

CALCUTTA HIGH COURT

Bajrang Lal Laduram

Vs.

Agarwal Brothers

Ordinary Original Suit 00

(Chatterjee, J.)

19.08.1949

ORDER

Chatterjee, J.

1. This is an application by Bajranglal Serowgee who carries on business under the name and style of Bajranglal Laduram for having the effect of an arbitration agreement determined by this Court. The application is really for an adjudication that an arbitration agreement between the parties is still subsisting.

2. By contract No. 1633 dated 28th July 1948 the petitioner alleges that he agreed to purchase from the respondent 80,000 heavy cees bags in 200 bales at the rate of Rs. 140/4/- per 100 bags delivery August 1948. The terms of the agreement appear from a copy of the Bought Note included in the annexure to the petition.

3. Clause 13 of the said contract contained an agreement for arbitration in very wide terms.

4. The petitioner's case is that on 16th August 1948 he sent shipping instructions to the respondent to bring 50 bales, that is, 20,000 heavy cees bags, and on 18th August 100 bales, that is, 40,000 heavy cees bags alongside the vessel "Kutsang," The respondent failed to bring the aforesaid goods alongside the ship and a letter was sent to the respondent complaining about this failure.

5. It is alleged the petitioner by letter dated 31st August 1948, again requested the respondent to tender the pucca delivery order in respect of the balance of 50 bales of goods, that is, 20,000 heavy cees bags and offered to pay for and take delivery of the said pucca delivery order. The respondent neither sent the 150 bales in terms of the shipping instructions nor did they give any delivery order. The petitioner's attorneys demanded payment of the different bills amounting to Rs. 15,992/6/4 but the respondent failed to pay. Thereupon on 13th December 1948 the petitioner filed a statement of case and referred the dispute to the arbitration of the Bengal Chamber of Commerce and claimed the said sum from the respondent.

6. The reply of the respondent was a complete denial of the transaction. Their case is, they never entered into the contract in question and they repudiated liability in to. Some statements and counter statements were filed before the Tribunal of Arbitration of the Bengal Chamber of Commerce who, it is alleged, heard oral evidence.

7. On or about 8th April 1948, the petitioner was informed by a letter from the Registrar, Bengal Chamber of Commerce that the Arbitrators were not prepared to proceed with the arbitration until the question of the existence of the arbitration agreement was decided by this Court.

8. On receipt of this letter from the Registrar of the Bengal Chamber of Commerce dated 8th April 1948 the present application was presented.

9. The real question I have got to determine is the maintainability of this application.

10. The question argued before me is this can a person who affirms the existence of an arbitration agreement apply to the Court under Section 33 or any other section of the Arbitration Act for an adjudication by the Court that such an agreement exists and is binding on the parties ?

11. In *Manik Lal v. Shiva Jute Bailing Ltd¹*, Das, J. held that the "existence" of an arbitration agreement which by Section 32, Arbitration Act, 1940, cannot be challenged by a suit is not the factual but the legal existence of an agreement on grounds like mistake, fraud, illegality, etc under Sections 19 to 30, Contract Act. His Lordship further held that Section 33 applies only when the applicant admits the factual existence of an agreement but challenges the "legal" existence thereof on such grounds as misrepresentation, fraud, etc. In *Bajinath v. Chhotulal²*, Clough, J. followed the judgment of Das, J.

12. Sinha, J, has differed from the judgments of both these learned Judges in *Chaturbhuj v. Bhicamchand Chororia and Sons³*, According to the learned Judge the intention of the framers of the Arbitration Act was that the right and liabilities of the parties in respect of an arbitration agreement or an award such as are mentioned in Sections 31 and 32 of the Act should be litigated only in the Court having jurisdiction under Section 31 and on an application made under Section 33 and not by way of suit. The intention of the legislature was to take away the remedy by way of suit which the parties to an arbitration agreement or an award had before the passing of the Act and to relegate them to the remedies as provided in the Act.

13. The opening words, "any party to the arbitration agreement" in Section 33 of the Act should be construed according to Sinha, J. to mean a party who is alleged to be a party to an arbitration agreement but who challenges the existence thereof and that there is nothing in the section to restrict the meaning of the word, 'existence' to 'legal existence' and it should be read in its ordinary and natural meaning, namely, existence either in fact or in law.

¹52 C. W. N. 389

³53 C. W. N. 410

²52 C. W. N. 397

14. Mr. Harwell, learned counsel appearing on behalf of the respondent, relied on the judgment of Das and Clough, JJ. while Mr. Ganguli for the petitioner relied on the view of Sinha, J. In this case it is not necessary for me to come to any decision regarding this conflict of Judicial authorities which should really be resolved by the Court of appeal. Even if Sinha, J. is right in the

view that he has taken, the party who challenges the existence of an arbitration agreement is entitled to apply under Section 33, Arbitration Act. That section provides a remedy to the party who challenges the existence of an agreement to refer to arbitration and he can come to Court and obtain a decision, even when the other side does not wish to enforce it. *Bhagwandas v. Atma Singh*⁴,

15. Chapter V, Arbitration Act, contains the general provisions relating to all arbitrations i.e., arbitration without intervention of a Court, or arbitration in suit or arbitration with the intervention of a Court when there is no suit pending."

16. Section 31 deals with jurisdiction. Sub-section (1) deals with the forum for filing awards. Sub-section (2) provides that all questions relating to the validity, effect or existence of an award or an arbitration agreement shall be decided by the Court in which an award under the agreement has been or may be filed and by no other Court. Sub-section (3) states that all applications relating to the conduct of the arbitration proceedings shall be made to such Court. Sub-section (4) makes it clear that that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of a reference and the arbitration proceedings shall be made in that Court and in no other Court.

17. Section 32 and Section 33 are the new sections introduced by the Arbitration Act of 1940. They were introduced in accordance with the suggestions of the Civil Justice Committee and were meant to negative the decisions in *E.D. Sasson and Co. v. Ramdutt Ramkissen Das*⁵, and *Matulal v. Ram Kissendas*⁶, where it had been held that a suit must be filed if a party wants to challenge the existence of a submission. Sections 32 and 33 are in the following terms :

"32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

33. Any party to any arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

18. The first part of Section 32 prevents a substantive right to challenge the existence of an arbitration agreement. The second part of that section prevents the setting aside,

⁴47 Bom. L. B. 716 : AIR 1945 Bom 494

⁵47 Cal. 806 : (AIR 1920 Cal 820)

⁶50 Cal. 1 : (AIR 1922 PC 374)

amending or modifying or in any way affecting an arbitration agreement, otherwise than as provided by the Act. It has been held by the Calcutta High Court that suit to challenge the existence or validity of an arbitration clause in a contract or for determining the effect of an

arbitration agreement or award is not maintainable by reason of Section 33, Arbitration Act of 1940 which provides that such a challenge must be made by means of an application and not by means of a suit. *Deokinandan v. Basantlal*⁷, A contrary view has been taken by a Division Bench of the East Punjab High Court in *Banwari Lal v. The Board of Trustees, Hindu College, Delhi*⁸, With respect to the learned Judges of the East Punjab in my opinion the correct view was taken by Lort-Willisms, J., in the Calcutta case cited above. The Madras High Court has also taken the same view as the Calcutta High Court adopted : *Rashid Jamshed Sons and Co. v. Moolchand Jothajee*⁹,

19. Section 33 is a corollary to Section 32. Under Section 33, an arbitration agreement or an award has to be decided by means of an application. Section 33 provides a remedy not to the person who affirms the existence or validity of an arbitration agreement but to the person who challenged the same. Obviously, the legislature thought that the person who sets up a submission can go to arbitration and have the disputes decided by the arbitrators. Mr. Ganguli, learned counsel for the applicant, wants me to split up Section 33 and he contends that an application can be made to the Court (A) by any party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement or (B) by any party to an arbitration agreement desiring to have the effect of either an arbitration agreement or an award determined. Counsel concedes that he cannot come under (A) because he is not challenging the existence or validity of the arbitration agreement as he is really asserting the existence of such agreement and is affirming the validity thereof. But he contends that he comes under (B) and he desires to have the effect of the arbitration agreement determined by this Court. I cannot accede to this contention. The words "existence, effect or validity of an arbitration agreement or award" are used in Section 32. Under Section 33 if any one challenges the arbitration agreement he can come to Court. If there is any question raised as to whether there is any particular dispute within the ambit of the arbitration agreement, or whether it has ceased to be operative on account of frustration or any supervening illegality or impossibility then that can also be determined under this section by means of an application. In my opinion, the word "effect" does not mean the existence of an arbitration agreement. It connotes in this context the purport, drift, or tenor of the agreement. What Mr. Ganguli wants me to decide is that there is in fact an existing, valid and binding arbitration agreement. Really there is no question of deciding the effect of that agreement.

20. My attention has been drawn to a case decided by the Division Bench of the Bombay High Court in *M. Gulamali Abdulhussein and Co. v. Vishwambharlal Ruiya*¹⁰, The learned Judges Chagla, C.J. and Tendolkar, J., held that an application to establish the existence or validity of an arbitration agreement can be entertained by a Court under the Arbitration Act, 1940, though not under Section 33 thereof. According to these learned Judges when the Legislature enacted Section 32 and barred all suits with regard to the existence, effect or validity of an arbitration agreement and the object of the Legislature was that all questions with regard to these

⁷ I. L. R. (1941) 2 Cal. 123 : AIR 1941 Cal 527

⁹(1945) 2 M. L. J. 98 (AIR 1945 Mad 371)

⁸ AIR 1949 H. P. 165

¹⁰51 Bom. L. R. 79 : (AIR 1949 Bom 158)

matters should be dealt with under the Arbitration Act, and not by substantive suits, it is open to a party to make any application with regard to which a suit is barred under Section 32. Section 33 according to Chagla, C.J., is merely one instance of such an application. The Legislature cannot conceivably deal with all possible applications that may arise with regard to which suits are barred under Section 32.

21. With great respect, I cannot agree with the view taken by Chagla, C.J., in the above case. When the Legislature enacted Section 32 and barred all suits with regard to the existence, validity or effect of an arbitration agreement or award, it realised that proper procedure or remedies should be prescribed or rights should be conferred on litigants for the determination of such questions and that is why Section 33 was enacted. Section 33 to my mind is not to be read as illustrative. It is difficult to follow how a general right to apply may be held to exist when the statute makes specific provisions providing for the rights of a litigant to come to Court with regard to a specific class of cases under specific conditions. The fact that the right of suit is taken away by Section 32 does not confer a general right on the litigants to apply to Court. To my mind, it is not correct to urge that Section 32 has impliedly created a general right to apply to Court under that section. If that was the correct view, then Section 33 would be unnecessary. When the Legislature had its attention directed to the necessity of making provisions in order to provide for the situation created by the enactment of a provision like Section 32, then it must be assumed that Section 33 is exhaustive and not illustrative. Therefore, in my opinion, a person who denies the existence of an arbitration agreement cannot apply under the Arbitration Act. I cannot understand how can there be a general right to apply under an Act although there is no right to apply under any specific section of the Act. Mr. Ganguli contends that if this is the correct view, then the arbitration agreement would be wholly infructuous and he is left absolutely without any relief or remedy whatsoever and when a person has a right he must have a remedy. I do not agree that a person in the position of the petitioner is not without any remedy whatsoever. The arbitrators should proceed with the reference. The respondents can appear before the Tribunal of Arbitration under protest and without prejudice to their contention that there is no submission or arbitration agreement. That question cannot be decided by the arbitrators. If the arbitrators make an award on the merits in favour of the petitioner, then the respondent can apply under Section 33 in order to challenge the validity of the award. In any event, the Court will be in a position to determine whether there was a valid and binding arbitration agreement justifying the reference to the Tribunal of Arbitration before a decree is passed on the award. I am expressing no opinion on the existence or validity of the arbitration agreement at this stage.

22. The application is dismissed. Costs will abide the result of the arbitration.

23. The attention of the Tribunal of Arbitration of the Bengal Chamber of Commerce should be drawn to this judgment and they should be asked to proceed with the arbitration as I have indicated hereinbefore.

Application dismissed.