

(2001) 04 DEL CK 0033

In the Delhi High Court

Case No : Letters Patent Appeal No. 492 of 1998

Milkfood Limited

APPELLANT

Vs

M/s. GMC Ice Cream (P) Ltd and others

RESPONDENT

Date of Decision : 27-04-2001

Acts Referred:

Citation : (2001) 4 AD 549 : (2001) 59 DRJ 17 : (2002) 1 RAJ 482

Hon'ble Judges : Om Prakash Dwivedi, J;A.D. Singh, J

Bench : Division Bench

Advocate : A.M. Singhvi, Mr. B.K. Sood, Mr. M.K. Gupta and Mr. Pushpinder Bansal, for the Appellant; Chandra Shekhar Mr. Anil Kumar Upadhyay, Mrs. Sheela Singh and Mr. Neeraj Shekhar, for the Respondent

Judgement

Anil Dev Singh, J.—This is a Letters Patent Appeal directed against the order of the learned single Judge dated 13th October, 1998. The facts leading to the appeal are as follows :-

2. The appellant is a company incorporated under the Companies Act, 1956 and having its registered office in New Delhi. It is engaged in the business of marketing and sale of ice cream under the brand name "Milk Food 100% Ice Cream". The first respondent is also a private limited company incorporated under the Companies Act and having its registered office at Gaya, Bihar.

3. The appellant and the first respondent entered into an agreement on April 7, 1992 by virtue of which first respondent was to manufacture and pack in its factory for the appellant, range of ice cream that may be mutually agreed upon between the parties from time to time. The agreement was to remain in force for a period of five years. The first respondent was required to deposit a sum of Rs. ten lakhs with the appellant for a period of five years. In the event of dispute between the parties, the same was to be resolved through arbitration. It is the case of the appellant that the first respondent did not take any steps to fulfill the obligations under the agreement. According to the appellant, after about a lapse of more than three years, the first respondent Along with letter dated May 7,

1995 sent two demand drafts for Rs. five lakhs each, which were required to be sent in the year 1992. As a result of the delay caused by the first respondent the drafts were returned by the appellant to the first respondent on May 20, 1995. On the other hand the first respondent claims that after the agreement between the appellant and the first respondent the latter installed additional plants and machinery as per the specifications and directions of the appellant for manufacture of ice cream. According to the first respondent the appellant failed to supply the material for packing the ice cream.

4. The first respondent entertained an apprehension that the appellant shall cause disturbance in the manufacture and supply of ice cream. This led to the filing of a suit, being Suit No. 40/95, by the first respondent in the Court of Munsiff, First Class, Gaya, seeking permanent injunction for restraining the appellant from causing any disturbance in the manufacture, supply and launching of the ice cream according to the specifications given by the appellant. In response, on May 17, 1995, the appellant filed a petition u/s 34 of the Arbitration Act, 1940 for the stay of the suit on the ground that the parties are governed by an arbitration clause contained in the aforesaid agreement. The Munsiff, First Class, Gaya by his order dated August 3, 1995 while taking note of Clause 20 of the agreement stayed the proceedings in the suit. The first respondent being aggrieved of the order passed by the Munsiff, First Class filed a miscellaneous appeal, being miscellaneous appeal No. 7/95, before the Second Additional district Judge, Gaya. By a detailed order, the second Additional District Judge dismissed the appeal of the first respondent on March 14, 1996. Thereafter the first respondent filed a revision petition before the High Court of judicature at Patna against the order of the Munsiff, Gaya dated August 3, 1995.

5. On May 6, 1997, parties stated before the Patna High Court that the disputes between them be referred to arbitration as per the aforesaid agreement. It may be noted that after the Munsiff the suit, the appellant on September 14, 1995 appointed Sh. H.L. Aggarwal , former Chief Justice, Orissa High Court, as an Arbitrator purportedly under Clause 20 of the agreement. A communication in this regard was sent to the first respondent on September 14, 1995. The appellant also made a statement before the Patna High Court that he had selected Sh. H.L. Aggarwal as the Arbitrator. On the other hand the first respondent stated that he had selected Sh. Uday Singh, a retired Judge of the Patna High Court by its order dated 6th May, 1997 referred the disputes between the parties to the aforesaid Arbitrators. The High Court while disposing of the Revision petition observed as follows:-

" Before this court parties have agreed that the dispute between them may be referred, as per the agreement to Arbitrators chosen by the parties. The plaintiff had chosen Shri Uday Singh, a retired Judge of this court and Senior Advocate of the Supreme Court, while the defendants have chosen Shri Hari Lal Agrawal, Senior Advocate of the Supreme Court, a former judge of this Court and Chief Justice of Orissa High Court, as Arbitrators. The dispute between the parties is

referred to arbitrators."

6. After the reference of the disputes by the Patna High court, the Arbitrators appointed Sh. Avadh Behari Rohtagi, a former Judge of the Delhi High court as the Presiding Arbitrator. On November 2, 1998, the appellant filed an application before the arbitrators submitting inter alias that the Indian Arbitration and Conciliation Act, 1996, does not apply and the provisions of Indian Arbitration Act, 1940 alone would be applicable to the proceedings. In other words, the appellant invited the Arbitrators to decide the question as to which of the two Acts would be applicable to the arbitration proceedings. The Arbitrators by a majority of 2:1 decided on April 6, 1998 the application of the appellant and held that the provisions of Arbitration and Conciliation Act, 1996 would apply to the arbitration proceedings. The appellant being aggrieved of the order passed by the Arbitrators filed a petition, being OMP 94/98, u/s 33 of the Arbitration Act, 1940 which came up before a learned single Judge of this Court.

7. The learned single Judge on October 13, 1998 maintained the order of the Arbitrators dated April 6, 1998 and disposed of the petition accordingly. Dissatisfied with the order of the learned single Judge, the appellant has filed the instant appeal.

8. Learned counsel appearing for the first respondent has raised a preliminary objection to the maintainability of the appeal. He submitted that an appeal against an order of the learned single Judge made in a petition filed u/s 33 of the Arbitration Act would but lie and is barred under the provisions of section 39 thereof. He also contended that right to appeal from a judgment which may otherwise be available under the Letters Patent is barred by section 39 of the Arbitration Act, 1940. In support of his submission reliance was placed by him on the decision of the Supreme Court in *Union of India (UOI) Vs. Mohindra Supply Company*, , where it was held as follows :-

"...If by the express provision contained in S. 39(1), a right to appeal from a judgment which may otherwise be available under the Letters Patent is restricted, there is no ground for holding that cl. (2) does not similarly restrict the exercise of appellate power granted by the Letters Patent. If for reasons aforementioned the expression "second appeal" includes an appeal under the Letters Patent, it would be impossible to hold that notwithstanding the express prohibition, an appeal under the Letters Patent from an order passed in appeal under sub-s. (1) is competent."

9. This decision of the Supreme Court was followed by a Full Bench of this Court in *Union of India Vs. A.S. Dhupia and Another*, , in which it was observed as follows:-

"...The only argument to distinguish this authority (*Union of India (UOI) Vs. Mohindra Supply Company*,) urged by Mr. Sen, the learned counsel for the appellant, was that Section 10 of the Act of 1966 should be taken to be a special provision and, Therefore, must be held to confer a right of appeal even against

those orders which are not covered by Section 39(1) of the Act which is a general provision. In our view the argument is plainly untenable. The Act is a specific Code dealing with the arbitration matters and Section 39(1) is a special provision indicating the orders which alone are appealable. It is wrong, Therefore, to say that Section 10 of the Act of 1966 which only provides for a forum of appeal is a special provision and will override Section 39(1) of the Act...." (text supplied in parentheses)

10. The aforesaid Full Bench decision was relied upon in *The East India Hotels Ltd. Vs. Jyoti (P) Ltd.*, , in which one of the questions was whether an order of the arbitration court disposing of a prayer for interim injunction was appealable. In this regard the Divisional Bench of this Court held as follows:-

"(iii) An order of the arbitration court disposing of a prayer for an interim injunction is not appealable; rather an appeal there from is specifically prohibited by Section 39(1) of the Arbitration Act."

11. Again in *State of West Bengal Vs. Gourangalal Chatterjee*, , the Supreme Court reiterated the position that appeal will not lie from an order passed by a learned single Judge of the High Court under the Letters Patent of the Calcutta High Court in view of the specific bar u/s 39 of the Arbitration Act, 1940. In this regard, it held as follows:-

"The learned counsel for the appellant vehemently argued that since the decision by the Supreme Court was in respect of an appeal directed against an order passed by a learned Single Judge in exercise of appellate jurisdiction no second appeal lay but that principle could not be applied where the order of learned Single Judge was passed not in exercise of appellate jurisdiction but original jurisdiction. The argument appears to be without any substance as sub-section (1) of section 39, which is extracted below:

(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court Authorised by law to hear appeals from original decrees of the Court passing the order-

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award;

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

Provides that an appeal could lie only from the orders mentioned in the sub-section itself. Since the order passed by learned Single Judge revoking the authority of the Chief Engineer on his failure to act as an arbitrator was not covered in either of the six clauses mentioned in Section 39 it is obvious that no appeal could be filed against the order of the learned Single Judge."

12. However a contrary view seems to have been taken by the Supreme Court in *Vanita M. Khanolkar v. Pragna M. Pai and others* JT 1998 (7) SC 17, wherein it was observed that any statutory provision barring an appeal or revision cannot cut across a constitutional power of a High Court. It was inter alia held that the power of appeal emanating from the Letters Patent would not get excluded unless the statutory enactment concerned expressly excludes appeals under the letters patent. The principle was stated thus:-

"3. Now it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court. Even the power flowing from the paramount charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under letters patent. No such bar is discernible from Section 6(3) of the Act. It could not be seriously contended by learned counsel for the respondents that if Cl. 15 of the Letters Patent is invoked then the order would be appealable. Consequently, in our view, on the clear language of Cl. 15 of the Letters Patent which is applicable to Bombay High Court, the said appeal was maintainable as the order under appeal was passed by learned single Judge of the High Court exercising original jurisdiction of the Court. Only on that short ground the appeal is required to be allowed."

13. It is significant to note that the decision in *Mohindra Supply Company's* case (supra) was rendered by four Judges of the Supreme Court, while the decisions in *State of West Bengal v. M/s. Gourangalal Chatterjee* and *Vanita M. Khanolkar v. Pragna M. Pai and others* (supra) were rendered by Benches comprising of two Judges. In *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, observations made by the Supreme Court appear to support the view that the right of appeal against the judgments under the letters patent was not affected by other statutory provisions relating to appeals. In this regard the following observations of the Supreme Court need to be looked at :-

"32. Thus, this Court has clearly held that the right to appeal against Judgments under the Letters Patent was not affected by S. 104(1) of the Code of 1908 and the decision Therefore fully supports the argument of Mr. Sorabjee that there is no consistency between the Letters Patent jurisdiction and S. 104 read with Order 43, Rule 1 of the Code of 1908. Similarly, in *Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others*, this Court while construing the

provisions of S. 202 of the Indian Companies Act observed as follows (at pp. 512, 513):-

"There, was no doubt either that most of the orders or decisions in winding up would not be comprehended within the class of appealable orders specified in Section 104 or O. 43, R. 1. If Therefore the contention of the respondent were accepted it would mean that in the case of orders passed by the District Courts appeals would lie only against what would be decrees under the Code as well as appealable orders under S. 104 and O. 43, R. 1 and very few of the orders passed in the Courts of the winding up would fall within these categories. On the other hand, the expression "judgment" used in Cl. 15 is wider.... The learned Judge Therefore rejected a construction which would have meant that the same orders passed by District Courts and by a Single Judge of a High Court would be subject to different rules as to appealability."

14. Thus the position in law is not very clear. If we go by the Full Bench decision of this Court, no appeal would lie against the order passed by the learned single Judge. The view of the Full Bench, as already noted, finds support from the two decisions of the Supreme Court in *Mohindra Supply Company* and *State of West Bengal v. M/s. Gourangalal Chatterjee's* cases (supra). On the other hand it appears to us that the principle laid down by the Supreme Court in *Vanita M, Khanolkar* and *Shah Babulal Khimji's* cases (supra) would support the view that appeal would lie under the Letters Patent to the Division Bench from an order passed by the learned Single Judge of this Court u/s 33 of the Arbitration Act, 1940. Since the question of maintainability of appeals in such matters arises in a large number of cases, we consider it appropriate to request the Chief Justice to constitute a Bench of five Judges to consider the question as the Full Bench decision of this court was rendered by four Judges.