

M/S. MILKFOOD PVT. LTD.

v.

M/S. GMC ICE CREAM (P) LTD.
(Civil Appeal No.6316 of 2011)

AUGUST 4, 2011

[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]

ARBITRATION ACT, 1940:

s.31(4) – Territorial jurisdiction – Arbitration clause stipulating that venue of arbitration would be Delhi and the contract subject to Delhi jurisdiction – Suit filed in Gaya – In revision before Patna High Court against order on appellants' application u/s 34 for stay of suit, arbitral tribunal appointed which gave its award – Application u/s 14(2) filed in Gaya court to make the award the rule of the court – Patna High Court upholding the order of the Gaya court that it had jurisdiction – HELD: Application u/s 33 filed by appellant in Delhi High Court praying for a clarification as to whether arbitration proceedings would be governed by the 1940 Act or the 1996 Act will have to be treated as the first application in terms under the 1940 Act in the reference and all subsequent applications will have to be made in Delhi High Court, which alone will have jurisdiction in the matter and not the Gaya court – Order appointing arbitrators by Patna High Court was not in an application under the Act, but in a revision u/s 115 CPC arising out of an order in an application u/s 34 to stay the proceedings in a civil suit – Therefore, it cannot be said that the first application in a reference was made before Patna High Court – Orders of Patna High Court and of Sub-Judge, Gaya, set aside – Respondent shall obtain return of application u/s 14(2) from Gaya court and file it before Delhi High Court.

Under an agreement, the respondent was to

- A manufacture and pack appellant's product (ice cream). The agreement contained an arbitration clause stipulating that the venue of arbitration would be Delhi and the contract was subject to Delhi jurisdiction. The respondent filed a suit in the Court of Munsif, Gaya (Bihar) for
- B injunction to restrain the appellant from interfering with the manufacture and supply of ice cream by it. The appellant's application u/s 34 of the Arbitration Act, 1940 (the Act) filed on 19.6.1995 for stay of the proceedings in the suit stating that the contract between the parties
- C provided for arbitration was allowed. The revision filed by the respondent was disposed of by the High Court by its order dated 6.5.1997, as the parties had appointed their arbitrators and the matter stood referred to the arbitral tribunal, which gave the award on 17.8.2004. The
- D respondent filed a suit u/s 14 (2) of the Act in the Court of Sub-Judge, Gaya on 28.8.2004 praying that the award be made a rule of the Court. The appellant contended that only the Delhi High Court had the jurisdiction to entertain the application and not the court at Gaya. The
- E appellant also challenged the award by filing a petition u/ss 30 and 33 of the Act on 16.10.2004 before the Delhi High Court, which held that it was for the Gaya court to decide the issue of jurisdiction. The Court of Sub-Judge, Gaya held that it had jurisdiction to decide the application
- F u/s 14 (2) of the Act. The said order was upheld by the Patna High Court.

- In the instant appeal, the question for consideration before the Court was: whether the proceedings u/s 14 (2) of the Act could have been initiated only in the Delhi High
- G Court and not before the Court of Sub-Judge, Gaya, having regard to s. 31 (4) of the Act.

Allowing the appeal, the Court

- HELD: 1.1Sub-s. (4) of s. 31 of the Arbitration Act,
- H 1940 provides that where any application under the Act,

in any reference, had been made in a court competent to entertain it, then notwithstanding anything contained in the Act (or in any other law for the time being in force), that court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and therefore all arbitration proceedings shall be made in that court alone and not in any other court. [para 9] [809-B-C]

1.2 The application u/s 34 of the Act filed by the appellant on 19.6.1995 cannot be considered to be the first application to a court in the reference to arbitration. [para 11] [810-E-F]

Kumbha Mawji vs. Union of India 1953 SCR 878 ; *UOI vs Surjeet Singh Atwal* 1970 (1) SCR 351=1969(2) SCC 211 – relied on.

1.3 The order dated 6.4.1997 appointing the arbitrators made by Patna High Court, was not in an application under the Act, but in a revision petition u/s 115 of the Code. Further the said revision did not arise out of arbitration proceedings, but against the order in an application u/s 34 of the Act to stay the proceedings in a civil suit. Therefore, it cannot be held that the first application under the Act in a reference was made before the Patna High Court. The order dated 6.5.1997 of the Patna High Court can also not be considered to be an order u/s 8 of the Act, as neither an application was filed u/s 8 of the Act nor the conditions for making an application thereunder existed in the instant case. Consequently, the question of making all subsequent applications arising out of the reference under the Act, to that court does not arise. [para 11-13] [810-G-H; 811-A-B-H; 812-A-B-F]

1.4 The appellant filed an application (OMP No.94/1998) in the Delhi High Court u/s 33 of the Act in April 1998

A praying for a clarification as to whether the arbitration proceedings between the parties would be governed by the provisions of Arbitration Act, 1940 or by the provisions of Arbitration and Conciliation Act, 1996. Thereafter the respondent made an application (OMP
 B No.217/2000) to Delhi High Court for summoning and examining one 'OP' as a witness in respect of the pending arbitration, to produce certain documents. Therefore, the application (OMP No.94/1998) made by the appellant u/s
 C 33 of the Act will have to be treated as the first application under the Act in the reference and all subsequent applications will have to be made in the High Court of Delhi. Consequently, Delhi High Court alone will have jurisdiction to entertain any subsequent applications and, therefore, the court at Gaya will not have jurisdiction. It
 D is also relevant to note that the arbitration clause provides that the venue of arbitration shall be Delhi and Delhi courts will have jurisdiction. The impugned order of the Patna High Court as also the order of Sub-Judge, Gaya are set aside and it is held that all applications should be filed in Delhi High Court. [para 14-16] [812-G-H; 813-G-H; 814-A-B]
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Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd. 2004 (3) SCR 854 = 2004 (7) SCC 288 – referred to.

F 1.5 The respondent shall, therefore, obtain return of the application u/s 14(2) of the Act from the Gaya court and file it before Delhi High Court. [para 17] [814-C]

Case Law Reference:

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| G | 1953 SCR 878 | relied on | para 11 |
| | 1970 (1) SCR 351 | relied on | para 11 |
| | 2004 (3) SCR 854 | referred to | para 15 |

H CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6316 of 2011.

From the Judgment & Order dated 25.04.2008 of the High Court of Patna in C.R. No. 690 of 2006.

Jayant Bhushan, Ramji Srinivasan, Kamal Budhiraja, Sidharth Bawa, Simar Narula, Aman Gupta (for Dua Associates) for the Appellant.

Soli J. Sorabjee, Neeraj Shekhar, Ashutosh Thakur, Priyaranjan Roi for the Respondent.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Leave granted.

2. Under an agreement dated 7.4.1992, respondent agreed to manufacture and pack appellant's product (ice cream) as per the specifications and standards of the appellant. Clause 20 of the said agreement provided for settlement of disputes by arbitration. The said clause provided that the venue of arbitration should be Delhi and contract was subject to Delhi jurisdiction.

3. Respondent filed a suit (T.S.No.40/1995) in the court of learned Munsif, Gaya (Bihar) for an injunction to restrain the appellant from interfering with the manufacture and supply of ice cream by the respondent. On being served with the notice of the said suit, the appellant filed an application under section 34 of Arbitration Act, 1940 ('Act' for short) for stay of proceedings in the suit on the ground that the contract between the parties provided for arbitration. The learned Munsif by order dated 3.8.1995 allowed the appellant's application under section 34 of the Act and stayed further proceedings in the suit.

4. The respondent filed a revision under section 115 of the Code of Civil Procedure ('Code' for short) before the Patna High Court against the order dated 3.8.1995. The High Court disposed of the said revision petition by the following order dated 6.5.1997 :

"Before this court parties have agreed that the dispute

A between them may be referred, as per the agreement to Arbitrators chosen by the parties. The plaintiff has chosen Shri Uday Sinha a retired judge of this court and Senior Advocate of the Supreme Court, while the defendants have chosen Shri Hari Lal Agrawal, Senior Advocate of the Supreme Court, a former judge of this court and Chief Justice of Orissa High Court as Arbitrators. The dispute between the parties is referred to arbitrator.

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C I hope that the learned Arbitrators will dispose of the arbitration proceedings within three months of the entering the reference.

D Let a copy of this order be sent to both Shri Hari Lal Agarwal at his address Nageshwar Colony, Boring Road, Patna-1 and Shri Uday Sinha at his Patna address 308 Patliputra Colony, Patna.

Parties are directed to appear before the Arbitrators within a month from today.

E Let all necessary documents be filed before the Arbitrators within four weeks thereafter.

This application is disposed of.”

F It may be mentioned that long before the disposal of the revision petition, by notice dated 14.9.1995 the appellant had appointed its arbitrator and called upon the respondent to concur in that appointment or alternatively nominate its arbitrator. When respondent also appointed its arbitrator, the two arbitrators appointed an umpire. The arbitral tribunal made an award dated 17.8.2004 in favour of the respondent.

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H 5. The respondent filed a suit under section 14 (2) of the Act in the court of Sub-Judge, Gaya on 28.8.2004 praying that the award be made a rule of the court. The appellant entered appearance on 28.10.2004 and made an application under Order 7 Rule 10 of the Code read with section 31(4) of the Act

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contending that only the Delhi High Court had jurisdiction to entertain the application and Gaya court did not have jurisdiction.

6. The appellant also challenged the award by filing a petition under sections 30 and 33 of the Act before Delhi High Court on 16.10.2004. On 25.10.2005 the appellant's petition under sections 30 and 33 of the Act was disposed of by Delhi High Court on the ground that the award had been filed before the learned Sub-Judge, Gaya, prior to filing of the petition by the appellant under sections 30 & 33 of the Act and since the matter was pending in the Gaya court and the appellant had challenged the jurisdiction of that court, the Gaya court would decide whether it had jurisdiction; and if it came to the conclusion that it had no jurisdiction, that court could forward the record to Delhi High Court, in which event the appellant could seek revival of the petition under sections 30 and 33 of the Act.

7. The Sub-Court Gaya heard and dismissed the application filed by the appellant (for return of the plaint to the respondent) by order dated 23.3.2006 holding that it had jurisdiction to entertain and decide the application under section 14(2) of the Act. The said order was challenged by the appellant by filing a revision petition before the Patna High Court. A learned single Judge of the Patna High Court dismissed the revision petition, by the impugned order dated 25.5.2008. He noted that the parties had earlier consented before the Patna High Court for referring the disputes to arbitration and that Patna High Court had recorded the said agreement and referred the disputes to arbitration by order dated 6.5.1997. He held that the said order dated 6.5.1997 should be considered to be an order under section 8 of the Act; and if so, the order dated 6.5.1997 would be the order in the first application under the Act in the reference; and as Patna High Court did not have original jurisdiction, the Sub-Judge, Gaya which was the corresponding civil court having original jurisdiction would have jurisdiction to entertain the application

A under section 14(2) of the Act, having regard to section 31(4) of the Act. The said order is challenged in this appeal by special leave.

B 8. On the contentions urged, the only question that arises for consideration is whether the proceedings under section 14(2) of the Act could have been initiated only in the Delhi High Court and not before the Sub-court, Gaya, having regard to section 31(4) of the Act.

C 9. Section 31 of the Act deals with jurisdiction and the same is extracted below :

“31. Jurisdiction.—(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

D (2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

F (3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

G (4) *Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings-, and all subsequent applications arising, out of that reference, and the arbitration proceedings*

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shall be made in that Court and in no other Court."

(emphasis supplied)

Sub-section (4) of section 31 provides where any application under the Act, in any reference, had been made in a court competent to entertain it, then notwithstanding anything contained in the Act (or in any other law for the time being in force), that court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and therefore all arbitration proceedings shall be made in that court alone and not in any other court. Sub-section (4) of section 31 of the old Act corresponds to section 42 of the new Act.

10. As the court where the first application was made is the court competent to entertain all subsequent applications under the Act, it is necessary to decide where the first application in the reference was made under the Act. In chronological order, the four applications in the reckoning for being considered as the first application in the reference under the Act, in a competent court are :

- (i) The application dated 19.6.1995 filed by the appellant under section 34 of the Act, in the court of Munsif, Gāya (resulting in the order dated 3.8.1995).
- (ii) The revision petition dated 2.7.1996 filed by the respondent against the order dated 3.8.1995, under section 115 of the Code, in the Patna High Court (resulting in the order dated 6.5.1997).
- (iii) The application made in April 1998 by the appellant under Section 33 of the Act, in the Delhi High Court (resulting in the order dated 13.10.1998).
- (iv) The application dated 16.8.2000 by the respondent under section 27 of Arbitration & Conciliation Act,

A 1996 in the Delhi High Court (resulting in the order dated 1.10.2000).

B The appellant contends that the first application in the reference was filed under the Act in Delhi High Court in April, 1998 and therefore all subsequent proceedings including the application under section 14(2) should be filed in Delhi High Court. The respondent contends that the application made either in the Gaya Court on 19.6.1995 or in the Patna High Court on 2.7.1996 should be considered to be the first application in the reference in a competent court; and as that Patna High Court did not have original civil jurisdiction, the corresponding civil court namely the Sub-Judge, Gaya was the court where all applications, including an application under section 14(2) of the Act should be filed.

D 11. In *Kumbha Mawji vs. Union of India* - 1953 SCR 878, this Court explained that the words 'in any reference' would mean 'in the matter of a reference to arbitration'. In *Union of India vs. Surjeet Singh Atwal* - 1969 (2) SCC 211, this Court held that an application under section 34 of the Act is *not to be considered as an application under the Act in a reference*.

E Therefore, the application under section 34 of the Act filed by the appellant on 19.6.1995 cannot be considered to be the first application to a court in the reference to arbitration. Let us next examine whether the first application under the Act in the reference was first made to the Patna High Court. A Revision Petition (C.R.No.1020/1996) was filed in the Patna High Court under section 115 of the Code, aggrieved by the order dated 3.8.1995 passed in an original suit filed by the respondent. The order dated 3.8.1995 was made allowing an application filed by respondent for stay of proceedings under section 34 of the Act. Therefore, the order dated 6.4.1997 appointing the arbitrators was made by Patna High Court, not in an application under the Act, but in a revision petition under section 115 of the Code. Further the said revision did not arise out of arbitration proceedings, but against the rejection of an

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application under section 34 of the Act to stay the proceedings in a civil suit. If the proceedings in which the order dated 6.5.1997 was made by the Patna High Court did not relate to an application under the Act in a reference, nor is it a revision arising from an application under the Act in a reference, it is not possible to hold that the first application under the Act in a reference was made before the Patna High Court.

12. At this juncture, it is necessary to notice the argument put forth by the respondent. The respondent contends that even though the revision petition did not arise from an application under the Act, the order dated 6.5.1997 made therein by the Patna High Court, recorded the consent of the parties that the disputes may be referred to arbitrators chosen by the parties, recorded the names of the arbitrators appointed by them, and referred the disputes between the parties to arbitration. According to the respondent, a court can appoint an arbitrator either under section 20 or section 8 of the Act; as there was no application for filing the agreement under section 20 of the Act, the order dated 6.5.1997 should be deemed to have been made in an application under section 8 of the Act to the High Court. The respondent therefore contends that the Patna High Court should be treated as a court where first application under the Act was filed and therefore all subsequent applications should be filed in that court. There is no merit in this contention. Section 8 relates to the power of civil court to appoint an Arbitrator or umpire. With reference to the facts of this case the power under section 8 of the Act can be exercised only if the following conditions mentioned in the section are fulfilled : (i) the parties did not concur in the appointments of arbitrators, when differences arose; (ii) one of the parties to the arbitration agreement served on the other party a written notice nominating its arbitrator and calling upon the other party to make its nomination; (iii) the other party did not appoint its arbitrator within 15 clear days after the service of such notice; and (iv) an application was made by the party who gave the notice under section 8 of the Act for appointment of the arbitrator. The

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A order dated 6.5.1997 of the Patna High Court cannot be considered to be an order under section 8 of the Act, as neither an application was filed under section 8 of the Act nor the conditions for making an application under section 8 of the Act existed in this case.

B 13. As noticed above the said order was made in a
revision petition against the grant of an application under
section 34 in a suit filed by the respondent. All that the High
Court did was to record the submission that both parties had
appointed their respective arbitrators and therefore the
disputes stood referred to them. Such an order recording the
nomination of arbitrators by consent and referring the disputes
to arbitration, can be made in any suit or other proceedings,
even if they do not arise under the arbitration agreement or
under the Act. If for example a civil suit is filed by a party
against the other and there is no arbitration agreement
between them, but during the course of the said suit both
parties agree that the matter should be referred to a named
arbitrator for arbitration and the court accordingly refers it to
arbitration, is not an appointment of an arbitrator under section
8 of the Act, but a consent order referring the disputes to the
arbitrators already appointed by the parties. Therefore we can
not accept the contention that the order dated 6.5.1997 of the
Patna High Court should be treated as an order in a proceeding
under section 8 of the Act. If the order dated 6.5.1997 is not
an order made in an application under the Act in a reference,
it follows that the question of making all subsequent applications
arising out of the reference under the Act, to that court does
not arise.

G 14. In this case the appellant filed an application (OMP
No.94/1998) in the Delhi High Court under section 33 of the
Act in April 1998 praying for a clarification as to whether the
arbitration proceedings between the parties would be governed
by the provisions of Arbitration Act, 1940 or by the provisions
of Arbitration and Conciliation Act, 1996. Thereafter the
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respondent made an application (OMP No.217/2000) to Delhi High Court for summoning and examining one O.P.Singh as a witness in respect of the pending arbitration, to produce certain documents. Therefore the application (OMP No.94/1998) made by the appellant under section 33 of the Act will have to be treated as the first application under the Act in the reference. If that is so all subsequent applications will have to be made in the High Court of Delhi.

15. Learned counsel for respondent submitted that the application filed by it in OMP No.217/2000 for issue of summons to a witness to produce documents, cannot be treated as an application under the Act as it was filed under section 27 of the Arbitration and Conciliation Act, 1996 and not under the provisions of section 43 of Arbitration Act, 1940. OMP No.217/2000 was made for issue of processes for appearance of witness and production of documents, in a pending arbitration proceedings. When the application was filed in the year 2000, there was some confusion as to whether the new Act applied or the old Act applied. In fact that question was pending before the Delhi High Court in OMP NO.94/1998 filed by the appellant. That issue was decided by Delhi High Court on 13.10.1998 holding that the matter was governed by 1996 Act, but that order was reversed by the order dated 5.4.2004 of this court in *Milkfood Ltd. Vs. GMC Ice Cream (P) Ltd.* [2004 (7) SCC 288] holding that the old Act applied with the following observations : "For the reasons aforementioned, we are of the view that in this case, the 1940 Act shall apply and not the 1996 Act. The award shall be filed in the court having jurisdiction whereafter the parties may proceed in terms of the old Act." Therefore OMP No.217/2000 could be deemed to have been made under section 43 of the Act. At all events as OMP No.94/1998 has to be treated as the first application under the Act, Delhi High Court alone will have jurisdiction to entertain any subsequent applications and therefore the court at Gaya will not have jurisdiction. It is also relevant to note that the Arbitration clause provides that the venue of arbitration shall be Delhi and Delhi courts will have jurisdiction.

A 16. In view of the above we allow this appeal, set aside the impugned order of the Patna High Court as also the order of Sub-Court, Gaya and hold that all applications should be filed in Delhi High Court.

B 17. The respondent shall therefore obtain return of the application under section 14(2) of the Act from the Gaya court and file it before Delhi High Court within two months from today. If it is so filed, Delhi High Court shall entertain the same and dispose it of in accordance with law. We may note that when the matter had come up before this court in the first round, in C the order dated 5.4.2004, this court had expressed the hope that the award will be made and all legal proceedings should come to an end within four months from the date of communication of that order. More than seven years have elapsed thereafter and the proceedings have not ended. We D therefore request the High Court to dispose of the matter expeditiously.

R.P.

Appeal allowed.