

(2005) 08 CAL CK 0013

In the Calcutta High Court

Case No : G.A. No. 4468 of 2004 and 369 of 2005, A.P.O.T. No. 71 of 2005,
A.P.O. No. 81 of 2005 and Suit No. 13 of 1998

Tata Iron and Steel Co. Ltd.

APPELLANT

Vs

Standard Chrome Ltd.

RESPONDENT

Date of Decision : 05-08-2005

Acts Referred:

Arbitration Act, 1940 — Section 39, 39(1), 39(2)
Arbitration and Conciliation Act, 1996 — Section 16(2), 16(3), 17, 34(2), 37
Companies Act, 1956 — Section 433
Limitation Act, 1963 — Section 5

Citation : (2006) 2 CHN 378

Hon'ble Judges : Pravendu Narayan Sinha, J; Pinkai Chandra Ghose, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Pinkai Chandra Ghose, J.—This appeal is directed from an order dated February 7, 2005 whereby the Hon"ble First Court rejected an application filed by the appellant u/s 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act).

2. In this appeal two questions arose before us :--

(a) Whether the appeal is maintainable;

(b) Whether the agreement in question contained an Arbitration Clause.

3. Facts also pleaded in the petition that under an agreement dated 5th August, 1993 the appellant herein was to supply the chrome ore to the respondent herein for conversion and for return of the finished materials to the appellant herein. Accordingly, respondent started lifting the chrome ore and receiving the same as well as coke from the appellant. The appellant further incurred various expenses and raises its debit notes in respect thereof as a result a sum of Rs. 2,51,60,753.81/- have become due and payable by the respondent to the

appellant in spite of demands respondent failed to pay the said amount and the appellant duly issued a notice u/s 433 of the Companies Act, 1956 (hereinafter referred to as the said Act) and initiated the winding up proceeding for its claims. After instituting the said proceedings by the appellant herein, the respondent filed a counter-blast suit on 9th January, 1998 and claimed a decree for a sum of Rs. 5,12,64,200/-.

4. The respondent disputed the facts and pleaded that although the appellant asked for dismissal of the suit and the injunction which is beyond the scope of Section 8 of the said Act did not pray for reference of the dispute to the arbitration. It is also submitted that the appellant herein abandoned the said arbitration clause by filing the winding up petition being C. P. No. 588 of 1997 and part of the claim arose out of the said claim and7or Memorandum of Understanding to which the appellant relied upon.

5. The claim of the appellant was relegated to a suit by an order dated 6th April, 1999 by this Court and an appeal was filed by them being APOT No. 508 of 1999 along with an application u/s 5 of the Limitation Act.

6. It is further submitted that at the first instance the appellant came before this Court without applying for order invoking the said arbitration clause and pursued their remedy in the Civil Court. It is also submitted that Writ of Summons was duly served on the appellant in or about 1998. The suit appeared in the list since the defendant failed to file their written statement and thereafter, the application filed u/s 8 of the said Act with an intention to delay the hearing of the suit. Hence, it was submitted before the Hon"ble First Court that the said application was not maintainable and should be dismissed in limini.

7. It was also contended before the Hon"ble First Court that the cause of action of the respondent arose out of the breach of agreement to sell and purchase goods entered into on 15th July, 1995. The agreement so relied upon before the Hon"ble First Court is of the year 1993, but it would be evident from the said agreement on which reliance was placed before the Hon"ble First Court by the appellant being an agreement of the year 1993 was made only for a period of 12 months and subsequent thereto the agreement of 1995 was entered into between the parties and the said agreement is an independent agreement that of the agreement of the year 1993.

8. It was also submitted that there was no arbitration clause of respect of the said agreement in the year 1995 and is inextricably connected with the agreement of 1993 and the Hon"ble Court has the jurisdiction to apply Section 8 of the said Act in respect of the said suit.

9. The Hon"ble First Court after taking into account all these facts came to the conclusion that parties took steps in respect of the said agreement and the appellant filed a winding up petition and the petition was relegated to a suit on the ground of counter-claim of the respondent. The Hon"ble First Court also came to the conclusion that no part of the claim of the respondent based on the

agreement in the year 1993 and thereafter it cannot be contended that the disputes, between the parties would attract the arbitration clause and there is no scope for exercise of jurisdiction u/s 8 of the said Act. Hence, the application was dismissed.

10. Mr. Mitra, learned Advocate appearing on behalf of the appellant relied upon the decisions reported in P.S. Sathappan (Dead) by Lrs. Vs. Andhra Bank Ltd. and Others, , Vinita M. Khanolkar Vs. Pragna M. Pai and Others, ; National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee), and Orma Impex Pvt. Ltd. Vs. Nissai Asb Pte. Ltd., and contended before us that order is appealable.

11. He also strenuously argued before us that the agreement of 1993 and the agreement of 1995 are inter-dependent and 1995 agreement contains all the clauses including the arbitration clause, which was mentioned in 1993 agreement. Therefore, disputes, if any, are also covered under the said arbitration clause. He also relied upon the decisions reported in 2004 CWN 1018, Stephen Commerce Pvt. Ltd. v. Owners & Parties Interested in the Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, in support of his such contention. He also drew our attention to the discussions had between the parties and tried to impress upon this Court that the said negotiation between the parties is nothing but on the basis of the earlier agreement, which is subsisting at that point of time and tried to rely upon the same.

12. Mr. Kar, learned Advocate appearing on behalf of the respondent contended that the appeal is not maintainable and relied upon the decisions reported in Union of India (UOI) Vs. Mohindra Supply Company, ; State of West Bengal Vs. Gourangalal Chatterjee, ; 1995 (1) CLJ 458 (SB), Union of India v. K. Satyanarayan & Co. ; Union of India and Another Vs. Monoranjan Mondal and Others, , Sureka Steel Ltd. v. Union of India : 1999 (1) CLT 52 (DB), State of West Bengal v. R. C. Banerjee; 2000 WBLR (Cal) 307 (DB), Cityscape Developers Pvt. Ltd. v. Akla Builders Put. Ltd., Union of India (UOI) and Others Vs. Aradhana Trading Co. and Others, , in support of his such contention and contended that the appeal is hit by the provision of Section 37 of the said Act.

13. He further submitted that no relief has been sought and he drew our attention to the said application. He further contended that parties entered into a conversion agreement dated August 5, 1993. Under the said agreement the appellant was required to supply raw materials such as chrome ore and coke to the respondent for processing and conversion. The appellant failed to comply with its commitments under the said agreement. Subsequent thereto, on July 15, 1995 parties entered into a fresh agreement. Earlier the agreement dated August 5, 1993 contains an arbitration clause. The said earlier agreement has stood superseded and/or rescinded and/or substituted by the new contract. The new contract between the parties does not contain any arbitration clause. Therefore, disputes between the parties cannot be referred to arbitration and he relied upon the decisions reported in M/s. Indian Drugs and Pharmaceuticals Ltd. Vs. M/s.

Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others, and Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, , Narayan Prasad Lohia v. Nikunj Kumar Lohia and Ors. Furthermore, disputes between the parties are not covered under the arbitration agreement. He also submitted that the entire subject-matter of the suit is not covered under any arbitration agreement nor the subject of the disputes can come within the scope of this arbitration agreement and he also relied upon a decision reported in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, , in support of such contention.

14. It is necessary for us to place Section 37 of the Arbitration and Conciliation Act, 1996 which is reproduced hereunder:

Section 37. Appealable orders.--(1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely :

(a) granting or refusing to grant any measure u/s 9;

(b) setting aside or refusing to set aside an arbitral award u/s 34(2) An appeal shall also lie to a Court from an order of the arbitral tribunal--

(a) accepting the plea referred to in Sub-section (2) or Sub-section (3) of Section 16 ; or

(b) granting or refusing to grant an interim measure u/s 17.

(3) 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.

15. We have also considered the decisions before us and it appears to us after analyzing those decisions particularly held in "P.S. Sathappan (Dead) by L.Rs. v. Andhra Bank Ltd. and Ors." (supra) that until and unless an appeal is barred by a specific provision, the right of the High Court under Clause 15 of the Letters Patent cannot be wiped off. The Hon"ble Supreme Court in "Orma Impex Pvt. Ltd. v. Nissai ASB PTE. Ltd." (supra) held that Clause 15 of the Letters Patent is applicable to decisions rendered by the learned Single Judges of the High Court exercising jurisdiction under the Trade Marks Act, although under the said Act no appeal has been provided.

16. It is also true that unless the powers conferred upon the High Court under Clause 15 of the Letters Patent is specifically excluded by a statute, the power of the High Court does not get excluded by a general provision barring an appeal.

17. But it is also a fact as has been held in "Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums" (supra) where the Hon"ble Supreme Court held that where an arbitration clause exists, the Court has a mandatory duty to refer the dispute arising between the contracting parties to the learned Arbitrator and the Civil Court has no jurisdiction to continue with the suit one of such application u/s 8 has been filed.

18. In the instant case, this decision has no application since in our opinion, the Trial Court has correctly held that the agreement between the parties which was entered into on 15th July, 1995 is an independent one and we have also examined the said agreement and we do not find any reason to differ from the opinion formed by His Lordship and we do hold that the said agreement does not contend any arbitration clause. Therefore, in our opinion, the decision has no application in the facts and circumstances of this case.

19. On the ground of question of non-appealability of the application in question, we have also considered the decisions cited before us by Mr. Kar, learned Advocate appearing on behalf of the respondent, and we have analyzed the said decisions and we have found in "Union of India v. Mohindra Supply Co." (supra) where the Hon"ble Supreme Court held that an appeal under the Letters Patent is barred under the provision of Section 39(2) of the Arbitration Act, 1940 since the said Act expressly prohibits a "second appeal" from an order passed in appeal u/s 39(1) except an appeal to the Supreme Court.

20. In "State of West Bengal v. Gouranga Lal Chatterjee" (supra) the Hon"ble Supreme Court has also held that no appeal is maintainable if it is hit by Section 39 of the said Act. Even in "Union of India v. K. Satyanarayan & Co." (supra) and in "State of West Bengal v. R.C. Banerjee" (supra) the Hon"ble Courts held that no appeal under Clause 15 of the Letters Patent would lie which does not come within the purview of Clauses (i) to (vi) of Section 39 of the Act of 1940.

21. In "Union of India v. Monoranjan Mandal" (supra) after taking into account Section 37 of the Arbitration and Conciliation Act, 1996 the Hon"ble Division Bench of this High Court has held that an appeal would lie only under the provision of the said Section 37 and not otherwise.

22. Therefore, after analyzing these decisions we have to come to the conclusion that the application must fail since the appeal is not maintainable and is hit by provision of Section 37 of the Arbitration and Conciliation Act, 1996.

23. Therefore, on both the grounds we dismiss this appeal and affirm the decision of the Hon"ble First Court.

Pravendu Narayan Sinha, J.

24. I agree.