Case No. 67

(1998) 28 CLA 413 (Cal.)

BEFORE THE HIGH COURT OF CALCUTTA
Revisional Application against order No. 7 dated 26th February, 1997

WIMCO LTD.
Vs
SAMBHU DAYAL GUPTA AND OTHERS

BIJITENDRA MOHAN MITRA, J
3rd July, 1997

Arbitration clause in the agreement - erroneous reference to the Old Act of 1940 and not the new Act of 1996 - Matter covered under the 1996 Act - Mistake does not void the agreement itself.

SYNOPSIS

Admitting a revision application against the order of a lower court which had held that there was an arbitration agreement but had rejected the request of one of the parties to the dispute to refer it to arbitration, the Calcutta High Court has pointed out that section 8 leaves the concerned judicial authority with no alternative to a direction to the party to move the Chief Justice or any institution designated by him to nominate an arbitrator where neither of the partners has already initiated action in this regard. The High Court has held, in this connection, that the mention of the Arbitration Act, 1940 in the arbitration agreement would not void it.

COMMENTS

It is to be noted that what the relevant arbitration agreement was executed, it was the Arbitration Act, 1940 that was in force. There was nothing wrong with the agreement.

Appearances: S P Roychowdhury, Subhra Kamal Mukherjee & Somnalh Dan for the Petitioner.

Joy Saha for the Respondents.

JUDGMENT

MITRA.J

1. The instant revisional application is directed against Order No. 7 dated 26th *February,* 1997 arising out of an application under section 8 of the Arbitration and

Conciliation Act, 1996 ('the Act'/ 'present Act' / 'new Act') in Title Suit No. 76 of 1996 passed by the learned court of Assistant District Judge at Durgapur. The applicant in the original application under section 8 of the Act has prayed for reference of 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 15th July, 1996 the plaintiff was appointed as Stockist of the defendant No. 2 and pursuant to 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 filed 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 under section 8. It has been observed, inter alia, that when there is an arbitration agreement and defendant No. 2 has filed before filing of any other statement, the dispute as comprehended under section 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."

2. 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 Act has come to an inference and has held that the application under section 8 is liable to be rejected. So far as section 8 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 shall, if a party so applies not later than when submitting his first statement on the subsistence of the dispute, refer the parties to arbitration. This court while being asked to analyse the pith and substance of the section is reminded of the

analogous provisions of section 34 of the earlier Arbitration Act, 1940 ('the earlier Act'). 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 under section 34 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 exerciseable under section 34 of the earlier Act, 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 earlier Act and section 8 of the present Act is that provision as incorporated under section 34 of the earlier Act is rather discretionary while exercise of powers under Section 8 of the Present Act in 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 Act and on scrutiny being made of the provisions contained therein has come to a finding that the connected application in spite 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 provision of section 11 of the Act and in terms of section 11(4) and clause thereof postulates that if a party fails to appoint arbitrator within 30 days from the receipt of a request to do so from the other party and in terms of clause (a) of section 11(4) 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 (b) of section 11(12), where the matters referred to, inter alia, amongst others is covered by sub-section (4) of section 11 the reference to the Chief Justice in those sub-section shall be construed as a preference 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 is it 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 (e) of section 2. 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 case 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 of technical compliance of procedure. This court assumes a situation where there is no technical compliance, namely, a part does not request the Chief Justice or any institution designated by him the whether the right as accorded under section 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 under section 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 viable 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 straightaway the petition under section 8 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 under section 8.

3. 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 earlier Act. It has been contended with some amount of force by Mr. Saha that earlier Act has stood repealed by the present Act 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 present 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, 1872 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 present Act, the earlier Act 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. Roychowdhury, the learned advocate appearing on behalf of the petitioners has joined the issue. According to Mr. Roychowdhury 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, 1897. According to Mr. Roychowdhury 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:

> "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 re-enacted."

4. According to Mr. Roychowdhury, 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 whether the reference made to the provision of a repealed Act in any instrument shall have reference to the provisions of the re-enacted Act. There are two sub-sections of section 8 of the General Clauses Act. Both of them are based on the principle that if a law is repealed or re-enacted the reference to it should be construed after repeal to the re-enacted law. Section 8 of the General Clauses Act

also provides within its ambit, namely, an instrument and here in the instrument itself the reference is made of the earlier Act which according to Mr. Roy chowdhury is required to construe as reference to the provisions of re-enacted under section 8 of the Genera] Clauses Act in particular and the provisions in general as contained in present Act. Mr. Roychowdhury 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 entitles a party to allege that he meant something different from what was meant by the other party. Mistake of law per se 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 inconsistency 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 under section 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 re-enacted 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 Arbitration Act was re-enacted. Therefore, any mistake with regard to the year of the new Act and

the year of the earlier Act does not constitute a mischief of a mistake as to a law not in force in India. Therefore, this court in spite of the 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 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, preexisting 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 lexicons 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.

5. 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 appear the proposed arbitrator failing which consequence follow but the court has misdirected in exercise of its jurisdiction by rejecting the application under section *8* 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.

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

7. The revisional application thus stands disposed of.

8. 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.