
(1984) 03 CAL CK 0039

In the Calcutta High Court

Case No : Appeal No. Nil of 1983 in Spl. Suit No. 5 of 1983

West Bengal Essential Commodities Supply Corporation Ltd.	APPELLANT
Vs	
International Trading Corporation of India	RESPONDENT

Date of Decision : 29-03-1984

Acts Referred:

Arbitration Act, 1940 — Section 20, 8(1)

Citation : AIR 1984 Cal 313 : 88 CWN 793

Hon'ble Judges : Murari Mohan Dutt, J;G.N. Ray, J

Bench : Division Bench

Advocate : Partha Bose, for the Appellant; Hirak Mitra, for the Respondent

Final Decision : Allowed

Judgement

M.M. Dutt, J.—This is application for interim stay of the operation of the judgment and order dated September 29, 1983 passed by a learned single Judge of this Court appointing a member of the Bar an arbitrator for the adjudication of all disputes as raised by the respondent in the application u/s 20 of the Arbitration Act as well as the counter claims as made by the appellant in the affidavit-in-opposition. The application has been filed by the appellant, the West Bengal Essential Commodities Supply Corporation Ltd., a government undertaking in the connected appeal preferred against the above judgment and order of the learned Judge passed u/s 20 of the Arbitration Act.

2. On April 7, 1981 the respondent, M/s. International Trading Corporation of India, a proprietorship firm entered into agreement with the appellant for the supply of crushed common salt and superfine salt for the year 1981-82. The appellant was described in the said agreement as "purchaser" and the "respondent as "seller". Clause 10 of the agreement which is an arbitration clause runs as follows:--

"10. In the event of any dispute and difference arising under this Agreement regarding construction thereof or in respect of any other matter or thing relating

to this agreement either during the continuance of this Agreement or after termination thereof, the same shall be referred to the sole arbitration of an Arbitrator to be appointed by the Managing Director of the purchaser. No objection can be raised regarding such appointment either on the ground that the Arbitrator is or was an employee of the purchaser or the said Arbitrator has or had anything to do relating to this Agreement. The Award of the said Arbitrator shall be final and binding on both the parties to this Agreement"

3. The respondent filed an application u/s 20 of the Arbitration Act on January 27, 1983, inter alia, praying therein for the filing of the arbitration agreement by the appellant, for reference of the disputes as raised by the respondent to arbitration in terms of the agreement and for the appointment of an arbitrator as envisaged in the agreement.

4. It was inter alia alleged by the respondent in the said application u/s 20 of the Arbitration Act that pursuant to the order of the appellant, the respondent had been supplying crushed common salt. But, suddenly, the appellant by its telegram dated February 22, 1982 instructed the respondent to stop despatch of crushed common salt until further order. Thereafter, in spite of repeated requests made by the respondent, the appellant did not allow the respondent to supply the balance quantity of salt and, ultimately, the appellant by its letter dated September 16, 1982 cancelled the contract unilaterally and thereby committed breach thereof. The respondent, by an Advocate's letter dated November 10, 1982, called upon the appellant to make payment of the sum of Rs. 7,71,212.50 alleged to be the amount of loss suffered by it together with interest thereon at the rate of 18% per annum and also demanded from the appellant the refund of security deposit being the sum of Rs. 25,000/-.

5. The application was opposed by the appellant by an affidavit-in-opposition. In the affidavit-in-opposition, besides dealing with the allegations of the respondent as made in the application u/s 20 of the Arbitration Act, it was alleged that in reply to the Advocate's letter of the respondent dated December 2, 1982, the appellant by its letter dated January 15, 1983 sent by registered post informed the respondent as also its Advocate of the appointment of an arbitrator by the Managing Director of the appellant in terms of Clause 10 of the said agreement dated April 7, 1981. The said letter was duly received by the appellant on January 22, 1983. Further, it was alleged in the affidavit-in-opposition that the appellant by its letter dated February 14, 1983 informed the respondent's Advocate of the appointment of a new arbitrator in place of the previously appointed arbitrator. The said letter was also duly received by the respondent's Advocate.

6. It was inter alia, contended by the appellant that as an arbitrator was appointed by the Managing Director of the appellant pursuant to the disputes raised by the respondent in the said Advocate's letter and the fact of such appointment of an arbitrator having been communicated to the respondent and its Advocate on January 22, 1983, that is, before the filing of the application u/s

20 of the Arbitration Act on January 27, 1983, the application was not maintainable.

7. On the other hand, in the affidavit-in-reply filed by the respondent, it was submitted, *inter alia*, that as the arbitration agreement does not provide for the supply of vacancy, the appointment of a second arbitrator in place of the first one, was not tenable in law.

8. The learned Judge took the view that the second appointment of the arbitrator was bad because the Managing Director had no authority to make the appointment of an arbitrator for the second time and also because the matter was *sub judice* when such appointment was made. In the view of the matter, the learned Judge by the impugned judgment and order allowed the application and, as stated already, appointed a member of the Bar, the arbitrator for adjudication of the disputes between the parties, superseding the appointment of the arbitrator already made by the appellant under the terms of the agreement.

9. As elaborate submissions have been made on the merits of the case by the learned Counsel of both parties, we treat the appeal as *on day's list* for, in our opinion, the disposal of the application will virtually mean the disposal of the appeal.

10. The first point that has been urged on behalf of the appellant relates to the maintainability of the application u/s 20 of the Arbitration Act. It is contended that as the respondent was informed by the appellant of the appointment of an arbitrator in accordance with the arbitration agreement before the respondent filed the application u/s 20, the application was not maintainable. In our opinion, there is much substance in the contention, the only object of the respondent in taking resort to the provision of Section 20 of the Arbitration Act was to have an arbitrator appointed by the Court for the purpose of adjudication of the disputes raised by the respondent. It is not disputed that the respondent was informed by the appellant of the appointment of an arbitrator by the Managing Director of the appellant in accordance with the arbitration agreement. The respondent did not disclose that fact in the application u/s 20 which proceeded on the basis that no appointment had then been made. It is true that in view of the provision of Sub-section (1) of Section 20, one may take recourse to the filing of an application u/s 20 instead of proceeding under Chapter II of the Arbitration Act, that is to say, in the instant case, the respondent without calling upon the appellant to appoint an arbitrator, could file an application u/s 20. But, as already an arbitrator was appointed and the respondent was informed of such appointment before the application was filed the application was not, in our Opinion, maintainable, for, in such a case, the Court would have nothing to do.

11. Much reliance has, however, been placed by Mr. Hirak Mitter on the provision of Section 8 of the Arbitration Act in support of the maintainability of the application. In vain does Mr. Mitter invoke the provision of Section 8(1)(a) which, in our opinion, has no manner of application, The said provision will apply only

when one or more arbitrators are to be appointed by consent of parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments. In the instant case, the parties have by the agreement consented to the reference of the disputes "to the sole arbitration of an Arbitrator to be appointed by the Managing Director of the purchaser", who is the appellant before us. Such appointment had already been made and, therefore, there was no question of an arbitrator to be appointed by consent of parties and all the parties not concurring in the appointment after differences have arisen. The provision of Section 8(1)(a) was not, therefore, in terms applicable. Even assuming that it was, no written notice was served by the respondent on the appellant requiring it to concur in the appointment or in supplying the vacancy and, as such, there, was no question of the appellant making the appointment within fifteen days of the service of the notice, the failure of which alone would entitle the Court to appoint an arbitrator. In our opinion, there is no substance in the contention of the respondent relating to the maintainability of the application and the appointment of the arbitrator by the Court on the basis of the provision of Section 8(1)(a) of the Arbitration Act which was not, on the face of it, applicable.

12. It is, however, urged on behalf of the respondent that as during the pendency of the application another arbitrator was appointed in place of the first one, such second appointment being illegal and invalid as not having been intended by the parties under the arbitration agreement, the application was maintainable, and the Court had jurisdiction to supersede such appointment and appoint an arbitrator of its own choice. This contention does not appear to be tenable in law. The question as to the maintainability of the application has to be considered on the basis of the facts and circumstances as on the date the application was filed and not on the date on which the maintainability question has been actually considered. On the date the application was filed, an arbitrator was already appointed and there was no question as to the legality of such appointment. Therefore, there can be no doubt that the application was not maintainable. The learned Judge, in our opinion, should have dismissed the application on that ground.

13. We may now consider the legality or otherwise of the second appointment of the arbitrator by the Managing Director of the appellant in place of the first one. It is submitted on behalf of the respondent that as there is no indication in the arbitration agreement that the parties intended that the vacancy should be filled up or supplied the second appointment of the arbitrator in place of the first one is invalid, and the learned Judge was perfectly justified in appointing an arbitrator. It has been already stated that the learned Judge took the view that the Managing Director of the appellant had no authority to appoint an arbitrator for the second time, and that in any event, he had no such authority as the matter was sub judice.

14. It is true that the arbitration agreement does not indicate that in case of

vacancy, it shall be filled up but, at the same time, "the arbitration agreement does not show that the vacancy should not be supplied." So, by virtue of the provision of Section 8(1)(b), the Managing Director of the appellant was quite competent to supply the vacancy caused by the refusal of the first arbitrator. It is, however, submitted on behalf of the respondent that as the Managing Director of the appellant was not specifically empowered to fill up the vacancy, such vacancy could only be filled up by the parties and, on their failure, by the Court. We are unable to accept this contention. The Managing Director of the appellant has been specifically authorised by the parties to appoint the arbitrator. In our opinion, this authority of the Managing Director does not come to an end on the appointment of an arbitrator, but it will continue for the purpose of filling up the vacancy that may be caused for any of the reasons as mentioned in Section 8(1)(b) of the Arbitration Act. In making the appointment, the Managing Director of the appellant acted on behalf of the parties. In other words, the first and, thereafter, the second appointment of arbitrators should be deemed to have been made with the consent of both parties including the respondent. So the appointment of the arbitrator for the second time by the Managing Director of the appellant was quite legal. We are unable to accept the view of the learned Judge that as the matter was sub judice, the appointment of the arbitrator was invalid- It is not disputed that no interim order was passed by the learned Judge restraining the Managing Director of the appellant from making any appointment. We do not think that simply because, the , application u/s 20 of the Arbitration Act was pending that would affect suspension of the arbitration agreement or of the authority of the Managing Director of the appellant to appoint an arbitrator as conferred on him by the parties by the arbitration agreement. We are of the view that in the absence of any order of the learned Judge restraining the Managing Director of the appellant from acting under the arbitration agreement, he was entitled to fill up the vacancy caused by the refusal of the previously appointed arbitrator to act. In the circumstances, we hold that the appointment of the arbitrator for the second time is quite legal and valid, and the learned Judge had no jurisdiction to appoint an arbitrator in suppression of the appointment of the arbitrator by the Managing Director of the appellant in terms of the arbitration agreement.

15. For the reasons as aforesaid, the impugned judgment and order of the learned Judge is set aside and the application of the respondent u/s 20 of the Arbitration Act is dismissed.

16. The appeal is allowed. The respondent shall pay cost of the trial Court as also of this Court to the appellant.

17. The filing of the Paper Books and the settlement of index of papers are dispensed with. The undertaking is discharged.

18. The arbitrator appointed by the Managing Director of the appellant is directed to enter upon the reference within four weeks from date and to decide the disputes as raised by the respondent in the application u/s 20 of the Arbitration

Act and the counter-claims of the appellant as made in the affidavit-in-opposition of the appellant filed in the trial Court.

The arbitrator appointed by the learned Judge is discharged.

G.N. Ray, J.

19. I agree.