

Against the Judgment and order dated 23.3.2006 passed  
by Principal Sub-Judge, Gaya in T.S. No. 262 of 2004

C.R. No.690 of 2006

M/S MILKFOOD PRIVATE LIMITED  
Versus  
M/S G.M.C. ICE CREAM (P) LTD.

For the Petitioner: Mr.Chittaranjan Sinha No.-1 (Sr. Advocate)  
Mr. Amit Prakash  
Mr. Soni Srivastava  
For Opposite Parties: Mr. Chandrashekhar (Sr. Advocate)  
: Mr. A.K. Upadhyay

P R E S E N T  
THE HON'BLE JUSTICE SMT. MRIDULA MISHRA

**Mridula Mishra.J** Heard learned counsel for the petitioner and  
learned counsel for the opposite party.

Civil Revision No. 690 of 2006 was earlier  
decided by order dated 27/9/2007 against which S.L.P.  
(C) No. 21576/07 was filed by the Opposite Party. The  
Supreme Court by order dated 26.11.2007 has set aside  
the order passed in the Civil Revision and remitted the  
matter for fresh decision in accordance with law with a  
request for expeditious hearing and disposal of the  
matter preferably within three months.

Now Civil Revision is being heard in terms of  
the order of the Supreme Court in S.L.P. (C) No.  
21576/07.

Civil Revision No. 690/06 has been filed by  
petitioner, M/s Milk Food Private Limited for setting

aside the order dated 23<sup>rd</sup> March, 2006 in Title Suit No. 262/04 whereby application under order VII rule 10 C.P.C. read with Section 14(2) of the Arbitration Act, 1940 has been rejected with a finding that Delhi High Court has no jurisdiction to entertain an application under Section 14(2) of the Arbitration Act, 1940, as Section 31(4) excludes it's jurisdiction.

M/s Milk Food Limited (petitioner) and M/s G.M.C. Ice-cream (opposite party) entered into an agreement in the year, 1992 for the manufacturing of ice cream on the basis of terms and conditions mentioned in the agreement. Clause 20 of the agreement provided that in case of any dispute or any difference arising at any time in between the parties relating to matters mentioned in the agreement , the dispute shall be referred to a single arbitrator, in case the parties can agree upon one, and failing such agreement, two arbitrators; one to be appointed by either party and in case of disagreement between the two arbitrators to an umpire to be appointed by the said two arbitrators before them entering upon the reference.

The opposite party filed a suit being Title Suit No. 40/1995 in the court of Munsif-I, Gaya for an injunction. The petitioner (Defendant) on receiving the notice of the suit, filed an application under Section 34 of the Arbitration Act, 1940, for stay of the suit in view of the provisions for Arbitration contained in

Clause 20 of the agreement. This application was allowed by order dated 03.8.1995 by the Munsif -Ist, Gaya and the finding of the court was, "Defendants, stand was that they do not wish to challenge jurisdiction of the court. The dispute between parties arose after filing of the suit, prior to that there was no occasion to refer matters to Arbitration as there was no dispute between the parties. On the request, application dated 17.7.1995 filed on behalf of Respondents No. 1 to 3 **is** allowed. Further proceeding of the suit stayed and in the meantime, matter is referred to arbitration." The plaintiff (opposite party) preferred Misc. Appeal No. 30/95 against the order passed by Munsif-Ist, Gaya. Show-cause notice in the injunction matter was issued to the parties. The defendant (present petitioner) filed his rejoinder before the District Judge, Gaya. The M/s Milk Food Limited (petitioner), in the meantime issued registered letter dated 14.9.95, informing M/s G.M.C. Ice cream regarding appointment of Hon'ble Mr. Justice H.L. Agarwal (retired) as it's Arbitrator in terms of Clause 20 of the agreement between the parties and called upon the opposite party to concur in that appointment or in case of disagreement to appoint it's nominee arbitrator for the settlement of the dispute. By order dated 16.12.1995, the Additional District Judge, Gaya rejected the petition filed by M/s Milk Food Limited (petitioner) in Misc. Appeal to hear the appeal

and proceed to decide injunction matter. Against this order, M/s Milk Food Limited (petitioner) preferred C.R. No. 27 of 1996 in which an order of stay was passed and the proceedings in Misc. Appeal No. 30/95 was stayed. Civil Revision No. 27/96 was allowed by order dated 14.2.1996. The Additional District Judge was directed to complete the hearing of Misc. Appeal and also to finally dispose of the appeal latest by 16.3.1996. By order dated 13.3.1996, the Additional District Judge-II, Gaya dismissed the Misc. Appeal affirming the Munsif's order dated 03.8.1995. Against this order, M/s G.M.C. filed Civil Revision No. 1020/1996 which was disposed of by order dated 06.5.1997 as during the pendency of Civil Revision application, both the parties agreed for reference of dispute to the arbitrator chosen by them. M/s G.M.C. chose Hon'ble Mr. Justice Uday Sinha (retired) and M/s Milk Food had already chosen Hon'ble Mr. Justice H.L. Agarwal (retired) as their arbitrators. With consent of the parties, the dispute was referred to the appointed arbitrators with a request to dispose of arbitral proceeding within three months from the date of the reference. Parties were directed to appear before the arbitrators within a month from 06.5.1997 and to file necessary documents within four weeks thereafter. Before the arbitrators, the question arose whether the Arbitration and Conciliation Act, 1996 or Arbitration Act, 1940 would have application to the proceedings. The

majority arbitrators were of the view that 1996 Act will have application to the proceedings. Against this order, a petition u/S 33 of the Arbitration Act, 1940 was filed by M/s Milk Food Limited before the Delhi High Court vide O.M.P. No. 94/98. By order dated 13.10.1998, Single Judge of the Delhi High Court held that arbitral proceeding will be governed by the Arbitration and Conciliation Act, 1996. Letters Patent Appeal was preferred against the judgment of the Single Judge and the five Judges' Bench decided the L.P.A. as not maintainable.

Being aggrieved by the order dated 17.2.2003; Civil Appeal No. 9672/03 was filed by M/s Milk Food Limited. The Supreme Court held that since the arbitral proceeding commenced on 14.9.95, i.e. the date when M/s Milk Food Limited issued registered letter appointing arbitrator in terms of Clause 20 of the agreement and calling upon M/s G.M.S. Ice cream to appoint its nominee arbitrator for settlement of dispute, as such Arbitration Act, 1940 would apply. It was also observed that the entire arbitral proceeding need not be re-opened. The arbitrator may proceed to give their award which shall be filed in the court having jurisdiction. The award has been pronounced on 14.8.2004. The arbitrators have determined the Stamp Paper payable on award on the basis of Bihar State Stamp Act. Stamp has been paid by M/s G.M.C. and the same has been signed and

filed by the arbitrators in the court of Principal Sub-Judge, Gaya.

After filing of award by arbitrators, Title Suit No. 262/04 was filed by M/s G.M.C. u/S 14(2) of the Arbitration Act, 1940 before Principal Sub-judge, Gaya for making the award rule of the court. M/s Milk Food Limited receiving the summons appeared in Suit No. 262/04 and filed an application raising limited objection to the jurisdiction of the court of Principal Sub-Judge, Gaya. The Principal Sub-Judge, Gaya heard the parties on the question of jurisdiction to entertain the suit u/S 14(2) of the Arbitration Act, 1940 for making the award rule of the court and finally, by order dated 23.3.2006 held that the court at Gaya has jurisdiction to decide the application filed u/S 14(2) of the Arbitration Act, 1940 for making award rule of the court, in view of Section 31(4) of the Arbitration Act.

The question for consideration is whether the court at Delhi or court of the Principal Sub-Judge, Gaya has jurisdiction to entertain the suit filed u/S 14 of the Arbitration Act, 1940 for making award rule of the court.

The stand of the petitioner is that jurisdiction of Principal Sub-Judge; Gaya is barred by Section 31(4) of the Arbitration Act, 1940. Section 31(4) of the Arbitration Act, 1940 reads as under:

“(4)” Notwithstanding anything contained elsewhere in this Act or in any law for the time being in force, wherein any reference in an 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 shall be made in that court and in no other court.”

Petitioner's case is that the matter was referred to arbitration as soon as the notice dated 14.9.1995 was issued by the petitioner and served on the opposite party, once the arbitration proceeding initiated on 14.9.95, first “in reference” application was filed by the petitioner u/S 33 of the Arbitration Act, before Delhi High Court being O.M.P. No. 94/1998 with a prayer for clarification that the provisions of Arbitration Act, 1940 will apply to the arbitration proceedings. Thus in view of Section 31(4) , the Delhi High Court is the court within the meaning of Section 2(C) of the Arbitration Act, 1940, being a civil court having jurisdiction to decide the questions forming the subject matter of the reference, if the same had been the subject matter of a suit. Once an application in reference is 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 of the arbitration proceedings shall be made in that court alone and in no other court.

It has also been submitted that the jurisdiction of Gaya court is otherwise also ousted by the agreement dated 07.4.1992 between the parties. Clause 20 of the agreement dated 07/4/1992 is the arbitration clause. It provides that all arbitration proceeding shall be held in Delhi. It further provides that this contract is subject to Delhi jurisdiction by specifying that arbitration proceeding shall be held at Delhi. This clause makes the intention of the parties clear to exclude the jurisdiction of all other courts other than Delhi High Courts. It has also been submitted that M/s G.M.C. Ice-cream Private Limited had also filed O.M.P. No. 217/2000 in Delhi High Court for orders for summoning witnesses from Patna. Thus, in view of provisions of Section 31(4) of the Act, only the Delhi High Court have jurisdiction in the matter.

The case of the opposite party on the other hand, is that the arbitrators after passing the award filed it in the court of Principal Sub-Judge, Gaya as such, the court of Principal Sub-judge, Gaya is the competent court. The stand of the petitioner that the Delhi High Court is the proper place for filing application u/S 14(2) is misconceived. The cause of action for filing suit or for reference of the dispute



for arbitration arose on account of breach of agreement as bank draft was returned by the petitioner in violation of the terms of agreement. The draft was returned at Gaya address of the opposite party. As such, pecuniary and territorial jurisdiction to entertain the proceeding is of Gaya court. The opposite party when filed petition u/S 34 of the Arbitration Act for stay of Title Suit No. 40/95, did not challenge the jurisdiction of the court. The objection was regarding filing of suit instead of referring the dispute to the arbitration. It has also been submitted that since the petitioner is heavily relying on the order of Munsif- Ist, Gaya for the purpose of scope of the arbitral proceeding, at the same breath, petitioner cannot take the plea that Gaya court is lacking jurisdiction in any manner. The notice dated 14.9.95 for reference to arbitrator was sent to the opposite party at Gaya. Gaya court is otherwise competent to entertain the suit as it is a proceeding of breach of agreement and not for determination of right and interest of the parties during the subsistence of the agreement. So far the terms of agreement regarding Delhi Jurisdiction are concerned; it in no way excludes the jurisdiction of the Gaya Court.

Section 2(C) of the Arbitration Act defines court in the light of Section 31 of the Arbitration Act, which deals with jurisdiction. The word "Court" means court having civil jurisdiction over the subject matter

of reference. The court must be a competent court within the meaning of Section 31. In the present case, the dispute regarding breach of agreement arose at Gaya and for that civil suit was filed as it had territorial as well as pecuniary jurisdiction. The petitioner also did not raise any objection so far entertaining the suit on the ground of jurisdiction is concerned. Simple objection was regarding maintainability of suit in view of Clause 20 of the agreement. The petitioner filed his objection u/S 34 of the Arbitration Act and on that basis, the proceeding of the suit was stayed and the dispute was referred for arbitration.

Counsel for the petitioner submits that a party to arbitration agreement may chose to file suit in a court having no jurisdiction, in such suit if defendant has to make an application u/S 34 of the Arbitration Act for stay of the suit, it cannot be a deciding factor for deciding jurisdiction as the court otherwise had no jurisdiction and it cannot be not a "court" within the meaning of Section 2(C) of the Act.

I do not find much force in this submission for the reason that it is not the case of the petitioner that the suit was filed by the opposite party before a court having no jurisdiction. The court had civil jurisdiction to entertain the suit in which the petition u/S 34 was filed for stay of the suit. Counsel for the petitioner has submitted that in view of the decision of

the Supreme Court reported in **AIR 1970, 189 (Union of India Vs Surjeet Singh Atwal)** and **AIR 1953 (S.C.) 313 (Kumbha Mawji Vs Union of India)** the issue of jurisdiction under Section 31(4) of the Act is no more 'res integra'. It has been held by Supreme Court that petition u/S 34 of the Act is not a petition 'in reference' to an arbitration proceeding for constructing of Section 31(4) of the Act which is a non-obstinate clause.

The counsel for the opposite party in reply to this has submitted that it is true that the judgment of Kumbha Mawji has been explained by Supreme Court in the case of Union of India Vs Surjeet Singh Atwal, but in paragraph No. 5 of this judgment, the Apex Court has explained that 'notwithstanding the fact proceeding under Sections 8 and 20 are anterior to the reference yet they lead to reference and cover under mischief of Section 31(4) of the Act.'

Counsel for the opposite party submits that the order dated 06.5.97 is an order u/S 8 of the Arbitration Act, for the reason that the petitioner through registered letter dated 14.9.95 had asked the opposite party to concur in the appointment of arbitrator and in case of difference appoint it's nominee arbitrator for settlement of dispute. It was during pendency of the civil revision application that the parties decided to refer their dispute to arbitrator chosen by them.

Thereafter, by the orders of the court, the dispute was referred to the arbitrator with a direction to proceed and file relevant documents and dispose it of within three months. The Supreme Court in the decision reported in **1972(1) S.C.C. 702 (State of Madhya Pradesh Vs M/s Saith and Skelton (P) Ltd & Ors)** as well as in the case of **M/s Gurunanak foundation Vs M/s Ratan Singh & Sons** reported in **1981(4) S.C.C. 634** has answered the question relating to Section 31(4) in relation to Section 14(2) of the Act. In that case also arbitrator was appointed by the court with the consent of the parties to make award and the time was fixed for preparation of award. The Supreme Court considering this situation has recorded its finding in the following manner:

In Nachiappa Chettiar V. Subramanian Chettiar, (1960) 2 SCR 209 = (AIR 1960 SC 307) the question arose whether the trial court had jurisdiction to refer the subject matter of a suit to an arbitrator when the decree passed in the suit was pending appeal before the High Court. Based upon Section 21, it was urged before this court that the reference made by the trial court, when the appeal was pending, and the award made in consequence of such reference, were both invalid as the trial court was not competent to make the order of reference. This court rejected the said contention and after a reference to Ss. 2 (c) and 21 of the Act held that the expression "Court" occurring in S. 21 includes

also the appellate court, proceedings before which are a continuance of the suit. It was further held that the word "suit" in S. 21 includes also appellate proceedings. In our opinion, applying the analogy of the above decision, the expression "Court" occurring in S. 14 (2) of the Act will have to be understood in the context in which it occurs. So understood, it follows that this court is the court S. 14 (2) where the arbitration award could be validly filed."

Similarly in 1981 Supreme court 2075, an application was made to Delhi High Court u/S 20 for a direction to file the arbitration agreement in the court, the proceeding was numbered as a suit. The suit ended in order of reference to the arbitrator. As subsequent application was made to Delhi High Court u/S 5 read with Section 11 of the Act for removal of the arbitrator of this application being dismissed. The matter was brought to the Supreme Court in appeal. By the decision of the Supreme Court in the appeal, the arbitrator was removed and another person was appointed as sole arbitrator. The Supreme Court held that undisputedly, therefore, the arbitrator was appointed by the Supreme Court. The appeal was accordingly disposed of. Thereafter, the Supreme Court gave further direction about the matter and method of conducting the arbitral proceeding and fixed the time for completion of arbitral proceeding. The Supreme Court by appointing another

arbitrator would not mean the Supreme Court was not in seisin of the matter. Consequently, in view of provision of Section 31(4), the Supreme Court alone would have jurisdiction to entertain award and it could not be filed before the Delhi High Court.

Counsel for the petitioner submits that Section 8(i) (a) of Arbitration Act, 1940, deals with the power of Court to appoint arbitrator. So far the order dated 06.5.1997 (Annexure-4) is concerned, it is not an order u/S 8 of the Arbitration Act, 1940. The submission of the counsel for the opposite party is based on the wrong premises that the order contained in Annexure-4 is an order u/S 8 of the Act. In fact, power of the court was not invoked for appointment of arbitrator rather the parties selected their arbitrators with consent. First ingredient as provided u/S 8 is that the parties must file an application and (ii) the court should appoint an arbitrator. In the present case, both the ingredients are missing. Section 8 application can be filed when there is difference between the parties regarding selection of arbitrator. There was no difference rather parties chose their arbitrators with consent , as such, no application was filed, u/S 8. So this order cannot be treated as first "in reference" in the arbitration proceeding.

The question for consideration is which application filed before which court should be treated

as first application "in reference" by the parties to the arbitration agreement. Admittedly, M/s Milk Food Private Limited by sending a registered letter dated 14.9.95 intimated M/s G.M.C. regarding appointment of arbitrator and sought consent of G.M.C. or asked to appoint it's own arbitrator. G.M.C. declined to consent on the appointment of Hon'ble Mr. Justice H.L. Agarwal (retired) or opined/nominate any other arbitrator. In civil Revision No. 1020/96 both the parties consented and the High Court passed an order dated 06.5.97. In view of decision reported in 1972(1) S.C.C. 702 and AIR 1970S.C.189, this order can be considered to be an order passed u/S 8 of the Arbitration Act, 1940 as the dispute was referred to the appointed arbitrators. The request was made to the arbitrators to dispose of arbitration proceedings within three months. Notices were sent to the arbitrators and the parties were also directed to appear before the arbitrators within one month from the date of order and to file necessary documents. So far the O.M.P. No. 94/98 filed by M/s Milk Food u/S 33 of the Arbitration Act, 1940 is concerned, it cannot be treated as first "in reference" application before a court of competent jurisdiction as prior to that, the parties had already filed an application before the Patna High Court consenting to refer their dispute to arbitrator and also chose their arbitrators. The Supreme court in Civil Appeal No. 9672/03 and the

case of M/s Milk Food Private Limited has held that arbitral proceeding commenced in the instant case on 14.9.95 and considering that only it was decided that Arbitration Act, 1940 would apply. Since in view of the Supreme Court, arbitration proceeding commenced on 14.9.95 and thereafter, the parties consented for appointment of arbitrator and the direction was issued for commencing the proceeding. In any view, the order dated 06.5.97 can be treated as first "in reference application" and relevant for deciding the jurisdiction u/S 31(4) of the Act.

Section 31 of the Act provides the forum in which an award may be filed. Sub-section 4 vests exclusive jurisdiction in the court to which an application has been made in any reference and that court is only competent to entertain all subsequent applications arising out of the reference case and that is the only court having jurisdiction over the arbitration proceeding. In the present case, the award was rightly filed u/S 14(2) in the court of Principal Sub-judge, Gaya as this court has jurisdiction u/S u/S 31(4) as in reference application has been filed before the Patna High Court and the original court having territorial jurisdiction is of Gaya Court. The award has rightly been filed in the court of Principal Sub-judge, Gaya, and this court alone has jurisdiction to



entertain the suit u/S 14(2) read with Section 31(i) and 31(4) of the Arbitration Act.

I do not find any merit in the application.

This Civil Revision application is dismissed.

(Mridula Mishra,J.)

Patna High Court  
The Day of April, 2008  
N.A.F.R./AKV

