(1997) 07 CAL CK 0001

Calcutta High Court

Case No: None

In Re: Wimco Limited — APPELLANT

Vs

RESPONDENT

Date of Decision: July 3, 1997

Acts Referred:

- Arbitration Act, 1940 - Section 34, 8
- Arbitration and Conciliation Act, 1996 - Section 11, 11(4), 2, 34, 4(a)
- Contract Act, 1872 - Section 21
- General Clauses Act, 1897 - Section 21, 8, 8(1)

Hon'ble Judges: Bijitendra Mohan Mitra, J

Bench: Single Bench

Advocate: S.P. Roy Chowdhury, Subhra Kamal Mukherjee and Somnath Dan, for the Appellant;Joy Saha, for the Respondent

Judgement

Bijitendra Mohan Mitra. J.

1. The instant revisional application is directed against Order No. 7 dated 26.2.97 arising out of an application u/s 8 of the Arbitration & Conciliation Act, 1996 in Title Suit No. 76 of 1996 passed by the learned Court of Assistant District Judge at Durgapur. The applicant in the original application u/s 8 of the connected Act has prayed for reference to the matter to arbitration and the learned Judge by the impugned order has been pleased to dismiss the same on contest against the plaintiff and ex-parte against others. So far as the narration of the case is concerned it appears that under an agreement dated 15.7.96 the plaintiff was appointed as Stockist of the defendant No. 2 and pursuant the agreement the plaintiff advanced money for supply of defendant No. 2''s produce but it has been alleged that the defendant No. 2 in collusion with other two defendants unilaterally cancelled the agreement. In the wake of the same, the connected suit was instituted. The defendant No. 3 prayed for time to file written statement but defendant No. 2 also

filed written statement. It is significant to mention that defendant No. 2 filed the connected application with assertion that the agreement in question contained arbitration clause and he has also that the certified copy of the agreement, the genuineness of which is not challenged. The said application has been contested. The contention of the defendant No. 2 is to the effect that before filing any other statement, he filed the application u/s 8. It has been observed, interalia, that when there is an arbitration agreement and defendant No. 2 has filed before filing of any other statement, the dispute as comprehended u/s 8 is maintainable. It is significant to mention that in the agreement entered into between the plaintiff and the defendant No. 2, there is a specific clause enumerated which is quoted as hereunder :

Any dispute arising out of or relating to this contract shall either be referred to the sole Arbitrator within the meaning of Arbitration Act, 1940 the provision of which shall apply to every such submission or all disputes shall only be to the Jurisdiction of Bombay Court

On construction of the aforesaid stipulation contained in the original agreement as mentioned, the court concerned has agreed with the contention of the defendant No. 2 that the present agreement spells out an arbitration agreement. The trial court on construction of the provisions of Section 11 of the Arbitration and Conciliation Act, 1996 has come to an inference and Has held that the application u/s 8 is liable to be rejected. So far as Section 8 of the Act is concerned it has been spelt out therein that a judicial authority before which an action is brought in a matter which is a subject of arbitration agreement and if a party so applies not latter than Without submitting, his first statement on the subsistence of the dispute refers the parties to arbitration. this Court while being asked to analysic the pith and substance of Section is reminded of the analogous provisions of Section 34 of the earlier Arbitration Act of 1940. In comparison made with regard to the - language and provision as adopted in Section 34 of the earlier Act it appears that the power vested u/s 34 of the Arbitration Act 1940 on the judicial authority before which the proceedings are pending can grant stay on formulation of its opinion that there is sufficient reason that the matter should be referred to arbitration then the judicial authority in seisin of the matter is authorised to grant an order of stay of the pending legal proceeding. The said power exercisable u/s 34 of the Arbitration Act. 1940 appears to be discretionary but a comparative scrutiny made with Section 8 of the present Act being the Arbitration and conciliation Act, 1996 normally reveals that the element of discretion has been taken away and an obligation has been cast on the judicial authority before which the matter is pending to refer the matter to arbitration. Therefore, the distinguishing feature of Section 34 of the Act, 1940 and Section 8 of the Act. 1996 is that provision as incorporated u/s 34 of the earlier Act rather discretionary while exercise of powers u/s 8 of the present Act. 1996 is obligatory. Here, in the impugned order the Court has opined that substance of the dispute is referable to arbitration. The concerned Court has tried to make a scrutiny

of the provisions of Section 11 of the Arbitration and conciliation Act. 1996 and on scrutiny being made of the provisions contained therein has come to a finding that the connected application inspite of formation of the opinion that the same is referable to arbitration is liable to be rejected. this Court has the occasion to go through the provisions of Section 11 of the Arbitration, and conciliation Act 1996 and in terms of Section 11(4) of the Arbitration and Conciliation Act. 1996 and clause (a) thereof postulates that if a party fails to appoint arbitration within 30 days from the receipt of a request to do so from the other party and in terms of Clause 6(a) of Section 11 -if a party fails to act as required in terms of Section 4(a) the said party may request the Chief Justice or any person or Institution designated by him to take necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment. In terms of Clause 12(b) of Section 11 of the Act - where the matters referred to inter alfa, amongst others is covered by sub-Section (4) of Section 11 the reference to Chief Justice in those sub-Sections shall be construed as a reference to, the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-Section (1) of Section 2 is situate and where the High Court itself is the court referred to in that clause, to the Chief Justice of that High Court. It is pertinent to make a reference to the concluding portion of Section 11(4) where it is laid down that the appointment of the proposed Arbitrator shall be made, upon request of a party by the Chief Justice or any person or institution designated by him. The tenor of reasoning contained is that unless the party concerned makes a request to the Chief Justice or any person or institution designated by him, the appointment of the proposed Arbitrator shall be made. It is significant to mention that pendency of the proceeding is referred to as before a judicial authority which is in seisin of the controversy and judicial authority could be visualised as something else from the definition of the Court as contemplated in definition Clause 2(e) of the said Act. In terms of the said definition, the Court means principal civil courts of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction but does not include any civil court of a grade inferior to such principal civil court or any court of Small Causes. The moot question for consideration is that if there is a right in favour of a party and mandate is cast on the judicial authority in seisin of the proceeding to refer the matter to arbitration and in view of the finding recorded that substance of the dispute in the pending adjudication is referable to the arbitration whether such right of a person provided under substantive provision can be taken away on the ground of infraction or technical compliance of procedure. this Court assumes a situation where there is no technical compliance namely, a party does not request the Chief Justice or any institution designated by him then whether the right as accorded u/s 8 can ipso facto evaporate and such technical violation of the procedure can make inroad into the domain of the statutory right. Therefore, this Court is of the view that on that particular score, the trial court cannot dismiss the application u/s 8 and in absence of any request of a party as the judicial authority has not been conferred with any suo motu power. It is open to the said authority to

direct the party to approach the Chief Justice of the State High Court or an institution or person designated by him to appoint the Arbitrator. The only eventuality that is visible on construction of Section 8 coupled with the findings contained that the dispute is referable to arbitration then the Judicial authority concerned ought to have directed the party with a time bound direction to make a formal request to the Chief Justice of the local High Courts so that he can do the needful in the matter. If within the time allowed by the judicial authority the party concerned does not comply with the direction then the consequences may follow but straightway the petition u/s 8 of the present Act cannot be rejected. Accordingly, viewed from that angle the concerned judicial authority is directed to give a formal direction to the party seeking arbitration to apply before the learned Chief Justice of the State High Courts within a stipulated time failing which consequence may follow. Therefore, the rejection of the application seems to be tinctured by irregularity in exercise of jurisdiction as it has resulted in dismissal of the application u/s 8 of the Act.

2. Mr. Saha, the learned Advocate appearing on behalf of the concerned opposite party, has drawn the attention of this Court to the particular stipulation relating to agreement of arbitration which has also been quoted in the order impugned. It appears that there a reference has been made for appointment of the sole arbitrator but within the meaning of the Arbitration Act, 1940. It has been contended with some amount of force by Mr. Saha that earlier Arbitration Act, 1940 has stood repealed by the present Arbitration and Conciliation Act, 1996 and as such no valid agreement of arbitration is there. Arbitration agreement has been defined in Section 7 of the Act and in terms of clause (2) of Section 7 thereof it has been spelt out that the Arbitration Act may be in the form of a arbitration Clause in a contract or in the form of a separate agreement. According to Mr. Saha whether the arbitration clause forms part of the parent contract or is in the form of a separate agreement and in the event of it being incorporated as a Clause in the parent contract itself it is to be read as a separate species of the contract itself. Mr. Saha in aid of his submission has taken sufficient pains - to take this Court to the provisions of Section 21 of the Contract Act and the same has been read by Mr. Saha that the validity of a contract is open to serious, question as a mistake of law not in force in India as the same effect of the mistake of fact. Mr. Saha has laid great amount of emphasis of law not in force in India and according to him because of the repealing provisions of the Arbitration and Conciliation Act. 1996 the Arbitration Act of 1940 has become a law not in force and the same is required to be translated as a mistake as to fact. The Court was on the threshold of analysis of the submissions made by Mr. Saha about the construction of Section. 21 but there Mr. Roy chowdhury the learned Advocate appearing on behalf of the petitions has joined the issue. According to Mr. Roy chowdhury in this given case in analysis of Section 21 will be an imperfect analysis if the court is oblivious of provisions of section 8 of the General Clauses Act According to Mr. Roy chowdhury Section 21 is required to be''

appreciated in context of Section 8 of the General Clauses Act and he refers to the language of Section 8(1) of the said Act which is quoted hereunder :

Section 8(1) - where this Act or any (Central Act) or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so reenacted. According to Mr. Roy chowdhury, no different intention is manifest from the conduct of the party that they want the matter to be referred to arbitration. The only point is that whether the reference made to the provision of a repealed Act in any instrument shall have reference to the provisions of the reenacted Act. There are two sub-Sections of Section 8. Both of them are based on the principle that if a law is repealed or reenacted the reference to it should be construed after repeal to the reenacted law. Section 8 also provides within its ambit, namely, an instrument and here in the instrument itself the reference is made of 11940 Act which according to Mr. Roy chowdhury is required to construed as reference to the provisions re-enacted u/s 8 in particular and the provisions in general as contained in Arbitration and Conciliation Act, 1996. Mr. Roy chowdhury submits that canon of construction is required to be given effect to in consonance with provisions of Section 8 of the General Clauses Act. It has been commented upon that in terms of Section 21 of the Contract Act the same merely entities a party to allege that he meant something different from what was meant by the other party. Mistake of law perse is no ground for avoiding a contract. But the question whether in the formation of a contract a mistake of law has occurred per se or is associated with also with the mistake of fact depends upon facts and circumstances of each particular contract. If a mistake is separately mixed with a fact with particular contract, the same may be avoided. If the mistake of law is not associated with the mistake of fact, and they are separable then the implication of adverse inference flowing from Section 21 of the Contract Act cannot be attracted. The mistake of law of fact may be one of expediency and policy rather than of principle for as one is bound to know the law and consequently be presumed to know it. There seems to be inconsistence in granting relief based solely upon an alleged mistake of law. Such mistakes are not commonly absolved of liability of proof. A mere mistake of law unattended with any special circumstances furnishes no ground for the interposition of a court. But a fraudulent representation as to the effect of a deed, made with the intention that it may be acted upon by the other party, and which is intended to be acted upon may be used in deference to action on the deed where however mistake of law is not known or perceived by the other party to the transaction, the court will not unless there are very exceptional circumstances, interfere and grant reliefs. A man cannot be heard to say that though he understood what the words of the agreement were, he was under a mistake as to their legal effect or that though he knew the facts, he did not know the law resulting from those facts. this Court, therefore, by

harmonious construction of the provisions of Section 8 of the General Clauses Act read with Section 21 of the Contract Act keeping in view the illustration as contained in the body of the Act cannot derive the mischief as contemplated u/s 21. It cannot reconcile itself to the reality of transposition of a mistake as to law not in force to be translated as a mistake of fact A mistake as to law repealed and reenacted by a subsequent Act is not at par nor the same can be equated on similar footing with that of a mistake of law not in force in india. Here, the law of arbitration has all along been in force in India which stood repealed and the new Act being Arbitration and Conciliation Act, 1996 was reenacted. Therefore, any mistake with regard to the year of the current Act and the year of the previous Act does not constitute a mischief of a mistake as to a law not in force in India. Therefore, this Court inspite of its appreciation of the legal points argued by Mr. Saha cannot allow to be persuaded by the force of his argument because of some intrinsic fallacy in his submission. Mr. Saha has also tried to submit that overall effect of the new Act is radically different from that of the earlier Act which this Court cannot subscribe as it does not share the view of the user of the expression made by Mr. Saha that the Arbitration Act of 1940 is radically different from the Arbitration and Conciliation Act. 1996. The latter Act has been re-enacted with a view to elongate the dimension of it to bring in consonance with the object to bring in its ambit the International Commercial Arbitration and enforcement of foreign arbitral Award in terms of Uncitral Model Law on International Commercial Arbitration in 1985 in tune with the recommendation of the General Assembly of the United Nations. The only change that has been introduced is for enforcement of domestic Arbitral Award and to accelerate the process of arbitration as an efficacious form of adjudication of the disputes covered by Arbitration clause which is to be preferred to that of the court. The said elongation of the passage of time can be viewed as a mirror of social progress but change being the law of life, pre-existing law and present law cannot be stated to be radically different as submitted by Mr. Saha. So far as the dispute is concerned, the same has been comprehended in the widest range and if there is any dispute in terms of the etymological significance of the expression coupled with its jural meaning as ascribed in law lexicuva this cannot limit the dispute within a particular periphery and any dispute covered by the same is amenable to be referred to arbitration provided, the same is comprehended by the clause of arbitration.

3. this Court accordingly sustains the order to the extent that the trial Court will be required to direct the party seeking arbitration to make a formal written request to the Chief Justice of the State within a time-bound direction to appoint the proposed Arbitrator failing which consequence will follow but the Court has misdirected in exercise of its jurisdiction by rejecting the, application u/s 8 of the Act simply on the ground that the party has not put forward the request through the proper channel, namely by making adequate representation before the Chief Justice State High Court Subject to the modification as contained in this direction, the order impugned

stands altered and the same will be superseded by the instant order by which the learned Judge of the trial Court is directed to give a direction to the party seeking arbitration to approach formally the learned, Chief Justice within a time specified, by the concerned judicial authority. Therefore, the concerned Court will be required to take follow up steps in terms of the order at the earliest opportunity so that delay is not further caused.

4. Pending compliance of the directions as contained in this order, the connected suit will remain stayed.

5. The revisional application thus stands disposed of. Let this order be communicated to the trial court concerned by Special Messenger, the cost of which will be deposited by the petitioner within a week from date.