
(1998) 10 DEL CK 0062
In the Delhi High Court
Case No : OMP No. 94 of 1998

Milkfood Limited

APPELLANT

Vs

G.M.C. Ice Cream Private Limited and Others

RESPONDENT

Date of Decision : 13-10-1998

Acts Referred:

Citation : (2000) 83 DLT 130

Hon'ble Judges : Dalveer Bhandari, J

Bench : Single Bench

Advocate : Mr. Arun Jaitley and Mr. B.K. Sood, for the Appellant; Mr. Chandershekher and Ms. Sheela Singh, for the Respondent

Judgement

Dalveer Bhandari, J.—The petitioner Milk Food Ltd., has approached this Court by filling a petition u/s 33 of the Arbitration Act, 1940 in which a prayer has been made that order be passed clarifying that the provisions of Indian Arbitration Act, 1940 would apply to the arbitration proceedings pending before the Arbitrators and the order of the two Arbitrators passed on 6-4-1998 be declared as incompetent and illegal.

2. The brief facts necessary to dispose of this petition are recapitulated in the succeeding paragraphs.

(1) The petitioner is engaged in a business of manufacturing, marketing and sale of Ghee, Milk Powder, Dairy Whitener, Liquid Milk and Yogurt, etc. Earlier the petitioner was engaged in the business of marketing and sale of Ice Cream under the brand name "MILKFOOD 100%"

(2) It is further stated in the petition that respondent No. 1 approached the petitioner with an offer for the manufacturing the Ice Cream for the petitioner. The said respondent further represented that it was going to install a plant for manufacture of Ice cream having suitable capacity would and would arrange for all necessary personnel, permission and labour. The respondent would manufacture ice cream on the directions of the petitioner. An agreement between

the parties was executed and according to the agreement, respondent No. 1 was to deposit Rs. 10 lakh with the Company for a period of 5 years. The deposits shall carry interest at the rate of 15 per cent per annum compounded quarterly.

(3) According to Clause 20 of the said agreement which reads as under

"In case of any dispute or any difference arising at any time between the Company and the Manufacturer as to the construction, meaning or effect of this agreement or any clause or thing contained therein or the rights and liabilities of this company or the manufacturer hereunder in relation to the premises, shall be referred to a single Arbitrator, in case the parties can agree upon one, and failing such agreement, to two Arbitrators one to be appointed by either party and in case of disagreement between the two Arbitrators aforesaid and in so far as and to the extent that they disagree to, an Umpire to be appointed by the said two Arbitrators before they enter upon the reference All such arbitration proceedings shall be in accordance with and subject to the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment."

(4) According to the petitioner, the respondent did not take any steps in accordance with the said agreement and in any event the respondent did not intimate the petitioner about having taken any such step. After a lapse of about more than three years, respondent No. 1 sent two Demand Drafts for Rs. 5 lakhs each along with its letter of May 7, 1995, which was to be sent in 1992. Consequently, the payment sent in May, 1995 was returned. It is stated by the petitioner that by that time the petitioner had also entered into negotiations/agreements with Brooks-Bond Lipton India Ltd., for assignment of its Trade Marks, Assignments of Marketing Sales and Distribution Assets and non-competition agreement etc.

(5) Respondent No. 1 filed a suit in the Court of Munsif-I, Gaya. The Trial Court stayed the proceedings and the order of the trial Court was affirmed by the learned Additional District judge in appeal. Thereafter, a Civil Revision was filed before the High Court against the order of the Munsif Court, Gaya, Bihar dated 3-8-1995 whereby the defendant's application u/s 34 of the Arbitration Act was allowed.

(6) It has been alleged that the respondent had appointed Shri A. B. Rohtagi, a retired Judge of this Court as the third Arbitrator without the knowledge or consent of the petitioner. The third Arbitrator (Umpire) could have been appointed by the two respective Arbitrators only.

(7) The Arbitrators issued a notice to the petitioner with the direction of filing claim by respondent No. 1. When it became clear that the Arbitrators were proceeding under the provisions of the Arbitration and Conciliation Act, 1996 immediately thereafter the petitioner filed an application seeking direction/clarification that only the provisions of the Indian Arbitration Act, 1940 should be applicable to the arbitration proceedings pending before the Arbitrators. A reply was filed by respondent No. 1 in which it was mentioned that the provisions of

the Arbitration and Conciliation Act, 1996 would be applicable to the proceedings and not the provisions of the Indian Arbitration Act, 1940. The Arbitrators by their order dated 6th April, 1998 by a Majority decision held that the order dated 6th May, 1997 passed by the High Court at Patna being a consent order was a starting point of the Arbitral proceedings and anything said or done before that day was of no consequence. It was held that in view of the starting point the arbitration proceedings could be held only under 1996 Act(8) Respondent No. 4, Justice H.L. Aggarwal gave a dissenting order. In this order, he observed that it was erroneous to hold that the notice for initiating the arbitration proceedings can only be sent by the claimant and not by the respondent. According to the dissenting order, the notice for initiating the arbitration proceedings could be sent by either of the parties.

(9) It was also held in the dissenting order that there cannot be one commencement for the limitation purposes and the other for the arbitration proceedings. Consequently, it was held in the dissenting order that the 1940 Act would apply. The petitioner is aggrieved by the majority view and has prayed that the majority order be set aside.

(10) Mr. Arun Jaitley, the learned Senior Advocate, appearing for the petitioner submitted that the Arbitrators (majority order) have erred in holding that the arbitration proceedings commenced from the date or order of the High Court of Patna dated 6th May, 1997. According to the petitioner, the majority order ignored the specific provision of Section 21 of the Arbitration Act, 1940. It was submitted that Section 21 of the Arbitration Act, 1996 specifically states that the arbitration proceedings commence when a request for the disputes to be referred to arbitration is received by the respondent. According to him, the arbitration clause was invoked when the request of the petitioner sent through a legal notice dated 14-9-1995 was received by the respondent and Therefore, the arbitration proceedings have to be carried out in accordance with the provisions of the 1940 Act.

(11) According to the learned Counsel for the petitioner, the Arbitrators have erred in holding that the arbitral proceedings commenced only when the Arbitrator actually entered upon the arbitration reference and not when the notice by one of the parties requesting for arbitration is sent

(12) Mr. Jaitley, the learned Counsel for the petitioner submitted that the learned Arbitrators have erred in holding that the arbitration proceedings commenced from the date of consent of both the parties recorded by the High Court on 6-5-1997 because they had ignored the entire background of the agreement of the parties. The petitioner expressed his willingness and readiness for the arbitration by way of application filed u/s 34 of the Arbitration Act, but it has to be in accordance with the Indian Arbitration Act, 1940. According to the majority view, the dated 6-5-1997 was the crucial date when by consent, both the parties referred the matter to the arbitration and accordingly the arbitration proceedings have to be carried out in accordance with the provisions of the 1996 Act

(13) The learned Counsel for the petitioner submitted that the Arbitrators have erred in holding that the provisions u/s 37(3) of 1940 Act is only for the purpose of limitation and not for any other purpose

(14) The learned Counsel for the petitioner submitted that the Arbitrators had erroneously held that the notice dated 14-9-1995 was a non-starter. It was wrongly held that the notice contemplated a notice by the claimant and not by the respondent

(15) Mr. Jaitley, the learned Senior Advocate placed reliance on the judgment Union of India (UOI) Vs. Surjeet Singh Atwal, . The Court in the said case observed that an application for stay u/s 34 of the Arbitration Act cannot be treated as an application in a reference u/s 31(4) of the Act. It has nothing to do with any reference. It is only intended to make an arbitration agreement effective and prevent a party from going to Court contrary to his own agreement that the dispute is to be adjudicated by a private Tribunal. The Court in this case came to the conclusion that application for stay u/s 34 of the Act cannot be treated as an application u/s 31(4) of the Act (16) The learned Counsel for the petitioner also placed reliance on the judgment Puri Construction Pvt. Ltd. Vs. State of Madhya Pradesh, , to show that the arbitration proceedings can take place only in a court which has jurisdiction to deal with it

(17) The learned Counsel for the respondent M/s. G.M.C. Ice Cream Pvt. Ltd., Mr. Chandrashekhar submitted that the petitioner had filed a petition u/s 34 of the Arbitration Act and before the High Court of Patna. The parties agreed for arbitration and with the consent of the parties, the Arbitrators were appointed. The consent once given cannot be raked later on and in this view of the matter, only Patna Court would have the jurisdiction. It is submitted that the controversy raised in the petition, by no stretch of imagination comes within the scope of Section 33 of the Arbitration Act, 1940. Exercise of discretion at this belated stage of arbitration proceedings where the evidence has been taken and the date of cross-examination has been fixed may not be a sound exercise of discretion guided by the principles of law and equity. It is submitted that Clause 20 of the Agreement clearly envisages that the parties shall be governed by any statutory modification or re-enactment of the Arbitration Act. When the Agreement was entered into, the Act of 1996 could not have come into force and this clause was specifically inserted so that future statutory modification and enactments could be taken into consideration and because of this clause, the arbitration proceedings have to be carried out in accordance with the provisions of the Indian Arbitration Act, 1996. It is mentioned that the petitioners were fully aware of the respondent's plant at Gaya, Bihar. As a matter of fact, one of the representatives of the petitioner Milk Food Limited all through kept on inspecting the commercial unit and on suggestion of the representative of the petitioner, a demand draft was sent on 7-5-1975. Mr. Chandrashekhar also submitted that it was incorrect to say that there was an agreement to send the draft in 1992 and no such condition was ever intimated to the respondent. There has not been any

whisper of the arbitration agreement. The respondent submitted that the story of delay in receiving of the Bank draft is an afterthought and a cooked up story to cover the ill design of the petitioner in entering into an agreement with the Brooke Bond Lipton India Ltd(18) Learned Counsel for the respondent submitted that the cause of action had taken place in Gaya and the proper Court of jurisdiction is Patna and not the Delhi Court

(19) It is also mentioned that the appointment of the third Arbitrator was well within the knowledge of the petitioner from day one of the proceedings in which the third Arbitrator had participated. The petitioner by necessary implication consented to the appointment of the third Arbitrator and the controversy as to application of new of old Act has been raised at a very belated stage when the witnesses of the petitioners were to be cross-examined. It is also argued on behalf of the respondent that the petitioner had participated in the proceedings all through but did not raise any objection regarding the jurisdiction. It is submitted by the learned Counsel for the respondent that in view of the consent order as well as agreement dated 7-4-1992, it was only the new Act which shall apply for the purpose of deciding that dispute between the parties

(20) The learned Counsel for the respondent Mr. Chandrashekhar also submitted that the notice has to be by the claimant. The respondent in this case has no claim or counter claim. Therefore, there is no question of the respondent's invoking the arbitration clause. The consent once given cannot be raked. It is also submitted that now claim/reply to the claim and evidence by way of affidavit has already been filed, and the arbitration proceedings at this stage is now of cross-examination of witnesses. At this belated stage, the controversy regarding the old and new Act would cause grave prejudice to the respondent. The petitioner is primarily interested in delaying the entire matter. In this view of the matter, this petition being devoid of any merit deserves to be dismissed with costs I have heard learned Counsel for the parties and considered the following judgments cited at Bar

- (1) Union of India v. Surjeet Singh Atwal (supra)
- (2) Virendra Saigal Vs. Sumatilal Jamnalal,
- (3) Behrein Petroleum Co. Ltd. v. P. J. Pappu and another 1966 SC 634
- (4) Niranjan Swain Vs. State of Orissa and Others,
- (5) Hakam Sing Vs. Gammon (India) Ltd.,
- (6) Natraj Studios Pvt. Ltd. v. Natraj Studios and another AIR 1981 SC 537
- (7) A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem,
- (8) Puri Construction Pvt. Ltd. v. State of Madhya Pradesh (supra)

3. On consideration of the submissions made at the bar, and in the light of the facts and circumstances of this case, the following conclusions are irresistible

(a) According to Section 21 of the Arbitration and Conciliation Act, 1996, unless otherwise agreed by the parties, the arbitral proceedings commence on the date of which a request for that dispute is referred to arbitration. The Act postulates a notice by a claimant to the respondent calling upon him to appoint an Arbitrator for the settlement and it cannot be the other way round. No respondent would ask for the appointment of an Arbitrator when he has no dispute to refer (unless the respondent would be a counter claimant). In case he has disputes to refer, then the respondent would become the claimant. The majority order correctly held that no defendant will save limitation for the claimant or the plaintiff. In view of this finding, the notice dated 14-9-1995 cannot be construed as a notice calling upon to initiate the arbitration proceedings

(b) The agreement dated 7th April, 1992 contemplates that such arbitration proceedings shall be in accordance with and subject to the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment. In 1992, when the agreement was entered into, the parties could not visualise the 1996 Act but in the relevant Clause 20 of the agreement, foundation of any statutory modification or re-enactment has been laid down. When the parties by consent before the High Court agree to refer the dispute to the arbitration in that even parties have to be governed by 1996 Act. This conclusion is consistent even with the underlying intention the parties according to Clause 20 of the agreement(c) Logically, it has to be concluded that the arbitration proceedings begin when the disputes are referred for the arbitration. In the instant case, the disputes were referred for arbitration by the order of the High Court only on 6-5-1997. The parties have Therefore, to be governed by the provisions of 1996 Act.

(d) The petitioner was aware of the third arbitration from the very beginning and it has to be assumed that the petitioner by necessary implication gave consent for referring the disputes to the arbitration. All this happened after the 1996 Act came in force, Therefore, only the 1996 Act has to be made applicable in this case.

(c) The most vital and important circumstance of this case is that on 6-5-1997, both the parties gave a clear consent to refer this matter to the arbitration before the High Court of Patna. The parties by agreement gave a good-bye to all other proceedings and on 6-5-1997, agreed for reference of their disputes to the Arbitrator. The sanctity of the undertaking given to the Court by the parties has to be maintained. No one can be permitted to breach or flout the undertaking in this manner.

4. In view of the aforesaid findings, this Court approves the majority order dated 6-4-1998 and accordingly it is concluded that the parties in the arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996.

5. This petition is accordingly disposed of. In the facts and circumstances of this case, the parties shall bear their own costs.