

(2017) 01 CAL CK 0049

In the Calcutta High Court

Case No : F.M.A. No. 30 of 2015 (F.M.A.T. No. 1011 of 2014)

Lafarge India Private Limited

APPELLANT

Vs

Kishore Kumar Sahoo

RESPONDENT

Date of Decision : 10-01-2017

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2017) AIR(Calcutta) 116 : (2017) 1 CalLJ 546 : (2017) 2 CalLT 85

Hon'ble Judges : Mr. Biswanath Somadder and Mr. Sankar Acharyya, JJ.

Bench : Division Bench

Advocate : Mr. Utpal Bose, Sr. Advocate, Mr. Sudha Satva Banerjee, Mr. Prantik Garai, Mr. Chayan Gupta, Mr. Pramod Kumar Shrivastava and Mr. Prabhat Kumar Shrivastava, Advocates, for the Appellant; Mr. Probal Kr. Mukherjee, Sr. Advocate, Mr. Mohit Gupta, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Biswanath Somadder, J.—The instant appeal arises out of a judgment and order dated 5th August, 2014, passed by the learned Additional District Judge, 7th Court at Alipore, District - South 24-Parganas, dismissing an application under section 34 of the Arbitration and Conciliation Act, 1996, being Misc. Case No.39 of 2012, taken out by Lafarge India Private Limited - the appellant herein - on the ground that the said application was not maintainable before it.

2. The genesis of the matter is that certain disputes and differences arose between the appellant and one Kishore Sahoo, who is a Commission Agent, during the course of their business transactions which gave rise to issuance of a notice dated 11th April, 2006, by Kishore Sahoo to the appellant requesting for appointment of a Sole Arbitrator to adjudicate certain disputes pertaining to an agreement dated 12th February, 2001. On 22nd May, 2006, Kishore Sahoo filed an application under section 11(6) before the Orissa High Court and by an order dated 9th March, 2007, a former Judge of the said High Court was appointed as the Sole Arbitrator. In the meanwhile, the appellant herein had filed an

application before the Calcutta High Court on 17th August, 2006, under section 11 of the Arbitration and Conciliation Act, 1996. After the order was passed by the Orissa High Court on 9th March, 2007, in the section 11 application filed before it, an application was taken out by the appellant before the said Court on 7th September, 2007, seeking recall of the order dated 9th March, 2007, whereby a former Judge of the Orissa High Court was appointed as Arbitrator. That application was dismissed which resulted in filing of a SLP before the Hon"ble Supreme Court of India by the appellant herein. The following order was passed by the Supreme Court on 25th March, 2009:-

"Leave granted. Without examining the various points urged, we feel interest of justice would be best served by appointing an arbitrator different from the one appointed by the High Court by the impugned order. It shall not be construed that we have expressed any opinion about competence of the concerned retired Judge who was appointed. But considering the nature of the controversy, it would be appropriate to appoint some other arbitrator. The parties have agreed that Shri H.L. Agarwal, retired Chief Justice of Orissa High Court be appointed as the arbitrator. The terms of the arbitration, fees, etc. shall be fixed by Justice Agarwal. The appeal is accordingly disposed of."

3. Subsequently, the arbitration proceedings took place and finally an award was passed by the learned Arbitrator on 12th December, 2011. The appellant herein preferred an application under section 34 of the Arbitration and Conciliation Act, 1996 challenging the award dated 12th December, 2011. The said application, registered as Misc. Case No.39 of 2012, was filed on 3rd March, 2012, which was dismissed by the judgment and order dated 5th August, 2014, giving rise to the present appeal.

4. It appears that the learned Court below while hearing out the section 34 application also took into consideration a petition filed by the respondent herein challenging the maintainability of the section 34 application on the ground that the Court had no jurisdiction to hear the setting aside application in view of the bar provided under section 42 of the Arbitration and Conciliation Act, 1996.

5. According to the respondent, in view of the judgment of the Orissa High Court having been upheld by the Hon"ble Supreme Court of India, the competent Court in Orissa had the jurisdiction to entertain the application under section 34 of the Arbitration and Conciliation Act, 1996 and no other Courts, including the Court of the learned Additional District Judge at Alipore, had jurisdiction to entertain the application under section 34 of the Arbitration and Conciliation Act, 1996. The respondent, as it appears, further contended before the learned Court below that the appellant having participated in the arbitral proceedings had waived its right to object in respect of the jurisdiction of the arbitral tribunal under section 4 of the Arbitration and Conciliation Act, 1996. It was also argued on behalf of the respondent that a separate petition had been filed by him before the learned District Judge, Cuttack, under section 34 of the Arbitration and Conciliation Act, 1996. According to the respondent, the learned District Judge, Cuttack, was the

competent Court having jurisdiction to entertain the section 34 application. It was also contended by the respondent that the appellant herein had filed a maintainability application before the learned District Judge, Cuttack, in respect of the section 34 application filed before it, which stood dismissed.

6. After considering the submissions made by the respective parties - which have been set-out in details in the impugned judgment and order - the learned Court below proceeded to dismiss the appellant's application under section 34 of the Arbitration and Conciliation Act, 1996 on the point of maintainability, with the following observations:-

"On perusal of the Order of the Hon''ble Orissa High Court dated 07.09.07, it appears that similar point as agitated in this Misc. Case in hand was raised that in view of Clause 18 of the Agreement, arbitration could only be taken place in Calcutta/West Bengal. In this misc. case also it is argued that consequent to the said Clause-18, the petition U/S. 34 of the Act to set aside the award, can only be filed in the Courts in Calcutta, West Bengal.

The copy of the Order of the Hon''ble Orissa High Court dated 07.09.07 further reveals that the several case laws which have been cited before this court viz. S.B.P. & Co. v. Patel Engineering Ltd. reported in (2005) 8 SCC 618, Hakkam Singh v. M/S Gammon (India) Ltd. reported in (1971) 1 SCC 286 and A.B.C. Laminart (P) Ltd. & another v. A.P. Agencies, Salem reported in (1989) 2 SCC 163, were also referred before the Hon''ble the Chief Justice of Orissa High Court and after considering these Case Laws, Hon''ble Orissa High Court rejected the contention raised by the petitioner that the Clause 18 deals with forum selection clause with regard to arbitration. It has been held that Clause- 18 cannot be treated as forum selection clause so far as arbitration is concerned and found that the arbitration clause in this case is contained in Clause 24 of the agreement."

Against the said order, petitioner company moved to the Hon''ble Supreme Court and Hon''ble Supreme Court in Civil Appeal No.2139-2140 of 2004 (arising out of SLP(C) No.20341-20342/2007) vide Order dated 25.03.09 passed the following order :

"Leave granted. Without examining the various points urged. We feel interest of justice would be best served by appointing an arbitrator different from the one appointed by the High Court by the impugned order. It shall not be construed that we have expressed any opinion about competence of the concerned retired Judge who was appointed. But considering the nature of the controversy, it would be appropriate to appoint some other arbitrator. The parties have agreed that Shri H.C. Agarwal, retired Chief Justice of Orissa High Court be appointed as the arbitrator.

The terms of the arbitration, fees, etc. shall be fixed by Justice Agarwal. The appeal is accordingly disposed of."

So though the Hon''ble Apex Court changed the arbitrator appointed by the Hon''ble Orissa High Court but did not pass any order with regard to jurisdiction of the Hon''ble Orissa High Court to appoint an arbitrator U/S.11(6) of the Act. As such after the above order of not only Hon''ble Orissa High Court that it had the jurisdiction to entertain the petition filed by the respondent U/S.11(6) of the Act but also after the order of the Hon''ble Apex Court, there is hardly any scope to challenge the question of jurisdiction of Orissa High Court and consequent to the same the argument about Clause 18 in the agreement being forum selection clause, is devoid of any merit.

In the said order passed by the Hon''ble the Chief Justice on 07.09.07 in the Misc. Case No.17 of 2007, it has been clearly observed that the cause of action in the case did arise within the jurisdiction of the said court. So for the said reason, the petition under Section 34 of the Act will lie in the "Court" as specified under Section 2(1)(e) of the Act, in Orissa. Since the decision of the Hon''ble Chief Justice under Section 11(6) of the Act is final, such finality would involve a pronouncement on the authority to receive the petitions subsequently and as such Section 42 of the Arbitration and Conciliation Act will operate as a bar.

Now coming to the argument that Section 42 will not operate as a bar as the Order U/S.11(6) of the Act by Hon''ble Chief Justice is not of a "Court", without entering into detail discussions in this regard, it may be pertinent to point out that even accepting the argument of Ld. Counsel for the petitioner, there cannot be any denial and dispute that the Court of Ld. District Judge, Cuttack, Orissa is a "Court" within the meaning of Section 2(e) of the Arbitration and Conciliation Act, 1996. An application U/S.34 has already been filed by the respondent before the Ld. District Judge, Cuttack and petitioner has appeared in that case and challenged the maintainability of the petition filed by the respondent U/S.34 of the said Act on the point of jurisdiction. On hearing both sides, Ld. District Judge, Cuttack rejected the petition challenging his jurisdiction to hear the petition U/S.34 of the Act. Thereafter, according to the petitioner, the Order passed by the Ld. District Judge, Cuttack on 05.11.12 has been challenged before the Hon''ble Orissa High Court but the respondent has denied of having any notice of the same and on this ground it has been argued by the Ld. Counsel for the respondent that the Order dated 05.11.12 passed by the Ld. District Judge, Cuttack since has not been challenged has reached to its finality and binding upon the parties.

I must point out that if according to the petitioner-company, order of Ld. District Judge, Cuttack has already been challenged before the Hon''ble High Court, Orissa then it is not understandable as to why the petitioner-company has approached this court over the self same matter. In my humble view when the Hon''ble High Court of Orissa is already seized of the matter, this petition U/S.34 of the Act cannot be entertained.

So for the reason as discussed above, case laws cited by the Ld. Counsel for the petitioner-company that an order under Section 11(6) of the Act is not by a

"Court", will have no application in the given facts and circumstances of this case and so I find it not necessary to discuss those case laws. I have already mentioned above that the Ld. District Judge, Cuttack is very much a court within the meaning of Section 2(1)(e) of the Arbitration and Conciliation Act, 1996.

So in view of the discussions as highlighted above, I find that this Misc. Case filed by the petitioner-company under Section 34 of the Arbitration and Conciliation Act is not maintainable and as such the case is liable to be dismissed.

Hence, it is

Ordered

That the Miscellaneous Case No.39 of 2012 is dismissed on contest as not maintainable"

7. The question which falls for consideration in the facts of the instant case is whether the learned Court below was right in holding that the application under section 34 of the Arbitration and Conciliation Act, 1996 - taken out by the appellant herein - was not maintainable for such reasons as observed by the learned Judge.

8. It appears that in the facts of the instant case when the order was passed by the Hon'ble Supreme Court on 25th March, 2009 in the SLP preferred by the appellant herein, the Supreme Court merely changed the personnel of the Arbitrator by considering the nature of the controversy and without examining the various points urged, purely in the interest of justice. The Supreme Court while appointing a former Chief Justice of the Orissa High Court as Arbitrator also made it clear that such appointment shall not be construed as an expression of any opinion with regard to the competence of the concerned retired Judge who was previously appointed by the Orissa High Court.

9. It is quite obvious that applications under section 11 are not to be moved before the "Court" as defined under clause (e) of sub-section (1) of section 2 of the Arbitration and Conciliation Act, 1996, but before the Chief Justice of either the High Court or the Supreme Court, as the case may be or their delegates. As a necessary corollary, section 42 would not apply in respect of applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not a "Court" as defined under section 2(1)(e) of the Arbitration and Conciliation Act, 1996. The learned Court below, however, while proceeding to dismiss the section 34 application on the point of maintainability took into consideration the order of the Hon'ble Chief Justice of Orissa High Court dated 7th September, 2007 in Misc. Case No.17 of 2007 passed in the section 11 application filed by the respondent before that Court which gave rise to the SLP preferred by the appellant herein. The learned Court below proceeded to observe that for the said reason, the petition under section 34 of the Arbitration and Conciliation Act, 1996 would lie in the "Court" as specified under section 2(1)(e) of the Arbitration and Conciliation Act, 1996 in Orissa, since

decision of the Chief Justice under section 11(6) of the Arbitration and Conciliation Act, 1996 was final and such finality would involve a pronouncement on the authority to receive the petitions subsequently and as such, section 42 of the Arbitration and Conciliation Act, 1996, would operate as a bar. The learned Court below thereafter proceeded to observe that even if argument advanced by the petitioner (being the appellant herein) was accepted with regard to section 42 not operating as a bar in respect of an order passed under section 11 of the Arbitration and Conciliation Act, 1996, there could not be any denial and dispute that the Court of the learned District Judge, Cuttack, Orissa, was the "Court" within the meaning of section 2(1)(e) of the Arbitration and Conciliation Act, 1996. The learned Court below further took into account that since an application under section 34 of the Arbitration and Conciliation Act, 1996 had already been filed by the respondent before the learned District Judge, Cuttack and the petitioner had appeared in that case and challenged its maintainability, the appellant could not have approached the learned Court below over the selfsame cause of action.

10. While making the above observations, the learned Court below did not take into consideration the settled legal proposition - as observed earlier - with regard to section 11 applications not being moved before the "Court" as statutorily defined under section 2(1)(e) of the Arbitration and Conciliation Act, 1996, but before the Chief Justice of either of the High Court or of the Supreme Court, as the case may be, or their delegates. As a necessary corollary, section 42 would not apply to such applications made before the Chief Justice or his delegate for the simple reason that the Chief Justice or his delegate is not a "Court" as defined under section 2(1)(e) of the Arbitration and Conciliation Act, 1996. That apart, the learned Court below also did not take into consideration one vitally important fact and that is, whether the section 34 application filed before it was a prior point of time in relation to the section 34 application filed by the respondent before the learned District Judge at Cuttack, or not. The answer was a matter of record and it is quite evident that the section 34 application filed by the appellant herein before the learned Court below was at a prior point of time in relation to the application under section 34 of the Arbitration and Conciliation Act, 1996 which was filed by the respondent before the learned District Judge at Cuttack subsequently.

11. At this juncture, we may take notice of the law laid down by the Supreme Court while considering the scope of section 2(1)(e) and section 42 of the Arbitration and Conciliation Act, 1996 in *State of West Bengal & Ors. v. Associated Contractors*, reported in (2015) 1 SCC 32, the Supreme Court arrived at the following conclusions:

"25. Our conclusions therefore on Section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having

original civil jurisdiction in the State, and no other court as "court" for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression "with respect to an arbitration agreement" makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under Part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be "court" for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.

The reference is answered accordingly."

12. As we have already observed that the application under section 34 of the Arbitration and Conciliation Act, 1996 filed before the learned Court below was at a prior point of time in relation to the application under section 34 of the of the Arbitration and Conciliation Act, 1996 filed by the respondent before the learned District Judge at Cuttack, we are of the view that the application under section 34 of the Arbitration and Conciliation Act, which was filed by the appellant herein, was maintainable before the learned Court below.

13. For such reasons as stated above, the impugned judgment and order of the learned Additional District Judge at Alipore, South 24-Parganas, is liable to be set aside and is accordingly set aside. The learned Court below shall proceed to dispose of the application under section 34 of the Arbitration and Conciliation Act, 1996 filed by the appellant herein on its merit, as expeditiously as possible.

14. The appeal stands allowed accordingly.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties.

Sankar Acharyya, J. : I agree.