

RAJASTHAN HIGH COURT

Tata Finance Ltd.

Vs.

Sumit Khamsera

S.B. Civil Revision Petition No. 841/2001

(Prakash Tatia, J.)

26.07.2005

ORDER

Prakash Tatia, J.

1. Heard learned counsel for the parties.

2. The facts in brief are that in a manner of hire purchase contract for vehicle No. RJ-27P-3384 a dispute arose between the petitioner and non-petitioner, upon which the non-petitioner filed a suit for injunction in a Civil Court, i.e., before the Court of Civil Judge (Jr. Div.) Udaipur City (North), Udaipur on 6th Nov., 2000. The defendant-petitioner immediately in response to the summon/notice of the suit for injunction and injunction application appeared before the trial Court and submitted an application under Section 8 of the Arbitration and Conciliation Act, 1996, (hereinafter referred as 'the Act of 1996') and submitted that in view of the clause contained in the agreement dated 30th Sept., 1998 between the plaintiff and the defendant, the matter may be referred for arbitration. No reply was filed by the plaintiff to the application of the petitioner-defendant before the trial Court and the trial Court after hearing the arguments, by impugned order dated 26th April, 2001 allowed the appellants-defendant's application filed under Section 8 of the Act of 1996 and directed the parties to get the arbitrator appointed through Court in accordance with law.

3. Though the appellant-defendant's application under Section 8 of the Act of 1996 was allowed by the trial Court, but the appellant-defendant is aggrieved against the direction of the trial Court whereby the trial Court directed the parties to get the arbitrator appointed through Court.

4. According to learned counsel for the petitioner as per condition contained in para No. 25 of the agreement between the parties, the petitioner-defendant has right to appoint the arbitrator in terms of the para No. 25 of the agreement, therefore, the trial Court should not have directed parties to get the arbitrator appointed through Court and the trial Court have allowed the defendant-petitioner to appoint the arbitrator as per condition No. 25 of the agreement. According to learned counsel for the petitioner by impugned order, the petitioner's right to appoint arbitrator and refer the dispute to the particular arbitrator has been taken away by the order of the Court. According to learned counsel for the petitioner, the trial Court had no jurisdiction to ignore the terms and conditions of the arbitration clause and in fact, by the condition No. 25 of the agreement, the plaintiff-respondent agreed for the procedure for appointment of the arbitrator and it gave unfettered and absolute right to the defendant to appoint the sole arbitrator and fix the place for arbitration proceedings, which in this case is agreed for to be at Mumbai only. Learned counsel for the petitioner also referred an application dated 23rd Feb., 2001 alleged to have been submitted before the trial Court whereby the petitioner informed the trial Court that the petitioner-defendant has already appointed the arbitrator and, therefore, the matter may be referred to the sole arbitrator appointed by the petitioner.

5. Learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court delivered in the case of *Gesellschaft Fur B. Forschung MBS, Germany v. Kopran Laboratories Ltd. and another* ¹ wherein after noticing the fact that High Court appointed arbitrator in violation to the terms of the arbitration clause, the Hon'ble Supreme Court set aside the order of the High Court and remanded the matter back to the High Court for fresh decision for appointment of arbitrator in accordance with law.

6. According to learned counsel for the petitioner, an arbitrator can be appointed at any time and even beyond the period of 30 days of demand of other party and right to appoint arbitrator does not get forfeited after the expiry of 30 days as provided under sub-section (5) of Section 11 of the Act of 1996. For this learned counsel for the petitioner, relied upon the judgment of the Hon'ble Apex Court delivered in the case of *Datar Switchgears Ltd. v. Tata Finance Ltd. and another.*²

7. Learned counsel for the respondent seriously contested the issue and submitted that the petitioner himself obtained the impugned order dated 26th April, 2001 and since

petitioner's own application under Section 8 of the Act of 1996 was allowed by the trial Court, therefore, the petitioner should not have any grievance against the order dated 26th April, 2001. It is also submitted that it was never the case of the petitioner that the petitioner has appointed the arbitrator and even if any application was submitted by the petitioner informing the trial Court about petitioner's appointing arbitrator then that was not pressed by the petitioner before the trial Court nor such is the case of the petitioner in this revision petition. According to learned counsel for the respondent, the arbitrator could not have been appointed without there being demand for appointment of the arbitrator by the plaintiff-respondent and for that he never served a notice upon the petitioner-defendant as required under sub-section (5) of Section 11 of the Act of 1996. Learned counsel for the non-petitioner plaintiff also submitted that when parties failed to referring the dispute to the arbitrator then the arbitrator can be appointed by following procedure as provided under Section 11 of the Act of 1996 and not as per Section 10.

8. I considered the submissions of learned counsel for the parties and perused the impugned order. It is clear that Section 8 of the Act of 1996 provides that whenever an action is brought before a Judicial Authority and the contesting party applies before the Judicial Authority for referring the matter to the arbitrator, the Judicial Authority shall pass an order to refer the parties to arbitration. The sub-section (3) of Section 8 of the Act of 1996 provides that notwithstanding that an application has been made under sub-section (1) of Section 8 of the Act of 1996 and that the issue is pending before the judicial authority, arbitration may be commenced or continued and an arbitral award may be passed. Therefore, the arbitrator could have been appointed during the continuation of the suit before the Court below by the parties by agreement or by following the procedure as provided under Section 11 of the Act of 1996. But, here in this case, the petitioner-defendant submitted application under Section 8(1) of the Act of 1996 and himself prayed that the matter required to be referred to arbitrator and it was not the case of the petitioner that petitioner by exercising his power under clause No. 25 appointed the arbitrator. Not only this, the petitioner did not submit before the trial Court in his arguments that subsequent to filing of the application under Section 8(1) of the Act of 1996, the petitioner appointed arbitrator. Therefore, contention of the petitioner that the petitioner has appointed arbitrator cannot be accepted as such a plea has been raised by the petitioner for the first time while arguing the revision petition.

9. The Section 11 of the Act of 1996 provides for procedure for appointment of the arbitrator and sub-section (8) of Section 11 of the Act of 1996 provides that while appointing arbitrator, due regard shall be given to any qualification required of the arbitrator, which can be found from the arbitration agreement. The sub-section (2) of Section 11 of the Act of 1996 provides that "the parties to agree on a procedure for appointing the arbitrator or arbitrators". The sub-section (3) of Section 11 of the Act of 1996 deals with the contingency of failing of the parties in the matter of referring the dispute to the arbitrator by agreement. The sub-clause (a) of sub-section (4) of Section 11 of the Act of 1996 gives the period within which the arbitrator can be appointed and sub-section (5) of Section 11 of the Act of 1996 provides for service of the notice by one party to other for appointment of arbitrator. When the parties even after the agreement providing for procedure for appointment of arbitrator fails to act or appoint the arbitrator then a petition can be filed under sub-sections (6) and (7) of Section 11 of the Act of 1996.

10. In view of the above, it is clear that agreeing for a particular person to be an arbitrator is a different matter than agreeing for procedure for appointment of the arbitrator. Who can be arbitrator that can be decided by the parties by their agreement. How the arbitrator shall be appointed for that also the parties may agree for the procedure as per sub-section (2) of Section 11 of the Act of 1996. The rest of the sub-sections of Section 11 provide that when the parties despite agreement fail to appoint the arbitrator then what shall be procedure for appointment of arbitrator. Here in this case, the question is not with respect to the person, who can be arbitrator. The question in this case is only that what should be the procedure when the plaintiff-respondent filed the suit for injunction without serving a notice or without calling upon the defendant to appoint arbitrator in terms of the agreement and the defendant has submitted application under Section 8(1) of the Act of 1996; whether the trial Court has committed illegality while allowing the application under Section 8(1) of the Act of 1996 in directing the parties to get the arbitrator appointed through Court by following procedure under Section 11 of the Act of 1996 ?

11. The apprehension shown by the petitioner is that by this he may be deprived of his right to appoint the arbitrator in terms of the agreement between the parties. I do not find any substance in the apprehension of the petitioner because as per sub-section (8) of Section 11 of the Act of 1996, the Chief Justice or the person designated by him is required to give due regard to any qualification, which may be required of the arbitrator as per agreement of the parties and further may have due regard for other

considerations for securing the appointment of an independent and impartial arbitrator.

12. So far as judgments of Hon'ble Supreme Court referred above are concerned, it will be relevant to mention here that in the case of Datar Switchgears Ltd. (supra), the controversy was entirely different. In that case there was controversy about the period within which an arbitrator could have been appointed. After receipt of the notice from the opposite party, the Hon'ble Apex Court held that right to appoint arbitrator does not get forfeited with the expiry of 30 days period as provided under Section 11(6) of the Act of 1996. The other point which was for consideration before the Hon'ble Apex Court was that who can be appointed as arbitrator and for that purpose, the Hon'ble Apex Court held that the clause in agreement stating that dispute shall be referred to arbitrator to be nominated by first party gives a right to one party to appoint the arbitrator and for such case for appointment of arbitrator, concurrence of the opposite party is not necessary.

13. Here in this case when the petitioner himself requested the trial Court by moving application under Section 8(1) of the Act of 1996 to refer the dispute for arbitration instead of appointing arbitrator by exercising power under clause 25 of the agreement, the trial Court had no option but to direct the parties to get the arbitrator appointed through Court. When complete procedure has been given for the purpose of arbitration proceedings starting from appointment of arbitrator under Section 11 of the Act of 1996 then the trial Court was right in directing the petitioner also to get the arbitrator appointed through Court. Therefore, the trial Court, the judicial authority had ample jurisdiction to direct the parties to approach for arbitration.

14. At this stage, it will be worthwhile to mention here that in Section 8 of the Act of 1996 it has not been provided that the judicial authority or the Court itself can appoint the arbitrator and refer the dispute to the arbitrator. Obvious reason may be because the procedure has been provided under Section 11 of the Act of 1996 for appointment of arbitrator and Section 11 of the Act of 1996 exhaustively covers the subject for procedure of appointing the arbitrator. In view of the above, if Section 8 of the Act of 1996 is read with Section 11 of the Act of 1996 then it is clear that the judicial Court can ask the parties to get the appointment of the arbitrator through Court, which means to follow the procedure as provided under Section 11 of the Act of 1996.

In view of the above, I do not find any reason to interfere in the order, which has been passed by the trial Court allowing the petitioner's application whereby the parties were

directed to get the appointment of the arbitrator. Hence, the revision petition of the petitioner is dismissed.

Petition dismissed.

Cases Referred.

1. (SLP (C) No. 1190/2002), decided on 13.3.2003
2. 2001(1) RCR(Civil) 267 (SC) : 2000 AIR SCW 3925