

The Union of India

Vs

Hri Om Prakash

Civil Appeal Nos. 1284 to 1290 of 1968

(A.C. Gupta, Jaswant Singh JJ)

02.04.1976

JUDGMENT

GUPTA, J. -

1. These seven appeals by certificate have been preferred by the Union of India against a common judgment of the Allahabad High Court disposing of seven appeals under Section 39(1) (vi) of the Arbitration Act, 1940. The appeals turn on the true meaning and scope of Sections 8 and 30 of the Act. Section 8 is in these terms :

8. Power of Court to appoint arbitrator or umpire - (1) In any of the following cases -

(a) Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

The question that arises for consideration is whether the court having appointed an arbitrator under sub-section (2) of Section 8 can proceed further to make an order of reference to the arbitrator. According to the respondent the court becomes functus officio after appointing an arbitrator and has

no jurisdiction to refer the matter to him.

2. The facts leading to the appeals are these. During the last world war the respondent, a contractor, entered into seven agreements with the military department of the Government of India for the construction of a hospital, three other buildings and three tubewells. In each of these agreements there was a clause providing that any dispute arising between the parties would be referred to an arbitrator. In four cases the agreements provided for arbitration by the Director of Farms, General Headquarters, Simla; in two cases the Officer Commanding, Lucknow, was to be the arbitrator, and in the remaining other case, a Quarter-Master at Delhi was chosen as the arbitrator. Disputes having arisen between the parties, the respondent made seven applications in the court of the First Civil Judge, Meerut, under Section 8(2) of the Act stating that the offices by reference to which the arbitrators were selected in the agreements had been abolished and it was therefore necessary to appoint new arbitrators. In the applications the respondent named several officers praying that one of them be appointed to act as arbitrator "who shall have like power to act in the reference and to make an award as if he has been appointed by the consent of the parties". It will be noticed that the prayer repeats the material portion of sub-section (2) of Section 8. On February 13, 1950 the court appointed Col. Ranbir Singh whose name was not in the respondent's list, to act as arbitrator in all the seven cases and further directed the papers to be sent to him, asking him to give his award within two months from that date. If the respondent's contention in these appeals is correct that after appointing an arbitrator under Section 8(2) the court loses jurisdiction and cannot make an order of reference, the further directions given in the order of February 13, 1950 were invalid. However, the question did not assume importance at that stage because both sides agreed to submit the disputes to Col. Ranbir Singh for arbitration. After the arbitration had made some progress, Col. Ranbir Singh returned the papers to the court on being asked not to proceed further by the government counsel, who thought that the arbitrator was not competent to deal with the questions of law arising for decision. After this the District Judge, Meerut, transferred the cases to the Judge of the Small Cause Court, Meerut, presumably on the assumption that the respondent's applications for the appointment of an arbitrator were pending. If the respondent's contention is right, this was an erroneous assumption, but no objection was raised at the time and the Judge of the Small Cause Court by his order dated February 13, 1951 appointed Director of Farms, General Headquarters, Simla, to act as arbitrator in all the seven cases. In that order the court further directed as follows :

All these cases should be referred to him for arbitration. He must file his award within one month of this order.

The papers were then sent to Brigadier H. L. Bhandari who was said to be the officer concerned. The respondent applied to the court on March 8, 1951 for review of the order alleging that the office of the Director of Farms, General Headquarters, Simla, had been abolished and as such Brig. H. L. Bhandari could not be the officer mentioned in the order. The respondent did not take part in the proceedings before Brig. Bhandari, but before he moved the court on May 4, 1951 for stay of the proceedings before the arbitrator, the latter had made his awards which were filed in courts on that very day. The review application was ultimately dismissed on May 12, 1951.

3. The respondent made seven applications urging several grounds for setting aside the awards, but the Judge of the Small Cause Court, Meerut, overruled all objections and confirmed the awards, and a decree in terms of the award in each case was passed on May 26, 1952. Against that order the

respondent preferred seven appeals to the Allahabad High Court. The High Court allowed the appeals accepting the contention that the court was functus officio after appointing the arbitrator under Section 8(2) and had no jurisdiction to refer the cases to the arbitrator. The High Court was of the view that it was for the parties to refer their disputes to the arbitrator after he was appointed by the court, and the reference by the court being without jurisdiction, the awards were invalid. The High Court further held that when the court below made the order of reference there was no post of Director of Farms, General Headquarters, Simla, in existence and, as such, Brig. Bhandari was not competent to act as arbitrator on the basis of the order dated February 13, 1951. The Union of India questions the correctness of the High Court's decision in these appeals.

4. The validity of the order of reference depends upon the scope of Section 8 which deals with the power of the court to appoint an arbitrator or umpire. Sub-section (1) of Section 8, so far as it is relevant for the present purpose, provides that if any appointed arbitrator is incapable of acting, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, any party to the agreement may serve the other parties with a written notice to concur in supplying the vacancy. Sub-section (2) of Section 8 lays down that if no appointment is made within 15 days after the service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators "who shall have like powers to act in the reference and to make an award as if he or they had been appointed by consent of all parties". The question is whether having made the appointment, the court acting under sub-section (2) can also make an order of reference to the arbitrator. The Act contemplates three kinds of arbitration : (i) arbitration without intervention of a court, dealt with in Chapter II of the Act which includes Section 3 to Section 19; (ii) arbitration with intervention of a court where there is no suit pending, dealt with in Chapter III which consists of only one section, viz. Section 20; and (iii) arbitration in suit which is covered by Chapter IV. It is clear from the provisions of Chapter II that after the appointment of arbitrator, the proceedings are to be outside court, and up to the state of filing the award intervention of court is not contemplated unless any occasion arises requiring the court to remove the arbitrator under Section 11. An agreement to submit difference to arbitration implies an agreement to refer the differences to the arbitrator. Section 8 only empowers the court to appoint an arbitrator where the parties do not concur in the appointment. Section 20 occurring in Chapter III contains provisions for arbitration with intervention of a court where there is no suit pending. Section 20 reads :

20. Application to file in Court arbitration agreement. - (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the agreement or any part of it, and where a difference has arisen to which the agreement, applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice in the notice why the agreement should not be

filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act, so far as they can be made applicable.

This section confers power on the court to order the agreement to be filed and, further, to make an order of reference to the arbitrator appointed by the parties, or, where the parties cannot agree upon an appointment, to an arbitrator appointed by the court. Sub-section (1) of Section 20 makes in plain that the provisions of the section can be availed of only if no proceeding under Chapter II has been initiated. Section 8 does not contain any provision empowering the court to make an order of reference to the arbitrator as one finds in sub-section (4) of Section 20. Thus it seems clear that the court in the instant cases had no jurisdiction, after appointing an arbitrator under Section 8(2), to proceed further to make an order referring the disputes to the arbitrator.

5. The question which now arises is whether the awards could be set aside as invalid because the reference was incompetent. Section 30 of the Act which sets out the grounds for setting aside an award is in these terms :

30. Grounds for setting aside award. - An award shall not be set aside except on one or more of the following grounds, namely :

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after his issue of an order by the Court superseding the arbitration or after arbitration proceeding have become invalid under Section 35;

(c) that an award has been improperly procured or is otherwise invalid.

According to the respondent an award obtained on an invalid reference is also invalid and is covered by clause (c) of Section 30. It was argued on behalf of the appellant, on the authority of the Privy Council in *Chhabba Lal v. Kallu Lal* (73 IA 52 : AIR 1946 PC 72), that the words "otherwise invalid" in Section 30(c) did not cover a case where the award was challenged on the ground of some invalidity attaching to anything outside the award itself. In *Chhabba Lal's* case the Privy Council held that an objection to the validity of the reference to arbitration did not come within the provisions of paragraph 15 of the Second Schedule to the Code of Civil Procedure, 1908, which provided that no award was to be set aside except on the specific grounds mentioned therein, or the award, "being otherwise invalid". This view which affirms that of *Iqbal Ahmed, J.* in his dissenting judgment in a Full Bench decision of the Allahabad High Court, *Mt. Mariam v. Mt. Amina* (AIR 1937 All 65 : ILR 37 All 317), was taken in relation to an award on a reference made in a suit. Their Lordships observed :

.... all the powers conferred on the court in relation to an award on a reference made in a suit presuppose a valid reference on which an award has been made which may be open to question. If there is no valid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding.

There was no provision in the Second Schedule to the Code of Civil Procedure, which was repealed by the Arbitration Act, 1940, like Section 32 or Section 33 of the Act. Section 32 bars the institution of suits concerning arbitration agreements or awards and provides that no arbitration agreement or award shall be set aside, amended, modified or in any way affected otherwise than as provided in this Act; Section 33 says that a party to an arbitration agreement seeking to challenge the agreement or the award must do so by making an application to the court. When the Second Schedule to the Code of Civil Procedure was in force, an award made on an invalid reference could be set aside only by filing a suit which was then the "appropriate proceeding" but now the proceeding appropriate for the same purpose is an application to the court as the respondent in these cases has done. Also, these are case of arbitration without the intervention of court, and the observation from the judgment in Chhabba Lal's case, quoted above, that a reference in a suit should be presumed to be a valid reference, does not apply to these cases. The words "or is otherwise invalid" in clause (c) of Section 30 are wide enough to cover all forms of invalidity including invalidity of the reference. We do not find any reason why the general and unqualified language of clause (c) should not include an award on an invalid reference which is a nullity. The cases cited at the Bar show that all the High Courts with only one or two exceptions have taken this view. We hold therefore that the awards challenged in these appeals are nullities and have been rightly set aside by the High Court. In the view we have taken it is not necessary to consider the other question, whether Brig. Bhandari who made the awards was the officer answering the description of Director of Farms, General Headquarters, Simla, to whom the court had referred the disputes. In the result the appeals fail and are dismissed with costs. One set of hearing fee.

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