

SUPREME COURT OF INDIA

Petine Shipping Inc. of Monrovia

Vs.

Minerals and Metals

C.A.No.2627 of 2009

(Tarun Chatterjee and H.L. Dattu JJ.)

17.04.2009

JUDGEMENT

H.L. Dattu J:-

1. Leave granted.

2. This appeal is directed against the orders passed by the High Court of Judicature at Bombay in Appeal No. 132 of 2000 in A. P. No. 313 of 1999 dated 26.4.2007. By the impugned judgment, the Division Bench has held that in the reference, an application was admittedly made to Delhi High Court and therefore, it would not only be in accordance with law, but will also be proper for the parties to approach the same court.

3. The facts leading to this Special Leave Petition are: the appellant is a Liberian Shipping Company carrying on business through their protecting agents M/s. G.A.C. Shipping India Ltd. The respondent is a government company, which by charter party dated 2.6.1989 chartered the appellants vessel M.V. Animar to carry Rock Phosphate from Togo to West Coast India. The respondent chose Mumbai as the port of delivery. The dispute resolution clause of the charter party provided that each party may appoint one arbitrator, who in the event of disagreement shall appoint an umpire, whose decision shall be final.

The arbitrators and the umpire were required to be commercial men.

4. When a dispute arose in 1990, the appellant vide letter dated 29.5.90 nominated Mr. A. K. Khandwala and the respondent vide telegram dated 18.6.90 appointed Justice Deshpande (Retired Chief Justice of the Delhi High Court). The appellant intimated the respondent by letter dated 9.7.90, that since their nominee was not a commercial man as required under the charter party clause; Mr. Khandwala would be the sole arbitrator. The respondent filed Arbitration Petition before the Delhi High Court, for a declaration that their nomination of Justice Deshpande as arbitrator was valid. During pendency of the said petition, Justice Deshpande expired. Vide letter dated 14.8.92, the respondent appointed Mr. K. Parthasarthi,

as Arbitrator, and on 18.8.92 the petition of the respondent was dismissed as having become infructuous. The court has not passed any other order in the petition filed by respondent.

5. The Arbitrators could not arrive at a unanimous decision and they appointed Mr. R. C. Cooper as the Umpire. When Mr. Cooper sought to proceed with the matter, the respondent inter alia raised objection as to the validity of the appointment of the umpire and the umpire vide letter dated 10.7.95, informed the parties that it would be prudent to approach the appropriate court for orders before proceeding further with the matter.

6. The appellant moved the High Court of Bombay, inter alia with a prayer for conformation/appointment of Mr. Cooper as Umpire and to enlarge the time for making the award. The Single Judge as well as Division Bench in Arbitration Petition dismissed the appellant's petition and appeal respectively, solely on the ground that in view of Section 31(4) of the *Arbitration Act, 1940* and in view of the Arbitration Petition filed by the respondent earlier before the Delhi

7. High Court, which had been dismissed as having become infructuous;

“the Bombay High Court cannot adjudicate upon the appellant's petition. The Division Bench of Bombay High Court has observed, that, if the Delhi High Court was one of the courts having jurisdiction and if the parties have already approached that court once, all future applications should also be made to that court. Aggrieved by the said order, appellant is before us by this special leave petition.”

8. We have heard learned counsel for the parties.

9. The Learned counsel for the appellant would contend, that, the Delhi High Court had dismissed the petition of the respondent as having become infructuous. Merely because an application was filed by the respondent before the Delhi High Court, this by itself would not make the Delhi High Court the competent court as envisaged under section 31(4) of the Act so as to exclude the Jurisdiction of all courts. Learned Counsel would also contend that the Arbitration Petition which has been moved by the respondent before the Delhi High Court was not an application as envisaged under section 31(4) of the Act and thus Delhi High Court did not get conferred with the exclusive jurisdiction to entertain all applications pertaining to the present arbitration dispute. It is further contended that if this becomes the situation, then any party could indulge in forum shopping by filling a superficial application before a court and withdrawing the same merely to ensure that all subsequent applications be made before that court. In support of his contentions, learned Counsel would draw our attention to observations made by this Court in the case of *Union of India vs. Surjeet Singh Atwal*¹, and *M/s Guru Nanak Foundation vs. M/s Ratan Singh and Sons*².

10. In *Union of India v. Surjeet Singh Atwal*³, this Court has held that an application under Section 34 of the Act (for stay of suit) does not amount to an application under Section 31(4) of the Act and it belongs to a different category because such application does not lead to a reference to arbitration.

11. In *M/s. Guru Nanak Foundation v. M/s. Ratan Singh & Sons*⁴, this Court has observed that even though the first Court to be approached by the parties had been the Delhi High Court, since eventually the Supreme Court appointed the arbitrator and gave further directions regarding the proceedings, it was the Supreme Court which was the competent Court under Section 31(4).

12. The only questions which needs our consideration is, whether Bombay High Court has the jurisdiction to adjudicate upon the Arbitration Petition, where a previous application had been filed before the Delhi High Court and subsequently dismissed by the same Court as having become in fructuous.

13. The main object of Section 31 of the Arbitration Act is to invest a single court with the exclusive jurisdiction to decide all questions relating to the matter of arbitration; this object is achieved by the combined operation of all its sub-sections. The words "application in a reference" used in sub-section (4) should therefore, be related back to sub-sections (2) and (3) and all applications regarding the conduct of arbitration proceedings or arising out of such proceedings or in which the court has to decide questions regarding the validity, effect, or existence of an award or an arbitration agreement between the parties to the agreement, should be treated as "application in a reference".

14. The very foundation for the jurisdiction of the court under Section 34 is the existence of an arbitration agreement. The applicant asserts that there is such an agreement, while the plaintiff either disputes the existence of such an agreement or pleads that it is invalid. Section 33 gives an independent right to a person who wishes to challenge the existence or validity of an arbitration agreement to anticipate the other side and to initiate proceedings to have these questions determined beforehand. Thus applications under Sections 33 and 34 both are fundamentally in the matter of arbitration proceedings and fall within the purview of Section 31(4) of the Arbitration Act, though the former is intended to make an arbitration agreement ineffective and the latter effective and neither leads to a reference. [See (1971) 1 SCC (Jour) 70]

15. In the case of *State of M.P. v. Saith and Skelton (P) Ltd.*⁵, this court has held that the expression 'court' will have to be understood as defined in Section 2(c) of the Act, only if there is nothing repugnant in the subject or context. It is in that light that the expression 'court' occurring in Section 14(2) of the Act will have to be understood and interpreted. It was this Court that appointed Shri V.S. Desai, on 29-1-1971 by consent of parties as an arbitrator and to make his award. It will be seen that no further directions were given in the said order which will indicate that this Court had not divested itself of its jurisdiction to deal with the award or matters arising out of the award. In fact the indications are to the contrary. The direction in the order dated 29-1-1971 is that the arbitrator is 'to make his award'.

“Surely the law contemplates further steps to be taken after the award has been made, and quite naturally the forum for taking the further action is only this Court. There was also direction to the effect that the parties are at liberty to apply for extension of

time for making the award. In the absence of any other court having been invested with such jurisdiction by the order, the only conclusion that is possible is that such a request must be made only to the court which passed that order, namely, this Court.”

16. Unlike in the present case where an application was filed before the Delhi High Court seeking declaration that appointment of Mr. Justice Deshpande as Arbitrator is valid. The same application became in fructuous because of the demise of Mr. Justice Deshpande and had to be dismissed as having become infructuous. The Delhi High Court neither gave any directions nor did it appoint an Arbitrator in the adjudication of the said application.

17. In *Bharat Coking Coal Ltd. v. Annapurna Construction*⁶, this court observed that a distinction must be borne in mind in a case where this Court had no control over the proceedings and the case in which control of proceedings of the arbitrator had been retained.

18. Therefore, in the view taken by this Court in Bharat Cooking case, although an application was filed before the Delhi High Court, but it did not retain any control over the said proceedings of the arbitrator.

“Also respondent did not file any application regarding appointment of another arbitrator in the Delhi High Court. Thus, the application filed before the Delhi High Court cannot be said to a reference made under Section 31(4) of the Act.”

19. Under the agreement, respondent has chosen Mumbai as the port of delivery and the vessel carrying the Rock Phosphate was delivered at the port of Bombay. Therefore it cannot be denied that Bombay High Court had the jurisdiction in the Arbitration Petition filed before it, as the goods were delivered at the Port of Bombay.

20. Therefore, the High Court of Bombay, in our view, is not correct in rejecting the Arbitration Petition on the ground of lack of jurisdiction.

21. In view of the above discussion, the appeal is allowed. The impugned order passed by the High Court is set aside. The application filed under Section 28 of the Arbitration Act, 1940 for extension of time for making the Award is restored on the Board of the Bombay High Court.

“The court is requested to consider the application on merits as early as possible at any rate within an outer limit of six months from the date of receipt of the orders. No order as to costs.”

¹(1969) (2) SCC 211
⁴(1981) 4 SCC 634

²(1981) (4) SCC 634
⁵(1972) 1 SCC 702

³(1969) (2) SCC 211
⁶(2008) 6 SCC 732