

# CALCUTTA HIGH COURT

Babulal Dhandhania

Vs.

Gauttam and Co

Arbitration Suit No. 141 of 1949

(Chatterjee, J.)

12.08.1949

## ORDER

### **Chatterjee, J.**

1. This is an application by the petitioner Babulal Dhandhania for setting aside an award made by the Bengal Chamber of Commerce, dated 6th April 1949.
2. On 9th March 1943, the respondent Gauttam and Co. bought from the petitioner 2,000 maunds of linseed oil at Sections 33 per maund. The terms of the contract will appear from Bought Note No. 2957, a copy of which is annexed to the petition.
3. There was a clause that any dispute regarding the contract was to be settled by arbitration of the Bengal Chamber of Commerce in Calcutta. The petitioner failed to deliver the goods in time and it is alleged by the respondent that at the request of the petitioner the time for delivery was extended from time to time till 21st July 1948.
4. The petitioner delivered certain quantities but failed to deliver about 1056 maunds. The time for delivery was further extended till 25th August 1948. Yet the petitioner failed and neglected to give delivery. According to the petitioner there was a frustration of the contract. But the respondent alleged that the real reason for non-delivery was that the market had gone against the petitioner and he wanted to avoid delivery.
5. On 19th October 1948, the respondent referred the disputes to the arbitration of the Bengal Chamber of Commerce. An award was made on 8th April 1949 by that Chamber which was filed in Court on 9th July 1949. Under the award the petitioner who carried on business under the name and style of Jhowla Prosad Babulal was directed to pay to the respondent Gauttam and Co., a sum of Rs. 18,480-8-9 together with interest and costs as mentioned therein.
6. The ground on which the petitioner seeks to set aside the award is that the respondent is not a registered firm and in any event was not registered under the Indian Partnership Act at the material time. The letter dated 6th May 1949 from the Registrar of firms addressed to the

petitioner's attorney shows that Gauttam and Co. was not registered in the office of the Registrar under the Partnership Act.

7. Learned counsel for the petitioner, Mr. K.K. Basu, has contended that the effect of non-registration is fatal to the validity of the reference and the award. His argument is based on Section 63, Partnership Act. The relevant portion of that section is set out below :

"69. (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of a set-off or other proceedings to enforce a right arising from a contract, but shall not affect –

(A) the enforcement of any right to some for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(B) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner."

8. Mr. Basu contends that the reference to arbitration to the Bengal Chamber of Commerce constitutes a "proceeding to enforce a right arising from a contract" under Section 69(3), Partnership Act. According to him the effect of sub-sections (1), (2) and (3) of Section 69 properly read is that no suit or proceeding to enforce a right arising from a contract shall be instituted in any Court or before any arbitrator by a firm unless that firm is registered under the Partnership Act.

9. No authority has been cited by Mr. Basu in support of his contention. In the affidavit in opposition filed by the respondent it is pointed out that Gauttam and Co. is a registered firm and it was registered under the Partnership Act on 1st June 1949 and this appears from a copy of the certificate of the Registrar annexed to the affidavit of a partner of the said firm. But Mr. Basu contends that on the date the reference was made, which was admittedly 19th October 1948, the firm was not registered and, therefore, the reference to arbitration was bad and the arbitrators had no authority to decide the alleged disputes referred to them. He argues that the reference to the Bengal Chamber of Commerce means the enforcement of an arbitration agreement between the parties and therefore it was really enforcing a right arising from a contract between the parties.

10. The question, I have to determine, is whether the reference to arbitration in this case meant a proceeding to enforce a right arising from a contract; within the meaning of Section 69(3), Partnership Act.

11. Section 69 contains one of the most vital provisions introduced by the Partnership Act of

1932. It was suggested in some quarters that it was desirable to make the registration of a firm, compulsory but that suggestion was not succeeded to. Yet the practical effect of Section 69 is to make the registration of a firm compulsory. That section forbids the institution of certain suits in respect of a partnership which has not been registered under the Act.

12. Under sub-section (1) a partner cannot institute a suit to enforce a right arising from a contract or conferred by the Act against the firm or his co-partners unless the firm is registered.

13. Sub-section (2) lays down that a firm which has not been registered shall not be competent to institute a suit against any third party to enforce a right arising out of a contract until the registration of the firm is effected.

14. Sub-section (3) extends the provision of Sub-sections (1) and (2) to a claim of set-off or other proceedings to enforce a right arising from a contract. But it introduces exceptions in case of suits for the dissolution of the firm or for accounts of a dissolved firm and preserves the power of an Official Assignee under the insolvency Acts.

15. Sub-section (2) bars suits by an unregistered firm for the recovery of damages for non-delivery of goods. Obviously if a firm is sued as a defendant and then if it wants to claim a set-off for such damage, then the firm must be registered otherwise the claim would be incompetent.

16. The question is can the bar be extended to the case of an unregistered firm which claims reference to arbitration under an arbitration clause in a contract between the parties? I am assured that there is no authority directly on the point. In *Jamal Usmal v. Firm Umar Haji Karim*<sup>1</sup>, the learned Judges held that Section 69(3), Partnership Act has no application to the execution of a decree. They held that the words "other proceedings to enforce a right arising from a contract" are to be taken as sui generis of a claim of set off. Sub-sections (1) and (2) relate to the right of bringing a suit and the opening words of sub-section (3) relate to the right of setting up a defense and have no relation to the entirely different question of a claim to enforce the execution of a decree. A claim of set off can be a partial defense to a suit and such a claim arising out of a contract may be set up in defense to negate the right of suit altogether, and it is these claims in defense which are placed under the same disabilities as the right to bring a suit at all in so far as unregistered firms are concerned. Sub-section (3) of Section 69 has, therefore, no application in the execution of decrees, whether consent decrees or decrees after contest. I have to point out that such elaborate discussions were not needed because in Section 69(1) it is clearly provided that Section 69 shall not apply to any proceeding in execution. Another case cited is *Satish Chandra v. P.N. Das and Co*<sup>2</sup>, Objection was taken to the enforceability of an award in favour of an unregistered firm under Section 69(1), Partnership Act. It was held that there was no illegality on the face of the award within cl. of para. 14 of sch. 2 to the Code. No argument was advanced on the basis of Section 69(3), Partnership Act.

17. In my view the word 'proceeding' in Section 69(3) means something in the nature of a suit that is a proceeding which is instituted or initiated in a Court. Mr. Bachawat, learned

<sup>1</sup> ILR (1943) Nag. 510 : (AIR 1943 Nag 175)

<sup>2</sup> 16 Pat 742 : (AIR 1938 Patna 231)

counsel for the respondent, has drawn my attention to *Hood Barrs v. Cathcart*<sup>3</sup>,

In that case the words "action or proceeding instituted" in Section 2, Married Women's Property Act, 1893 were held to mean some action, or proceeding in the nature of an action, initiated by a married woman as a plaintiff, and do not include a motion or step taken by a married woman in an action in which she is defendant. Davey, L.J. observed as follows :

"It must be borne in mind that an appeal is in reality in the nature of a defence by the person against whom an order has been made. Now, I take it that the words 'action or proceeding' must mean some action, or some proceeding in the nature of an action ; that is to say, a proceeding in which a lis is initiated ; and it appears to me that 'instituted' would be an inapt word for any such proceeding as has been suggested by Mr. Hopekinson. I have never myself heard of an appeal being instituted and I do not suppose any one ever heard of such an expression being applied to an appeal whereas 'instituted' is an apt word for the commencement of a suit, and I think the use of the words 'from time to time' paints out what is meant."

18. In *Sharlington v. Fulham Guardians*<sup>4</sup>, it was held that a demand for a reference to arbitration under an arbitration clause in a building contract in respect of an alleged breach of that contract by the guardians of a union was not a commencement of proceedings within the meaning of Section 4, Poor Law [Payment of Debts] Act, 1359, and a claim for damages for breach of such a contract did not constitute "a debt, claim or demand lawfully incurred or become due" within the meaning of Section 1 of that Act until the amount of the damage had been ascertained either by the award of an arbitrator or in some other manner provided by law.

19. Stroud in his Judicial Dictionary, Supplementary volume, 1931 Edition, at page 728, cites this case as authority for the proposition that a claim or demand for arbitration under a contract is not a "proceeding" within Section 4, Poor Law Act of 1859.

20. On the authority of *Chhabba Lal v. Kallu Lal*<sup>5</sup>, Mr. Bachawat contends that the petitioner cannot set up the alleged illegality or invalidity of the reference on an application to set aside an award. With considerable cogency Mr. Basu points out that in that case the application was made under paragraph or Section 15 of Schedule 11, Civil Procedure Code , which applies to an award made as the result of an order of reference in a suit. The Judicial Committee had to construe the words 'being otherwise invalid' in Section 15. But their Lordships pointed out that by way of contrast the language of Section 21 of Schedule II may be noted. Sir John Beaumont observed :

"That Section 21 empowers the Court to pronounce judgment according to an award made on a reference out of Court, and the opening words require the Court to be satisfied that the matter has been referred to arbitration. There are no such words in Section 16."

Section 21 dealt with the filing and enforcement of an award on a reference without the

<sup>3</sup>(1894) 3 Ch. D. 376

<sup>5</sup>73 IA 52 : (AIR 1946 PC 72)

<sup>4</sup>1904-2 Ch. 449 : (73 LJ Ch. 777)

intervention of Court and in such a case the Court must be satisfied that there was a valid reference to arbitration. It is urged by Mr. Basu that the Privy Council judgment is an

authority only for the proposition that when a reference has been made by an order of Court in a suit the validity of the award cannot be questioned on an application for getting aside the award. Really such reference by Court presupposes a valid agreement for arbitration judicially recognized as binding on the parties.

21. My attention has been drawn to *E.D. Sassoon and Co. v. Ramdutt Ramkissendas*<sup>6</sup>, The Judicial Committee held that where an award is objected to on the ground of want of jurisdiction in the arbitrator, suit can be instituted and also an application can be filed under Section 14, Arbitration Act, 1399 for setting aside the award. How far the present Arbitration Act 1940 reproduces the old law is a debatable point.

22. I would allow Mr. Basu to urge his point and to treat it as an application under Section 33, Arbitration Act and, if necessary, I would have allowed an amendment of the petition.

23. On the merits the question raised is one of the proper construction of Section 69, Partnership Act. Under sub-section (3) the provisions of sub-sections (1) and (2) shall apply also to proceedings to enforce a right arising from a contract. Let us assume that a reference to arbitration is a proceeding to enforce a right within sub-section (3). Yet the question is : What is the penalty or disqualification created or imposed by sub-sections (1) and (2) ? These Sub-sections merely bar the institution of certain suits in any Court. Therefore applying the provisions in those sub-sections to a case covered by sub-section (3), the penalty or disqualification that the non registration of a firm entails is that it is debarred from instituting proceedings in any Court. In my view, Section 69, Partnership Act, does not preclude a reference to an arbitrator without the intervention of a Court and the word 'proceeding' in Section 69(3) does not cover a reference to arbitration aliunde the Court.

24. A word like 'proceeding' may have several or different meanings and its exact meaning can be determined by its association with other words. The language used is not very clear and in case of any doubt or obscurity the right of a person under a valid and binding contract to resort to a private forum for the determination of his disputes should not be taken away and a new obligation or penalty ought not to be imposed on him so as to bar the exercise of his right in the absence of explicit language in the Statute compelling the Court to decide against such reference to arbitration.

25. The application fails and is dismissed with costs.

Application dismissed.

<sup>6</sup>49 IA 366 : (AIR 1922 PC 374)