

(2006) 05 CAL CK 0050

In the Calcutta High Court

Case No : A.P.O. No. 124 of 2005, A.P.O.T. No. 43 of 2005 and A.P. No. 278 of 2003 & APO No. 124 of 2005, APOT No. 43 of 2005 and AP No. 278 of 2003

Magma Leasing Limited

APPELLANT

Vs

Gujarat Composite Limited

RESPONDENT

Date of Decision : 02-05-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 25

Citation : AIR 2006 Cal 288

Hon'ble Judges : Sengupta, J; Aniruddha Bose, J

Bench : Division Bench

Judgement

1. This appeal is directed against the order of the Hon''ble first Court dated 7th September. 2004 whereby and whereunder His Lordship has been pleased to set aside, the award passed by the learned Sole Arbitrator on merit. Before His Lordship the respondent (applicant therein) took two broad points - (1) learned Arbitrator had no jurisdiction to decide the subject matter: (2) the impugned award was passed without giving opportunity of hearing in real sense and furthermore no reason has been given by the learned Arbitrator.

2. The respondent specifically raised preliminary point of jurisdiction u/s 16 of the Arbitration and Conciliation Act, 1996 before the learned Arbitrator and the learned Arbitrator has rejected the plea of lack of jurisdiction and while doing so has given reasons upon interpreting documents and also applying the principle of law decided by the Courts. The Hon''ble first Court did not find any fault in this decision making process by the learned Arbitrator on the preliminary point. The learned first Court of course on merit has accepted the respondent's contention that the impugned award does not carry any reason nor any opportunity of being heard was given.

3. Aggrieved by the latter portion of the judgment and order of the Hon''ble first Court the appellant approached us with this appeal. It is apposite to record that

the respondent did not lag behind to challenge the decisions of the learned Arbitrator before the learned first Court on the question of jurisdiction contending appointment of learned Arbitrator is de hors the arbitration clause.

4. Mr. Abhrajit Mitra, learned Counsel submits that no interference is called for as far as decision on the question of jurisdiction as has been rendered by the learned Arbitrator and the Hon''ble first Court are concerned. The decisions of both the Forums rest on factual and legal findings and their own reasons. It is settled position of law that this should not be upset by the Appeal Court's own reasoning. We agree with the principle of law as urged by Mr. Abhrajit Mitra and there are large number of decisions not only rendered by this Court but also by the Apex Court on this proposition and it is so well settled firmly we need not refer to any of such decisions. Mr. Surojit Nath Mitra of course did not dispute the aforesaid legal principle. Still then he contends that if the arbitration agreement as well as the parent agreement are read together carefully as a whole it would appear that method of appointment of Arbitrator was rested with the financier. In the lease agreement no financier has been described. It will appear from various clauses of the same agreement that existence of financier is to be found. In this case he says that Allahabad Bank was the financier and it is this bank who is to make appointment of Arbitrator not by the lessor appellant. In this case, he submits in substance that the lessor has no authority to call upon the Sole Arbitrator to enter upon reference or for making appointment. He also submits that there is no appointment in real sense if the documents are read. Both the learned Arbitrator and the Hon''ble first Court have misread all those documents and should not have held that the learned Arbitrator has jurisdiction or competence to enter upon reference.

5. We think it fit that we should deal on the question of jurisdiction first before we proceed to deal with the rival contentions of this case on merit. We have gone through carefully the decisions of the learned Arbitrator as well as the Hon''ble first Court. We find both the two Forums have concurrently found on fact by applying the law that the learned Arbitrator has jurisdiction. We do not find from the records that these decisions are based on palpable misreading of the document, irrational or illogical reasoning. Moreover their own reasoning cannot be substituted by our own reasoning. Only point left to be considered by this Court is whether on the plain reading of the documents a reasonable prudent man could pass such decision which have been rendered by both the Forums. In the public law field principle of reasonableness is applicable. According to us, while examining this aspect of the matter, albeit in the private law field this principle is also equally applicable. Therefore, we do not hesitate to apply this principle whether this decision is possible to be rendered on the given facts and circumstances and also documents on record or not. We are not hesitant at all to record our agreement with the Hon''ble first Court in this regard. Before we do so we think it fit to set out the arbitration clause.

43. ARBITRATION

All disputes, differences, claims and questions whatsoever arising from this agreement between the parties and/or respective representatives touching and concerning this presents or anything herein contend (contained) or in any way relating to or arising from this presents shall be referred to a sole arbitrator to be appointed by the Financier. The parties freely and voluntarily are agreeing to the above procedure relating to the appointment of such sole arbitrator. The parties also agree that they shall join in the Arbitration proceedings immediately after obtaining notice from the Arbitrator and take necessary steps to complete the same within the specified period. Such arbitration shall be in accordance with and subject to the provisions of Arbitration Act for the time being in force. The award of such arbitrator so appointed shall be final and binding on the parties to this agreement. Such arbitration proceedings will be at Calcutta. During the pendency of the arbitration proceeding, the Hirer shall continue to pay the installments regularly as per terms of this agreement. The sole arbitrator shall pronounce the award within 90 days after entering on the reference or within such extended time as the party may agree from time to time. The cost and expenses of the arbitration proceedings shall be borne by the Hirer unless otherwise directed by the arbitration proceedings. Provided, however, that if the financier apprehends that the Hirer may alienate or charge or dispose of the said equipment(s) or may cause damage to the said equipment(s), the Financier shall be at liberty to seek redress in a Court of law, straightway, without resort to arbitration proceedings in the first instance or during pendency thereof.

6. It is true in the arbitration clause the appointing authority is described as financier. In the parent agreement the word "financier" is missing. From the documents we find that the lessor being the appellant is to procure the fund from the bank. In our opinion because of this clause one cannot say who is financier in real sense in this transaction. The documents are annexed which were considered by the learned Arbitrator as well as the Hon"ble first Court. From the extract of the resolution of the board meeting of the respondent it is clear that the lessor in real sense is accepted and acknowledged as the financier and it is not the concern of the respondent about source of fund of the appellant, nor disclosure of source does not enable the respondent to take any stand different from what it has understood and acted upon. The fact remains that the appellant have supplied fund to procure the equipment and to deliver it on the basis of the terms and conditions agreed upon in writing between the parties which is described as lease agreement. Moreover we find that when the dispute arose a letter was written by the appellant to the learned sole Arbitrator, copy whereof was also supplied to the respondent. The said letter is set out hereunder:

SS/1251/2002-2003

October 7, 2002

Mr. Tarun Aich,

Advocate,

Dear Sir,

My Client : M/s. Magma Leasing Limited, 24, Park Street, Kolkata - 700016.

Re : Agreement dated 1st September, 1998 entered into between my client and M/s. Gujarat Composite Ltd. having its registered office at 14, Netaji Subhas Road, Kolkata.

Under the instruction from my client above named, I address you as follows:

By and under an agreement dated 1-9-1998 my client leased out various capital equipments to the said Gujarat Composite Ltd. Under the said lease agreement Gujarat Composite Ltd. was obliged to pay a sum of Rs. 1,61,200/- per month as lease commencing from 1-3-1999. The lease is to end on 1st February, 2004.

The said Gujarat Composite Ltd. paid the lease rentals up to November, 2001 failed and neglected to pay the lease rentals from December, 2001. In accordance with the said agreement the said Gujarat Composite Ltd. is required to pay delayed payment charges at the rate mentioned in the said agreement.

In the premises as on 10th September, 2002 a sum of Rs. 22,99,611/- has become due and payable by the said Gujarat Composite Ltd. to my client.

By my letter being No. SS/1103/2001-2002 dated 16th September, 2002, I on behalf of my client called upon the said Gujarat Composite Ltd. and the guarantor Mr. N.K. Bangur of 16, Alipore Road, Kolkata-27 to pay to my client the said sum of Rs. 22, 99,611/- along with further interest calculated at the rate of 2.5% per month until payment of the said sum of my client. A copy of the said notice is enclosed herewith for your ready reference.

Despite receipt of the said notice the said Gujarat Composite Ltd. and/or the said Mr. N.K. Bangur have failed and neglected to pay the said sum to my client.

In the premises aforesaid, I request you to kindly enter into upon reference and pass an award for all sums which has become due and payable by the said Gujarat Composite Ltd. and the Guarantor Mr. N.K. Bangur to my client as expeditiously as possible.

Yours faithfully,

Srenik Singhvi

Enclo : As above.

Copy to : 1. M/s. Gujarat Composite Ltd.

2. N.K. Bangur.

7. On receipt of this letter the respondent did not respond to the same nor raised any objection. Thereafter the matter was referred to the sole Arbitrator and the sole Arbitrator entered upon reference. On receipt of this letter the learned Arbitrator took upon himself to adjudicate the matter and therein a composite

statement of defence taking preliminary point was filed.

8. Therefore, if all those documents are read and construed it is possible to conclude that the lessor itself is the financier and it was the intention of the parties and that have also been held by the two Forums. Had it been different intention then the respondent could have led evidence to establish that Allahabad Bank is the financier and it is the Allahabad Bank who is competent to appoint the Arbitrator since the plea was taken by the respondent who had burden to prove the same. In this case no such endeavour was made. Had there been a specific clause mentioning the Allahabad Bank is the financier then obviously question of adducing evidence would not have arisen either by orally or by otherwise. Rather it is clear from the document on evidence placed before the learned Arbitrator the lessor himself was accepted to be the financier.

9. Accordingly for the foregoing reasons on this point we uphold the decision of the Hon''ble first Court and we are unable to accept the argument of Mr. Surojit Nath Mitra.

10. Now coming to the merit of the matter it appears to us that learned first Court has held upon applying his mind that opportunity of being heard was not given and also that no reason was given by the learned Arbitrator. We shall deal with the decision of the first Court regarding giving of opportunity. It appears from the records that learned Arbitrator at one point of time proceeded with this matter without any evidence being adduced. And we think this procedure is not illegal.

11. From the records we find the notices were given upon both the parties on each and every occasion. The respondent appeared before the learned Arbitrator and participated in the proceedings either effectively making submission or obtaining adjournment. However, on the last occasion the respondent failed to appear and on that date itself the learned Arbitrator proceeded with finally and concluded the hearing and thereafter award was passed.

12. Mr. Surojit Nath Mitra while supporting the judgment of the Hon''ble first Court and assailing the act and action of the learned sole Arbitrator contends that it was not fair on the part of the learned Arbitrator to complete the hearing on the first day of default. Mr. Abhrajit Mitra submits that there is no illegality on the part of the learned Arbitrator who can do so as the law enables him under the provision of Section 25(c). We have read the aforesaid Section and in our opinion in order to appreciate the provision we should set out this portion of the aforesaid Section.

* * *

25(c). a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the arbitral award on the evidence before it.

13. In our opinion the aforesaid provision is enabling provision and ample

discretion has been left with learned tribunal with the word "may". It is settled position of law that power of discretion is exercised with restraint and when there other option left, in particular in judicial and quasi-judicial proceedings. It does not mean that the learned Arbitrator should exercise this extreme power in case of one default. We are not for a single moment supporting any lackadaisical litigant to take refuge to the aforesaid discretionary provision. Discretion is always a judicial if not judicious. Judicious action demands in a case of this nature that on one hand unnecessary latitude of indulgence should not be given, and on the other hand the learned Arbitrator should not proceed hastily. There are decisions of this Court while considering and discussing the procedure of arbitration proceedings held under repealed Arbitration Act, 1940 wherein Court formulated concept of serving peremptory notice of hearing so that a litigant may be warned if he defaults in future, final act may be performed by the learned Arbitrator. In this connection a decision of Division Bench of this Court reported in Juggilal Kamlatpat Vs. General Fibre Dealers Ltd., may be referred to.

14. Here factually the respondent defaulted only on one day and we think the learned Arbitrator should not have exercised discretionary power while concluding the hearing.

15. We think another chance should have been given because in the record there is no successive failure on the part of the respondent, although adjournment was sought for, true. But in all fairness a peremptory notice should have been given. Under those circumstances, we feel the reasoning of the first Court is justified. However, the aforesaid elaborate discussion was not recorded by His Lordship.

16. Learned first Court thereafter, having found that no reasons had been given, set aside the award but next course of action for the ends of justice was not followed by the Hon"ble First Court.

17. We are unable to subscribe the views expressed by the learned Trial Judge on point of non-assigning of reason. We find on plain reading of the award the learned Arbitrator expressed his mind while passing the award and according to us the same constitute reason. However, this decision is now merely an academic, as the award is not sustainable on the ground explained above. We are merely for the time being adjourning the matter and suspending the portion of the judgment and order of the Hon"ble First Court and in exercise of inherent power we are sending back the matter to the learned arbitral tribunal to hold hearing of the parties afresh. This matter is adjourned for a period of four weeks after vacation.

18. Learned Arbitrator shall proceed on day-to-day basis and shall give chance of hearing to the respondent on merit and he shall proceed from the stage where it was left by him and will not start de novo. He will make and publish the award and place before this Court within three months from the date of receipt of signed copy of the minutes of this order. It is made clear that no adjournment under any circumstances except on the ground of illness of the learned appearing

counsel of either party shall be granted by the learned Arbitrator. We keep all points open regarding the argument urged before us, particularly the point of jurisdiction.

19. This matter will be placed before this Bench as it has been heard partly.

20. Mr. S.N. Mitra prays for stay of operation of the judgment and order as far as the question of jurisdiction is concerned. Such prayer is opposed by Mr. Abhrajit Mitra appearing on behalf of the appellant. We do not find any reason to grant any stay of operation of this judgment and order. We feel that even if the learned Arbitrator holds against Mr. Mitra's client afresh, it is always open for them to challenge before the higher appropriate forum on all points including the point of jurisdiction.

21. All parties concerned are to act on a signed copy of the minutes of the operative portion of this judgment and order on the usual undertakings.

22. Let urgent xerox certified copy of this judgment and order be supplied to the parties, if they apply for, upon fulfilling all the formalities.