

2022 LiveLaw (SC) 54

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SANJIV KHANNA; BELA M. TRIVEDI, JJ.
6TH JANUARY, 2022
CIVIL APPEAL NO. 195 OF 2022 (@SLP (C) No. 11350/2020)

M/S. PREMIER SEA FOODS EXIM PRIVATE LIMITED

VERSUS

M/S CARAVEL SHIPPING SERVICES PRIVATE LIMITED

Arbitration and Conciliation Act, 1996; Section 34, 37 - Reference to wrong provision, as long as power exists would not matter.

(Arising out of impugned final judgment and order dated 06-12-2019 in CMP No. 24620/2019 passed by the High Court of Judicature at Madras)

For Petitioner(s) Mr. Ankur Khandelwal, Adv. Mr. Himanshu Handa, Adv. Ms. Kaveri Vats, Adv. Mr. Utkarsh Sharma, AOR

For Respondent(s) Ms. Liz Mathew, AOR Ms. Sonali Jain, Adv.

ORDER

Leave granted.

The appellant M/S Premier Sea Foods Exim Private Limited in 2009 had filed the suit for recovery of Rs. 26,53,593/- (Rupees Twenty Six Lakhs Fifty Three Thousand Five Hundred and Ninety Three Only) along with future interest @ 11.5 per cent per annum against the respondent M/S Caravel Shipping Services Private Limited before the Subordinate Judges Court, Kochi.

The respondent upon service of summons in the suit had filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the Arbitration Act], which application was dismissed by the Subordinate Judges Court, Kochi, vide order dated 8th January, 2013. The appeal preferred by the respondent before the High Court of Kerala also dismissed, vide order dated 8th September, 2015. Review application preferred by the respondent before the High Court of Kerala suffered dismissal vide order dated 14th June, 2016.

The respondent had filed written statement before the Subordinate Judges Court, Kochi in December 2015.

The respondent, however, challenged the review order dated 14th June, 2016 before this Court in SLP(C) Nos. 31101-31102 of 2016, which petition was allowed vide order dated 29th October, 2018. The effect, thereof, was that the proceedings in the suit could not be proceed, the matter having been referred to arbitration, the appellant is to raise his claim before the arbitrator.

In 2012, the respondent, even during the pendency of the application under Section 8 of the Arbitration Act, had filed an application under Section 11 of the Arbitration Act before the High Court of Madras. Notwithstanding the order dated 8th

January, 2013 rejecting the application under Section 8 of the Arbitration Act passed by the Subordinate Judges Court, Kochi, the High Court of Madras allowed the application under Section 11 vide judgment dated 9th January, 2015. This gave rise to a very peculiar situation as there were two conflicting orders and judgments of the courts of competent jurisdiction.

Upon the order dated 9th January, 2015 passed by the High Court of Madras, the respondent filed a claim petition before the arbitrator. On being served, the appellant, it appears, was advised to file his written statement as well as counter claim before the arbitrator. Subsequently, on legal advise, the appellant withdrew the counter claim before the arbitrator stating that the counter claim was subject matter of the civil suit filed by the appellant before the Subordinate Judges Court, Kochi. As already noticed above, the application filed by the respondent under Section 8 of the Arbitration Act for reference to arbitration was dismissed by the Subordinate Judges Court, Kochi vide order dated 8th January, 2013, which order had been affirmed by the High Court of Kerala vide order dated 8th September, 2015.

After order dated 29th October 2018 passed by this Court allowing the application under Section 8 of the Arbitration Act filed by the respondent, the appellant made an application for revival of the counter claim before the arbitrator. The arbitrator however, rejected the application vide order dated 14th May, 2019 on the ground that the appellant had earlier filed and withdrawn its counter claim without any liberty to revive the counter claim. This order of the arbitrator was made subject matter of challenge in the petition under Section 37(2) of the Arbitration Act along with an application for condonation of delay of 84 days. The application for condonation of delay has been dismissed by the impugned order passed by the High Court of Judicature at Madras dated 6th December, 2019. The impugned order while dismissing the application for condonation has elaborately gone into merits and has held that the appellant was rightly not permitted to revive the counter claim before the arbitrator. The primary reason being that the appellant had withdrawn the counter claim before the arbitrator on 21st August, 2015.

We have noted the facts in some details to highlight anomalies which have arisen in the present case. The suit filed by the appellant was initially allowed to be proceeded with, as application filed by the respondent under Section 8 was dismissed both by the Subordinate Judges Court, Kochi as well as by the High Court. Therefore, there is merit in the contention of the appellant that it should not have filed a counter claim before the arbitrator, as its claim was the subject matter of the civil suit filed before the Subordinate Judges Court, Kochi. Clearly, the appellant had proceeded on legal advise, first to file the counter claim before the arbitrator and then to withdraw the counter claim to avoid asseveration that the appellant has submitted to the jurisdiction of the arbitrator, notwithstanding the order rejecting the application under Section 8 of the Arbitration Act. The effect of the order dated 29th October, 2018 allowing the application under Section 8 of the Arbitration Act, is that the appellant is entitled to raise its claims, till them the subject matter of suit or otherwise, before the arbitrator. It is necessary to clarify this position as to ensure effective and complete

adjudication of all dispute. In our opinion, therefore, the learned arbitrator is clearly wrong in rejecting the application made by the appellant for revival of the counter claim.

Even if the appeal under Section 37 would not be maintainable, objection/appeal under Section 34 would be maintainable. Reference to wrong provision, as long as power exists would not matter. What we have done is to give true as well as legal effect to the order dated 29th October, 2018 passed by this Court. However, as there has been a delay on the part of the appellant in filing an application under Section 37(or Section 34 as held above) of the Arbitration Act, we deem it appropriate to direct the appellant to pay the cost of Rs.2,00,000/- (Rupees Two Lakhs Only) to the respondent. Only on the payment of the cost, the appellant would be entitled to raise and press its counter claim before the arbitrator. Additionally, we clarify that the respondent would be entitled to raise all defences against the counter claim including the defence that the counter claim is barred by limitation. If any such plea is taken, it will be examined and considered by the arbitrator in accordance with law taking into account the contentions and legal pleas placed by both the sides. We have made no comments and expressed any opinion in this regard or on the merits of the all other pleas and contentions.

Recording the aforesaid, the appeal is allowed in terms set out above.

All pending applications are disposed of.

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