YOGI AGARWAL

v.

M/S. INSPIRATION CLOTHES & U AND ORS.

(Special Leave Petition (C) No. 29333/2008)

DECEMBER 1, 2008

[R.V. RAVEENDRAN AND D.K. JAIN, JJ.]

ARBITRATION AND CONCILIATION ACT, 1996:

s. 8 r/w s.7 – Application by defendant in suit seeking reference to arbitration – HELD: In order to constitute an arbitration agreement for purposes of ss. 7 and 8, two conditions should be satisfied – Firstly, it should be between the parties to the dispute – Secondly, it should relate to or be applicable to the dispute – In the instant case, neither of the two conditions was satisfied – Firstly, the suit related to transactions said to have taken place between plaintiff and defendant no. 1 company and its two directors, whereas the documents put forth as containing the arbitration agreement related to some transactions between a proprietary concern of defendant no. 2 and plaintiff – Secondly, the provision for arbitration is not contained in any contract or document relating to the suit transactions, but contained in documents relating to some unconnected independent transactions – Defendants, in their application u/s. 8, did not even allege that there was an arbitration agreement in regard to the subject matter of the suit – What they alleged was that 'subject matter of the suit' was similar to or identical to with the subject matter of the arbitration agreement' – That does not entitle them to seek relief u/s 8 – As there was no 'arbitration agreement', the requirements of s.7 were not met – Consequently, rejection of the application filed by defendants u/s 8 does not call for interference – Further, there is a delay of 182 days in filing the petition – The only reason assigned by the petitioner, a seasoned businessman, to explain the

A *delay is that he was confused by diverse opinions about filing of special leave petition – The explanation is neither satisfactory nor sufficient to condone the delay – Delay/ Laches.*

B CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 29333/2008.

From the final Judgment and Order dated 29.11.2007 of the High Court of Calcutta at Calcutta in C.O. No. 1258 of 1006.

C Shyam Divan, Sunil Singhania and Sarad Kumar Singhania for the Appellant.

The Order of the Court was delivered by

ORDER

D

R.V. RAVEENDRAN J. 1. Dismissal of an application under Section 8 of the Arbitration and Conciliation Act, 1996 ('the Act' for short), filed by the defendants in a money suit (filed by the first respondent herein against three defendants, that is, E third respondent company, and its two directors namely, petitioner and second respondent), affirmed by the High Court, has led to the filing of this special leave petition. For convenience, we will refer to the parties by their rank in the suit.

2. There is a delay of 182 days in filing this petition. The F only reason assigned by the petitioner, a seasoned businessman, to explain the delay is that he was confused by diverse opinions about filing of special leave petition. The explanation is neither satisfactory nor sufficient to condone the delay. Even assuming that the delay is condonable, we find that G the special leave petition is liable to be rejected on merits.

3. The plaintiff filed the suit on 9.9.2003 for recovery of Rs.9,48,143 with interest allegedly due in regard to (i) price of two consignments supplied by plaintiff to the nominees of the H first defendant company and (ii) value of nine samples made

available by the plaintiff to defendants. In the said suit, defendants made an application dated 17.12.2005 under section 8 of the Act, for referring the parties to arbitration. To show the existence of arbitration agreement; the defendants relied upon three invoices of 'Yash Traders', a proprietary concern of the second defendant (petitioner herein), dated 2.11.1999, 22.6.2001 and 11.2.2003 in regard to the sale of cotton fabric by the said Yash Traders to the plaintiff containing the following note: "All disputes pertaining to this transaction if any will be subject to the Arbitration Rules & Regulations of Bharat Merchant Chamber". The defendants alleged that the said invoices were accepted by the plaintiff thus resulting in a binding arbitration agreement.

4. The trial court noted that there was no arbitration agreement in regard to the suit transactions and that the defendants wanted the three invoices (containing a provision for arbitration) relating to some other transactions to be treated as an arbitration agreement between parties in regard to the suit transactions. It examined the three invoices and held that the said invoices could not be treated as containing an arbitration agreement within the meaning of Section 7 of the Act, as the invoices were signed only by 'Yash Traders' and not by the plaintiff. The said decision has been affirmed by the High Court.

5. The petitioner has filed this special leave petition, contending that to constitute a valid arbitration agreement, a document containing the arbitration agreement *need not be* signed by all parties. According to the petitioner, if an invoice signed by the seller is acknowledged or accepted or acted upon by the buyer, a term in the invoice providing for arbitration will be an "arbitration agreement" as between the seller and the buyer, irrespective of whether the buyer signed the document or not. We do not propose to examine the said contentiCn as it does not really arise for consideration in this case.

6. The fundamental lacuna in the claim of defendants for

A reference to arbitration is the absence of an arbitration agreement between the parties, in regard to the suit transactions. The three invoices containing a provision for arbitration relied upon by the petitioner (second defendant), do not relate to the suit transactions at all. The plaintiff, as noticed B above, filed a suit for recovery of the amounts allegedly due in regard to some samples supplied by him to the defendants and certain supplies made to the nominees of the first defendant company. The three invoices relied on by the defendants, on the other hand, relate to sale of goods by the proprietary C concern of second defendant to the plaintiff. The said invoices have nothing to do with the suit transactions. Such unconnected documents cannot be pressed into service to claim the existence of an arbitration agreement.

D 7. 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 E 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 plaintiff was or is a party, unconnected with the transactions or contracts to which a suit F relates, cannot be considered as existence of an 'arbitration agreement' in regard to the suit transactions/contracts. When sections 7 and 8 of the Act refer to the existence of an arbitration agreement between the parties, they necessarily refer to an arbitration agreement in regard to the current dispute G between the parties or the subject matter of the suit. It is fundamental that a provision for arbitration, to constitute an arbitration agreement for the purposes of sections 7 and 8 of the Act, should satisfy two conditions. Firstly, it should be between the parties to the dispute. Secondly, it should relate H to or applicable to the dispute.

8. In this case, neither of the two conditions was satisfied. Firstly, the suit related to transactions said to have taken place between plaintiff and first defendant company and its two directors, whereas the documents put forth as containing the arbitration agreement related to some transactions between a proprietary concern of second defendant and plaintiff. Secondly, the provision for arbitration is not contained in any contract or document relating to the suit transactions, but contained in documents relating to some unconnected independent transactions. It is significant that, in their application under section 8 of the Act, the defendants did not even allege that there was an arbitration agreement in regard to the subject matter of the suit. What they alleged was that 'subject matter of the suit' was similar to or identical with the 'subject matter of the arbitration agreement'. That does not entitle them to seek relief under section 8 of the Act. As there was no 'arbitration agreement', the requirements of section 7 were not met.

9. As there is no arbitration agreement with reference to the subject-matter of the suit filed by the plaintiff (first respondent herein), rejection of the application filed by defendants under Section 8 of the Act, does not call for interference. The special leave petition is, therefore, dismissed both on the ground of delay and on merits.

R.P. Special Leave Petition dismissed.