(2011) 02 CAL CK 0011

Calcutta High Court

Case No: G.A. No. 165 of 1996 and C.S. No. 320 of 1995

Hindusthan Copper		APPELLANT
	Vs	
Utkal Moulding		RESPONDENT

Date of Decision: Feb. 14, 2011

Acts Referred:

- Arbitration Act, 1940 - Section 34
- Arbitration and Conciliation Act, 1996 - Section 8
- Micro, Small and Medium Enterprises Development Act, 2006 - Section 15, 16, 17, 18, 18(4)

Citation: (2011) 2 CHN 111

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: P.K. Mallick, for the Appellant; Ranjan Bachawat and S.S. Bose, for the Respondent

Judgement

Sanjib Banerjee, J.

If the fate of this application depended on the readiness and willingness of the applicant in the proper conduct of the application, it would have to be dismissed without any ado. But the readiness and willingness that has to be assessed in an application u/s 34 of the Arbitration Act, 1940 is not of the post application conduct but of the likely conduct in course of the arbitration proceedings. This application has not been prosecuted by the Defendant-applicant for nearly fifteen years and was discovered to be pending upon an exercise in such regard being conducted by Court. The Defendant enjoys a stay of the further progress of the suit.

2. The claim in the suit is on account of interest for delayed payments. It appears from the plaint that pursuant to notices inviting tender issued by the Defendant and offers made by the Plaintiff, two purchase orders were placed by the Defendant on the Plaintiff for supply of chilled cast iron products. According to the Plaintiff, the

goods had been delivered and bills raised which the Defendant accepted without any demur. It also appears to be the admitted position that the payments were released but such payments were made v. ell beyond thirty days from the dates of the receipt of the bills. The suit is based on the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993. There is a specific reference in the plaint to such Act.

3. As to the jurisdiction of this Court, the plaint refers to the registered office of the Plaintiff within jurisdiction, to the purchase orders having been placed on the Plaintiff thereat and to the bills having been raised by the Plaintiff on the Defendant from the Plaintiffs office within jurisdiction. Since the claim does not relate to the other aspects of the transaction, it is necessary to see what the plaint says of the invoices and the payment obligations. Paragraph 8 of the plaint refers to the two purchase orders and the Plaintiff having raised its bills for price of goods sold and delivered aggregating to over Rs. 1.01 crore. The Plaintiff has referred to the various invoices and the details thereof have been indicated at annexure ''D'' to the plaint. The remaining three sentences of paragraph 8 of the plaint are relevant:

8. ...In each of the invoices it was stipulated that all matters are subject to Calcutta jurisdiction. The Defendant paid the amount mentioned in the said invoices from outside the jurisdiction. But in almost all cases not within stipulated or agreed period and as such, committed various defaults as will appear from the two several charts being annexures "C" and "D" respectively mentioned hereto before.

4. The Defendant has urged two grounds by way of the present application. The Defendant says that this action could not have been instituted in this Court since the purchase orders were issued by the Defendant from its office in district Balaghat in the then undivided Madhya Pradesh and the agreement between the parties contains a forum selection clause. The Defendant says that, in any event, the arbitration clause contained in the special terms and conditions governing the purchase orders binds the parties and the Plaintiff could not have launched this action in derogation of the arbitration agreement.

5. As to the efficacy of the forum selection clause, the Defendant says that though it stipulates that the District Court of Balaghat (MP) would have the jurisdiction to entertain proceedings relating to the purchase orders, there may not be words of exclusivity that make a forum selection clauses binding. The Defendant says that its primary thrust is on the arbitration agreement since the clause is of widest import.

6. Clause 23 of the general terms governing either purchase order is, indeed, in most sweeping terms:

23) Arbitration:

Except where it has been provided otherwise any dispute or difference arising out of or in connection with the supply or any operation covered by the purchase order

and any dispute or difference arising out of or in connection with the agreement entered into between the company and the supplier including any dispute or difference relating to the interpretation of the purchase order or any clause thereof shall be referred to the sole arbitration of a person appointed by the Chairman of the HCL and the provisions of Arbitration Act, 1940 and the rules there under and any amendment thereto from time to time shall apply. No. objection shall be taken on the ground that the Arbitrator so appointed is an employee of the company and that he has or had to deal with the matters for which the purchase order or reference relates or that in the course of his duties he had dealt with or expressed views on all or any of the matters covered by the reference. The award of the Arbitrator shall be final, conclusive and binding on all the parties to the purchase order. The Arbitrator shall be competent to decide whether any matter, dispute or difference referred to him falls within the purview of arbitration as provided above.

7. The Plaintiff says that Section 34 of the 1940 Act cannot be invoked by the Defendant since the Defendant, on its own showing, did not take any steps in pursuance of the arbitration agreement. The Plaintiff seeks to assert that since it was the Chairman of the Defendant who was required to appoint an Arbitrator and since such Chairman did not take any steps to appoint any Arbitrator, there was No. readiness or willingness evident on the Defendant''s part to entitle the Defendant to invite this Court to exercise its discretion and refer the claim to arbitration. Such argument has to be rejected out of hand. There does not appear to be any pre-suit notice issued demanding payment in terms of the Act of 1993 on which the suit is founded. Even if such a demand had been made, there was No. request by the Plaintiff herein to the appointing authority for the Constitution of an Arbitral Tribunal. Once the suit was filed and the Defendant had notice, there was No. scope for the Chairman of the Defendant to thereafter appoint an Arbitrator since that may have amounted to overreaching the Court. Section 34 of the 1940 Act, unlike Section 8 of the Arbitration and Conciliation Act, 1996, does not contemplate the initiation of an arbitral reference notwithstanding the pendency of an action covered by the arbitration agreement before a judicial authority. The Defendant has, in making the present application within a short time of being aware of the suit, shown its readiness and willingness to go to arbitration and the Defendant continues to be ready to go to arbitration.

8. The other point that has been canvassed by the Plaintiff is that the 1993 Act has now been repealed and replaced by the Micro, Small and Medium Enterprises Development Act, 2006. Section 32(2) of the 2006 Act provides as follows:

32. Repeal of Act 32 of 1993. -

(1) ...

(2) Notwithstanding such repeal, anything done or any action taken under the Act so repealed under Sub-section (1), shall be deemed to have been done or taken under

the corresponding provisions of this Act.

9. The Plaintiff refers to Section 18 of the 2006 Act which provides for disputes covered by the said Act being entertained by a Council. The Plaintiff has also referred to a notification dated October 1, 2008 published in the Orissa Gazette by which, in terms of Section 20 of the 2006 Act and by virtue of Section 30 of the said Act, the Orissa Micro and Small Enterprises Facilitation Council has been set up. The Plaintiff refers to Section 24 of the 2006 Act that stipulates that the provisions of Sections 15 to 23 of that Act would have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. The Plaintiff insists that in view of the said Act of 2006 and the mechanism envisaged there under, the present application u/s 34 of the Arbitration Act, 1940 can No. longer be pursued. The Plaintiff also says that the Plaintiff has applied before the Council in Orissa in respect of the claim which is the subject matter of the present suit. Though such statement does not appear in the Plaintiffs affidavit, but the Plaintiffs affidavit was filed in the year 1996 and the matter remained pending. Since the Plaintiff has made a statement that it has applied in support of its claim which forms the subject matter of the suit before the council in Orissa, such statement is recorded.

10. There are several reasons as to why the second ground of defence urged by the Plaintiff to resist the present application should fail. To begin with, the Plaintiff clearly shows that the bills were raised by the Plaintiff on the Defendant from the Plaintiffs office within jurisdiction and since the subject matter of the claim relates only to payment and not to the supplies, it would be registered office of the Plaintiff in Calcutta which would be material for the purpose. On the basis of the averments in the plaint which the Plaintiff cannot disown, and which it has not attempted to disown, the Council in Orissa may not be competent to entertain the request despite Section 18(4) of the 2006 Act. As would appear from the relevant sentence in paragraph 8 of the Plaintiff, the Plaintiffs invoices specified that the jurisdiction would be exclusively in Calcutta. In such view of the matter, the notification published in Orissa will have No. effect on the present suit, notwithstanding the Plaintiff having a manufacturing facility somewhere in Orissa.

11. Nothing in the 2006 Act that the Plaintiff has cited makes the operation of such act retrospective. Ordinarily, if the claim is founded on a particular provision of law, it has to be assessed on the basis of such provision unless there is a complete obliteration of the relevant provision by a subsequent act of the appropriate legislature. Notwithstanding the 1993 Act being repealed, the Plaintiff here would still have been entitled to pursue its claim under the 1993 Act since the suit had been filed at a time when the 1993 Act was in operation and had not been repealed by the 2006 Act. It can also not be appreciated as to how the mechanism under the 2006 Act can be pressed unto service for a claim of the year 1995.

12. What is of importance is the effect of the undisputed arbitration agreement between the parties to the action. The 1993 Act, since such Act has to govern the claim of the Plaintiff, gave a substantive right to a person covered by the provisions thereof to be entitled to seek interest subject to the conditions specified in the relevant provisions. But the Act of 1993, as it stood on the date of the institution of the suit, did not indicate the form of action or the forum where the claim had to be instituted by a beneficiary under that Act to be able to avail of the benefit there under.

13. It was open, in terms of the 1993 Act as it stood at the time of the institution of the suit, for a beneficiary there under to pursue its claim by way of an ordinary civil action as the Plaintiff herein did. But the right of the Plaintiff herein to continue the action was subject to any other enforceable agreement that may have existed between the parties. As is now evident from the arbitration agreement, which forms a part of the documents appended to the plaint, that such arbitration agreement is of the widest amplitude and would encompass all claims relating to interest under the 1993 Act that the Plaintiff herein may have against the Defendant. It is only the choice of forum which is governed by the arbitration agreement and not the nature or the quality of the claim.

14. Though the Defendant here says that it is also doubtful as to whether the present Plaintiff can invoke the provisions of the 2006 Act, the Plaintiff says that it has complied with the requirement of filing its memorandum of association with the appropriate authority. But, in the light of the view taken here, it is not necessary to enter into such aspect of the matter.

15. G.A. No. 165 of 1996 succeeds. In view of the arbitration agreement between the parties as contained in Clause 23 of the general terms governing both purchase orders, the claim of the Plaintiff has to be carried to arbitration in accordance with such agreement. The Defendant should ensure that its Chairman appoints the arbitrator in accordance with the arbitration agreement within a period of four weeks from date. Suit No. 320 of 1995 will remain stayed but the Plaintiff may apply for annulment of this order if the appointment is not made within the time specified. If the Arbitrator is appointed within the time permitted, the further or other remedies of the parties will be governed by the 1940 Act.

16. There will be No. order as to costs.

17. Urgent certified photocopies of this order, if applied for, be given to the parties subject to compliance with all requisite formalities.