appellants went in appeal before the division bench of the High Court. Vide order dated 28.09.2012, the division bench also dismissed the same.

14. From the facts of this case, we find that a suit was filed for declarations, permanent injunction and recovery of money by the appellants stating that a meeting was held in between the parties in which it was decided that appellant No. 1 would no longer be the contractor and the agreement dated 06.06.2009 would stand terminated by mutual consent and the construction would be carried out by the sub-contractors to be appointed as per the suggestions of appellant No.2, who would supervise the same but without any profit/remuneration as per the oral agreement. The respondent agreed to make all payments towards purchase of material, construction, fee of architect etc. Appellant No. 2 incurred an amount of Rs. 45 lakhs for and on behalf of the respondent which is sought to be recovered under this suit. The appellants also claimed a declaration to the effect that the agreement dated 06.06.2009 between appellant No. 1 and the respondent was obtained by fraud and mis-representation, hence, it is null and void. Another declaration sought for in the suit was that the agreement dated 06.06.2009 stood terminated by mutual consent. A decree for injunction is also sought for restraining the respondent from initiating and carrying on any proceeding arising out of and on the basis of agreement dated 06.06.2009 between appellant No. 1 and the respondent. On the other hand, the respondent took the preliminary objection that the suit is bad for misjoinder of parties and causes of action and further that the arbitration proceedings initiated by the respondent, in terms of the arbitration clause, is pending adjudication before the Arbitral Tribunal.

15. Admittedly, the cause of action for recovery of Rs. 45 lakhs claimed in the present suit is the expenditure alleged to have been incurred by appellant No. 2 pursuant to the oral agreement he claims he had with the respondent sometime in April, 2011. On the other hand, the cause of action with respect to reliefs of declarations and injunction is the agreement dated 06.06.2009. The alleged agreement dated 06.06.2009 was, admittedly, between the appellant No. 1 and the respondent to which appellant No. 2 was only a witness, which as per the terms of the plaint terminated later on by mutual agreement between the appellant No. 1 and the respondent. At this stage, it was agreed orally that appellant No. 2, who is the husband of appellant No. 1, would take over the execution of the pending works. Admittedly, Appellant No. 1 is not a party to the alleged oral agreement between Appellant No. 2 and the respondent for supervision of the construction by him.

16. From the materials available on record, particularly, the transcript of conversation between the appellant No. 2 and the respondent on 6th and 7th April, 2011, we find that the oral agreement was substituted in place of the alleged written agreement dated 06.06.2009. There is a complete accord and discharge of the responsibilities and liabilities of appellant No. 1 vis-a-vis the defendant and vice-versa. The plaint also avers that after the accord between appellant No. 1 and the respondent and simultaneous discharge of the obligations, a

distinct oral agreement was entered into between appellant No.2 and the respondent. It is quite clear from what has been stated above that the cause of action: the right to get declarations with regard to the said contract as null and void or a right to seek an injunction restraining the respondent from taking any action on the basis of the said contract, if any, with regard to the prior written agreement arises in favour of appellant No. 1 against respondent and not in favour of appellant No. 2 as he was not a party to the agreement dated 06.06.2009. On the similar lines, the right to seek money decree, as is claimed by the appellants, would be a distinct cause of action founded on subsequent oral agreement between the appellant No. 2 and the respondent.

17. Learned single Judge of the High Court, vide order dated 17.09.2012, directed the parties to elect as to whether they want the suit to be treated as a suit for recovery of money by appellant No. 2 against the respondent or a suit for declarations and injunction by appellant No. 1 against the respondent and to amend the plaint accordingly. Learned single Judge, after taking a considered view that the suit is bad for misjoinder of parties and/or misjoinder of causes of action, held that the application filed by the defendant under Section 8 of the Act would be disposed of only after the appellants make an election in terms of this order. The appellants herein, instead of amending the plaint, went in appeal before the division bench, which got dismissed vide order dated 28.09.2012.

18. Since the suit was dismissed for misjoinder of parties and/or causes of action, it is pertinent to mention here the law on the point which is as under:- Order II Rule 3

> "Joinder of causes of action - (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.
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> (2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject matters at the date of instituting the suit."
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> Order II Rule 6
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> "Power of Court to order separate trials - Where it appears to the court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

In Black's Law Dictionary it has been stated that the expression 'cause of action' is the fact or facts which give a person a right to judicial relief. A cause of action, thus, means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which

taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded.

19. Order II, Rule 3, provides for the joinder of several causes of action and states that a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly or several plaintiffs having causes of action in which they are jointly interested against the same defendant or defendants jointly may unite them in one suit. The remedy for any possible inconvenience with regard to said rule is supplied by the provisions of Order II, Rule 6, which authorizes the Court to order separate trials of causes of action which though joined in one suit cannot be conveniently tried or disposed of together.

20. Similarly, Order I Rule 1 of the Code permits joinder of more than one persons any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and if such persons brought separate suits, any common question of law or fact would arise. Order I Rule 2 provides that where it appears to the court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

21. In this connection, it is pertinent to refer to a judgment of this Court in *Ramesh Hirachand Kundanmal vs. Municipal Corporation of Greater Bombay and Others*[3] wherein it was held as under:-

> "14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objectives. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness . It is not merely that he has an interest in the correct solution of some questions involved and has thought or relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."

22. In view of the foregoing discussion, we are of the opinion that the appellants even though had different causes of action against the respondent but it was a continuity of the agreement dated 06.06.2009 and oral agreement is evidenced by the transcript of conversation between the appellant No. 2 and the respondent on 6/07.04.2011, therefore, both the appellants could have joined as plaintiffs in a suit and the suit is not bad for misjoinder of parties or causes of action. Hence, learned single Judge as also the division

bench, was not right in giving an option to the appellants to pursue reliefs qua appellant No. 1 or qua appellant No. 2 only.

23. In the present facts and circumstances of the case, it is also imperative to find out whether the High Court was justified in deciding the maintainability of the suit when an application under Section 8 of the Act is pending adjudication before the Arbitral Tribunal. Before proceeding further, it is appropriate to quote here Section 8 of the Act which reads as under:-

> "8. Power to refer parties to arbitration where there is an arbitration agreement. - [(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.
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> (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: [Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before the Court.]
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> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

24. It is also worthwhile to note Clause 33(d) of the agreement dated 06.06.2009 which refers the parties to Arbitration:-

> "Governing Law & Dispute Resolution: All or any disputes and differences whatsoever between the parties arising out of this Agreement or relating to or touching the mutual rights and obligations of the parties shall be subject to the jurisdiction of the Courts/Forums in Delhi only and shall be referred for adjudication to the sole arbitrator, to be appointed solely and exclusively by the FIRST PARTY, whose decision shall be final and binding upon the parties. The arbitration proceedings shall be held at New Delhi, India and only the Courts at New Delhi, India alone shall have jurisdiction over the subject matter of this AGREEMENT."

25. In *Sundaram Finance Limited and Another vs. T. Thankam*[4] this Court has held as under:-

> "8. Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of Section 8 of the Arbitration Act, moves the court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for the court to refer the parties to arbitration in terms of the agreement, as held by this Court in P. Anand Gajapathi Raju v. P.V.G. Raju."

26. In *P. Anand Gajapathi Raju & Others vs. P.V.G. Raju (Dead) and Others*[5], it was held as under:-

> "5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 before the court can exercise its powers are:
>
> (1) there is an arbitration agreement;
>
> (2) a party to the agreement brings an action in the court against the other party;
>
> (3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;
>
> (4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute."

In view of the above, where an agreement is terminated by one party on account of the breach committed by the other, particularly, in a case where the clause is framed in wide and general terms, merely because agreement has come to an end by its termination by mutual consent, the arbitration clause does not get perished nor is rendered inoperative. This Court, in the case of P. Anand Gajapathi Raju (supra), has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that in an agreement between the parties before the civil court, if there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator.

27. In view of the above, we are of the considered opinion that in the present case, the prerequisites for an application under Section 8 are fulfilled, viz., there is an arbitration agreement; the party to the agreement brings an action in the court against the other party; the subject matter of the action is the same as the subject-matter of the arbitration agreement; and the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. We have come to the conclusion that the civil court had no jurisdiction to entertain a suit after an application under Section 8 of the

Act is made for arbitration. In such a situation, refusal to refer the dispute to arbitration would amount to failure of justice as also causing irreparable injury to the defendant.

28. As we have already held that the oral agreement as evidenced by the transcript of conversation between the appellant No. 2 and the respondent on 06/07.04.2011 substituting the alleged written agreement dated 06.06.2009 and which contained a clause for arbitration, the same clause for arbitration would also be applicable to the oral agreement. The Division Bench has also erred in law in affirming the order passed by learned single Judge. Both the orders, therefore, cannot be sustained and are set aside and, therefore, in view of the decision in P.R. Shah (supra), there can only be one arbitrator and there can only be a single arbitration.

29. In view of the foregoing discussion, the appeal succeeds and is allowed. However, instead of remitting the matter back to the learned single Judge for deciding the suit itself on merits, we refer the disputes raised by the appellants in CS(OS) 1532 of 2012 to the sole arbitrator already appointed, viz., Hon' ble Mr. Justice V.K. Gupta (Retd.) and request the arbitrator to decide the disputes expeditiously in accordance with law.

Judgment Referred.

[1]*(2012) 1 SCC 0594*
[2]*(2012) 5 SCC 0214*
[3]*(1992) 2 SCC 0524*
[4]*(2015) 14 SCC 0444*
[5]*(2000) 4 SCC 0539*