

(1976) 08 GUJ CK 0012
In the Gujarat High Court

Deepak Nitrite Limited

APPELLANT

Vs

Gujarat State Fertilizers Co. Ltd.

RESPONDENT

Date of Decision : 12-08-1976

Acts Referred:

Arbitration Act, 1940 — Section 20, 41(b)
Civil Procedure Code, 1908 (CPC) — Section 41(a)
Constitution of India, 1950 — Article 226, 227

Citation : (1977) 18 GLR 660

Hon'ble Judges : D.P. Desai, J

Bench : Single Bench

Judgement

D.P. Desai, J.—In a petition to file in Court an arbitration agreement u/s 20 of the Arbitration Act, 1949 (hereafter for brevity's sake referred to as "the Act"), numbered as Special Suit No. 140 of 1976, an application for temporary injunction was given by the plaintiffs praying that pending the hearing and final disposal of the suit, the defendants, their servants and agents be restrained from stopping supply of liquid ammonia to the plaintiffs and that the defendants be ordered to supply to the plaintiffs liquid ammonia in terms of the agreement dated 16th December, 1970 on the plaintiffs paying to the defendants the price thereof as may be demanded by the defendants without prejudice to the rights and contentions of the parties. The plaintiffs are a public limited company engaged in manufacture of Sodium Nitrite and Sodium Nitrate, which required liquid ammonia for the manufacture. Admittedly, the agreement dated December 16, 1970 was entered into between the plaintiffs and the defendants (which are also a limited company), under which the defendants) i.e. the seller agreed to sell and the plaintiffs agreed to buy liquid ammonia at the price prevailing from time to time at the time of dispatch. The said price was to be paid exclusive of all taxes, duties, or charges like sales tax, octroi, delivery expenses etc. and was subject to revision from time to time. The said agreement was for a period of five years commencing from the date of the first delivery of the liquid ammonia by the seller to the buyer. This period was liable to be extended for such further

periods and on such terms and conditions as may be agreed upon between the parties. Due to some difficulties experienced by the plaintiffs company, the first delivery of liquid ammonia came to be taken in November 1972 and, therefore, it is plaintiff's case that the period of agreement commenced from November, 1972. Period to that, budget excise duty depending upon use of Naptha which was a raw material used in manufacture of liquid ammonia, was varied. Thus, if Naptha was used for the production of fertilizers, the budget duty was to be Rs. 4.15 per K.L., whereas if it was to be used for manufacturing any items other than fertilizers, (which duty was to be Rs. 9.20 per K.L. On March 21, 1973, the defendants informed the plaintiff by their letter of the same date that there current rates for supply of liquid ammonia was Rs. 1840 per M.T. The plaintiffs had written to the defendants prior to that they had made a representation to the Government as per defendants' advice and there was likelihood of reduction in excise duty of Naptha with retrospective effect. The plaintiffs further informed the defendants that they would be making payment of the price of liquid ammonia "under protest" or as provisional payments subject to readjustment on receipt of a final decision as to the rate of excise duty on Naptha. The defendants did not accept this position taken up by the plaintiffs. The plaintiffs continued, however, to purchase liquid ammonia from the defendants at the rate of Rs. 1840/-per M.T.

2. Further complications arose on the announcement of the new Budget proposals in the year 1974, on account of which the defendants had to send a cable to the plaintiffs on March 9, 1974 intimating them that the likely revised basic price would be around Rs. 5000/- to Rs. 6000/- per M.T. Ultimately, by a cable dated March 16, 1974, the defendants intimated to the plaintiffs that the price of liquid ammonia has been revised at Rs. 4,915/- per M.T. effective from March 2, 1974. The plaintiffs, by their letter dated March 19, 1974 pointed out to the defendants that the price was increased unreasonably pointing out at the same time that the Fertilizer Corporation of India Limited had kept their prices at Rs. 2550/-per M.T. Thereafter, on March 27, 1974, the defendants intimated to the plaintiff that price of liquid ammonia was reduced from Rs. 4.915/- to Rs. 4,099/- effective from March 27, 1974. The plaintiffs continued to place orders with the defendants and the latter continued to make supplies. But it is plaintiffs' case that they have paid price under protest and subject to reasonable price being fixed.

3. By their letter dated July 2, 1975, the plaintiffs pointed out to the defendants that under the terms of the agreement the price to be fixed was to be reasonable price keeping in view the price of Naptha, the price of associated gas, cost of electric power and water as forming part of the price structure. The plaintiffs also stated that the defendants were not entitled to fix any price arbitrarily or capriciously. Then it was pointed out that the defendants had unreasonably and unjustifiably increased the price from Rs. 1840/- to Rs. 4915/- per M.T. The subsequent reduction of Rs. 4,099/- was characterized as a small reduction by the plaintiffs. The plaintiffs further stated that since March 6, 1974, the plaintiffs

have been paying the price of liquid ammonia under protest; and were entitled to the refund of such amount as was in excess of the reasonable price. The defendants repudiated this claim of the plaintiffs by their reply dated August 13, 1975. The plaintiffs replied to the said letter by their letter of August 27, 1975. The defendants by their letter of September 15, 1975 reiterated defendants stand stating that the defendants will supply liquid ammonia at its price prevailing at the time of dispatch in terms of the agreement between the parties.

4. By instituting the aforesaid suit, the plaintiffs claimed that the agreement contained in Clause 9 pertaining to arbitration in the main agreement of December 16, 1970 be filed and that the disputes or differences between the parties as disclosed from the aforesaid three letters dated July 3, 1975, August 13, 1975, and September 15, 1975 be referred to arbitration. Pending the suit, an application for interim injunction with the prayers mentioned above was given.

5. The learned trial Judge by his order dated May 10, 1976 dismissed the said application. Hence the present appeal.

6. At the hearing of this appeal, Mr. Bhabha, learned Counsel for the defendants-respondents raised a preliminary objection relating to the maintainability of the appeal; and it is that objection which is to be decided by this judgment. The submission of Mr. Bhabha is based on the provisions of Sections 38 and 40 and the second Schedule of the Act. They may be reproduced:

39(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order: An order:

- (1) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or connecting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award;

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

41. Subject to the provisions of the Act and of rules made there under:

- (a) the provisions of the Code of Civil Procedure, 1908, shall apply to all pro

ceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in Clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

The Second Schedule

(See Section 41)

Powers of Court

1. The preservation, interim custody or sale of any goods, which are the subject-matter of the reference.
2. Securing the amount in difference in the reference.
3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.
4. Interim injunctions or the appointment of a receiver.
5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.
7. According to Mr. Bhabha, the order passed by the trial Court in the present case is an order falling u/s 41(b) of the Act and is governed by the provisions of Section 39(1) in respect of an appeal. As the order in question does not fall within the categories of orders specified in Section 39(1), the appeal, runs the argument, is not competent.
8. Now, it is quite clear that if the order in question falls u/s 41(b) of the Act, present appeal would not be competent. Therefore, the question is whether this order falls u/s 41 (b). The contention of Mr. Mehta for the plaintiffs-appellants is that Section 41(b) is limited to proceedings which have commenced before the arbitrators and are pending; and that in other proceedings under the Act which are pending before the Court, the exercise of the power of granting injunction would be referable to the provisions of the CPC which provisions have been made applicable in their entirety to all proceedings before the Court under the Act. It was further urged that the order being under Order 39 of the Code of Civil Procedure, is passed by virtue of the application of the provisions of the Code as

a whole to proceedings before the Court under the Act by virtue of Section 41 (a) of the Act. Therefore, an order passed under the powers conferred by the Code of Civil Procedure, is not an order under the Act. It is an order under the Code of Civil Procedure. In that case, runs the argument; Section 39(1) has no application, because it speaks of appeals from orders passed under the Act. It was also submitted that the words "under this Act" would mean "under express provisions of the Act". The contention is that an order which is passed by virtue of the powers conferred by the CPC is not an order under the express provisions of the Act. By way of illustration, it was pointed out that an order passed under Order 7, Rule 11 of the CPC in relation to proceedings before the Court under the Act would be an appeal able order. Such was the case in *Tharpal v. Arjunsingh* AIR 1957 Mp 22 . In that case a Division Bench dealt with an order made under the provisions of Order 7, Rule 11 of the CPC and held that to such an order Section 39 of the Act did not apply; and an appeal was competent. It was also held that the words "and from no others" occurring in Section 39(1) of the Act do not cover orders passed under the provisions of the CPC and that those words refer to orders passed under the express provisions of the Act, meaning thereby that an appeal does not lie u/s 39(1) from order passed under the express provisions of the Act other than those enumerated by Sub-clauses (i) to (vi) of Section 39(1) of the Act. In giving interpretation to the phrase "and from no others" the Madhya Bharat High Court followed a decision of Allahabad High Court in *Sri Krishen and Another Vs. Radha Kishen and Another*, . In the Allahabad decision, the impugned order was an order of the rejection of an application to set aside an experts order passed in the suit. The Division Bench of Allahabad High Court also interpreted the words "under the Act" preceding the aforesaid words "and from no others" in Section 39(1) of the Act. The High Court said that the words "under the Act" refer to the express provisions of the Act and not to the provisions contained in the Civil Procedure Code. The argument on behalf of the appellants-plaintiffs, therefore, was that if the order of the trial Court would fall under Order 39 of the Code of Civil Procedure, then that order would not be under an express provision of the Act and the provisions of Section 39 of the Act would not govern that order in respect of its appeal ability It was further contended that under Order 43 of the Code of Civil Procedure, the present order would be appeal able to this Court.

9. First of all we have to examine the question whether the order refusing temporary injunction in the present case would be an order falling within the provisions of Section 41(b) of the Act. Now, one thing is clear and it is this. Section 41 contemplates proceedings before the Court under the Act as well as proceedings pending before the arbitrators whether as a result of reference through the Court or as a result of reference outside the Court. Clause (a) of Section 41 makes the provisions of the CPC applicable inter alia to all proceedings before the Court. Therefore, powers exercisable by a Court under the Code are exercisable by the Court in all proceedings under the Act before it. Having made this general provision, the Legislature in Clause (b) made provision

for certain specific powers of the Court as set out in the Second Schedule and the exercise of those powers. This provision, which is made specifically in respect of matters set out in the Second Schedule, has a double purpose (1) exercise of power for the purpose of and in relation to any proceeding before the Court and (2) exercise of the same powers in respect of the same matters for the purpose of and in relation to arbitration proceedings. The exercise of first category of power is provided by using words of affirmation as shown by the phrase "as it has for the purpose of, and in relation to any proceedings, before the Court." Therefore, exercise of power of the first category has to be done under this Clause (b) because specific provision in that connection is made. The source of power in such a case cannot be traced to Clause (a) and the provisions of the Code made applicable by it. Similarly, when the Court exercises these powers when arbitration proceedings are pending, it exercises those powers u/s 41 (b). Thus, as regards matters set out in the second Schedule, the exercise of powers by the Court whether for the purposes of and in relation to arbitration proceedings or for the purposes of and in relation to any proceedings before the Court, is referable to cause (b) of Section 41 of the Act alone. In any case, the phrase "for the purpose of and in relation to arbitration proceeding" is of wide amplitude and will take in exercise of power by the Court in a pre-reference proceeding pending before it because that proceeding has relation to arbitration proceedings which may follow at a later stage of the case.

9A. To put it in other words, as regards powers of the Court in respect of the matters set out in the Second Schedule, Clause (b) of Section 41 is exhaustive, and these powers the Court exercises by virtue of the said clause and not by virtue of the application of the provisions of the CPC by Clause (a) of Section 41. It is quite clear that the powers in respect of the matters at Sub-clauses (i), (iii), (iv) and (v) are powers of the Court under the provisions of the CPC as well. The Legislature having made provision for the application of the provisions of the Code of Civil Procedure, to all proceedings before the Court by Clause (a), proceeded to carve out certain powers exercisable by the Courts under the CPC and made a specific provision for them by Clause (b) In doing so, it appears that the object of the Legislature was to see that the aforesaid powers as set out in the Second Schedule are exercisable by the Court only under the provisions of Clause (b). If that is the position, the present order can fall under Clause (b) of Section 41 only because it is in respect of a specified matter. The proposition that in respect of the specified matters with which the Court had to deal, the provisions of the Act are exhaustive is beyond challenge. A Division Bench of Calcutta High Court in *Rebati Ranjan Chakravarti Vs. Suranjan Chakravarti and Others*, , in dealing with an order of appointment of receiver, sought as a result of making of an application u/s 8 of the Act, made following observations in paragraph 7 at page 644.

An application for the appointment of a Receiver in an arbitration proceeding can only be made u/s 41 of the Arbitration Act read with the Schedule II. It cannot be made under any other provision of law, because the Arbitration Act is a

complete Code in itself. Where an application is made invoking the Court's jurisdiction under this provision, then an order allowing such an application or dismissing such an application for whatever reasons must be deemed to be orders under the said provision and not outside it.

10. Of course, in Calcutta case, in respect of the disputes, a reference was made to arbitration of a number of arbitrators but as all the arbitrators were persons residing outside the jurisdiction of the High Court, an application was made before the High Court for appointment of umpire u/s 8 of the Act. Along with this application, two applications for appointment of receivers were made. The observations mentioned above, however, are based on the principle that the provisions are exhaustive as the Act is a complete code in itself. In Debendra Nath Singha and Others Vs. Dwijendra Nath Singha and Others, , the learned Single Judge observed in paragraph 38 that the case before him involved interpretation of Section 41(b), particularly the proviso contained therein. The learned Judge said in the said paragraph:

On a proper construction of Section 41 of the Arbitration Act and of Section 41 (b) in particular, I am of the opinion, that the Court has the power and jurisdiction to appoint a receiver or to make any order of interim injunction or to make orders in respect of other matters set out in the Second Schedule in appropriate cases for the purpose of, and in relation to fabrication proceedings; I am further of the opinion that in view of the provisions contained in Section 41 of the Arbitration Act, the power and jurisdiction of the Court to appoint a receiver or to make any order of interim injunction or any order in respect of the other matters set out in the Second Schedule are now governed, controlled and regulated by the said section, and apart from the power and jurisdiction conferred by the said section, the Court has no power and jurisdiction independently of the provisions contained in the said Section 41 to appoint a receiver, to make any order of interim injunction or any order in respect of the other matters a set out in the Second Schedule.

11. Therefore, in respect of the matter set out in the Second Schedule, the Court, whether for the purpose of and in relation to arbitration proceedings or for the purpose of and in relation to any proceedings before it, can exercise powers only under Clause (b) of Section 41 and under no other provision. The power exercised by a Court in respect of matters set out in the Second Schedule in a proceeding before it, is nothing but exercise of the power for the purpose of find in relation to arbitration proceeding. If on the other hand we try to make distinction in the source of the same power depending upon the stage at which it is exercised, a curious result would follow. For instance, exercise of power of granting injunction or appointment of receiver prior to reference to arbitration would have its source in Order 39 or 4") of the Code and will be subject to an appeal under Order 43 of the Code (of course on the footing that the order is not made under an express provision of "he Act); whereas exercise of the same power in respect of the same subject matter after reference to arbitra tion will

not be appeal able, because its source is traceable to Clause (b). In the plain language of Clause (b) coupled with the Second Schedule, there is no indication that the Legislature ever intended such a result.

12. The cases relied upon on behalf of the appellants-plaintiffs were cases pertaining to orders which were not orders in respect of matters set out in the Second Schedule. Therefore, the fact that an appeal was held to be competent in those cases would not be helpful in deciding the question posed in the present case where we are concerned with matters specified in the Second Schedule, and the exercise of powers in respect of those matters.

13. In the result, the preliminary objection raised on behalf of the respondents-defendants succeeds and I hold that the present appeal is not competent.

14. Mr. Mehta, the learned Counsel for the appellants has also made an alternative submission that in case this appeal is held to be not maintainable, the present proceeding may be converted into a Special Civil Application. Mr. Bhabha for the respondents objected to this prayer, on the ground that though the memorandum of the present appeal was drafted as a petition under Article 227 of the Constitution of India, D.A. Desai, J. while admitting the petition ordered that the proceeding be numbered as an appeal from order. The contention was that this order would amount to refusal to entertain this proceeding as an application under Article 227 of the Constitution; and I have no power to review or vary that order. This argument, to my mind, is misconceived. It is quite clear that when this petition was presented before D.A. Desai, J. there were two courses open to the Court either to entertain it as an application under Article 227 of the Constitution or to entertain it as an appeal. The fact that the learned Judge passed an order stating "this proceeding be numbered as appeal from order" only shows that out of the two courses one course was chosen by the Court. The order did not amount to negating the right of the petitioner to move the Court under Article 227. In fact, there is nothing in this order passed by D.A. Desai, J. which shows even by necessary implication that the Court decided the question of maintainability of this application under Article 227 and held that it was not maintainable, and then proceeded to entertain it as an appeal from order. The order only shows that out of the two courses open, one course was adopted. That does not preclude the Court from adopting the other course when the interest of justice so require. In the present case, it is quite clear that initially the appellants wanted to file this as a Special Civil Application under Article 227. However, as it was thought at that time that an appeal from order would lie, the same was numbered as an appeal from order. Now, that the plaintiffs-appellants fail to obtain relief from this Court in this proceeding as an appeal from order, there is no reason why the plaintiffs should be debarred from approaching this Court under Article 227 of the Constitution. I, therefore, overrule the objection raised by Mr. Bhabha.

15. In the result, present appeal is held to be not maintainable; and at the request of Mr. Mehta for the appellants, permit/; on is granted to convert the

present proceeding into Special Civil Application under Article 227 of the Constitution of India. The same will be numbered as such and placed before the Court dealing with Special Civil Applications under Article 227. Looking to the question of interpretation involved, it is directed that each party will bear its own costs of this appeal from order.