Hindustan Petroleum Corporation Ltd. Vs Barun Sankar Chatterjee

Court: Calcutta High Court

Date of Decision: Jan. 16, 2012

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 2(e), 34, 42, 9
Constitution of India, 1950 â€" Article 227

Citation: AIR 2012 Cal 255 : (2012) 3 CHN 160

Hon'ble Judges: Dipankar Datta, J

Bench: Single Bench

Advocate: Debojyoti Datta and Subhasis Bandopadhyay, for the Appellant; Saptangshu Basu and Ayan Banerjee, Advocate for the opposite party No. 1, for the Respondent

Final Decision: Allowed

Judgement

Dipankar Datta, J.
An agreement dated March 31, 2004 was executed by and between the Corporation, the petitioner herein, and the

opposite parties 1 and 2. In terms thereof, M/s. Maa Durga Service Station (of which the opposite parties 1 and 2 are partners) was granted

dealership for dealing in petrol/diesel from a retail outlet situate on Jessore Road, Barasat, 24 Parganas (N). The dealership agreement contained

various clauses. While clause No. 65 provided that ""the Court in the city of Kolkata alone shall have jurisdiction to entertain any suit, application or

other proceeding in respect of any claim or dispute arising under this agreement"", clause No. 66, inter alia, laid down that ""any dispute or difference

of any nature whatsoever or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this

agreement shall be referred to the sole arbitration of the Managing Director of the Corporation or of some officer of the corporation who may be

nominated by the Managing Director"". An inspection of the retail outlet conducted by the vigilance wing of the Corporation revealed irregularities

committed by the dealer/firm. The petrol and diesel dispensing units were found to have been tampered. Show-cause notice was issued by the

Corporation, which was challenged before this Court in its writ jurisdiction. The Court refused to interfere. The partners of the firm responded to

the show cause notice and were heard. The Corporation, thereafter, by an order dated February 11, 2006 terminated the dealership agreement

and directed the partners of the firm to settle the accounts and to hand over the belongings of the Corporation to its sales officer. The order of

termination was again subjected to an unsuccessful challenge before the writ Court. The order of the writ Court was carried in appeal, which was

also dismissed.

2. In terms of the arbitration agreement recorded in clause No. 66 of the dealership agreement, the Corporation referred the dispute to arbitration

by appointing an arbitrator. The arbitrator made and published his award dated August 28, 2009.

3. The opposite party No. 1 filed an application u/s 34 of the Arbitration and Conciliation Act, 1996 (hereafter the Act) before the learned District

Judge, 24-Parganas (N) at Barasat, giving rise to Misc. Case No. 124 of 2009. Simultaneously, the opposite party No. 2 filed a separate

application u/s 34 of the Act before this Court. The said application has been registered as A.P. No. 629 of 2009.

4. The applications u/s 34 of the Act, referred to above, were preceded by two sets of application u/s 9 of the Act, one before this Court at the

instance of the opposite party no. 2 (presented on October 4, 2006 being A.P. No. 432 of 2006) and the other at the instance of the opposite

party No. 1 before the learned District Judge, 24-Parganas (N) (on October 10, 2006 being Misc. Case No. 332 of 2006).

5. In so far as the application filed by the opposite party No. 2 is concerned, a learned Judge of this Court on October 5, 2006 had granted leave

to move it before the vacation Bench. The application was moved before the vacation Bench on October 11, 2006 but the learned Judge relegated

the same to the regular Bench. Ultimately, it was dismissed for default on March 11, 2010.

6. Misc. Case No. 332 of 2006 was entertained on October 10, 2006 by the learned District Judge and an ex-parte order of injunction was

obtained by the opposite party No. 1.

7. The order was carried in appeal by the Corporation before this Court giving rise to FMAT No. 4395 of 2006. An application for stay filed in

connection therewith on November 21, 2006 came up for consideration before the Hon''ble Division Bench on December 18, 2006. It was

reported that December 20, 2006 had been fixed as the next date for hearing the application u/s 9 of the Act. Considering the fact that only a day

intervened between the date of hearing of the stay application by the Hon''ble Division Bench and the application u/s 9 of the Act by the learned

District Judge, the Hon''ble Division Bench considered it unfair to interfere with the impugned order. Upon hearing learned advocates for the

parties, the Hon''ble Division Bench was of the view that the stay application ought to be treated as the objection of the Corporation to the section

9 application filed by the opposite party no. 1 and the learned Judge was directed to conclude the hearing on December 20, 2006 and if that was

not possible, to continue hearing on day to day basis and to conclude it at an early date.

8. The application u/s 9 of the Act was thereafter heard on contest. While finally disposing it of by an order dated February 21, 2007, the learned

District Judge directed the parties to maintain status quo.

9. It appears from the order dated February 21, 2007 that the petitioner had objected to maintainability of the section 9 application before the

learned District Judge by referring to clause no. 65 of the dealership agreement, providing that only the Court in the city of Calcutta would have

jurisdiction to entertain a suit, application or other proceeding in respect of any claim or dispute arising there under. It was argued that the Court at

Barasat had no jurisdiction. The learned Judge was of the view that since the place of business is situated at Jessore Road under his jurisdiction,

the application was maintainable before him. It further appears that no point was raised before the learned Judge that having regard to initiation of a

previous proceeding u/s 9 of the Act by the opposite party no. 2, the application before him was not maintainable.

10. The order dated February 21, 2007 was again challenged by the Corporation before this Court in an appeal, registered as FMAT No. 1043

of 2007. An application for stay was also filed in connection therewith. By an order of the Hon''ble Division Bench dated April 9, 2007, the

appeal, after admission, was disposed of with a variation of the order under challenge. The extent of variation is not too significant for the purpose

of disposal of the present revisional application under Article 227 of the Constitution and, therefore, is not adverted to. However, it is noted that no

submission was advanced on behalf of the Corporation before the Hon''ble Division Bench to the effect that the section 9 application was not

maintainable before the Court of the learned District Judge at Barasat in view of section 42 of the Act.

11. It is after filing of the application u/s 34 of the Act by the opposite party No. 1 that a point regarding maintainability of Misc. Case No. 124 of

2009 was raised by the petitioner referring to section 42 of the Act. It was contended that the application for setting aside the award ought to have

been filed before this Hon''ble Court since A.P. No. 432 of 2006 was filed first, on October 4, 2006.

12. The application, together with the objection thereto filed by the opposite party No. 1, was considered by the Additional District Judge to

whom the records stood transferred. By order dated September 21, 2011, the learned Judge rejected the application filed by the Corporation.

The learned Judge was of the view that although the opposite party No. 2 might have tried to invoke the jurisdiction of this Hon''ble Court by

presenting an application u/s 9 of the Act on October 4, 2006, the same was not heard and no order had been passed by this Court upon

adjudication thereof. Additionally, it was ruled that the point sought to be urged by the Corporation was never raised earlier when the parties

appeared before the learned District Judge at the time of disposal of the section 9 application and that having regard to the definition of "Court" in

section 2(e) of the Act, together with the fact that the firm is situated within the territorial jurisdiction of the Barasat Court, that Court alone had

jurisdiction to adjudicate the dispute.

13. The Corporation challenges the order dated September 21, 2011 in this revisional application.

14. Mr. Dutta, learned advocate appearing for the Corporation contended that the learned Additional District Judge misdirected herself in passing

the impugned order. According to him, in terms of the provisions contained in section 42 of the Act, a decision on a previous application is not

relevant for determining the forum to which all subsequent applications should be made but it is the date on which the application is validly made,

that is relevant. Having regard to the facts and circumstances of the present case, it is clear that the jurisdiction of this Court was first invoked in

relation to the disputes between the parties on October 4, 2006 by the opposite party No. 2 rightly, when he presented his application u/s 9 of the

Act, whereupon leave was granted on October 5, 2006 to move the vacation Bench. He further contended that notwithstanding the fact that the

point of jurisdiction based on section 42 of the Act was not raised before the learned District Judge or even before this Hon"ble Court in the

previous rounds of litigation, that would not debar the Corporation from urging the point of jurisdiction at the stage of a challenge to the award u/s

34. Since the objection flows from a statutory interdict and having regard to settled principles of law that there cannot be an estoppel against

statute, the Corporation was justified in raising its objection which, unfortunately, was not dealt with by the learned Judge in the manner law

required her to deal with the same.

15. In support of his submissions, Mr. Dutta relied on the decisions reported in Inder Sain Mittal Vs. Housing Board, Haryana and Others, (Shiva

Carriers vs. Royal Projects Ltd. and ors.) and 2009 (1) Arb. LR. 37 (Delhi) (Mahesh Kumar Gupta and ors. vs. Suresh Chander Gupta and ors.).

16. He further submitted that A.P. 629 of 2009 came up for consideration before a learned Judge of this Court on December 15, 2012, when

direction for exchange of affidavits was made. In view thereof, two parallel proceedings against the self-same award are pending, one before this

Court and the other before the Barasat Court and that to avoid conflict of decisions, it is only just and fair that Misc. Case No. 124 of 2009 ought

to be heard along with A.P. 629 of 2009.

17. Mr. Basu, learned senior advocate for the opposite party No. 1 opposed the revisional application. According to him, the impugned order of

the learned Judge does not suffer from any infirmity warranting interference. Referring to the order passed by the Hon"ble Division Bench dated

December 18, 2006, he argued that the fact of presentation of an application u/s 9 of the Act by the opposite party No. 2 before this Court on

October 4, 2006 was well within the knowledge of the Corporation, yet. that was not urged as a ground for challenging the ex-parte interim order

dated October 10, 2006. Not only that, in the appeal against the order dated February 21, 2007, that point was again not raised. In the

circumstances, the Corporation must be held to have waived its right to object to the jurisdiction of the Barasat Court to entertain the application

u/s 34 of the Act. He, accordingly, prayed for dismissal of the revisional application.

18. I have heard learned advocates for the parties and considered the materials on record.

19. Since the argument of Mr. Dutta is based on section 42 of the Act, the same requires to be noted first. For facility of reference, section 42 is

quoted below:

42. Jurisdiction. - Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to

an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral

proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other

Court.

20. The mandate of section 42 of the Act is that all future applications must be filed only in the Court where the first application in respect of the

arbitral dispute was filed. However, it would be a fraud on statute if an application, in relation to an arbitral dispute between the parties, could be

filed either in Court A or B but is filed in Court Z, which is not the Court having jurisdiction to entertain the application, thereby paving the way for

all future applications to be filed in Court Z. In such an event, there would arise no requirement to file the subsequent applications in Court Z and if

either Court A or B is approached, it would be perfectly legitimate for it to entertain such subsequent application. What follows is that the

jurisdiction of a Court has to be duly invoked by a party and if the jurisdiction of a Court is found to have been invoked erroneously, future

applications in respect of the arbitration agreement in question would not lie in that Court where the first application was filed.

21. It has not been disputed that the opposite party No. 2 had approached this Court first with his application u/s 9 of the Act (A.P. No. 432 of

2006) on October 4, 2006. That application was duly made before this Court since this Court had the jurisdiction to entertain it. Once the

jurisdiction of this Court was duly invoked, the mandate of section 42 would require all subsequent applications under Part I of the Act to be filed

before this Court. It is not necessary for the Court to render a decision on such application one way or the other so as to guide the parties to file

further applications arising out of the same arbitration agreement. Decision on the first application is irrelevant; what is relevant is the date on which

the application is duly made to the Court competent to assume jurisdiction. I am of the firm view that the learned Additional District Judge

misdirected herself by reading in section 42 of the Act the requirement of adjudication of the application that is first made.

22. Now, the point of waiver is taken up for consideration. An objection that the Court, which has been approached by a party, does not have the

jurisdiction to deal with the subject matter of the dispute is not akin to an objection regarding territorial or pecuniary jurisdiction of the Court.

Objections on the ground of territorial or pecuniary jurisdiction may not be entertained after issues have been settled, unless a consequent failure of

justice would ensue. The objection can, therefore, be waived. However, law appears to be well settled that even if a party may not have raised the

point that the Court does not have the jurisdiction to decide the subject matter of dispute and ultimately suffers an order or a decree, such

order/decree is a nullity and that its invalidity may be raised wherever and whenever it is sought to be enforced or relied upon, even at the stage of

execution and even in collateral proceedings. Merely because the point was available to be raised but was not actually raised is no ground to hold

that the Court is empowered to assume jurisdiction over a subject matter of dispute, which it inherently lacks. Reference in this connection may be

made to the decision reported in Kiran Singh and Others Vs. Chaman Paswan and Others, .

23. I am, therefore, of the view that the learned Judge was wholly in error in rejecting the application of the Corporation seeking to question the

maintainability of the section 34 application before the Barasat Court.

24. There is one other weighty reason for which this Court feels inclined to interfere. This Court has entertained A.P. No. 629 of 2009. Such

entertainment has necessarily resulted in parallel proceedings running against one award made by the arbitrator. Principles relating to consolidation

of two proceedings for avoiding conflict of decisions have been laid down by the Hon''ble Supreme Court in its decisions reported in Prem Lala

Nahata and Another Vs. Chandi Prasad Sikaria, and Chitivalasa Jute Mills Vs. Jaypee Rewa Cement, . To prevent wastage of precious judicial

hours as well as costs that the parties might have to incur while prosecuting/contesting cases on the self-same points before two Courts, it would be

fair and proper to consolidate the two proceedings and I propose to order accordingly.

25. The impugned order stands quashed. I direct that records of Misc. Case No. 124 of 2009, which the learned Additional District Judge is in

seisin of, shall be transmitted to this Hon''ble Court for being tried together with A.P. No. 629 of 2009.

26. The revisional application stands allowed, without any order as to costs. Office is directed to communicate this order to the learned Additional

District Judge without any delay.

Urgent photostat certified copy of this order, if applied for, shall be furnished to the applicant at an early date.