
(2011) 09 CAL CK 0065
In the Calcutta High Court

Case No : GA No's. 2427 and 2625 of 2011 and CS No. 185 of 2011

LMJ International Ltd.

APPELLANT

Vs

Sleepwell Industries Company Ltd. and Another

RESPONDENT

Date of Decision : 09-09-2011

Acts Referred:

Grain and Feed Trade Association Arbitration Rules — Rule 10, 125, 21, 3.2

Citation : (2011) 09 CAL CK 0065

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Ranjan Deb and S.N. Mitra, Ashish Chakraborty and D.N. Sharma, for the Appellant; S.N. Mookerji and T.K. Bose, Dhruba Ghosh and Viswanathan, for the Respondent

Final Decision : Allowed

Judgement

Dipankar Datta, J.—Feeling aggrieved by the ex-parte ad-interim order of injunction dated August 10, 2011 passed on GA 2427 of 2011 filed in connection with CS 185 of 2011, the Respondent No. 1 has applied for vacating the same.

2. Mr. Mookerji, learned senior advocate appearing in support of the application contended that the suit instituted by the Petitioner is not maintainable having regard to the arbitration clause in the contract between the parties. Without waving such contention, it was further contended that the Petitioner abused the process of the Court while obtaining the ex-parte ad-interim order of injunction. He referred to prayer (a) of the application for injunction whereby the Petitioner claimed and obtained an order restraining the Respondent No. 1 from taking steps in terms of the letters dated July 28, 2011, being annexures X and Y thereto. According to him, the said letters do not relate to the subject contract bearing No. #LMJ/SIC/OCT/01 dated October 25, 2010 but were issued in connection with a different contract. It was next contended that the Petitioner did not approach the Court with clean hands. Material facts were suppressed to suit the Petitioner's convenience. The addendum by which the clause in the original

contract regarding payment was amended from time to time, the report issued by the competent authority of the Govt. of Bangladesh upon inspection of the rice supplied to it, the Bill of Exchange in its entirety, etc. were not disclosed. Grant of injunction being a discretionary relief, he contended that the Petitioner by conduct has disentitled it to continuance of the order of injunction. Finally, it was contented that having regard to the terms of the GAFTA Arbitration Rules, 125 (hereafter the GAFTA Rules) and in particular Clause 2.2 thereof, notice of arbitration given by the Respondent No. 1 and appointment of an arbitrator by it is not at all time barred, as projected by the Petitioner. He further contended that even if it is time-barred, any grievance that the Petitioner might have had in respect of reference of an alleged time-barred dispute to arbitration ought to be urged before the arbitral tribunal to be constituted in terms of provisions contained in the GAFTA Rules and the arbitral tribunal, depending on the merits of the rival claims, may entertain the reference or refuse to entertain it. Since the suit itself is not maintainable, he concluded by submitting that grant of interim relief does not and cannot arise and, accordingly, prayed for an order to vacate the order dated August 10, 2011.

3. Mr. Deb, learned senior advocate appearing for the Petitioner, at the outset, conceded that there was indeed a mistake on the part of the advocate-on-record for the Petitioner, as a result whereof, documents issued on the same date and bearing similar contents in respect of contract No. #LMJ/SIC/OCT/02 were annexed to the application. He submitted that since technicality cannot override substantial justice, the mistake ought to be condoned. Insofar as the contention advanced by Mr. Mookerji that the Petitioner had suppressed material facts is concerned, it was submitted that there has been suppression of no fact that could be considered material for a decision on the application and hence fatal for the Petitioner. He endeavored to impress the Court by inviting its attention to the pleadings in the application for injunction that all material facts were on record. Answering the last contention, it was submitted that there is no valid arbitration agreement between the parties and that even if there be any, reference of the dispute to arbitration was indeed time barred, and therefore, no valid claim for vacating the order dated August 10, 2011 has been set up.

4. Learned senior advocates for the Petitioner and the Respondent No. 1 have argued at length and invited the Court's attention to events commencing with execution of the contract as well as their subsequent conduct over the months. Facts relevant for a decision are that three contracts were entered into by and between the parties for procurement and supply of rice and that disputes and differences arising out of the first of the three contracts form the subject matter of the suit; that shipment of rice by a North Korean vessel created certain problems, which subsequently was sorted out, but thereafter disputes and differences arose in respect of inspection of quality of the contracted rice and finalisation of claims; that the Petitioner refuted the claim of the Respondent No. 1 except for payment of a sum of US\$ 23,258.01 vide e-mail dated June 1, 2011; that the Respondent No. 1 issued a notice of dispute dated June 10, 2011

whereby an amount of US\$ 382,348.90 was claimed with interest @ 18% per annum; that this notice was countered by the Petitioner by its letter dated June 28, 2011, whereby it was denied that any sum was due and payable to the Respondent No. 1 and that in the event the Respondent No. 1 proceeds to take any action, the same would be duly defended; that by its letter dated July 28, 2011, the Respondent No. 1 served a notice on the Petitioner expressing an intention to refer the dispute arising out of the subject contract to arbitration in accordance with the GAFTA Rules; and that by a further letter of even date, the Respondent No. 1 appointed Mr. R.A. Barber as arbitrator and requested the Petitioner to appoint an arbitrator pursuant to Clause (b) of Rule 3.2 of the GAFTA Rules.

5. Accepting the argument of Mr. Deb that a mistake was committed, this Court finds no reason to hold that the Petitioner attempted to and was successful in obtaining an order by abusing the process of the Court. This Court is also not inclined to hold that the Petitioner has suppressed facts, which are so material, that the Court would hold against it and decline the injunction. However, the third contention raised by Mr. Mookerji appears to carry weight.

6. Contract No. #LMJ/SIC/OCT/01 dated October 25, 2010 was entered into by and between the Petitioner and the Respondent No. 1 whereby the latter agreed to supply a particular quantity of rice to the former for consideration. The contract under the heading "Other Terms" contained the following clause:

All other terms/conditions not in contradiction with the above as per GAFTA 48. Arbitration as per GAFTA 125 in London.

Under the heading "ARBITRATION" appearing immediately thereafter, it was provided as follows:

All disputes in connection with this contract or the execution thereof shall be settled amicably by friendly negotiations between the parties. If no settlement can be reached, the case in dispute shall then be submitted GAFTA, London for arbitration as per GAFTA clause for rice and amendment if any and arbitration Rule 125.

7. On August 10, 2011, the Petitioner instituted the suit claiming that the disputes and differences between it and the Respondent No. 1 arising out of the subject contract cannot be referred to arbitration in terms of the GAFTA Rules, as the purported claim of the Respondent No. 1 pertains only to non-payment of amount allegedly payable to it by the Petitioner and that the time limit for claiming arbitration for such claim has long expired. In connection with the suit, an application for injunction was filed (GA. No. 2427 of 2011) claiming, inter alia, the following relief:

a) An order of temporary injunction do issue restraining the Respondent No. 1, its servants, agents and/or assigns from giving any effect and/or taking any step in terms of the said letters both dated 28th July, 2011 being Annexures "x" and

"Y" hereto in any manner whatsoever;

b) An order of temporary injunction do issue restraining the Respondent No. 2, its servants, agents and/or assigns from making and/or remitting any payment to the Respondent No. 1 or its banker in terms of the said letter dated 4th August, 2011, being Annexure "Z" hereto, issued by the Respondent No. 2.

8. By the order dated August 10, 2011, this Court had granted orders in terms of the above prayers for the reasons mentioned therein, limited till September 9, 2011 or until further order, whichever is earlier

9. On behalf of the Petitioner, reference was made to Clause 2.2(d) of the GAFTA the above prayers for the reasons mentioned therein, limited till September 9, 2011 or until further order, whichever is earlier Rules which reads as follows:

(d) irrespective of the time limits in (a), (b) and (c) above, in the event of non-payment of amounts payable, not later than 60 consecutive days from the notice that a dispute has arisen as provided for in the Payment Clause of the contract.

10. Based on the aforesaid clause, Mr. Deb has contended that the time for referring any dispute to arbitration in terms thereof having long expired, the Petitioner was entitled to injunction. On the other hand, Mr. Mookerji has referred to Rule 21 of the GAFTA Rules, which reads as follows:

21. NON-COMPLIANCE WITH TIME LIMITS and RULES If any time limit or provisions imposed by these Rules are not complied with, and when such matters are raised as a defence to the arbitration claim, then, subject only to the discretion of the tribunal or board of appeal conferred by this Rule, the claimant's claims and/or Appellant's appeal as the case may, shall be deemed to be waived and absolutely barred, except:

a) where the tribunal may in its discretion admit a claim if satisfied that the circumstances were outside the reasonable contemplation of the parties when they entered into the contract and that it would be just to extend the time, or when the conduct of one party makes it unjust to hold the other party to the strict terms of the time limit in question. Otherwise the tribunal may determine that the claim is waived and barred and refuse to admit it. There shall be no appeal to the board of appeal against the decision of the tribunal to exercise its discretion to admit a claim. If a tribunal decides not to admit the claim, then the claimant shall have the right to appeal pursuant to Rule 10, and the board of appeal shall have the power in its absolute discretion to overturn that decision and to admit the claim;

b) ***

11. There is no reason to agree with Mr. Deb that there is no arbitration agreement. The GAFTA Rules provide that any dispute arising out of a contract or arbitration agreement, which incorporates or refers to the rules, shall be referred to arbitration and arbitrator(s) or board of appeal, as the case may be, will

proceed to determine all issues put before them, in accordance with the provisions thereof. As has been noticed above, the subject contract clearly records the agreement of the parties that in case any dispute or difference arises in connection therewith, attempt to settle the same amicably shall be made failing which the dispute shall be submitted to GAFTA, London for arbitration. The intention of the parties to have their disputes and differences resolved through arbitration in the event amicable settlement cannot be reached, formed at the threshold of the contract, is the decisive consideration and it cannot be contended that there is no valid arbitration agreement.

12. This Court is also in agreement with Mr. Mookerji that the limitation to refer the dispute to arbitration, if at all Clause 2.2(d) applies, would run from June 1, 2011 when the Petitioner refuted the claim of the Respondent No. 1 and not from the last date mentioned in the payment clause of the contract, as originally agreed, and the reference having been made on July 28, 2011, the submission that it is time-barred is unacceptable.

13. Furthermore, even if the reference to arbitration is considered to be time-barred, it appears from a bare reading of Clause 21 that in a given case where the time limit fixed in the GAFTA Rules is not complied with and such a point is raised in defence, the matter could be adjudicated by the arbitral tribunal itself. What this Court has gathered from Mr. Deb's submission is that the Petitioner is not obliged, on facts and in the circumstances, to participate in the proceedings before the tribunal and to raise a defence that reference of the dispute is time barred and that this Court having satisfied itself regarding grant of injunction, it ought to continue till the disposal of the suit. Once it is held that the Respondent No. 1 did not delay its approach for having the disputes and differences settled by arbitration under the GAFTA Rules, the Petitioner would have no other option but to raise the point before the arbitral tribunal.

14. In the further considered view of this Court, the finding that reference of the dispute to GAFTA is not time barred might result in prejudice to the Petitioner and foreclose its right to raise the same point before the arbitral tribunal in defence. This Court, therefore, hastens to observe that the finding that the reference is not time-barred is prima facie and would not preclude the Petitioner to raise such point in defence before the arbitral tribunal, as and when the occasion therefore arises.

15. On consideration of the agreement between the parties that in the likelihood of a dispute arising between them which cannot be settled amicably the arbitral tribunal under the GAFTA Rules is to be approached, I do not see any reason as to why the order of injunction restraining the Respondent No. 1 from taking step in terms of such rules for resolution of dispute by arbitration should be stalled. This Court, therefore, finding substance in the submission of Mr. Mookerji allows the application for vacating interim order (GA 2625 of 2011) and dismisses the application for interim order (GA 2427 of 2011), with the observation that any action taken by the parties to the suit during its pendency shall be subject to and

abide by the result of the suit.

16. Mr. Mitra, learned senior advocate appearing for the Petitioner prays for stay of operation of this order. The prayer is opposed by Mr. Ghosh, learned advocate appearing for the Respondent No. 1. This Court finds no reason to stay the order. The prayer stands refused.

Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.