

# SUPREME COURT OF INDIA

Zenith Drugs & Allied Agencies Pvt. Ltd.

Vs.

Nicholas Piramal India Ltd.

C.A.No.4430 of 2009

(R.Banumathi and A.S.Bopanna,JJ.,)

30.07.2019

## JUDGMENT

### **R.Banumathi,J.,**

This appeal arises out of the order dated 26.03.2007 passed by the Guwahati High Court in Civil Revision (P) No.31 of 2005 in and by which the High Court allowed the revision petition preferred by the respondent and referred the parties to arbitration.

2. Brief facts which led to filing of this appeal are as follows:- The appellant is a Company registered under the Companies Act, 1956 and is involved with various types of agency businesses including that of clearing and forwarding agents, freight contractors, etc. M/s Rhone Poulenc India Limited (RPIL) vide agreement dated 01.05.1997 appointed the appellant Company as its clearing and forwarding agent for a period of three years. Clause 17 of the agreement dated 01.05.1997 contains arbitration clause. The agreement was renewed for a further period from 01.04.2001 to 31.03.2002.

3. RPIL vide its letter dated 20.07.2001 informed the appellant that their Company is getting merged with respondent Company- Nicholas Piramal India Ltd. (NPIL) and that pursuant to the merger, RPIL shall cease to exist as a legal entity and therefore, with effect from three months from the date of the letter, the subsisting clearing and forwarding agency agreement shall stand terminated in terms of the provisions of the agreement. The Bombay High Court in Company Application No.252 of 2001 passed the order dated 27.09.2001 inter alia approving amalgamation of RPIL with the respondent Company. The appellant by its letter dated 25.07.2001 objected to the unilateral decision of the respondent Company to terminate the clearing and forwarding agency agreement and requested the respondent to maintain status-quo with respect to the agency until the issue is resolved through negotiations. RPIL vide its letter dated 03.09.2001 informed the appellant that they are unable to accede to the request for withdrawing the termination letter. For all practical purposes, the clearing and forwarding agency agreement dated 01.05.1997 thus stood terminated.

4. The appellant filed Title Suit No.241 of 2001 inter alia praying for declaration that the contract between the appellant and RPIL-defendant No.1 was valid, subsisting, legal and continuing and for further declaration that defendants cannot terminate the appellant as clearing and forwarding agents in any manner in case of merger with the respondent Company. In the said suit, the parties have compromised the matter and on the basis of compromise deed dated 11.12.2001 jointly filed by the parties, Civil Judge, Senior Division, Guwahati vide its order dated 24.12.2001 decreed the Title Suit No.241 of 2001 on compromise as per the terms and conditions embodied in the compromise deed. In terms of the said compromise, respondent has made the payment of Rs.23,50,000/- to the appellant and also as a part of compensation package appointed the appellant as its stockist for their products at Guwahati and Agartala.

5. Case of appellant is that the respondents refused to honour the terms and conditions of the compromise decree therefore, the appellant had filed Title Execution case No.4 of 2002 for execution of the compromise decree dated 24.12.2001. Differences arose between the parties on the alleged diversion of stocks by the appellant's employee in the year 2002. The respondent filed criminal complaint in C.R. Case No.1446 of 2002 before the Chief Judicial Magistrate, Kamrup for the offences punishable under Sections 420, 406, 409 and 403 IPC read with Section 34 IPC. The respondent had also filed an application under Section 151 CPC praying for setting aside/recalling of compromise decree dated 24.12.2001 on the ground that the compromise decree was obtained by appellant by false inducement and misrepresentation and the same is vitiated on account of fraud.

6. On 30.04.2003, appellant had filed Money Suit No.73 of 2003 claiming compensation for rupees twenty crores. In the suit, the appellant inter alia alleged that due to intentional acts of omission and commission by respondent, the appellant- plaintiff had suffered huge financial loss as well as loss of goodwill and reputation in the market. On 15.06.2004, relying upon Clause 17 of the agreement dated 01.05.1997, the respondent filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 (for short "the Act") praying for referring the parties to arbitration in Money Suit No.73 of 2003. The trial court vide order dated 19.02.2005 dismissed the application filed under Section 8 of the Act by holding that the earlier suit in Title Suit No.241 of 2001 filed by the appellant was decreed on compromise between the parties and therefore, in view of the law laid down in *Nathani Steels Ltd. v. Associated Constructions*<sup>1</sup> the respondent-defendant cannot invoke the arbitration clause pertaining to the same dispute and the suit was directed to be proceeded. The respondent filed Civil Revision Petition No.31 of 2005 before the High Court challenging the order of the trial court dated 19.02.2005. The High Court vide impugned order allowed the revision petition and referred the dispute to arbitration. The High Court held that even before the merger of RPIL with the respondent which was approved by the Bombay High Court on 27.09.2001, the appellant instituted Title Suit No.241 of 2001 on the ground of illegal termination of contract, which suit resulted in a compromise decree. Observing that the existence of arbitration clause has been admitted by the appellant Company, the High Court held that in view of the decision reported in *Konkan Railway Corporation Ltd. and Another v Rani Construction Pvt. Ltd.*<sup>2</sup> and other decisions, the Civil Court has no jurisdiction to decide whether the subject matter of the

suit attracted the arbitration clause or not. The High Court further held that under Section 16 of the Act, whether arbitration clause applied to the subject matter of the suit or not is for the arbitrator to decide on its own jurisdiction. Being aggrieved, the appellant has preferred this appeal.

7. We have heard Mr. Manish Goswami, learned counsel appearing on behalf of the appellant and Mr. Hrishikesh Baruah, learned counsel appearing on behalf of the respondent.

8. The learned counsel for the appellant contended that the High Court erred in saying that the appellant-plaintiff admitted the existence of the arbitration clause and the High Court failed to take note that compromise decree dated 24.12.2001 in Suit No.241 of 2001 was in full and final settlement of the dispute between the parties. It was inter alia contended that a substantial and bona fide part of the claim was outside the scope of arbitration clause and when dispute is not covered by the arbitration clause, the same cannot be referred to arbitration. Placing reliance upon *Yogi Agarwal v. Inspiration Clothes & U and Others*<sup>3</sup> and *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Another*<sup>4</sup>, the learned counsel for the appellant submitted that in order to refer the parties to arbitration, the dispute must relate to the contract in respect of which the parties have agreed to refer to arbitration. Taking us through the pleadings and relief sought for in the subsequent suit in Money Suit No.73 of 2003, learned counsel for the appellant submitted that the dispute is exclusively determinable by the trial court and the High Court erred in referring the parties to arbitration. It was also submitted that the High Court did not keep in view that the respondent has challenged the very compromise decree dated 24.12.2001 on the ground of inducement and fraud by filing a petition and the same is still pending.

9. Per contra, the learned counsel for the respondent submitted that the factum of arbitration clause in the agreement dated 01.05.1997 is admitted by the appellant and the appellant is seeking compensation on account of illegal termination of clearing and forwarding agent agreement and the issue continues to be arbitrable. It was also submitted that the compromise deed dated 11.12.2001 in Title Suit No.241 of 2001 was obtained by the appellant Company through false inducement and practising fraud upon the respondent Company and if the fraud played by the appellant was known to the respondent Company, the respondent would not have been a party to the aforesaid compromise deed and the said compromise decree having been obtained by practising fraud is a nullity and void ab-initio. Learned counsel further submitted that the dispute raised by the appellant is “...touching upon the presents...” of the agreement dated 01.05.1997 and the High Court rightly set aside the order of the trial court and referred the parties to arbitration”.

10. We have carefully considered the rival contentions and perused the impugned judgment and materials on record. The following points arise for determination in this appeal:-

- (i) Whether the High Court was right in referring the parties to arbitration by observing that the appellant- Company admits the existence of arbitration clause in

the agreement dated 01.05.1997?

(ii) Whether the appellant is right in contending that the dispute raised in the Money Suit No.73 of 2003 is not covered by the arbitration clause and cannot be referred to arbitration?

11. In the agreement dated 01.05.1997 between the appellant-company and RPIL, the appellant was appointed as clearing and forwarding agent for the entire north-eastern region. Clause 17 of the said agreement contains the arbitration clause which reads as under:-

“In the event of dispute arising between the parties out of the subject contained herein or touching upon these presents during pendency of this Agreement or thereafter the same shall be referred to Arbitration Act Bombay as provided under the Rules and Regulations of the subject of Arbitration framed by the Bombay Chamber of Commerce and the competent court in Mumbai alone shall have jurisdiction in the matter.”

12. The respondent did not accede to the request of the appellant for withdrawing the termination letter and hence, the appellant filed Title Suit No.241 of 2001 inter alia praying for declaration that the contract between the appellant and the respondent-RPIL was valid, subsisting and continuing. The appellant also sought for declaration that the respondent cannot terminate the appellant as clearing and forwarding agent in any manner in case of RPIL's merger with NPIL and sought for permanent injunction. As pointed out earlier, the said Title Suit No.241 of 2001 ended in compromise and compromise decree was passed on 24.12.2001. As per the said compromise, an amount of Rs.23,50,000/- was paid by RPIL to the appellant by way of four demand drafts being (i) Draft No.215684 for Rs.7,50,000/-; (ii) Draft No.215682 for Rs.6,70,000/-; (iii) Draft No.215683 for Rs.6,20,000/-; and (iv) Draft No.215685 for Rs.3,10,000/-, all dated 04.01.2001 drawn on Allahabad Bank, Panbazar, Guwahati. As a part of compensation package, the respondent appointed the appellant as stockist of the company at Guwahati and Agartala. In terms of the compromise, the appellant has handed over all the documents to the respondent. The relevant portion of the terms of compromise reads as under:-

(iv) The defendant No.3 by letter dated 07.12.2001 has appointed the plaintiff as a stockist of the company at Guwahati and Agartala as part of compensation package.

(v) The plaintiff has handed over all the stocks of goods to the defendants company and the company has already started lifting the stocks from the custody of the plaintiff and expected to clear by 11th December, 2001. The plaintiff has also handed over entire documents including L/R in possession, files, records and Sales Tax documents such as both utilized and unutilized sales tax documents (1) Road Permit; (2) Despatched Note; (3) 'C' Forms; (4) 'F' Forms; (5) 'C' Forms from stockists and papers to the defendants relating to the C & F Agency under defendants No.1; (6) All previous records starting from November, 1994 till date has also been handed over to the plaintiff; (7) Software supplied and data's of

computer is also taken and PC left after complete deletion of programme of RPIL.”

13. From a reading of the above terms of the compromise deed dated 11.12.2001, it is clear that the parties have substituted a new agreement by way of compromise. As per the agreement dated 01.05.1997, the appellant was the clearing and forwarding agent for the entire north-eastern region; whereas under the terms of the compromise, the appellant has been appointed as stockist of the company only for Guwahati and Agartala and not as clearing and forwarding agent for north-eastern region. The clauses in the compromise memo also clearly state that the appellant handed over all the stocks of goods to the respondent-Company. The appellant had also handed over the entire documents in their possession both used and unused as well as sales tax documents, road permit, ‘C’ forms from stockists and other documents. When the parties have settled their differences and compromised the matter, in the dispute subsequently arising between the parties, arbitration clause in the prior agreement cannot be invoked. Since the agreement dated 01.05.1997 (agreement for appointing the appellant as clearing and forwarding agent) and the compromise (appointing the appellant as stockist) are different, the arbitration clause in the agreement dated 01.05.1997 cannot be read into the terms of the compromise as per which the parties have entered into a new arrangement and this has not been kept in view by the High Court. The High Court erred in holding that the existence of the arbitration clause has been admitted by the appellant-Company and it is for the arbitrator to decide under Section 16 of the Act whether the arbitration clause applied to the subject matter of the suit or not.

14. The parties can be referred to arbitration in an application filed under Section 8 of the Act only if the subject matter of the action before the judicial authority relates to dispute which is the subject matter of the arbitration agreement. As per Section 8 of the Act, the following conditions have to be satisfied for referring the parties to arbitration:-

- (i) there is an arbitration agreement;
- (ii) a party to the agreement brings an action in the court against the other party;
- (iii) subject-matter of the action is the same as the subject-matter of the arbitration agreement;
- (iv) the opposite party applies to the judicial authority for referring the parties to arbitration before it submits his first statement on the substance of the dispute. An application under Section 8 of the Act can be made only if the subject matter of the suit is also the same as the subject matter of arbitration. In other words, only those disputes which are specifically agreed to be resolved through arbitration can be the subject matter of arbitration; and upon satisfaction of the same, the Court can refer the parties to arbitration.

15. Observing that filing application under Section 8 of the Act should relate to the arbitration agreement or to be applicable to the dispute, in *Yogi Agarwal v. Inspiration*

*Clothes and U and Others*<sup>5</sup>, it was held as under:-

“9. When a defendant invokes Section 8 of the Act by alleging existence of an arbitration agreement, he should establish that such arbitration agreement related to, or is applicable to, the suit transaction/contract. The parties may enter into different contracts at different points of time or may enter into a series of unrelated transactions. It is possible that in regard to some, they may provide for arbitration and in regard to others, may not provide for arbitration. Obviously, the existence of an arbitration agreement with reference to some other transaction/contract to which the plaintiff was or is a party, unconnected with the transactions or contracts to which a suit relates, cannot be considered as existence of an “arbitration agreement” in regard to the suit transactions/contracts.

16. In the present case, the compromise decree does not contain any arbitration clause. The subsequent Suit No.73 of 2003 has been filed by the appellant due to failure of the respondent Company to appoint the appellant as stockist of their products in Guwahati and Agartala and the same has caused substantial loss to the appellant. In the said suit, the appellant also alleged that due to illegal act of the respondent, the appellant has to face the criminal trial unnecessarily due to which the appellant has sustained heavy loss both financially and mentally and also it resulted in loss of goodwill and reputation of the appellant and therefore, the appellant claimed compensation of rupees twenty crores from the respondent. The suit claim is not covered by the arbitration.

17. Mr. Hrishikesh Baruah, learned counsel for the respondent submitted that clause 17 of the agreement dated 01.05.1997 covers all the disputes including “any dispute arising between the parties” that may “touch upon” the clauses of the agreement. It was submitted that the reading of the plaint filed by the appellant clearly shows that the disputes between the parties stem from the contractual agreement which “touches upon” the agreement dated 01.05.1997. Learned counsel further submitted that the words “....touching upon these presents ” used in the agreement has wide meaning which not only relates to the dispute arising out of the appointment of the appellant as clearing and forwarding agent, but also any other dispute arising out of the same would necessarily fall within the ambit of “touching upon these presents ” and the High Court rightly referred the parties to arbitration. In support of his contention, the learned counsel placed reliance upon P Ramanatha Aiyar’s *Advanced Law Lexicon*, 4th Edition, Page 4876. The relevant portion relied upon reads as under:-

“The dictionary meaning of the word ‘touching’ is ‘in reference or relation to, respecting, regarding, or concerning’ and this meaning indicates that the disputes need not directly arise out of the business of the society; but that it is enough that it should have reference or relation to or concern the business of the society. *M.S. Madhava Rao v. D.V.K. Surya Rao*<sup>6</sup>, [Madras Co-operative Societies Act (6 of 1932), S.51]”

In this regard, reliance was also placed upon in *Deccan Merchants Cooperative*

*Bank Ltd. v. Dalichand Jugraj Jain and Others*<sup>7</sup>, *World Sport Group (Mauritius) Limited v. MSM Satellite (Singapore) PTE Limited*<sup>8</sup>.

18. Taking us through the pleadings in the Money Suit No.73 of 2003, the learned counsel for the respondent submitted that the various claims made in the Money Suit No.73 of 2003 relate to the alleged loss sustained by the appellant-plaintiff due to termination of the agreement dated 01.05.1997 necessarily falls within the ambit of “ touching upon these presents ” occurring in clause 17 of the agreement and therefore, the High Court rightly referred the parties to arbitration. Placing reliance upon *Swiss Timing v. Commonwealth Games*<sup>9</sup>, the learned counsel submitted that to shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration agreement. It was submitted that when there is a clause for arbitration agreed by the parties, it is mandatory for the civil court to refer the disputes to an arbitrator. It was urged that in the present case, in view of clause 17 of the agreement dated 01.05.1997 and in view of the mandatory language of Section 8 of the Act, the High Court rightly referred the parties to arbitration.

19. Though some of the claims in the Money Suit No.73 of 2003 relate to the loss allegedly sustained by the appellant- plaintiff due to termination of the agreement dated 01.05.1997, other claims relate to the loss said to have been caused to the appellant-plaintiff subsequent to the compromise. According to the appellant-plaintiff, claim of Rs.1.40 crores relates to alleged loss caused due to the failure of respondent to appoint appellant-plaintiff as stockist at Guwahati and Agartala; claim relating to the alleged loss of goodwill and reputation; claim relating to the loss caused due to the mental pressure and legal proceedings and such other claims do not touch upon the agreement dated 01.05.1997. The learned counsel for appellant submitted that in the Money Suit No.73 of 2003, substantial part of the claim pertains to the events subsequent to non-compliance of the compromise memo which do not fall within the ambit of agreement dated 01.05.1997 and could be resolved only by the civil court.

20. As discussed earlier, by the agreement dated 01.05.1997, the appellant was appointed as clearing and forwarding agent of RPIL for the entire north-eastern region; whereas under the compromise memo, the appellant has been appointed as stockist of the respondent Company at Guwahati and Agartala which is entirely a different appointment though, as part of compensation package. Clause 17 of the agreement dated 01.05.1997 cannot be invoked regarding the agreement of the parties to appoint the appellant as stockist for Guwahati and Agartala pursuant to the compromise.

21. It is also pertinent to note that the respondent has challenged the compromise decree alleging that it has been obtained by inducement and fraud. In view of the allegations of fraud levelled by the respondent that the compromise decree is vitiated by fraud, the parties cannot be referred to arbitration. Observing that where there are allegations of fraud which are so complicated that it becomes absolutely essential that such complex issues can be decided only by the Civil Court on apprehension of the evidence adduced by the parties, in *A. Ayyasamy v. A. Paramasivam and Others*<sup>10</sup>, it was held as under:-

“25 It is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself”.

Since the respondent has raised the plea that the compromise decree is vitiated by fraud, the merits of such a plea could be decided only by the Civil Court upon consideration of the evidence adduced by the parties.

22. As discussed earlier, there is no arbitration clause relating to the dispute between the parties in not appointing the appellant as stockist and the claim of compensation towards loss of goodwill and reputation. The High Court erred in proceeding under the footing that the dispute falls within the ambit of the agreement dated 01.05.1997 and that the appellant-plaintiff admits the existence of the arbitration clause and the impugned judgment is liable to be set aside.

23. In the result, the impugned order of the High Court in Civil Revision (P) No.31 of 2005 is set aside and this appeal is allowed and the Money Suit No.73 of 2003 shall stand restored to the file of Civil Judge, Senior Division, Kamrup, Guwahati and the trial court shall proceed with the matter in accordance with law.

Judgment Referred.

<sup>1</sup>(1995) Supp.(3) SCC 0324

<sup>4</sup>(2003) 5 SCC 0531

<sup>7</sup>AIR 1969 SC 1320

<sup>10</sup>(2016) 10 SCC 0386

<sup>2</sup>(2002) 2 SCC 0388

<sup>5</sup>(2009) 1 SCC 0372

<sup>8</sup>AIR 1969 SC 1320

<sup>3</sup>(2009) 1 SCC 0372

<sup>6</sup>AIR 1954 Mad 103, 107 (FB).

<sup>9</sup>(2014) 6 SCC 0677