

Union of India

Vs

Surjeet Singh Atwal

Civil Appeal No. 760 of 1966

(S. M. Sikri, R. S. Bachawat, V. Ramaswami-I JJ)

22.04.1969

JUDGMENT

RAMASWAMI, J. -

1. This appeal is brought by special leave from the judgment of the Punjab High Court, dated January 11, 1965 in FAO No. 82-D of 1963.
2. The said Appeal was filed under Section 39 of the Arbitration Act, 1940 (hereinafter referred to as the Act) against the order of the Subordinate judge, First Class, Delhi, dated January 29, 1963, passed on an application under Section 20 of the Act by the Union of India for filing the arbitration agreement in court and to make a reference of the dispute to the officer mentioned in the agreement.
3. In the year 1942 tenders were invited by the Union of India for construction of certain runways and roads in an aerodrome at Dalbhumgarh. The tender of the respondent, Surjeet Singh Atwal, was accepted and the agreement was executed on August 19, 1944. Clause 25 of the agreement provided for the settlement of the disputes by reference to the arbitration of the Superintending Engineer of the Circle for the time being, according to law. The respondent alleged that he had completed the work entrusted to him under the contract and made a claim of Rs. 50,000 on the basis of his last bill. On the other hand the Union of India made a demand against the contractor for a sum of Rs. 5,09,164/- on the ground that the amount had been over-paid to the respondent. Ignoring the arbitration clause respondent filed a suit on the original side of the Calcutta High Court for the recovery of Rs. 50,000 being Suit No. 531 of 1951. The Union of India made an application under Section 34 of the Act for the stay of the suit. The suit was consequently stayed and the matter was referred to the arbitration of the Superintending Engineer, Calcutta Aviation Circle, C.P.W.D., Calcutta. Before the arbitrator the Union of India made its counter claim for a sum of Rs. 5,09,164/- . The Contractor objected to the entertainment of the counter-claim. The stay of the suit which was granted by the Calcutta High Court was later on vacated. Pending the suit of the respondent in the Calcutta High Court, the Union of India filed an application under Section 20 of the Act in the Court of the Sub-ordinate Judge, First Class, Delhi for getting the agreement of reference filed in the Court and for making the reference of the disputes between the parties to the arbitration of the Superintending Engineer, Central Circle No. 1, C.P.W.D., Calcutta. The respondent opposed the petition mainly on the ground that the court of Subordinate Judge, First Class, Delhi, had no jurisdiction to entertain the application. It was contended that the appellant had filed an application under Section 34 of the Act for stay of the suit filed in the Calcutta High Court, and, therefore, any subsequent application relating to arbitration under the agreement should be filed in the Calcutta High Court. By its judgment, dated January 29, 1963 the Subordinate Judge, First Class, Delhi, allowed the application of the appellant and ordered that the disputes between the parties be referred

to the Superintending Engineer, Calcutta, Circle No. 1, C.P.W.D. The learned Subordinate Judge held that the contract of the parties was concluded at Delhi and it was signed at Delhi on behalf of the respondent and, therefore, the Delhi Court had jurisdiction to try the suit. Aggrieved by the judgment of the Subordinate Judge, First Class, the respondent filed an appeal under Section 39 of the Act in the Punjab High Court. By his judgment, dated January 11, 1965, D. K. Mahajan, J., allowed the appeal and set aside the order of the Subordinate Judge, First Class, and dismissed the application of the appellant on the ground that the Delhi Court had no jurisdiction to entertain an application under Section 20 of the Act.

4. The question involved in this appeal is whether the application made by the appellant under Section 34 of the Act before the Calcutta High Court was an application in a reference within the meaning of Section 31(4) of the same Act. Section 2(c) of the Act defines "Court" thus :

"Court means 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, but does not, except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court."

Section 14 provides that the award may be filed in the court. 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 the 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 proceeding 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 remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

5. Two conditions must be fulfilled in order to give a 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 respondent that an application for stay of suit under Section 34 of the Act was an application made "in a reference" within the meaning of Section 31(4) of the Act. In support of this proposition reference was made to the decision of this Court in *Kumbha Mawji v. Union of India* (1953 SCR 878), in which it was held that the phrase "in any reference" in Section 31(4) of the Act was comprehensive enough to cover an application first made after the arbitration is completed and a final award made and the sub-section is not confined to applications made during the pendency of the arbitration proceeding. It was pointed out that sub-section (1) of Section 31 determines the jurisdiction of the court in which an award can be filed and that sub-sections (2), (3) and (4) of Section 31 were intended to make that jurisdiction effective in three different ways : (1) by vesting in one court the authority to deal with all questions regarding the validity, effect or existence of an award or an arbitration agreement, (2) by casting on the persons concerned the obligation to file all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings in one court, and (3) by vesting exclusive jurisdiction in the court in which the first application relating to the matter was filed. The context, therefore, of sub-section (4) would seem to indicate that the sub-section was not meant to be confined to applications made during the pendency of an arbitration. The necessity for clothing a single court with effective and exclusive jurisdiction, and to bring about by the combined operation of these three provisions the avoidance of conflict and scramble is equally essential whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced. It was, therefore held that the expression "in any reference" in Section 31(4) should be construed as "in the course of a reference". Even so, we are of opinion that the application for stay of suit under Section 34 in the present case is not an application in a reference with the wider meaning given to that phrase by this Court in *Kumbha Mawji's case* (supra). There are different sections in the Arbitration Act whereby an application is to be made even before any reference has been made. Section 8 for instance, provides for an application to invoke the power of the Court, when the parties fail to concur in the appointment of an arbitrator to whom the reference can be made. So also Section 20 provides for an application to file the arbitration agreement in court so that an order of reference to an arbitrator can be made. These are clearly applications anterior to the reference but they lead to a reference. Such applications are undoubtedly applications "in the matter of a reference" and may fall within the purview of Section 31(4) of the Act even though these applications are made before any reference has taken place. But an application under Section 34 is clearly not an application belonging to the same category. It has nothing to do with any reference. It is only intended to make an arbitration agreement effective and prevent a party from going to Court contrary to his own agreement that the dispute is to be adjudicated by a private tribunal.

6. We do not, therefore, consider that an application for stay of suit under Section 34 is an application in a reference even within the wider meaning given to that phrase by this Court in *Kumbha Mawji's case* (supra). The second condition imposed by Section 31(4) is that the application for stay must be made to a Court competent to entertain it. It should be noticed that in Section 34 the expression "judicial authority" is used. The section provides for an application to a judicial authority before whom a legal proceeding is pending for the stay of that proceeding. An application for stay of legal proceeding 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(c) to decide the question forming the subject-matter of the reference. 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(c) of the Act. The view that we have expressed is borne out by the decisions of the Calcutta High Court in *Choteylal Shamlal v. Cooch Behar Oil Mills Ltd.*, (ILR (1954) Cal 418); *Brittannia Building & Iron Co. Ltd., v. Gobinda Chandra Bhattacharya* (64 CWN 325) and *Basanti Cotton Mills Ltd. v. Dhingra Brothers* (AIR 1949 Cal 684).

7. For these reasons we consider that the application for stay under Section 34 of the Act cannot be treated as an application in a reference under Section 31(4) of the Act. Therefore, the Subordinate Judge, First Class, Delhi was right in holding that the application under Section 20 of the Act was maintainable in his Court and for making a reference of the dispute to the arbitrator mentioned in the agreement. Accordingly we set aside the order of the Punjab High Court and restore the order of the Subordinate Judge, First Class, Delhi, dated January 29, 1963, allowing the application filed by the appellant under Section 20 of the Arbitration Act, 1940. The appeal is allowed with costs.

</html