

(2007) 09 OHC CK 0004

In the Orissa High Court

Case No : Misc. Case No. 17 of 2007 arising out of ARBP No. 9 of 2006

Kishore Kumar Sahoo

APPELLANT

Vs

Lafarge India Pvt. Ltd and Another

RESPONDENT

Date of Decision : 07-09-2007

Acts Referred:

Arbitration Act, 1940 — Section 16(1), 20, 41

Arbitration and Conciliation Act, 1996 — Section 11, 11(11), 11(6)

Contract Act, 1872 — Section 9

Citation : (2007) 09 OHC CK 0004

Hon'ble Judges : A.K. Ganguly, C.J

Bench : Single Bench

Advocate : S.C. Parija, Avijit Pal and B.P. Mohapatro, for the Appellant; Jishnu Chowdhury, P.K. Srivastava, S.S. Jena and P.K. Panda, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Ganguly, C.J.—ARBP No. 9 of 2006 was filed by the Petitioner seeking appointment of an Arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act"). In that matter the Hon"ble Chief Justice on 14.7.2006 passed an order for issuing notice upon the Opposite Parties by registered post with A.D. making it returnable within six weeks. Thereafter, from the office notes it appears that notice was served upon the Opposite Parties and Opposite Parties entered appearance through their Counsel. On 1.12.2006, the Hon"ble Chief Justice directed listing of the matter two weeks thereafter On 5.1.2007 there is another order by Hon"ble the Chief Justice for listing the matter. The matter was listed on 9.3.2007 and on that date the matter was called and the Learned Counsel for the Petitioner was heard, but nobody appeared for the Opposite Parties and there was no prayer even for adjournment. This Court after hearing the Learned Counsel for the Petitioner by a reasoned order, appointed a Learned retired Judge of this Court the sole Arbitrator and it was further directed that the arbitration proceeding be completed and award be passed within six months from the date of entering

upon reference by the Learned Arbitrator.

2. Pursuant to the said order, this Court has been told that the Learned Arbitrator entered upon reference and held a few sittings. Then, an application was filed by the Opposite Parties being Misc. Case No. 17 of 2007 for recalling the Order Dated 9.3.2007. On the said Misc. Case, the matter has been heard on contest on several dates.

3. From the facts which have been disclosed, it appears that the Opposite Party in ARBP No. 9 of 2006 and the Petitioner in Misc. Case No. 17 of 2007, Lafarge India Pvt. Ltd. (here in after referred to as the "said company") filed a petition u/s 11 of the said Act before the Calcutta High Court at Kolkata on 18th August, 2006 but no order has been passed on the same. However, the Learned Counsel for the company urged that it filed an application for dismissal of the Section 11 application filed by Kishore Kumar Sahoo (hereinafter referred to as "Sahoo") before this Court vide Misc. Case No. 35 of 2006 and on that application the case was heard on 1.12.2006 before the Hon'ble Chief Justice and the Learned Counsel for Sahoo wanted an adjournment in order to cite some Judgments. However the Order Dated 1.12.2006 by the Hon'ble Chief Justice does not indicate that.

4. It is admitted by the Learned Counsel for the parties that there is an Arbitration Clause between the parties and it is also admitted that there are arbitrable disputes between the parties, but the parties cannot agree on their choice of Arbitrator and both the parties applied for appointment of Arbitrator, as pointed out above, u/s 11 of the said Act.

5. The main ground taken in Misc. Case No. 17 of 2007 praying for recalling of the order of this Court dated 9.3.2007 rests on Clause 18 in the agreement which runs as under:

18. Any proceedings under this Agreement to be adopted by either of the party shall be subject to the jurisdiction of the Courts in Calcutta/West Bengal only.

It was argued that the said clause was not considered by this Court in its Order Dated 9.3.2007 and it should be recalled and it was also urged that in view of that Clause, arbitration can only take place in Calcutta/West Bengal only and the application u/s 11 of the said Act before Orissa High Court is misconceived and so the Order Dated 9.3.2007 should be recalled.

6. Therefore, the first question which arises is whether Order Dated 9.3.2007 can be recalled when the same had been passed after hearing the Petitioner and upon notice on the Opposite Parties, and pursuant to notice they entered appearance but did not appear on the date when the order was passed. It was urged that since the order passed by the Chief Justice u/s 11 is a judicial order, as has been determined by the Constitution Bench judgment of the Supreme Court in the case of S.B.P. and Company v. Patel Engineering Ltd. and Anr. reported in (2005) 8 SCC 618, Chief Justice has the inherent power to recall his

own order in the absence of any contrary indication in the governing statute. Reference in this connection has been made to the Judgments of the Supreme Court in the case of *The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others*, , in the case of *SBP & Company v. Patel Engineering Ltd. and Anr.* reported in (2005) 8 SCC 618, in the case of *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, to the judgment of the Madhya Pradesh High Court in the case of *Sunderlal Mannalal Vs. Nandramdas Dwarkadas and Others*, , to the judgment of the Calcutta High Court in the case of *Smt. Ratu Datta v. State of West Bengal and Ors.* reported in 1989 (1) CHN 274, also to the judgment of the Kerala High Court in the case of *K.V. Aboo v. Commissioner for Workmen's Compensation*, reported in 1977 (2) LW 134 and also to the judgment of the Madras High Court in the case of *Chigurupati Subbanna v. District Labour Officer, East Godavari*, reported in AIR 1930 Mad 618.

7. While considering the aforesaid decisions this Court is of the opinion that the power u/s 11 of the said Act is given to the Chief Justice and not given to a Court even if the order which is passed by the Chief Justice is a judicial order. This is made clear in *Patel Engineering's* case. In Review Petition No. 144 of 2006, I held that once an order is passed by the Chief Justice u/s 11(6) after hearing both the parties, the same cannot be reviewed. But there is a distinction between review of an order and the recalling of an order which has been passed without hearing the other side. It is not disputed that when the order was passed by me on 9.3.2007 u/s 11, there was no representation by the company despite notice being served on it. Therefore, this application is virtually an application for recalling the order, which was passed ex parte against the company and is not an application for review. Review is normally contemplated under Order 47 CPC in a case where both sides have been heard and order is passed or when an order has been passed which affects a party but it was not noticed or not impleaded. But in this case the company, though impleaded and noticed, was not heard for default on its part.

8. In *Ghanashyam Mohapatra and Others Vs. Suryamani Swain*, Learned Division Bench of this Court was pleased to make a distinction between an application for review and one for restoration. (See paragraph 18 of the report). The said distinction is well known. However, the present application is not one for restoration inasmuch as the Order Dated 9th March, 2007 was passed on merit. Therefore this is an application, which has been filed for recalling the previous order on certain grounds.

9. I am of the opinion that even if the power u/s 11 of the said Act is not a power given to a Court, but is a power given to the Chief Justice. The Chief Justice, being the highest judicial authority of the State, has the inherent power of doing justice and in a given case, the power of recall of an order passed by him- previously, which is a judicial one, is incidental to such inherent power of the Chief Justice. Therefore, Misc. Application No. 17 of 2007, which is an application

for recalling the previous order is maintainable.

10. After allowing the prayer for recall, this Court heard the Learned Counsel for both the parties at length.

11. The main argument on behalf of the Learned Counsel for the said Company was that this Court has no jurisdiction to appoint an Arbitrator in view of Clause 18 in the Arbitration Clause which has been set out herein above.

12. In support of that contention, Learned Counsel relied on the judgment of the Supreme Court in the case of Hakam Sing Vs. Gammon (India) Ltd., . In that case the relevant clauses in the contract are set out:

12. In the event of any dispute arising out of this sub-contract, the parties hereto agree that the matter shall be referred to arbitration by two Arbitrators under the Arbitration Act of 1940 and such amendments thereto as may be enacted thereafter.

13. Notwithstanding the place where the work under this contract is to be executed, it is mutually understood and agreed by and between the parties hereto that this contract shall be deemed to have been entered into by the parties concerned in the City of Bombay and the Court of law in the City of Bombay alone shall have jurisdiction to adjudicate thereon.

13. In the context of those clauses" the dispute arose between the parties as a petition was filed before the Subordinate Judge at Varanasi for a reference u/s 20 of Arbitration Act" 1940. It may be noted that u/s 41 of the old Act; CPC was applicable to the proceedings under the said Act in its entirety. Therefore, the Court by referring to Clauses 12 and 13 of the contract and the provisions of Section 41 of the old Act came to the conclusion that where two more Courts have jurisdiction, under the CPC to try a suit or proceeding and an agreement between the parties is to the effect that the dispute between them shall be tried in one of such Courts the same is not contrary to public policy. In coming to that conclusion the Court held that the Respondent had their Head Office at Bombay from which they carry on their business, so the Bombay High Court shall have the jurisdiction to try the proceeding relating to arbitration.

14. In the instant case, Clause 18 which has been referred to, is substantially different from Clauses 12 and 13 which were considered in Hakam Singh. In Clause 18 there is no reference to arbitration. The arbitration clause in this code contained in cause 24 of the agreement which is as follows:

24. Any dispute or difference between the parties hereto arises out of this agreement shall be referred to Arbitration of Single Arbitration to be operated by the parties hereto and if not to the Arbitration of two Arbitrators one each to be appointed by either of the parties in accordance with the provisions of the Indian Arbitration Act or its modification or reconstitution.

Therefore, Clause 18 cannot be treated as forum selection clause so far as

arbitration is concerned. Reference in this case may be made to Section 16(1)(a) of the new Act, which is set out below:

16. (1) The arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

15. It is clear from Section 16(1)(a), that arbitration clause is to be treated as an agreement independent of the other terms of the contract. In the instant case, arbitration clause does not refer to any forum selection, rather it provides that arbitration will take place in accordance with the relevant statutory provisions.

16. In the instant case, the Petitioner was appointed the Consignment Agent of the Company for selling its cement at Angul (Banarpal) and to provide services of transport, unloading and storage. The Company has an office at Bhubaneswar within the jurisdiction of this Court and transactions were also made from the said office. The registered office of the Company is at Nariman Point, Mumbai and it is carrying on business at Gopal Nagar, District Bishnupur in the State of M.P. and it has a Principal dump at Angul (Banaarpal) and Cuttack. The Petitioner was appointed a Consignment Agent of the Company for selling its cement in Angul and for transportation, unloading and storage. All notices to the said company are directed to be given to its office at Mumbai (clause 17 of the agreement). It may be true that the agreement was entered into at Calcutta, but it cannot be said that a substantial portion of the cause of action had not taken place in the State of Orissa. Therefore, factually this case is distinguishable from the ratio in the case of Hakam Singh and from the facts discussed above, it cannot be said that the Chief Justice of this Court has no jurisdiction to entertain an application u/s 11 of the Act.

17. The next case cited on this point was the judgment in the case of A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, . In that case also it was held where more than two Courts are having jurisdiction, the contract between the parties vesting jurisdiction in one of them is not against the public policy. It was not a case under Arbitration Act. In that case, Clause 11 of the Agreement provided as follows:

Any dispute arising out of the sale shall be subject to Kaira jurisdiction.

In paragraph 11 of the said Judgment, Learned Judges have held that the jurisdiction of the Court in the matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors. Following the aforesaid principle, it cannot be said that the Chief Justice of this Court, in the facts of this case, has no jurisdiction since there is forum selection clause in the arbitration agreement. In the case of A.B.C. Laminart Pvt. Ltd. also, Learned Judges held that the jurisdiction of the Court at Salem where a suit was filed, was not excluded by Clause 11 inasmuch as part of cause of action arose within

the jurisdiction of the Court at Salem and the Court held that the suit filed at Salem despite the aforesaid clause is maintainable. Therefore, the decision in A.B.C. Laminart does not support this contentions of the Petitioner's Counsel.

18. Reliance was also placed on the decision of the Supreme Court in the case of M/s. Angile Insulations Vs. M/s. Davy Ashmore India Ltd. and another, . That was also not a case under Arbitration Act, but that was a case relating to civil suit. In that case, it was decided that where two Courts are having jurisdiction and parties stipulate in the contract to vest jurisdiction in one such Court to try the disputes arising between themselves and if the contract is unambiguous, explicit and clear, the suit would lie in the Court agreed to by the parties and the other Court will have no jurisdiction. In that case, the relevant clause of the contract where jurisdiction is stipulated is as follows:

This work order is issued subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, fall within the jurisdiction of the above Court only.

The Court held that the clause is unambiguous and therefore the jurisdiction would lie within the High Court of Karnataka. In the instant case, as pointed out above Clause 18 does not refer to Arbitration Clause. So if a suit is filed between the parties, that clause may have some relevance. But arbitration will be governed by Clause 24 of the agreement, which is a different clause and that clause does not have any chosen forum. Therefore, the decision in the case of Angile Insulations has no application in the facts of this case.

19. Reliance was also placed on the judgment of the Supreme Court in the case of M/s. Shriram City Union Finance Corporation Ltd. v. Rama Mishra, reported in AIR 2002 SC 2402. That was also a case u/s 9 of the Contract Act and it was not dealing with Arbitration at all. In that judgment the principle in the case of Hakam Singh has been reiterated. In that case Clause 34 of the agreement was the subject matter of interpretation by the Hon"ble Court. Clause 34 is as follows:

34. Subject to the provisions of Clause 32 above it is expressly agreed by and between" the parties herein above that any suit, application and or any other legal proceeding with regard to any matter, claims, differences and for disputes arising out of this agreement shall be filed and for referred to the Courts in Calcutta for the purpose of jurisdiction.

20. Considering the said clause, Hon"ble Apex Court held that it is open for a party for his convenience to fix the jurisdiction of any competent Court to have their disputes adjudicated by that Court alone. It was also said that if there are two equally competent Courts, it was open for the parties to choose anyone of the two Courts to decide their disputes. Here, this Court finds that in the instant case, there is no such selection of forum in the Arbitration Clause which is separate from Clause 18. In view of the provisions under Clause 18 between the parties, the suit can be filed in accordance with the said Clause. But since the part of cause of action has arisen within the jurisdiction of this Court, the Chief

Justice of this Court has the jurisdiction to entertain an application u/s 11 of the Act.

21. Reliance was also placed on the judgment of the Supreme Court in the case of New Moga Transport Company, through its Proprietor Krishanlal Jhanwar Vs. United India Insurance Co. Ltd. and Others, . This was also not a case relating to arbitration. Hon"ble Learned Judges of the Supreme Court held that under Clauses (a) to (c) of Section 20 of Code of Civil Procedure, the Plaintiff has a choice of forum and the Plaintiff cannot be compelled to go to the place of residence or business of the Defendant. So if the Defendant desires to be protected from being dragged into a litigation at some place merely because the cause of action arises there; it can save itself from such a situation by an exclusion clause. In paragraph 14 of the Judgment, Learned Judges reiterating the principle in Hakam Singh held that where two Courts have jurisdiction to try a proceeding, the agreement between the parties to have the dispute adjudicated in anyone of them is not opposed to public policy. But the parties cannot confer jurisdiction on a Court which does not have any jurisdiction to deal with the matter. For the reasons discussed above, this decision has no application in the facts of this case.

22. Learned Counsel also relied on a judgment of the Supreme Court in the case of Golkonda Engineering Enterprises Ltd. Secunderabad v. Assistant Director Genral (MP), Bharat Sanchar Nigam Ltd. reported in 2006 (1) Arb. LR 368. In that case, Clause 22 was the jurisdiction Clause which is as follows:

It is also a condition of this contract that the Court which has territorial jurisdiction upon the place from which the acceptance of tenders is issued shall have absolute jurisdiction for adjudicating any differences or disputes arising of this contract.

Under Clause 22, it was made very clear that the place from which acceptance of tender was issued shall have the absolute jurisdiction for adjudicating any dispute out of a contract. But in the instant case, the socalled jurisdiction clause under Clause 18 which has been set out above, does not fix the jurisdiction of any Court under any specific terms. Therefore, the said Clause cannot determine the jurisdiction of the Chief Justice for appointment of an Arbitrator u/s 11 of the said Act, specially when the Arbitration Clause is silent on the matter. On the other hand, the Arbitration Clause is to the effect that the Arbitration shall be in accordance with the provisions of the Act. Therefore, the Act will govern in so far as appointment of Arbitrator is concerned. The above decisions cited by the Learned Counsel for the Petitioner do not show that the Order Dated 9.3.2007 appointing an Arbitrator is to be recalled.

23. The independent existence and status of an arbitration clause has always been recognized in arbitration law and now this position is statutorily recognized u/s 16(1)(a) of the said Act (See National Agricultural Co-operative Marketing Federation Limited v. Gains Trading Ltd. reported in AIR 2007 SCW 4030, para 6,

page 4032).

24. It cannot be disputed while appointing an arbitrator u/s 11 of the said Act, the Chief Justice is concerned with the arbitration clause and that has been quoted in the Order Dated 9.3.2007

25. Apart from that, a substantial part of cause of action has arisen within the territorial limits of this Hon"ble High Court. The application u/s 11 of the Act, filed by Sahoo before this Hon"ble Court is earlier in point of time. In view of Section 11(11) of the Act, the Chief Justice of this Hon"ble Court is competent to appoint the arbitrator, as it did, by Order Dated 9.3.2007.

26. A Learned retired Judge of this High Court has been appointed the Arbitrator and the Petitioner has not expressed any apprehension of any prejudice in appearing before the Arbitrator so appointed.

27. Therefore, considering the matter from all its aspects this Court does not, for the reasons discussed above, feel inclined to recall the Order Dated 9.3.2007. The Learned Arbitrator may proceed with the arbitration as expeditiously as possible and pass an award.

28. The Misc. Case No. 17 of 2007 is accordingly dismissed.

29. Misc. Case No. 18 of 2007 is also dismissed.

30. There shall be no order as to costs.