

BOMBAY HIGH COURT

M. Gulamali Abdulhussein and Co

Vs.

Vishwambharlal Ruiya

O.C.J. Appeal No. 43 of 1948 and Award No. 49 of 1948

(M.C. Chagla, C.J. and Tendolkar, J.)

20.09.1948

JUDGMENT

M.C. Chagla, C.J.

1. This is an appeal from a judgment of Mr. Justice Bhagwati on a petition filed under the Indian Arbitration Act, holding that the petition was maintainable and adjourning it to Court for being disposed of on the merits. A few facts leading up to this petition may be stated. The petitioners' case was that on January 30, 1948, the respondents gave oral instructions for the purchase of 500 bars of silver. On February 4 the petitioners sent a contract to be signed by the respondents. The contract was delivered to the respondents and according to the petitioners an acknowledgment was obtained in the petitioners' peon book by an employee of the respondents. On February 15 the petitioners sent a statement of account to the respondents. The respondents refused to accept the statement of account and in the correspondence that followed the respondents denied that there was any contract between the petitioners and the respondents. The petitioners filed this petition for a declaration that there was a valid contract between the petitioners and the respondents, and as the contract contained an arbitration agreement, all disputes in connection with the contract were bound to be referred to arbitration.

2. Now, the first contention urged by the respondents was that the petition was misconceived inasmuch as in para 10 of the petition the petitioners expressly averred that the petition was filed under Section 33 and the relief that they sought was under that section, and the contention put forward was that this petition did not lie under the express provisions of Section 33 of the Indian Arbitration Act. Section 33 of the Arbitration Act enables a party to challenge the existence or validity of an arbitration agreement, and what is urged is that this is not a petition challenging the existence of an arbitration agreement, but it is a petition seeking to affirm the existence of an arbitration agreement. According to Mr. Maneksha, who appears for the respondents, it is only when a party wants to challenge an arbitration agreement that he can come to Court for the

necessary relief, but when he wishes to affirm the existence of an arbitration agreement, it is not open to him to take out a petition under the Indian Arbitration Act. It is important to note that under Section 32 of the Indian Arbitration Act, all suits are barred with regard to the existence, effect or validity of an arbitration agreement, and Mr. Maneksha concedes that it would not be open to the petitioners to file a declaratory suit for a declaration that there is in existence an arbitration agreement. If such a suit was filed, the petitioners would be met with Section 32. Therefore, according to Mr. Maneksha, the petitioners cannot get any relief at all in any Court of law. It is true that they could file a substantive suit on their cause of action, viz. on the contract on which they rely in this petition. But their right to have the matters determined by arbitration would not receive proper recognition or relief from any Court of law, because in this case as the factum of the contract is denied the arbitrators have no jurisdiction to determine that question. It is only when the Court has determined that question in favor of the petitioners and has held that there was a contract that the arbitrators would have jurisdiction to proceed with the reference. Now, a Court of law would hesitate considerably before coming to the conclusion that a party has an undoubted right, and yet the Legislature has provided no relief in respect of that right. It is important to note that in England a declaratory suit with regard to an arbitration agreement would lie. In India, whatever the position was prior to the passing of the present Arbitration Act, it is clear that now such a suit would be barred under Section 32.

3. Mr. Maneksha argues that inasmuch as Section 33 expressly provides for an application for challenging an arbitration agreement and there is no provision for affirming or asserting an arbitration agreement, the Legislature has taken away such a right from a person who wishes to proceed with the arbitration on the strength of an arbitration agreement. Mr. Maneksha says that at best there may be a lacuna in the Act and it is not for a Court of law to make good such a lacuna. It is perfectly clear that when the Legislature enacted Section 32 and barred all suits with regard to the existence, effect or validity of an arbitration agreement, the object of the Legislature was that all questions with regard to these matters should be dealt with under the Arbitration Act and not by substantive suits. That object is perfectly clear and patent from the terms of Section 32. It is therefore difficult to believe that having taken away the right of a party to proceed with a substantive suit, the Legislature also took away the right of a party to have the existence or the validity of an agreement determined by an application under the Arbitration Act. Mr. Maneksha is right that Section 33 would be superfluous or overlapping if the construction was put upon Section 82 that all questions with regard to the existence, effect or validity of an arbitration agreement have to be determined by applications under the Arbitration Act and not by civil suits, and that the right to make those applications is implicit in the very terms of Section 32 itself. But it may be that for greater caution the Legislature has dealt with a particular kind of application which is mentioned in Section 33. It does not therefore follow that because a particular kind of application is mentioned in Section 33, therefore the Legislature has not provided in the Act itself for all kinds of applications that may be made under that Act and has taken away the right with regard to the making of the applications other than the specific application referred to in Section 83 of the Act. In my opinion, therefore, it is open to a party to make any application with regard

to which a suit is barred under Section 32. Section 33 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.

4. Therefore, the learned Judge below was right in coming to the conclusion that the present petition was maintainable although not under Section 33 of the Arbitration Act.

5. The other contention put forward by Mr. Maneksha is that there is no written submission and therefore the petition is misconceived. The position is that the petitioners are members of the Marwadi Chamber of Commerce and the respondents are not members. Therefore, prima facie, any rule of the Marwadi Chamber of Commerce with regard to arbitration would not bind the respondents. If the contract had been signed by the respondents, then there would be no difficulty, because the contract itself contains a term with regard to reference to arbitration. But in this case the position on the petition and the affidavit in reply is that a contract was delivered by the petitioners to the respondents and the respondents at the most retained it and did not return it to the petitioners. It is true that in para. 11 of the affidavit in reply the respondents have taken up the contention that there was no written submission. Now, our law does not require that a submission to arbitration must be signed by both the parties. The only requisite of the law is that there must be a submission in writing. If there is a submission clause in a contract, it is not necessary that that contract must be signed by the other party before the other party can be bound by the submission clause; that party may accept the contract orally or he may accept it by writing. Therefore, if the petitioners are in a position to establish that this particular contract, which contains a submission clause, was accepted by the respondents, then there would be a written submission to arbitration within the meaning of the Arbitration Act.

6. Mr. Maneksha has relied on a judgment of Mr. Justice Kania in *Shriram Hanutram v. Mohanlal & Co.* 1 The learned Judge there was considering the question of staying a suit and the view that the learned Judge took was that it did not follow that merely because a contract was sent to the other party and the other party retained that contract that there was necessarily an acceptance of the contract. Mr. Maneksha wants to read this decision to mean that wherever a contract note is delivered and retained by the other party, it does not amount to acceptance, and that there would be no written submission within the meaning of the Arbitration Act. I do not read Mr. Justice Kania's judgment to mean that. It would depend upon the circumstances of each case whether the mere delivery of a contract note and the retention of that contract note by the other party does amount to acceptance or not. It is a pure question of fact which would have to be decided by the Court. But Mr. Maneksha is right to this extent that in this present case the petitioners have not averred, as they should have averred, that there was an acceptance of the contract by the respondents. The mere averment that the contract was delivered to the other side and retained by the other side is not per se tantamount to an averment that the contract was accepted by the other side, and although the respondents in the affidavit in reply expressly raised the issue that there was no written submission, still the petitioners did not file any affidavit in

rejoinder pleading the acceptance of the contract, nor did they think fit to have the petition amended to make the necessary averment. But, in my opinion, this by itself is not sufficient to non suit the petitioner. Mr. Justice Bhagwati has ordered that the petition has got to be heard on its merits, and it would certainly be, open to the respondents to urge that there was no written submission inasmuch as they never accepted the contract.

7. I think, therefore, the fairest thing to do under the circumstances would be to direct the petitioners to amend the petition by averring that there was an acceptance of the contract by the respondents and that this particular issue would be tried along with other issues which would arise on the petition by the Court trying the petition. Mr. Maneksha is justified in urging that as the petition stands today it is liable to be dismissed because the necessary averment is not there. But that is a grievance which is very easily remedied by a proper order for costs, and we will hear Mr. Maneksha on the question of costs after this judgment is delivered.

8. I would, therefore, dismiss the appeal and confirm the order made by Mr. Justice Bhagwati.

Tendolkar, J.

9. I agree.

10. Per Curiam. Having heard counsel on the question of costs, we think that the fairest order to make would be to vary the order made by Mr. Justice Bhagwati with regard to the costs by directing that the petitioners should pay to the respondents the costs of the hearing of the petition before Mr. Justice Bhagwati, and with regard to the costs in the appeal we order that the respondents should pay to the appellants half the costs of the appeal.

11. The petitioners to make the necessary amendment within two days. Petitioners to pay the costs of and incidental to the amendment. Liberty to the respondents to file any supplemental affidavit in reply to the amendment made by the petitioners to their petition within a week after the amendment. Petitioners also to pay the costs of any supplemental affidavit filed by the respondents.

Appeal dismissed.