

(2012) 12 CAL CK 0051

Calcutta High Court

Case No: C.O. No. 2648 of 2012

Sudarshan Vyapar Pvt. Ltd. and
Another

APPELLANT

Vs

Madhusudan Guha and Another

RESPONDENT

Date of Decision: Dec. 6, 2012

Acts Referred:

- Arbitration Act, 1940 - Section 34
- Arbitration and Conciliation Act, 1996 - Section 2(e), 3, 34, 5, 8
- Civil Procedure Code, 1908 (CPC) - Section 9
- Consumer Protection Act, 1986 - Section 2(1)(d), 2(1)(f), 2(1)(g), 3
- Seeds Act, 1966 - Section 19, 21

Citation: (2013) 1 CALLT 546

Hon'ble Judges: Soumen Sen, J

Bench: Single Bench

Advocate: K.K. Pathak, for the Appellant; Indranil Chakraborty and Ms. Suranjan Mandal, for the Respondent

Final Decision: Allowed

Judgement

Soumen Sen, J.

In this revisional application, the petitioner has challenged the jurisdiction of the District Consumer Disputes Redressal Forum to receive the complaint case filed by the opposite party in connection with a development agreement executed on 15th May, 2006. The petitioner in the said proceeding filed an application for dismissal of the complaint case being Case No. 191 of 2011 for want of jurisdiction in view of the fact that in the Supplementary Agreement executed on 6th January, 2007, the parties have agreed to resolve their disputes by arbitration in terms of the provisions of the Arbitration and Conciliation Act, 1986. The said application was resisted on behalf of the opposite party on the ground that the original

development agreement dated 15th May, 2006 does not contain any such arbitration clause and it specifically states that any legal proceedings in connection with the said development agreement can be filed and decided by the District Judge, Alipore or its Subordinate Court having jurisdiction to receive, entertain, try and determine all such suits.

2. Clause 26 of the Development Agreement and Clause 16 of the Supplementary Agreement are reproduced hereinbelow:-

26. Jurisdiction: In connection with any legal proceedings in respect of this Agreement or the property, the District Judge, Alipore or its Sub Ordinate Court shall have jurisdiction to receive, entertain, try and determine all suits and proceedings.

16. That all disputes between the parties will be settled amicably on failure thereto through arbitration as per provisions of the Arbitration & Conciliation Act, 1996.

3. It is submitted that by the Supplementary Agreement, Clause 26 of the original agreement has not been substituted and, accordingly, if a suit is maintainable concerning a dispute arising out of the development agreement then in view of Section 3 of the Consumer Protection Act, 1996, the proceeding before the consumer forum is equally maintainable. The learned Counsel for the opposite party refers to Section 3 of the Consumer Protection Act, 1996 which is reproduced hereinbelow:-

3. Act not in derogation of any other law. - The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

4. The learned Counsel has also relied upon a fairly recent decision reported [National Seeds Corporation Ltd. Vs. M. Madhusudhan Reddy and Another](#), in support of his contention and in order to establish that notwithstanding an arbitration clause mentioned in an agreement, consumer redressal forum is competent to receive, try and determine the said complaint.

5. Per contra, Mr. Pathak, the learned Counsel appearing on behalf of the petitioner submits that by reason of the Supplementary Agreement, the jurisdiction clause mentioned in the original development agreement stands superseded and/or substituted. It is further submitted that if the parties have agreed to resolve their disputes by arbitration, then in view of Section 5 and Section 8 of the Arbitration and Conciliation Act, the consumer forum is bound to stay the said complaint case and referred the parties to arbitration.

6. In order to appreciate such argument reference may be made to Sections 2(e), 5 and 8 of the Arbitration and Conciliation Act, 1996 which are reproduced hereinbelow:-

2(e). "Court" means the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

5. Extent of Judicial intervention - Notwithstanding anything contained in any other law for the time being in force, in matter governed by this part, no judicial authority shall intervene except where so provided in this part.

8. Power to refer parties to arbitration where there is an arbitration agreement -

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under subsection (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

7. The Hon"ble Supreme Court in [S.B.P. and Co. Vs. Patel Engineering Ltd. and Another](#), held that the provisions of Arbitration and Conciliation Act would apply to consumer forum. While considering the definition of Court u/s 2(e) of the Arbitration and Conciliation Act, 1996, the Seven-Judge Bench of the Hon"ble Supreme Court in Paragraph 18 made the following observations:-

18. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (See [M/s. Fair Air Engineers Pvt. Ltd. and another Vs. N.K. Modi](#), When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial

authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the court are curtailed on these aspects, on the other hand, section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of an in relation to any proceeding before it." Surely, when a matter is entrusted to a Civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that court would govern the adjudication.

8. Following the said decision, the learned Judges of this Court in similar matters have held that if the subject-matter of the dispute also forms the subject-matter of the arbitration then the consumer forum cannot proceed with the said complaint. Some of such decisions are mentioned hereinbelow:-

1) Indusind Bank Ltd. Vs. Gadadhar Banerjee being C.O. 223 of 2009 decided on 1st April, 2010.

2) M/s. Auro Developers & Ors. Vs. Mala Mukherjee & Ors. being C.O.No. 2828 of 2010 decided on 23rd December, 2011.

9. In Indusind Bank (supra) the learned Single Judge was considering an order passed by the forum in rejecting an application filed u/s 8 of the Arbitration and Conciliation Act, 1996. The learned single Judge following SBP (supra) held that when the dispute before the forum is arbitrable under the Arbitration and Conciliation Act, 1996 as per the Arbitration Agreement executed between the parties, the forum has no option but to refer the dispute to arbitration in terms of Section 8 of the said Act since the said provision is mandatory. The relevant observations of the learned single Judge is reproduced hereinbelow:-

Several decisions were cited by the Counsel appearing for the respective parties on the question as to whether the proceeding before the Forum can be continued in the facts of the instant case because of Section 8 of the Arbitration and Conciliation Act, 1996.

Mr. Talukdar, learned Advocate submitted that Section 3 of the Consumer Protection Act, 1986 provides that the provision of the said Act shall be in addition to and not in

derogation of the provisions of any other law for the time being in force. He contended that the entire scheme of the Act was enacted for creation of an additional avenue for giving speedy redressal of the grievances of the consumer in respect of a consumer dispute either arising from a defect in the goods purchased as per Section 2(1)(f) of the said Act or for deficiency in the service as per Section 2(1)(g) of the said Act. He, however, did not dispute that arbitration is not an avenue for redressal of such dispute between the parties as per the arbitration agreement entered between the parties. He, thus, contended that when two avenues are open to the consumer for redressal of his grievances, he may opt for any one of such avenues. Accordingly, he submitted that even if it is found that the dispute between the parties is covered by the arbitration agreement and such dispute can be resolved by arbitration as per the said agreement, but, still then, a party to such contract cannot be precluded from seeking remedy under the Consumer Protection Act, 1986 in addition to the Forum available to the parties for resolution of their dispute by way of arbitration.

Mr. Ghosh, learned Advocate repudiated such submission of Mr. Talukdar by submitting that it has been held by the Constitutional Bench of the Hon'ble Supreme Court in the case of [S.B.P. and Co. Vs. Patel Engineering Ltd. and Another](#), that Section 8 of the Arbitration and Conciliation Act contemplates a judicial authority before which an action is brought in a matter which is subject to the arbitration agreement, on the terms specified therein to refer the dispute to arbitration. It was further held therein that a judicial authority as such, is not defined in the Act and as such, it would certainly include the Court as defined in Section 2(e) of the said Act and would also include other Courts and may even include a special Tribunal like Consumer Forum.

By giving anxious consideration to the aforesaid decisions cited at the Bar, this Court holds that the decisions cited by Mr. Talukdar are not authorities on the subject as to whether the Forum under the Consumer Protection Act can still proceed with the complaint case when the defendant prays for a reference u/s 8 of the Arbitration and Conciliation Act for resolution of such dispute by way of arbitration as per the arbitration agreement between the parties. In those cases the Hon'ble Supreme Court considered the jurisdiction of the Consumer Forum vis-à-vis specific remedies under other Acts such as Co-operative Societies Act and/or ESI Act etc. In those cases the Hon'ble Supreme Court held that unless there is clear bar under those Acts for seeking any remedy under the Consumer Protection Act, it cannot be held that the proceeding before the Consumer Protection Act is not maintainable. In one of such decisions it was also held that when claim for damages cannot be granted by the Forum available under other Acts appropriately, then also seeking remedy before the Forum under the Act of 1986 cannot be denied to the party who approached the said Forum seeking such remedy.

In those cases the jurisdiction of the Consumer Forum vis-à-vis Section 8 of the Arbitration and Conciliation Act was neither an issue before the Hon'ble Supreme Court nor the same was decided therein.

Thus, when this Court finds that the Constitutional Bench of the Hon'ble Supreme Court in clear terms held in *SBP & Co. -Vs- Patel Engineering Ltd.* (supra) that Section 8 of the Arbitration and Conciliation Act is applicable before the special Tribunal like Consumer Forum and when the Hon'ble Supreme Court in the subsequent decision in the case of *Rashtriya Ispal Nigam Ltd. & Anr.* (supra) held that when the dispute before the Forum is arbitrable under the Arbitration and Conciliation Act, 1996 as per the arbitration agreement executed between the parties, the Forum has no option but to refer the said dispute to arbitration as Section 8 of the said Act is a mandatory provision which mandates a reference unlike the provision contained in Section 34 of the 1940 Act which simply contemplated stay of the suit, this Court has no hesitation to hold that the learned Forum/Commission committed illegality by not allowing the petitioner's prayer for reference of the said dispute to the arbitrator for its arbitration as per the arbitration agreement between the parties.

When both the parties have decided a particular Forum by agreement, for deciding any dispute touching the agreement, this Court feels that any one of the parties to the said agreement should not have opted for a different Forum by unilaterally giving a go bye to the bilateral agreement, even though the Forum chosen by one of such parties, is otherwise competent to decide the said dispute.

10. In *M/s. Auro Developers* (supra) a learned single Judge of this Court relying upon *SBP* (supra) and *Indusind Bank Ltd.* (supra) held that if the subject-matter before the forum is within the ambit of the Arbitration Agreement then the forum cannot proceed with the said complaint if an application filed u/s 8 of the Arbitration and Conciliation Act.

11. The learned Counsel on behalf of the opposite parties placed heavy reliance upon *National Seeds Corporation Ltd.* (supra) in order to justify the order passed by the consumer forum in rejecting the said application u/s 8 of the Arbitration and Conciliation Act. In fact, the District Forum rejected the said application after placing reliance upon the judgment delivered in *National Seeds Corporation Ltd.* (supra). In *National Seeds Corporation Ltd.* (supra), the Hon'ble Supreme Court observed that the remedy of arbitration is not the only remedy available to a party rather it is an additional remedy. The relevant observations of the Hon'ble Supreme Court in this regard can be found in Paragraphs 63 to 70 of the said report which are reproduced hereinbelow:-

63. The next question which needs consideration is whether the growers of seeds were not entitled to file complaint under the Consumer Protection Act and the only remedy available to them for the alleged breach of the terms of agreement was to apply for arbitration.

64. According to the learned counsel for the appellant, if the growers had applied for arbitration then in terms of Section 8 of the Arbitration and Conciliation Act the dispute arising out of the arbitration clause had to be referred to an appropriate arbitrator and the District Consumer Forums were not entitled to entertain their complaint. This contention represents an extension of the main objection of the appellant that the only remedy available to the farmers and growers who claim to have suffered loss on account of use of defective seeds sold/supplied by the appellant was to file complaints with the Seed Inspectors concerned for taking action under Sections 19 and/or 21 of the Seeds Act.

65. The consideration of this issue needs to be prefaced with an observation that the grievance of a farmer/grower who has suffered financially due to loss or failure of crop on account of use of defective seeds sold/supplied by the appellant or by an authorized person is not remedied by prosecuting the seller/supplier of the seeds. Even if such person is found guilty and sentenced to imprisonment, the aggrieved farmer/grower does not get anything. Therefore, the so-called remedy available to an aggrieved farmer/grower to lodge a complaint with the Seed Inspector concerned for prosecution of the seller/supplier of the seeds cannot but be treated as illusory and he cannot be denied relief under the Consumer Protection Act on the ground of availability of an alternative remedy.

66. The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Protection Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Protection Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996. Moreover, the plain language of Section 3 of the Consumer Protection Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force.

67. In [M/s. Fair Air Engineers Pvt. Ltd. and another Vs. N.K. Modi](#), the two-Judge Bench interpreted that section and held as under:

15. ...the provisions of the Act are to be construed widely to give effect to the object and purpose of the Act. It is seen that Section 3 envisages that the provisions of the Act are in addition to and are not in derogation of any other law in force. It is true, as rightly contended by Shri Suri, that the words "in derogation of the provisions of any other law for the time being in force" would be given proper meaning and effect and if the complaint is not stayed and the parties are not relegated to the arbitration, the Act purports to operate in derogation of the provisions of the Arbitration Act. Prima facie, the contention appears to be plausible but on construction and conspectus of the provisions of the Act we think that the contention is not well founded. Parliament is aware of the provisions of the

Arbitration Act and the Contract Act, 1872 and the consequential remedy available u/s 9 of the CPC i.e. to avail of right of civil action in a competent court of civil jurisdiction. Nonetheless, the Act provides the additional remedy.

16. It would, therefore, be clear that the legislature intended to provide a remedy in addition to the consentient arbitration which could be enforced under the Arbitration Act or the civil action in a suit under the provisions of the Code of Civil Procedure. Thereby, as seen, Section 34 of the Act does not confer an automatic right nor create an automatic embargo on the exercise of the power by the judicial authority under the Act. It is a matter of discretion. Considered from this perspective, we hold that though the District Forum omission and National Commission are judicial authorities, for the purpose of Section 34 of the Arbitration Act, in view of the object of the Act and by operation of Section 3 thereof, we are of the considered view that it would be appropriate that these forums created under the Act are at liberty to proceed with the matters in accordance with the provisions of the Act rather than relegating the parties to an arbitration proceedings pursuant to a contract entered into between the parties. The reason is that the Act intends to relieve the consumers of the cumbersome arbitration proceedings or civil action unless the forums on their own and on the peculiar facts and circumstances of a particular case, come to the conclusion that the appropriate forum for adjudication of the disputes would be otherwise those given in the Act.

68. In [Skypak Couriers Ltd. Vs. Tata Chemicals Ltd.](#), this Court observed:

2. ...Even if there exists an arbitration clause in an agreement and a complaint is made by the consumer, in relation to a certain deficiency of service, then the existence of an arbitration clause will not be a bar to the entertainment of the complaint by the Redressal Agency, constituted under the Consumer Protection Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force.

69. In [Trans Mediterranean Airways Vs. Universal Exports and Another](#), was observed:

41. In our view, the protection provided under the CP Act to consumers is in addition to the remedies available under any other statute. It does not extinguish the remedies under another statute but provides an additional or alternative remedy.

70. The aforementioned judgments present a clear answer to the appellant's challenge to the impugned orders on the ground that the growers had not availed the remedy of arbitration.

12. However, it appears that Two-Judge Bench of the Hon"ble Supreme Court did not consider the Seven-Judge Bench decision in SBP (supra).

13. In any event, it would appear that the Hon"ble Supreme Court in considering the maintainability of the complaint case on facts held that there is no provision in the

said Seeds Act and the Rules framed thereunder for compensating the farmers and there is nothing in the Seeds Act and the Rules made thereunder which would give an indication that the provisions of the Consumer Protection Act, 1986 are not available to the farmers who are otherwise covered by the wide definition of "consumer" u/s 2(1)(d) of the Consumer Protection Act. Moreover, it was held that the grievance of a farmer/grower who has suffered financially due to loss or failure of crop on account of use of defective seeds sold/supplied by the appellant or by an authorized person is not remedied by prosecuting the seller/supplier of the seeds. Even if such person is found guilty and sentenced to imprisonment, the aggrieved farmer/grower does not get anything. The same is not the case here. It has already been observed earlier that the subject-matter of the complaint is arbitrable and forms the subject of the Arbitration Agreement and, accordingly, the provision of Section 8 clearly applies.

14. It is also not disputed that Clause 16 of the Supplementary Agreement contemplates reference of all disputes to arbitration. The said Supplementary Agreement containing the arbitration clause is not in dispute. There is also no challenge thrown to the Supplementary Agreement containing the arbitration clause. The parties have clearly intended to have their disputes resolved through arbitration.

15. It has not been disputed from the bar that both the Development Agreement and the Supplementary Agreement have been executed by the opposite party. The original agreement dated 15th May, 2006 stands modified by the Supplementary Agreement. The reasons for execution of the Supplementary Agreement have been indicated in the recitals. Once the parties have agreed to resolve their disputes by the arbitration, the jurisdiction of a Civil Court is clearly ousted by reason of Section 5 of the Arbitration and Conciliation Act. In view of the aforesaid and having regard to the law laid down in SBP (supra), this Court is of the view that the consumer forum has no jurisdiction to entertain the said complaint.

16. In view thereof, the impugned order is set aside. The revisional application succeeds. There shall be no order as to costs. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.