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SUKANYA HOLDINGS PVT. LTD.

v.

JAYESH H. PANDYA AND ANR.

APRIL 14, 2003

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[M.B. SHAH AND ARUN KUMAR, JJ.]

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Arbitration and Conciliation Act, 1996—Section 8—Power to refer parties to arbitration where there is an arbitration agreement—Dissolution of partnership—Suit for dissolution by one—Arbitration petition by other—Dismissal of petition by High Court—Justification of—Held: Order of High Court does not call for any interference since Arbitration Act does not oust the jurisdiction of Civil Court to decide the dispute in a case where parties to arbitration agreement do not take appropriate steps under Section 8(1) and (2)—Section 8 does not apply when suit is commenced as to a matter which

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lies outside the arbitration agreement and is also between some of the parties who are not parties to arbitration agreement—Also bifurcation of subject matter to the action is not allowed and Section 89 cannot be resorted to for interpreting Section 8—Code of Civil Procedure, 1908, Section 89.

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Words and Phrases:

“A matter”—Meaning of in the context of Section 8 of the Arbitration and Conciliation Act, 1996.

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Appellant and respondents entered into a partnership agreement for carrying out construction of flats. The agreement contained an arbitration clause. Dispute arose between the parties. Respondent No. 1 filed a suit for dissolution of partnership and accounts and various other reliefs against contracting parties and also raised disputes against purchasers of the disputed flats. Appellant filed arbitration petition under Section 8 of the Arbitration and Conciliation Act, 1996. High Court rejected the petition as suit has been filed and as the defendants of the suit are not party or partners in the partnership firm and the terms of the partnership deed including the arbitration clause are not binding to them. Hence the present appeal. Appellant contended that under Section 8 of the Act the Court was required to refer the dispute arising to the arbitrator as contemplated by the arbitration clause because of the dissolution of the

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partnership; that in any case there is no bar in referring the dispute which arises between the appellant and respondents who are bound by the agreement to the arbitrator; that if the interpretation given by the High Court is accepted, arbitration clause could be defeated by an interested party by adding some reliefs which are not covered by the arbitration clause or by adding a few parties who are not bound by the arbitration clause; that this interpretation would be against the object and purpose of the Act and against the spirit of Section 89 CPC; and that the third parties who purchased the flat are not necessary parties to the dispute amongst the partners relating to dissolution and accounts of the firm and, therefore, dispute ought to have been referred to the arbitrator.

Respondent contended that the order passed by the High Court does not call for any interference as the plaintiffs have claimed various reliefs in the suit which could not be referred to the arbitrator; and that few of the defendants are not parties to the arbitration agreement.

Dismissing the appeal, the Court

HELD: 1.1. Except Section 8 of the Arbitration and Conciliation Act, 1996 there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral tribunal, if the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or such application is not accompanied by the original arbitration agreement or duly certified copy thereof. Therefore, the Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under section 8 (1) and (2) of the Act. [564-B-D]

1.2. There is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration and for splitting the cause or parties and referring the subject matter of the suit to the arbitrators. Also there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. Against this, under section 24 of the Arbitration Act, 1940, some of the parties to a suit could not apply that the matters in difference between them be referred to arbitration and Court may refer

A the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. The Section also provided that the suit would continue so far as it related to parties who have not joined in such application. [564-F, G]

B 2. Under Section 8 of the Act the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced as to a matter which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8 of the Act.

C [564-G-H; 565-A]

D 3.1. Section 8 of the Act cannot be interpreted as bifurcation of the cause of action-subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, bifurcation of the subject matter of an action brought before a judicial authority is not allowed. [565-B-D]

E 3.2. Such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated and would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

F 4. Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the Court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the Court is required to follow the procedure prescribed under the said Section. [565-D-G]

H CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1174 of 2002.

From the Judgment and Order dated 18.9.2001 of the Mumbai High Court in A.P. No. 500 of 2001. A

Shekhar Naphade, E.C. Agrawal, Mahesh Agarwal, Rishi Agarwal, Alok Agarwal, Manu Krishnan and Vivek Yadav for the Appellant.

R.F. Nariman, N.R. Choudhary, Jai Singhania and Somnanth Mukherjee for the Respondent. B

The Judgment of the Court was delivered by

SHAH, J. This appeal by special leave is directed against the judgment and order dated 18. 9. 2001 passed by the High Court of Bombay in Arbitration Petition No. 500 of 2001. C

Appellant and respondent Nos. 1 and 2 entered into a partnership agreement on 30th April 1992 for carrying on business in the name and style of M/s Hetali Construction Company to develop the land belonging to Ms Jaykirti Mehta who brought the said land as her capital contribution. Land was valued at Rs. 65,51,000. A Plan for construction of building was submitted in April 1992 and on 20.1.1993, commencement certificate was issued. It is submitted that till issue of commencement certificate, appellant's contribution in the said partnership was to the extent of Rs. 1,25,00,000 as capital contribution. By award dated 11.3.1993, Ms. Jaykirti Mehta was directed to stand retired from the partnership firm. It was agreed that after retirement of Ms. Mehta, other partners were to continue with the partnership. It is submitted that the appellant provided a fund of Rs. 60,88,000 to the said partnership firm for being paid to Ms. Jaykirti Mehta which was paid to her along with the amount of Rs. 5,24,000 in terms of the Award dated 11.3.1999. Further, a sum of Rs. 47,50,000 was paid to one Mr. Kirti Desai to settle the suit filed by him. The partnership firm entered into an agreement with M/s Laxman Commercial and Finance Ltd. and accordingly construction was started. It is contended that from 1996 to 1998, respondents took away some amount from the partnership without contribution to capital construction. On 7.4.1998, five flats were sold to the creditors of the partnership firm in order to repay the loans and excess amount was paid to the firm. In April 1999, M/s Laxman Commercial and Finance Ltd. sold flats No. 401 to 701 to different purchasers. On 23.6.1999, the partnership firm executed a Deed of Conveyance subject to rights of other parties in favour of M/s West End Gymkhana Ltd. in respect of disposed of flats. On 1.1.1999, respondent No. 1 wrote to the Income Tax Officer to complete the assessment of the partnership firm. H

A Accordingly, assessment order was passed on 30.3.2000.

Thereafter, respondent no. 1 filed suit No. 1991 of 2000 in the High Court of Bombay for dissolution of partnership firm and accounts and *inter alia* challenging the conveyance deed executed by partnership firm in favour of M/s West End Gymkhana Ltd. Respondent no. 1 also took out a notice of motion No. 1576 of 2000 for various interim reliefs.

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On the same day, appellant filed an application under Section 8 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act'). That application was kept for hearing along with the notice of motion.

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Subsequently, respondent no. 1 filed fresh suit bearing No. 2812 of 2001 for dissolution of the suit firm, accounts and other reliefs including the relief for setting aside the transfer of suit flats in favour of various defendants. The respondent withdrew the suit filed on 9th May, 2000.

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The appellant filed an arbitration petition No. 500 of 2001 under Section 8 of the Act. That application was opposed by respondent no. 1 by contending that the subject matter of the suit is not between the contracting parties and the reliefs are claimed not only against respondent nos. 1 and 2 who are contracting parties but are claimed against remaining 23 parties, who are purchasers/so-called tenants of the disputed flats.

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The High Court by its judgment and order dated 18. 9. 2001 rejected application under Section 8 of the Act. The Court arrived at the conclusion that in the suit apart from the relief of dissolution and accounts, plaintiff has prayed for other reliefs. All the defendants to the suit are not parties or partners in the partnership firm and the terms of the partnership deed including

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the arbitration clause are not binding to them. Only part of the subject matter could at the most be referred to the arbitration. Further, there is no power conferred on the Court to add parties who are not parties to the agreement in the arbitration proceedings. The Court also negatived the alternative prayer for referring part of the subject matter in respect of those parties who are parties to the partnership agreement which contains arbitral clause. The Court

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arrived at the conclusion that such procedure is not contemplated under the Act. The object and purpose of the Act is to avoid multiplicity of the proceedings and not to allow two forums simultaneously to proceed with the matter. That judgment and order is challenged in this appeal.

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Learned senior counsel Mr. Shekhar Naphade appearing for the appellant

submitted that under Section 8 of the Act, the Court was required to refer the dispute arising because of the dissolution of the partnership to the arbitrator as contemplated by the arbitration clause. He further submitted that in any case there is no bar in referring the dispute which arises between the appellant and respondent nos. 1 and 2 who are bound by the agreement to the arbitrator as envisaged in the partnership deed. He next contended that if the interpretation given by the High Court is accepted, arbitration clause could be defeated by an interested party by adding some reliefs which are not covered by the arbitration clause or by adding a few parties who are not bound by the arbitration clause. This interpretation would be against the object and purpose of the Act and against the spirit of Section 89 of Code of Civil Procedure.

He also submitted that the third parties who purchased the flat that is stock-in-trade of the firm and entered into transactions in connection with the business of the firm, are not necessary parties to the dispute amongst the partners relating to dissolution and accounts of the firm and, therefore, dispute ought to have been referred to the arbitrator.

As against this, learned senior counsel Mr. R. F. Nariman submitted that the order passed by the High Court does not call for any interference as the plaintiffs have claimed various reliefs in the suit which could not be referred to the arbitrator. He further submitted that defendants no. 3 to 25 are not parties to the arbitration agreement.

For appreciating the contentions raised by the learned counsel for the parties, we would refer to the relevant provisions namely Sections 5 and 8 of the Act, which are as under :-

"Section 5. Extent of judicial intervention. —Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

Section 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 so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

A (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.

B (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 made. ”

C For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part-I of the Act, Judicial authority shall not intervene except where so provided in the Act. Except D Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral Tribunal, if - (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under sub-sections (1) & (2) of Section 8 of the Act.

E Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

F Thirdly, there is no provision - as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided G that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application.

H The relevant language used in Section 8 is - “*in a matter which is the subject matter of an arbitration agreement*”. Court is required to refer the

parties to arbitration. Therefore, the suit should be in respect of '*a matter*' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced -"as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words '*a matter*' indicates entire subject matter of the suit should be subject to arbitration agreement.

The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

Reliance was placed on Section 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the Court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the Court is required to follow the procedure prescribed under the said Section.

Lastly, considering the language used in Section 8, in our view, it is not necessary to refer to the decisions rendered by various High Courts interpreting

A Section 34 of Indian Arbitration Act, 1940 which gave a discretion to the Court to stay the proceedings in a case where the dispute is required to be referred for arbitration.

For the reasons stated above, there is no substance in this appeal and is, therefore, dismissed. There shall be no order as to costs.

B It would be open to the parties to request the Court for expeditious disposal of the suit.

N.J.

Appeal dismissed.