

Court No. - 4

Case :- S.C.C. REVISION No. - 157 of 2024

Revisionist :- Anoop Maheshwari

Opposite Party :- Thomas T. Kurian

Counsel for Revisionist :- Ishir Sripat, Siddharth Agrawal

Counsel for Opposite Party :- Nipun Singh

Hon'ble Ajit Kumar, J.

1. Heard Shri Ishir Sripat, learned Advocate appearing for revision applicant and Shri Nipun Singh, learned Advocate assisted by Shri Naman Agarwal, learned counsel for opposite party.

2. A very short question arises for consideration of this Court in this revision application filed by the tenant petitioner, as to whether a small cause suit instituted for ejectment was maintainable in the face of the fact that tenancy agreement between the parties has been result of a written agreement entered on 27.08.2016 giving effect for a period of eleven months to run from 01.09.2016 to 31.07.2017 and which contained an arbitration clause vide clause 11 providing for arbitration between the parties in the event of any dispute arising out of the agreement of tenancy.

3. Facts are, since the tenancy was to end on 31.07.2017, the landlord first issued a notice on 01.05.2017 asking the tenant petitioner to vacate the premises in question on or before

15.07.2017 and handover the keys to the landlord. However, this notice was subsequently superseded by another notice dated 13.05.2017 asking the tenant petitioner to vacate the tenanted premises on 31.07.2017 i.e. the date on which the tenancy was to come to an end as per the agreement. Since the petitioner tenant raised dispute by giving reply on 29.07.2017 to the effect that there was an understanding reached between the parties that the agreement though orally was to last for ten years but in writing it was only for eleven months subject to renewal, the very notice to vacate the tenanted premises in question and handover the keys was untenable. As the tenant-petitioner did not vacate the premises, SCC suit was brought in by the landlord respondent.

4. Petitioner raised preliminary objection by filing application under Order VII Rule 11 CPC as to the maintainability of the suit by raising legal point that in view of arbitration clause provided under the agreement of tenancy the matter may be referred for arbitration instead of suit proceedings and therefore, respondent-landlord was liable to be non-suited.

5. The matter was contested by the landlord respondent on the said point taking the plea that the very contract between the parties came to an end on 31.07.2017 and since the suit got instituted subsequently, with the end of contract the landlord had every right

to sue him for not vacating the premises in question.

6. The trial judge framed the point as to the scope and applicability of the clause 11 of the agreement while considering the application filed under order 7 Rule 11 CPC and it was held that since the contract itself came to an end on 31.07.2017, the terms prescribed therein were not liable to be invoked and hence, there was no point in referring the matter for arbitration and suit was thus, held maintainable.

7. Shri Shripat, learned Advocate appearing for revision applicant while assailing the order has taken the Court to various clauses of the agreement more especially to Clauses 3,5,7,11 and 13. For better appreciation of the terms of agreement so as to take a holistic view in the matter as to maintainability of the suit in the face of the terms out of which the tenancy arose the same are reproduced hereunder:

"3. That the lease is for a period of 11 months w.e.f. 01/09/2016 TO 31/07/2017.

5. That the after expiry of 11 months period the rent shall be increased by 10% and the tenancy has been continued subject to mutual consent of the both parties.

7. That the lessee & lessor can vacate the premises, if they so desire after giving one month notice in written. That no additions and alterations will be made by the lessee without prior written consent of the lessor.

11. That in the event of any dispute or difference arising out of this agreement the matter will

be referred to an arbitrator approved by the lessor and his decision will be binding on both the parties.

13. At the end of lease period the lessee shall hand over the possession of the property peacefully."

8. According to Shri Sripat since the very first notice sent wanted the tenant to vacate the premises prior to the expiry of the tenancy, it gave birth to a dispute may be in a subsequent notice the demand for vacating the premises was modified to 31.07.2017. He gave a composite reply disputing the demand and resisted possession raising a plea of some oral understanding between the parties even while executing the tenancy agreement and, therefore, in view of clause 11 as quoted above the matter was liable to be referred for arbitration.

9. In support of his submission learned Advocate has relied upon certain authorities of Supreme Court in the matter of ***Union of India Vs. Kishori Lal Gupta and others AIR 1959 SC 1362 MANU/SC/0180/1959*** and in the matter of ***Hema Khattar and others Vs. Shiv Khera (2017) 7 SCC 716 MANU/ SC/0397/2017.***

Advancing another argument as to the date of consideration of the enforcement of the contract under the terms of contract in writing entered between the parties, he submits that the since notice itself was issued in May, 2017, it would be taken to have arisen out of the said contract/ agreement entered and therefore, Clause 11 of

the agreement on the date of issuance of notice was enforceable. He submits that since the suit itself has been brought at the strength of notice issued in May, 2017, it would be taken that the contract/ agreement was very much in force and, therefore, the Court ought to have taken into consideration relevant clause for the purposes of merit of application filed under Order VII Rule 11 CPC. In this connection learned Advocate has also relied upon another judgment of Supreme Court in the case of ***Shree Vishnu Constructions Vs. The Engineer in Chief Millitary Engineering Services and others (2023) 8 SCC 329 MANU/ SC/0551/2023.***

10. Thus, in view of the above learned Advocate appearing for petitioner submits that the application filed under Order VII Rule 11 CPC was liable to be allowed and accordingly petitioner was to be non-suited to take recourse to provisions of the Arbitration Act in view of clause 11 of the rent agreement entered between the parties. The judgment and decree, therefore, of the trial court, according to him, deserves to be set aside.

11. Countering the submissions advanced Mr. Nipun Singh, learned Advocate appearing for respondent submits that in view of clause 3 of the agreement since the tenancy was to end on 31.07.2017 taking recourse to clause 7 of the same agreement, a month's notice was very much maintainable at the instance of the

landlord and giving notice a month in advance in any circumstance can not be taken to be raising dispute of any kind as contrary to the terms of agreement entered between the parties. He submits that clauses 3,7 and 13 are if read together, then not only landlord had the right to issue notice but tenant was under obligation to handover possession of the property peacefully upon the expiry of the tenancy on 31.07.2017. He further submits that the second notice having been issued on 13.05.2017 the first notice issued on 01.05.2017 stands waived and the second notice very much contained a demand for handing over possession at the end of the tenancy i.e. on 31.07.2017. He submits that for any kind of alleged oral understanding if tenant raises despite terms of contract in writing, by giving reply, such a dispute would certainly fall outside the terms/ contract entered in writing and this by itself will not fall within the meaning of Section 7 of the agreement so as to bind the parties to invoke the provision of the Arbitration Act.

12. Besides the above, reply having been sent on 29.07.2017 by registered post, was to be taken to have been served only in the course of three working days and that would fall after 31.07.2017 when the contract perished. He has further submitted that since the terms of contract had come to an end, suit could not have been said to be not maintainable even if notice was sent during subsistence

of the contract as according to him the suit had been filed subsequently upon the expiry of the contract and the cause of action was to be taken to have arisen after 31.07.2017 when the tenant did not vacate the premises. He has therefore, submitted that even if the tenant continued beyond 31.07.2017 it would definitely give the landlord an actionable claim and so consequential ejectment of the tenant. In support of his submission learned Advocate has also relied upon the judgment of Supreme Court in the case of ***Union of India Vs. Kishori Lal Gupta and others AIR 1959 SC 1362 MANU/SC/0180/1959***, he has also relied upon the judgment of the Delhi High Court in the case of ***Mukesh Khurana Vs. Rahul Chaudhary*** decided on 09.07.2024 being ***FAO No. 200/2024 & CAV 286/2024 and the connected matters being CM Appl. 36461-36462/2024.***

13. Shri Nipun Singh, learned Advocate has further argued that in view of the amended provision of Section 8 of the Arbitration and Conciliation Act, 1996 ordinarily a suit would lie except where there exists valid agreement with an arbitration clause. So according to him the suit is not an exception but the arbitration clause is an exception and, therefore, the Court will ordinarily entertain a suit to determine the issues whether the arbitration agreement subsists to non-suit the plaintiff to avail the remedy

under the Arbitration Act. He submits that with the amendment brought in Section 8 of the Arbitration and Conciliation Act, 1996 the suit is entertainable. He therefore, submits that the application under Order VII Rule 11 CPC on this count could not have been maintainable and for this he has also placed reliance upon the authority of Andhra Pradesh High Court in the matter of ***Chunduru Visalakshi Vs. Chunduru Rajendra Prasad 2022 SCC Online AP 888.***

14. Having heard learned counsel for respective parties and having perused the records, insofar as the question regarding maintainability of the SCC suit pursuant to the notice issued to the petitioner by the landlord is concerned, I find substance in the argument advanced by learned counsel appearing for landlord respondent that the contract having ended on 31.07.2017 the arbitration clause provided for under Clause 11 of the written agreement could not have been enforced to non-suit the plaintiff. In the judgment that has been relied upon by both the parties in the matter of ***Kishori Lal Gupta (supra)***, the Court dealt with the issue at length on the question of enforceability of the arbitration agreement to hold that the suit would not lie and then summarized the legal position vide paragraph 23 that runs as under:

"23. The following principles relevant to the present case emerge from the aforesaid discussion: (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it; (2) however comprehensive

the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract;(3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may be put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls may categories of disputes in connection with a contract, such as the question of repudiation, frustration breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

15. From a bare reading of Clause 2 of the aforesaid paragraph it clearly transpires that existence of a contract is necessary for invocation of arbitration clause prescribed under the agreement as the clause would perish with the contract. In the present case it is admitted to the parties that the contract was only for a period of eleven months w.e.f 01.09.2016 till 31.07.2017. The legal effect of the contract automatically came to an end on 31.07.2017. The thin distinction that is tried to be drawn by Shri Sripat citing clauses 5 and 6 of above quoted paragraph between the void contract and the original contract that may be valid but conditions extinguished upon contract getting expired with the last date. There may lie different categories of disputes like question of repudiation, frustration and breach, etc. and so to that extent therefore, the contract would be taken to have subsisted. In my considered view looking to the facts of the case, more especially the notice that resulted later on in the cause of action to maintain a suit, would not beget any further dispute whatsoever. The terms of the agreement

are absolutely clear as to the beginning of the tenancy and its termination and the notice also does not prescribe for any kind of dispute being raised so as to call for an action otherwise because the notice was well within the provisions contained under Clause 7 of the agreement. The question of repudiation, frustration, breach therefore, cannot be said to have arisen, nor any action or conduct there to be out of any term/ condition of contract. Mr. Sripat has sought to urge that denial to handover possession creates a dispute for the tenancy under contract alone. No interpretation of judgment can be by reading something more in between the lines of the observations made. Repudiation/ frustration and breach relate to the condition flowing from contract but the moment contract perishes the lease ends, the condition under lease also perishes with such contract and, hence, the suit for eviction would lie. The provisions of clause prescribing for arbitration and making it invokable to non-suit the plaintiff has to be taken to have ended with contract. The judgment in the case of ***Hema Khattar (supra)*** cited by Shri Shripat vide its paragraph 26 refers to Section 8 of the Arbitration Clause as it then existed when the matter in the case of P. Anand Gajapati Raju case was decided in the year 2000. Admittedly there was no provision at that time prescribing for a suit to be entertained to determine issue as to whether the arbitration clause was enforceable or not in the face of a contract

existing or non-existing or void. For better appreciation relevant provision of Clause 8 of the Arbitration and Conciliation Act, 1996 are reproduced hereunder:

*"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.***

(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 the, 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 that Court.

(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 is made."

(emphasis added)

16. From a bare reading of the aforesaid provisions, it comes out to be quite explicit that suit is now made entertainable under Section 9 of CPC or otherwise under a special act, if any, like for instance SCC Suit in the present case under the Provincial Small Causes Act, 1887, to test the subsistence of a contract and/ or as to whether contract is a void one. The clause under the agreement, therefore, providing for arbitration would be enforceable provided, of course, the contract subsists. The judgment not only, therefore, is distinguishable for interpretation of Section 8 as it then stood as the judgment authority relied upon is of the year 2000 but even

otherwise I find that Division bench of Supreme Court has not even considered or referred to the judgment of the three Judges Benches in the Case of ***Kishori Lal Gupta (supra)***. So judicial propriety demands me to follow the judgment of a larger Bench as a binding precedent. Two other citations placed before the Court by Shri Nipun Singh. In the case of ***Mukesh Khurana (supra)*** has dealt with this aspect of the matter and vide paragraph 40 it has been held thus:

"40. There was earlier a written lease deed which contained arbitration clause. It came to end by efflux of time. Plaintiff simply created a new tenancy which was on month-to-month basis with increased rate of rent. Had the parties not taken any action whatsoever, it could have still been assumed that the previous lease deed and the arbitration clause remained alive and intact but since previous agreement was replaced and substituted by an oral agreement, defence cannot be permitted to fall back upon any of the term contained in the earlier lease agreement which has now ceased to exist."

17. It is in that case also initially agreement had came to an end. On the point of maintainability of an application filed under Order VII Rule 11 CPC to question the suit in view of the arbitration clause, I find Andhara Pradesh High Court in the case of ***Chunduru Visalakshi (supra)*** has considered amended provision as contained under Section 8 vide paragraph 42 and 43 and also vide paragraph 46 and 48 has dealt with this aspect of the power of the Court to reject the application filed under Order VII Rule 11 CPC but that would be a case when it is tried on the aspect of

maintainability of the suit as per Section 8 of Act, 1996 and Section 8, clearly stipulates for such an issue to be tried in suit before Civil Court or SCC court. Order VII Rule 11 CPC application would be maintainable only when there is a bar and since the amended provision Section 8 of the Arbitration and Conciliation Act, 1996 does not provide an absolute bar, therefore, the order VII rule 11 application would certainly not be maintainable. Vide paragraph 46 and 47 the Court has held thus:

"46. In M. Shankara Reddy (supra) the Division Bench of this Court held that when a statute prescribes or requires a thing to be done in a particular manner, it should be done in that manner or not at all. The popular principle of law is settled in the very old case of Taylor v. Taylor, [L.R.] 1 Ch. 426 which is cited with approval by the Hon'ble Supreme Court of India in Shiv Kumar Chandha v. Municipal Corporation of Delhi, (1993) 3 SCC 161 and also in Ram Chandra Keshav Adke v. Govind Jyoti (1975) 1 SCC 559. An application under Section 8 of the Act is an application that should be made in a particular manner and at particular time. The application should be accompanied by the original arbitration agreement or a certified copy thereof under Section 8(2) of the Act. Even the Andhra Pradesh Arbitration Rules, 2000 as framed by this Court requires that every application under Section 8 of the Act shall be duly signed and verified. It shall state the provision of law under which it is filed and contain a statement as described in Rule 4 of the Rules. Rule 4(2) also states a certified copy of the arbitration agreement and certified copies of the relevant document shall be annexed to every such application. Otherwise, it was held that, the application which was filed was not under Section 8 of the Act. It was only an application under Order VII Rule 11 CPC seeking rejection of the plaint on the ground that the arbitration clause bars the suit. This Court further held that Section 8 of the Act only empowers the Court to refer the parties to arbitration but does not give the Court an option to reject the plaint. Order VII Rule 11 does not give the Court an option to reject the plaint. Order VII rule 11 CPC empowers the Court to reject the plaint, when there is bar to Civil Suit because of any law. Section 8 of the Act was not a bar to a Civil Court. It provides an alternative to a defence against whom a civil suit is initiated to submit to the jurisdiction of the civil court or to make an appropriate application at appropriate time under Section 8 of the Act seeking an order to refer the parties to arbitration. The powers under Section 8 of the Act cannot be considered as a bar to the civil suit to entertain under Order VII rule 11 CPC.

47. In the present case, any application under Section 8 of the Arbitration and Conciliation Act, 1996 was not filed at the appropriate stage i.e., till the time of submission of the first statement i.e. the written statement. The submission of the learned counsel for the petitioner that the application which was filed is a composite application under Order VII Rule 11 CPC and Section 8 of the Arbitration and Conciliation Act cannot be accepted, as this is simply an application for rejection of the plaint under Order VII Rule 11 CPC in which one of the grounds taken by the defendant to reject the plaint is that there was an arbitration clause in the partnership deed i.e., clause 18, and in view thereof, the plaint should be rejected, without making any prayer in terms of Section 8 of the Arbitration and Conciliation Act to refer the parties to arbitration. In Rashtriya Ispat Nigam Ltd (supra), the Hon'ble Apex Court held that power under Section 8 of the Arbitration and Conciliation Act shall be exercised, if party so applies."

18. Coming to the last point as to the date of notice resulting in the cause of action which would be relevant for enforcement of the agreement which provided for arbitration clause and the judgment in the case of ***Shree Vishnu Construction*** cited more emphatically placing paragraph 10 thereof, in my considered view the analogy that is sought to be drawn as far as notice and enforcement of the clause referring to the date of amendment would hardly have any application. Even if notice was issued by the landlord respondent during subsistence of the contract in view of the saving provision contained under Clause 7 of the agreement, it would be well within the rights flowing from contract and is not referable to any dispute as such to invoke the arbitration clause.

19. It is worthy to be seen that the cause of action had arisen in the case only on or after 31.07.2017 when the tenant refused to vacate the premises in question and therefore, the suit was maintainable taking the cause of action to have arisen on or after 31.07.2017. If the reply notice by the tenant is taken to have been served upon the petitioner on 01.08.2017 even then the cause of action would be taken to have arisen after 31.07.2017 and therefore, the suit was maintainable and the arbitration clause got rendered uninvokable as the contract perished on 31.07.2021.

20. In view of the above, therefore, I do not find any manifest error

in the judgment and decree passed by the trial judge in decreeing the SCC suit in favour of the landlord respondent.

21. Thus, petition fails and is dismissed with no order as to cost.

Order Date :- 19.11.2024
Nadeem