

inderpal Singh Hassanwalia Vs. Bir Tibbtan Woollen Mills, Chowgan and ors.

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Court : Delhi

Decided On : Jan-24-1973

Reported in : AIR1974Delhi95

Judge : Avadh Behari, J.

Acts : [Arbitration Act, 1940](#) - Sections 20 and 31(4); [Code of Civil Procedure \(CPC\), 1908](#) - Sections 10; [Limitation Act, 1963](#) - Schedule - Article 137

Appeal No. : Suit Appeal No. 36-A of 1971 and Interim Application No. 106 of 1971

Appellant : inderpal Singh Hassanwalia

Respondent : Bir Tibbtan Woollen Mills, Chowgan and ors.

Advocate for Pet/Ap. : M.L. Oberoi and; Ravinder Nath, Advs

Judgement :

Avadh Behari, J.

(1) This is an application under Section 20 of the Arbitration Act. The material facts as stated in the application are these.

(2) The petitioner is the sole proprietor of Wool World (India). The respondents I and 2 entered into an agreement dated 10th of March, 1969 with the petitioner. By this agreement the petitioner was appointed the sole selling agent of blankets and other wollen textiles produced by respondent No. 1 for a period of five years. Copy of this agreement is set out as annexure ' A ' to the petition. According to the terms of this agreement the mills agreed to produce various kinds of blankets, tweeds, yarn and other textiles excluding mufflers as per instructions and requirements of the petitioner. The minimum production of the mills was to be of the order of Rs. .15 lakhs a commission of 5% was to be paid to the petitioner over the difference between the actual value of the produced material and the agreed minimum value of Rs. 15 lakhs. It is not necessary to reproduce here other terms of the agreement as these are not material for the decision of this application.

(3) The petitioner has alleged that respondents I and 2 did not perform their part of the contract. The petitioner has alleged a number of breaches of the contract by the respondents. It is said that respondents 3 and 4 have failed to deliver and supply the processed and the finished products to the petitioner. The petitioner needed woollen blankets for sale at Kulu Mela but these goods were not delivered to the petitioner. On the other hand respondents I and 2 themselves set up a stall in Kulu Mela in October, 1969 and sold their woollen products at rates much lower than those at

which the petitioner sold his woollen products. In the agreement there is a term as to arbitration. This is clause 12 and it provides :

'ANY dispute between the parties will be settled mutually between themselves. In case no mutual agreement will be attained, the dispute may be solved by arbitration.' The petitioner has prayed that the agreement be filed in court and an arbitrator may be appointed, in terms of the clause 12 of the said agreement for the determination of the disputes between the parties.

(4) As will be noticed from the allegations in the application the contesting respondents are respondents 1 and 2. Respondent No. 1 has filed a reply to the petition. In this reply respondent No. 1 has admitted the agreement dated 10th of March, 1969 which was entered into between the petitioner and respondent No. 1. It has however, been contended that the breach of the agreement was committed by the petitioner. It is said that the petitioner did not deposit 25% of advance payment at the time of the placing the orders.

(5) In point of law two Contentions have been raised in the reply of respondent No. 1.

(6) Firstly, it is submitted that this court has no jurisdiction to try this application under Section 20 of the Arbitration Act. In this behalf it was under that on 24th of November, 1969 the petitioner instituted a suit for injunction (Suit No. 664/1969) in the court of Sh. R. L. Gupta, Subordinate Judge, First Class, Delhi against the respondents. This suit for injunction is also based on the agreement dated 10th of March, 1969. In this suit the respondents 1 and 2 filed an application under Section 34 of the Arbitration Act praying that since there is an arbitration agreement between the parties, the suit should be stayed. It is submitted that this court has no jurisdiction to entertain this application for the reason that the application under Section 34 of the Arbitration Act was made to the court of Subordinate Judge, First Class and, therefore, under the provisions of Section 31(4) of the Arbitration Act only the court of the Sub-ordinate Judge, First Class, Delhi has jurisdiction over all the subsequent applications.

(7) Secondly, the contention raised is that this application is liable to be stayed under Section 10 of the Code of Civil Procedure. Again it is submitted that in view of the suit for injunction pending in the court of Sub-ordinate Judge, First Class, Delhi, this application should be stayed under Section 10. The petitioners have also filed separately an application No. 1 154/72. In this application the prayer is that since the matter is directly and substantially in issue in the injunction suit pending in the court of the Subordinate Judge, First Class, Delhi, the nearing of this application cannot proceed. Reference has also been made to other proceedings arising out of the suit for injunction between the parties. It is said that the petitioner moved an application for temporary injunction in the suit. The Sub-ordinate Judge, First Class, Delhi did not grant ad interim injunction and ordered that the injunction application be held over till after the decision of the application under section 34 of the Arbitration Act. Against this order of the Subordinate Judge, First Class, Delhi, the petitioner filed an appeal in the court of the Senior Sub-ordinate Judge which was dismissed on 12th of March, 1970. Against the order of Senior Sub-ordinate Judge, the petitioner filed a Revision (C. R. 227/70) in the High Court which is pending. It is said that in this revision petition the matters are substantially the same as in the present application under Section 20 of the Arbitration Act. I will take up these two pleas separately.

(8) It was not disputed that in the suit for injunction instituted by the petitioner in the court of Sub-ordinate Judge, First Class, Delhi an application under Section 34 of the Arbitration Act has been filed by the respondents I and 2. The question is whether an application made by the respondents I and 2 under Section 34 of the Arbitration Act in the court of the Sub-ordinate Judge, First Class is an application in a reference within the meaning of Section 31(4) of the Arbitration Act. Section 31(1) enacts that an award may be filed in any court having jurisdiction in the matter to which the reference relates. Section 31(2) provides that all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement shall be decided by the court in which the award has been filed and by no other court. Section 31(3) states that all applications regarding conduct of arbitration proceedings shall be made to the court where the award has been filed and to no other court. Section 31(4) reads as follows : 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 shall be made in that court and in no other court.' Section 34 states:

'WHERE any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings: may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the application was, at the time when the proceedings were commenced, and still remain, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.' Two conditions must be fulfilled in order to give the court exclusive jurisdiction under Section 31(4) of the Act. In the first place an application under the Arbitration Act must be made to the court competent to entertain it. In the second place the application must be made 'in any reference.' It was contended on behalf of the respondents that an application for stay of suit under Section 34 of Act was an application made 'in a reference' within the meaning of Section 31(4) of the Act. In support of this proposition reliance was placed by respondents, counsel on Shukrullah and another v. Mt. Rahmat Bibi, Mis Swastika Scientific Engineering Co. of Ambala Cantt v. The Union of India, and Kumbha Mawji v. The Union of India ' The petitioners' counsel has referred me to Harbans Singh v. Union of India It is not necessary to discuss these authorities this precise question has recently been settled by the Supreme Court.

(9) In Union of India v. Surjeet Singh Alwal, their Lordships of the Supreme Court have held that an application under Section 34 of the Arbitration Act is clearly not an application 'in the matter of a reference' and does not fall within the purview of Section 31(4) of the Act. It was observed that such an application has nothing to do with any reference. It is only intended to make an arbitration agreement effective and prevent party from going to court contrary to his own agreement that the dispute is, to be adjudicated by a private tribunal.

(10) The second condition imposed by Section 31(4) is that the application for a stay

must be made to a court competent to entertain it. It should be noticed that in section 34 expression 'judicial authority' is used. The section provides for an application to the judicial authority before whom a legal proceeding is pending for the stay of that proceeding. An application for stay of legal proceedings to a judicial authority before whom it is pending is an application under the Arbitration Act to a judicial authority competent to entertain it. But the judicial authority need not necessarily be a court competent under section 2(e) of the Act to decide the question forming the subject matter of the reference. Section 2(e) of the Act defines a Court thus:

'COURT means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit but does not, except for the purpose of arbitration proceedings under Section 21 include a Small Cause Court'.

Suppose a party files a suit in a court which has no jurisdiction to try, the matter and the defendant makes an application for stay of suit. It does not mean that all subsequent arbitration proceedings will have to be taken in the court having no jurisdiction to entertain the matter. Their Lordships of the Supreme Court observed at page 191;

'A party to an arbitration agreement may choose to file a suit in a Court which has no jurisdiction to go into the matter at all and merely because the defendant in such a suit has to make an application to that court under Section 34 of the Act for the stay of the suit it cannot be said that the court which otherwise has no jurisdiction in the matter becomes a court within the meaning of Section 2(e) of the Act.'

In *Virendra Sagal v. Sumatilal Jamnalal, S.N. Andley J.* (as his Lordship then was) had taken the view that the mere filing of an application in any court irrespective of whether such court has jurisdiction in the matter to which the reference relates would not fix that court permanently as the court in which all subsequent applications are to be filed. Subsequently, the Supreme Court in the case of *Union of India v. Swjeet Singh Atwal*, has authoritatively settled the controversy. Contrary view taken by the Punjab High Court in *Swaitika Scientific Engineering Co. v. Union of India*, is therefore no longer good law. Once it is held that the application for stay under Section 34 of the Act is not an application in a reference under section 31(4) of the Act, the argument that this court has no jurisdiction to try the application must be rejected.

(11) The second argument is that in view of the suit for permanent injunction and the civil revision pending in the High Court against the refusal to grant injunction, this application should be stayed under Section 10 of the Code of Civil Procedure. This argument can be disposed of on the short ground that Section 10 of the Code of Civil Procedure applies only to suits and cannot apply where one of the two proceedings is not a suit.

(12) 'In *Gurbakhsh Singh v. Sant Ram*', it was held that Section 10 did not apply to applications under para 20 schedule 2, Civil Procedure Code, in that case it was said that an application under para 20 Schedule 2 Civil P.C. for filing the award in court was not a plaint and that the hearing of such an application is not a suit though registered as a suit are not proceedings in a suit. It is a litigation but not a suit. Section 10 is applicable only to suits. For Section 10 to apply the matter in issue in one suit must be directly and substantially in issue in the previously instituted suit. In

the Ruby General Insurance Co.Ltd. v. The Bhart Bank Ltd., also it was held that proceedings under Section 20 of the Arbitration Act are not a suit.

(13) It cannot be said that the matter directly and substantially in issue in the present application is directly and substantially in issue in the suit for permanent injunction or in the revision petition. In this application I am only concerned with the filing of the arbitration agreement and the reference of the disputes to the arbitrator. In the suit for injunction and in the revision petition different prayers have been made which touch the merits of the dispute. In this application under Section 20, the arbitrator will decide the merits of the dispute between the parties. In my judgment the application under Section 10 of the Code of Civil Procedure (I. A. 106/71) is wholly misconceived. I, therefore, repel the argument that the present application under Section 20 of the Arbitration Act and as a result dismiss I. A. 106/71.

(14) The arbitration agreement is admitted by the respondents. In an application under Section 20 of the Arbitration Act what the court has to see is that there is an arbitration agreement between the parties. In *Union of India v. M/s. Chaman Lal Loona & Co.*, it was held that on an application under Section 20, ordinarily the only point for decision for the court was if there was an arbitration agreement and the question of liability was one for the arbitrator and not for the court to decide. In *Wazir Chand Mahajan and another v. The Union of India* their Lordships of the Supreme Court observed at page 993 :

'In dealing with an application for filing an arbitration agreement, the Court must satisfy itself about the existence of a written agreement which is valid and subsisting and which has been executed before the institution of any suit, and also that a dispute has arisen with regard to the subject-matter of the agreement which is within the jurisdiction of the Court.'

It is not disputed that the disputes between the parties fall within the arbitration clause. Once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute: See *A. M. Mair & Co. v. Gordhandas Sagarmull*.

(15) LASTLY. Mr. Ravinder Nath counsel for the respondents 1 and 2 argued that there was delay in filing the application under Section 20 of the Arbitration Act. In this case there is no question of delay. The arbitration agreement is dated 10th of March, 1969. This application was filed on 22nd of December, 1970. It is stated in the application that the respondents 1 and 2 committed breach in October, 1969 when respondents 1 and 2 did not allow respondents 3 and 4 to deliver the finished and processed goods to the petitioner.

(16) Directly connected with the question of delay is the question on limitation. In *Wazir Chand Mahajan v. Union of India*, and *Mohd Usman v. Union of India* the Supreme Court took the view that article 181 of the Limitation Act, 1908 governed limitation only in case of applications under the Code of Civil Procedure and did not apply to applications under Section 20 of the Arbitration Act. Under Article 137 of the New Limitation Act (Act 36 of 1963) the position is however different. Article 137 is as under :

ANY other application for which Three years When the right to no period of limitation is provided apply accrues. elsewhere in this Division.

It may, therefore, appear that applications under Section 20 of the Act will be governed by Article 137 of the Limitation Act of 1963 and the limitation will be three years from the date 'when the right to apply accrues'. A learned single Judge of the Patna High Court In the matter of Munghyr Electric Supply Co.,' has however taken the view that the view taken under Article 181 of the Limitation Act of 1908 will continue to hold the field even under Article 137 of the [Limitation Act, 1963](#) and the limitation prescribed in that article will not apply to applications under the Arbitration Act. I need not pronounce on this question of limitation because it appears to me that in any view of the ' matter the application is not barred by time.

(17) I, therefore, hold that the petitioner and respondents I and 2 entered into an arbitration agreement and that the differences have arisen to which the agreement applies. No sufficient cause has been shown why the court should not order the agreement to-be filled.

(18) In the arbitration clause which I have set out above no arbitrator has been named. The parties before me do not agree upon an arbitrator. In the first schedule to the Arbitration Act unless otherwise expressly provided the reference shall be to a sole arbitrator. The Court, therefore, has to make an order of reference to the arbitrator to be appointed by the court as the parties have neither appointed an arbitrator nor do they agree upon one.

(19) In the result. I accept the application under Section 20 of the arbitration Act and refer the matter to the sole arbitration of Sh. C.L Joseph, Advocate Delhi. The petitioner will pay Rs.500.00 as fees to the sole arbitrator in first instance. The petitioner-will also have his costs of the application which I assess at Rs. 100.00

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