SUPREME COURT OF INDIA

Sanshin Chemicals Industry

Vs.

Oriental Carbons and Chemicals Ltd.

C.A.No.1309 of 2001

(G. B. Pattanaik, K. G. Balakrishnan and B. N. Agrawal JJ.)

16.02.2001

JUDGEMENT

G.B. Pattanaik, J.

1. Leave granted.

2. This appeal by grant of special leave is directed against the judgment of Delhi High Court dated 8th August, 2000. The question for consideration is whether a decision regarding the venue of the arbitration proceedings could be assailed in appeal under Section 34 of the *Arbitration and Conciliation Act, 1996*. The Division Bench of the High Court by the impugned judgment agreed with the conclusion of the learned single Judge and came to hold on examining the arbitration clause in the agreement that the decision with regard to the venue of the arbitration sitting cannot be held to be an interim award and as such Section 34 of the Act cannot be invoked.

3. The appellant and respondent No. 1 entered into a technical collaboration agreement called "Insoluble Sulphur Technical Collaboration Agreement" on 1st of August, 1989. Under the agreement, respondent No. 1 was required to provide technical information for production of insoluble sulphur in India. Appellant discharged its obligation under the agreement. The said respondent No. 1 in May, 1996, wrote a letter to the Indian Council of Arbitration, making a claim against the appellant on the basis of certain disputes between the parties. But the Indian Council of Arbitration returned the papers to respondent No. 1 on 15-5-1996. On the very same day, the said respondent No. 1 filed a statement of claim before respondent No. 2, which was registered as Arbitration Case No. FTA/137. Said respondnt No. 2, its letter dated 25th of June, 1996 called upon the appellant to appoint an arbitrator. On 9-7-1996, the appellant wrote to the respondent No. 2 bringing to its attention Clause 8.4 of the agreement and stated that the appellant has not received any demand for arbitration from OCCL and as such the respondent No. 2 has no jurisdiction in the matter. Respondent No. 2 however by its Order dated 17th of July, 1996, called upon the appellant to submit the agreement regarding the venue of arbitration with reasons within 30 days. Appellant immediately answered the aforesaid letter of the respondent No. 2 by letter datd 22-7-1996, questioning the jurisdiction

of the respondent No. 2 and also seeking clarification as to whether FICCI had accepted the statement of claim of respondent No. 1. At this point of time, the appellant was assured that respondent No. 2 will not proceed with the matter till the issues regarding the venue are sorted out. On 9-8-1996, respondent No. 1's lawyer intimated respondent No. 2 that they had already appointed an arbitrator and it was for the arbitral tribunal to decide the venue under Section 20 of the Arbitration and Conciliation Act, 1996. Respondent No. 2 was called upon to nominate the appellant's arbitrator. Appellant by his letter dated 9th of August, 1996, intimated the respondent No. 2 that the requirement of Article 8.4 not having been complied with, there is no question of nominating arbitrator on behalf of the appellant. Appellant also wrote a letter to the respondent No. 1 on 6th of September, 1996, indicating therein that the Registrar of FICCI had no jurisdiction and that there had been no proper demand for arbitration. It was also stated that in any event, Japan was the designated place of arbitration. On 16th October, 1996, respondent No. 2 sent a communication to the Manager, Arbitration Department, Japan Commercial Arbitration Association, stating therein that since parties had not been able to agree on the place of arbitration within 30 days of the notice calling upon them to submit the agreement, the JCAA may nominate a member on the Joint Arbtration Committee. In that letter it had been stated that respondent No. 2 had already nominated one Umesh Kumar Khaitan as its Member on the Joint Arbitration Committee. Pursuant to the aforesaid letter from respondent No. 2, the JCAA appointed respondent No. 5 as its Member by letter dated 25th of October, 1996. Appellant had made some correspondence and queries regarding the proceedings of the Joint Arbitration Committee. Mr. Umesh Khaitan resigned as Member of JAC on 12th of January, 1998 and he was, therefore, substituted by respondent No. 3. The aforesaid JAC met in Delhi on 15th of July, 1998 and decided the venue for the sittings of the arbitral tribunal. The appellant filed an application before a learned single Judge of Delhi High Court, assailing the decision of the Joint Arbitration Committee dated 15th July, 1998 on various grounds under Section 34 of the Arbitration and Conciliation Act, 1996. The learned single Judge by his judgment dated 7th of April, 2000, dismissed the said application of the appellant on a finding that the impugned decision of the Joint Arbitration Committee dated 15th of July, 1998 is not an award and as such is not amenable to appeal under Section 34 of the Arbitration and Concilation Act 1996. Against the said judgment of the learned single Judge, the appellant preferred an appeal and the Division Bench having dismissed the appeal by its judgment dated 8th of August, 2000, the present appeal has been preferred to this Court.

4. Mr. Ashok H. Desai, the learned senior counsel, appearing for the appellant contended that on a plain reading of Clause 8.4 of the Technical Collaboration Agreement, would indicate that there is no agreed venue where the arbitral proceedings could be conducted and on the other hand, the procedure in the arbitral proceedings would be governed by the decision of the venue inasmuch as if it is to be held in India, then it shall be conducted in accordance with the rules applicable in India and if it is to be conducted in Japan, then the rules of Japan Commercial Arbitration Association would apply. According to Mr. Desai, since the procedure and the rules to be applicable for resolving the dispute would depend upon the very decision of the venue, such a decision amounts to a vital right of the party being decided by the Joint Arbitration Committee and as such the same partakes the character of an interim award and consequently Section 34 of the Arbitration and Concilation Act, 1996 would apply

to such a decision and aggreived party against such decision cannot be held to be remediless. Mr. Desai further urged that on an analysis of the agreement, itself would indicate that it contains two arbitration clauses, one nomenclatured as Joint Arbitration Committee and the other is the Arbitral Tribunal. While the former decides the dispute in relation to the venue, the latter decides the dispute on merits of the claim. Under such circumstances to hold that the decision of the Joint Arbitration Committee on the dispute relating to the venue even does not amount to an interim award, is unsustainable in law and the learned single Judge as well as the Division Bench committed serious error in recording a finding that the said decision does not amount to an award. Mr. Desai also urged that in case of an International Commercial Arbitration, the seat of the arbitral proceeding is of paramount importance and the parties to the agreement being conscious of the same, provided such an elaborate mechanism for resolution of a dispute in the event no agreement is arrived at on the question of venue. Adjudged from this stand point, the impugned judgment illegally excludes such a decision from the purview of a judicial review by way of filing an appeal under Section 34 of the Act and the same must be interfered with. Mr. Desai also urged that in view of the definition of "Award" in the Act in Section 2(c) which includes an interim award, and an award being a final determination of a particular issue or claim in the arbitration and the issue regarding venue being of seminal importance for adjudication of the rights of the parties, the conclusion is irresistible that such decision by the Joint Committee of Arbitrators, must be held to be an interim award and as such amenable to be reviewed under Section 34 of the Act and consequently, the High Court committed serious error in holding to the contrary.

5. Mr. D. A. Dave, the learned senior counsel, appearing for the respondents on the other hand submitted that though the expression "award" has been defined to include an interim award under Section 2(c) of the Act, but a decision to become an award must be a final determination of a particular issue or claim in the arbitration. The decision on the question of venue by a forum under the agreement termed as Joint Arbitration Committee, is at an earlier stage of initiation of the proceedings of the arbitral tribunal and, therefore, the same cannot be termed as an interim award. The High Court, therefore, was justified in not entertaining an appeal against the same under Section 34 of the Act. With regard to the different clauses of the agreement, Mr. Dave contends that the parties themselves agreed that the place of arbitration shall be determined by the Joint Arbitration Committee and such determination shall be binding and final, whereas the arbitration clause stipulates that any claim or dispute arising out of or relating to the agreement shall be settled by arbitration. The very fact that the parties agreed that the question of venue will be determined by a Joint Arbitration Committee in the event parties do not designate the place of arbitration or are unable to agree within 30 days of the demand, indicates that the parties never intended the said decision to partake the character of an award to be assailed in appeal and on the other hand the agreement not having authorised the arbitral tribunal to determine the place of arbitration, clearly establishes that such a determination by a separate forum is not an award and, therefore, is not appealable under Section 34 of the Arbitration and Conciliation Act. Mr. Dave also contended that the argument advanced on behalf of the appellant that the decision with regard to the venue of the arbitral proceeding is an adjudication of a vital right of the parties inasmuch as the procedure to be adopted in the arbitral proceedings would be the law

which governs the venue of the proceedings, is devoid of any force in view of Clause 9(1) of the agreement which categorically indicates that the agreement shall be interpreted in accordance with and governed by the laws of India. According to Mr. Dave, this provision in the arbitration agreement is conclusive of the fact as to which law will govern and consequently, the decision of the Joint Arbitration Committee with regard to the venue loses its significance. It is next contended by the learned senior counsel for the respondents that the arbitration clause providing resolution of any dispute or claim arising out of the agreement by arbitration can obviously relate to a claim or dispute in relation to the contract and a decision or determination by the Joint Arbitration Committee on the question of venue, which power the Committee gets under the agreement itself, cannot be held to be a decision in course of the arbitral proceedings nor can it be said to be an adjudication of claim arising out of the agreement and, therefore, is not an award. Mr. Dave also after referring to the different provisions in the Arbitration and Conciliation Act contended that making of an arbitral award and termination of proceedings occurs in Chapter VI and starts from Section 28 whereas place of arbitration occurs in Chapter V dealing with the conduct of arbitral proceedings. The commencement of arbitral proceedings contemplated under Section 21 is the date when a particular dispute is referred to the arbitration. In this view of the matter a decision on the question of venue will not be an award or interim award against which a party can take recourse to a Court under Section 34 and as such the impugned judgment of the learned single Judge as well as the Division Bench remain unassailable.

6. Before we examine the rival submissions made, it would be appropriate for us to notice the relevant clauses of the agreement, which ultimately would help us to decide the question as to whether the decision of the Joint Arbitration Committee dated 15-7-1998 can be held to be an interim award. Clause 8.4 is in fact the most crucial clause that requires consideration, which is quoted hereinbelow in extenso:-

> "Clause 8.4 - Any dispute or claim arising out of or relating to this Agreement shall be settled by arbitration. If the arbitration is to be held in India, the dispute shall be submitted to the Arbitration Tribunal of the Federation of Indian Chambers of Commerce and Industry and shall be conducted in accordance with the Rules of that Tribunal. If the arbitration is to be held in Japan, it shall be conducted in accordance with the Rules of the Japan Commercial Arbitration Association.
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> In the event that the parties have not designated the place of arbitration or are unable to agree thereon within thirty (30) days after the demand for arbitration has been made, the place of arbitration shall be determined by a Joint Arbitration Committee of three members, one to be appointed by the Arbitration sub-committee of the Federation, another by the Japan Commercial Arbitration Association and the third of a nationality other than that of any one of the parties to act as Chairman to be chosen by the other two members. In deciding the place of arbitration, the Joint Arbitration Committee shall consider among others the principle that, if only the quality of the goods is in dispute and/or inspection of the goods is necessary, arbitration of such case shall take place at the place where the merchandise is located. The party demanding arbitration according as it is resident in India or Japan shall give notice to

the Arbitration Tribunal of the Federation or the Japan Commercial Arbitration Association, as the case may be. The Arbitration Tribunal of the Federation or the Japan Commercial Arbitration Association, as the case may be, shall request both the parties to submit their agreement and reasons within thirty (30) days for preference regarding the place of arbitration. The determination of the place by the Joint Arbitration Committee shall be final and binding."

Clause 9.1 stipulates that the agreement shall be interpreted in accordance with and governed by the laws of India. Clause 9.7 is extracted hereinbelow in extenso:

"9.7. The terms and conditions herein contained constitute the entire agreement between the parties and shall supersede all previous communication, either oral or written, between the parties with respect to the subject matter hereof, and no agreement or understanding varying or extending the same shall be binding upon either party unless in writing signed by a duly authorized representative thereof in which writing this Agreement is expressly referred to."
Apart from the aforesaid relevant clauses, it would be appropriate to notice a few sections of the Arbitration and Conciliation Act, 1996. Section 2(6) is extracted hereinbelow in extenso:

"Sec. 2(6): Where this Part, except Section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.

Section 20 is the provision for deciding the place of arbitration, which is extracted hereinbelow in extenso:-

"Sec. 20. Place of arbitration- (1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in sub-section (1) the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2) the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."

On a construction of Clause 8.4 of the agreement, it is apparent that the parties themselves have maintained a distinction between submission of dispute to the arbitration tribunal and decision as to the place of arbitration to be determined by a Joint Arbitration Committee of three members. In the first part of the Clause, parties have agreed for referring any dispute or claim arising out of, or relating to the agreement to be settled by arbitration of an arbitration tribunal. The second part of the

agreement relates to a decision as to the venue of arbitration which in the event of lack of agreement between the parties, is required to be determined by a Joint Arbitration Committee of three members. Such decision of the Committee with regard to the venue is not a decision of a dispute or claim arising out of, or relating to the agreement and, therefore, cannot partake the character of an award or an interim award. Under Section 2(6) of the *Arbitration and Conciliation Act, 1996*, excepting Section 28 parties are free to determine certain issues and that freedom would include the right of the parties to authorise any person including an institution to determine that issue. Section 20 is the provision which sees that the parties are free to agree on the place of arbitration and failing upon any agreement, then under sub-section (2) it has to be determined depending upon the circumstances of the case and convenience of the parties. A conjoint reading of Section 2(6) and Section 20 therefore leads to the conclusion that in the event, parties do not agree with regard to the place of arbitration, though they were free to determine the same then they had the right to authorise any person including an institution and in the case in hand the Joint Committee is such an institution for deciding the venue of the arbitration and such decision of the Committee will not partake the character of adjudication of a dispute arising out of the agreement, so as to clothe it the character of an award. Chapter V of the Act contains Sections 18 to 27 and chapter VI deals with making of arbitral award and termination of proceedings which starts with Section 28. The decision on the question of venue under Section 20 would not come within making of an arbitral award starting from Section 28 and on this view of the matter also, the said decision on the question of venue will not be either an award or an interim award so as to be appealable under Section 34 of the Act. The decision of the Joint Committee on the question of the venue under Clause 8.4 is not a decision, deciding legal rights of the parties under the Contract. There is no mutuality and the said Committee is merely a machinery for deciding the question of venue. Such a decision does not have the characteristics of an arbitration award nor even can it be held to be an interim award. The conclusion of the Joint Committee is a conclusion on the guidelines contained in second part of Clause 8.4 of the agreement and is not a judicial determination and as such the said conclusion would not amount to an award. In *K. K. Modi v. K. N. Modi*[1] this Court considered the question as to whether Clause (9) of the Memorandum of understanding would constitute an arbitration agreement. The Court answered the question in the negative after considering as to what would be the attributes to be present for an agreement to be considered as an arbitration agreement. Paragraph (17) of the aforesaid judgment is quoted hereinbelow in extenso:-

"17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:

(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal."

The second part of Clause 8.4 conferring powers on a Joint Committee to decide the question of venue of the arbitration does not satisfy the aforesaid test laid down in Modi¹s case and, therefore would not be an arbitration agreement. Necessarily, therefore, the ultimate decision of the said Committee on the question of venue cannot be held to be an award, so as to confer a right of appeal to an aggrieved person under Section 34 of the Act. Russel on Arbitration in paragraph 2.098 deals with the question of venue of arbitration and the same is quoted hereinbelow in extenso:

"Ascertaining the seat. The place of arbitration is often specified in the arbitration agreement, by the selection of a particular place or country in which the arbitration is to be held. If the seat is not agreed on by the parties, the matter may be resolved by the arbitration institution or person the parties have agreed should have the power to designate the seat, or by the arbitral tribunal if the parties have authorised the tribunal to do so. The rules of various arbitration institutions contain a means of establishing the place of arbitration in the absence of express agreement by the parties. In all other cases, it is necessary to look at the parties' agreement and all the relevant circumstances. A reference to arbitration under the English Arbitration Acts would be construed as implying that English would be the place of arbitration. Similarly, provisions in an arbitration agreement stipulating for arbitration by a local tribunal or institution may indicate the appropriate place of arbitration."

In the present case, the second part of Clause 8.4 of the agreement conceived of the institution of Joint Committee, which institution had the power to decide with regard to the venue and such decision of the said Joint Committee cannot be held to be an award of arbitral tribunal. In view of our analysis on the different provisions of the agreement as well as the provisions of the Act itself, we are unable to accept Mr. Desai's argument that the agreement conceived of two arbitral proceedings, one in

relation to any dispute for the venue and the other in relation to the dispute arising out of the agreement.

7. It would be appropriate for us to notice at this stage that respondent No. 2 had intimated the Manager, Arbitration Department, Japan Commerical Arbitration Association that the parties had not been able to agree on the place of arbitration within 30 days of the notice, calling upon them to submit the agreement and, therefore, the said Japan Commercial Arbitration Association could nominate a Member to the Joint Arbitration Committee and pursuant to the said communication from respondent No. 2, the Japan Commercial Arbitration Association, appointed respondent No. 5 as its Member in the Joint Arbitration Committee by letter dated 25th of October, 1996. The aforesaid conduct of the Japan Commercial Arbitration Association and the unanimous decision of the Joint Arbitration Committee about the venue, is also quite significant in the context of the dispute.

8. Besides, bearing in mind the object behind the Arbitration and Conciliation Act, 1996, as has been indicated by this Court in the case of *Konkan Railway Corpn. Ltd. v. Mehul Construction Co.*[2] which is in consonance with the UNCITRAL model law, it would not be conducive to interpret the decision of the Joint Arbitration Committee with regard to the venue to be an interim award, conferring a right of challenge to an aggrieved person under Section 34 of the Act.

9. Mr. Desai's contention that the question of venue is of utmost importance, since the arbitral proceeding will be conducted in accordance with the rules applicable to the place where the arbitration proceeding is conducted and consequently, denial of a right to appeal against the same is never contemplated of, requires consideration. It is undoubtedly true that if the arbitration is to be held in India, then the proceeding will be conducted in accordance with the rules applicable in India and if the arbitration is to be held in Japan, it has to be conducted in accordance with the rules of Japan Commercial Arbitration Association and as such the decision on the question of venue is of utmost importance. But the further contention that an aggrieved party has no right to assail the same, once the said decision is not assailed at this stage, does not appear to be correct. The ultimate arbitral award could be assailed on the grounds indicated in sub-section (2) of Section 34 and an erroneous decision on the question of venue, which ultimately affected the procedure that has been followed in the arbitral proceeding could come within the sweep of Section 34(2) and as such it cannot be said that an aggrieved party has no remedy at all.

10. This appeal, accordingly fails and is dismissed.

Appeal dismissed.

[1]*(1998) 3 SCC 573*
[2]*(2000) 7 SCC 201*