

PATNA HIGH COURT

Thakur Prasad

Vs

Baleshwar Ahir

A.F.A.D. No. 444 of 1951

(Ramaswami and Jamuar, JJ.)

10.03.1953

JUDGMENT

Jamuar, J.

1. During the pendency of this appeal before this Court, the parties have filed applications stating that they have agreed that the matter in difference between them should be referred to arbitration, and, in pursuance of that agreement, they have executed a deed of agreement, which has been duly registered, to refer that matter to arbitration. Accordingly, under Section 21, Arbitration Act (10 of 1940), they have prayed for an order of reference.

2. The important question for consideration is whether an order of reference under Section 21, Arbitration Act can be made by an appellate Court. As there appears to be a divergence of opinion on this point between the Calcutta and the Allahabad High Courts, and there being no decision of this Court, this question has been referred to a Division Bench.

3. Section 21, Arbitration Act is as follows :

"Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

The term "Court" has been defined in Section 2(c) of the Act, and it is in the following terms : "

"'Court' means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court."

4. The point which arises for consideration is whether the term "Court" includes an appellate Court.

5. The Calcutta view has been expressed in - '*Abani Bhusan v. Hem Chandra*'¹, There it was pointed out that the question was not free from difficulty and required careful consideration, and it was held that the term "Court" as defined in the Arbitration Act does not include an appellate Court, and, consequently, there is nothing in the Arbitration Act which enables an appellate Court to refer to arbitration matters in dispute between the parties.

6. It will be useful to examine the legal position before the passing of the Arbitration Act, 1940. The general provisions for arbitration were then contained in para. 1 of Schedule 2, Civil Procedure Code, 1908. This second schedule was repealed as a result of the passing of the Arbitration Act. Paragraph 1(1) of Schedule 2 was as follows :

"Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may at any time before judgment is pronounced, apply to the Court for an order of reference."

7. It will be noticed that the only difference between this paragraph of the repealed Schedule 2 and Section 21, Arbitration Act is that, in the latter, there appear the words "in the suit" after the words "between them". There is no doubt that the addition of the words "in the suit" in Section 21, Arbitration Act is in order to emphasize that the differences which can be referred to arbitration must be confined to differences in the suit, and matters which are outside the scope of the suit must be excluded. Paragraph 1 of Schedule 2, Civil Procedure Code 1908, was construed to apply to appellate Courts as well, and that was because of the terms of Section 107(2) of the Code which are as follows :

".....the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

8. In the Calcutta case, referred to above, it was pointed out that it was by reason of the provisions of Section 107, Civil Procedure Code, 1908, that the appellate Court was enabled to exercise the powers which were conferred upon the original Court in para. 1 of Schedule 2, Civil Procedure Code, 1908, and, as no provision of the nature of Section 107, Civil Procedure Code, 1908, has been made in the Arbitration Act, 1940, to enable such reference to be made at the appellate stage, under the Arbitration Act such references cannot be made by the appellate Court. It was, accordingly, held that the term "Court" as defined in the Arbitration Act did not include an appellate Court, and, consequently, there was nothing in the Act which enabled an appellate Court to refer to arbitration the matters in dispute between the parties.

9. There appears to be a divergence of opinion in the Allahabad High Court. In - '*Shukrullah v. Mt. Rahmat Bibi*'², it was held that an appellate Court had no power to make reference to arbitration in respect of the subject-matter of an appeal pending before it. In this case also it was pointed out that, though under Section 107(2), Civil Procedure Code, an appellate Court was empowered to make an order of reference, that section ceased to have any application to matters falling within the ambit of the Arbitration Act, and it was interpreted that the word "suit" in Section 2 had the more technical and restricted meaning in a proceeding instituted in a Court of first instance on a plaint or such other manner as may be

prescribed. Accordingly, it was held that, under Section 21, Arbitration Act, it is only the parties to the suit who are competent to apply for a reference to arbitration, and that parties to an appeal are not so authorised.

10. In a later case of the Allahabad High Court, namely, - '*Munni Lal v. Kishun Prasad*³', a contrary view was taken. It was there held that it was not necessary to give such a restricted meaning to the word "suit" in Section 21, Arbitration Act, and their Lordships expressed the opinion that that term would not exclude execution proceedings or appeals or other proceedings before a Civil Court which are in the nature of suits and in which Civil Courts decide disputes between the parties of a civil nature.

11. Again, in a recent case of the same High Court - '*Lakshmi Narain v. Ram Babu*⁴', the view expressed in - 'AIR 1948 Allahabad 443' was approved.

12. There is no specific provision made in the Arbitration Act for a reference to arbitration at the appellate stage, hence, it is necessary to construe some of the provisions of the Act to discern whether such a course is forbidden.

13. Section 21, Arbitration Act speaks of parties to a suit and matters in difference between them in the suit. It enables such parties to apply in writing to the Court, before judgment is pronounced, for an order of reference. Examining the definition of the term "Court" as given in Section 2(c), Arbitration Act, 'quoted above, there seems no valid ground for holding that it excludes an appellate Court. Just as a Court of first instance has "jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit", so also an appellate Court has the same "jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit". This is the function of an appellate Court as well. I see, therefore, no reason why a restricted meaning should be given to the word "suit" as used in Section 21, Arbitration Act. In my opinion, the term "suit" in that section ought not to be taken to exclude an appeal. I, for myself, find no good ground for the legislature, while giving power to the Court of original jurisdiction to make an order of reference under Section 21, Arbitration Act, to exclude an appellate Court from making such an order.

14. The Arbitration Act, 1940, was an Act passed mainly to consolidate the law relating to arbitration. I have already pointed out that, before the passing of this Act, the law had been that an appellate Court had the power to make an order for reference to arbitration. This power has not been specifically taken away by the legislature while passing the Arbitration Act, 1940. It is always to be assumed that the legislature knows the law, even in technical matters. It is the rule that, where words and expressions in a statute are plainly taken from earlier statutes 'in pari materia' which have received judicial interpretation, it must be assumed that the legislature was aware of such interpretation, and intended it to be followed in later enactments. I would, accordingly, conclude that it may be inferred that the legislature intended the words used in Section 21, Arbitration Act, 1940, to be understood as they were understood in their previously accepted meaning. There would seem to be no basis for the view that the legislature intended to deprive the parties to a civil litigation from settling their disputes by arbitration after the termination of a suit and when an appeal is pending. The distinction between statutes which codify and those which consolidate the law has been well summarised in paras. 770 and 771 of

volume 31 Halsbury's Laws of England (Hailsham 2nd Edition) :

"770. In construing a codifying statute the proper course is, in the first instance, to examine its language and to ask what is its natural meaning. It is an inversion of the proper order of consideration to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with this view. After the language has been examined without presumptions, resort may be had to the previous state of the law for the construction of provisions of doubtful import, or of words which have acquired a technical meaning. The same words used in different codes may have different meanings, in each code according to the intentions of the statutes having regard to the mischiefs which they are designed to prevent.

"771. If a distinction is to be drawn between statutes which codify and those which consolidate the law, it is that in construing the latter there is a presumption that the law was not intended to be altered, but this presumption must yield to plain words to the contrary. Where a consolidating statute re-enacts sections that have come into existence at different previous dates, the statute must be construed on the same principles as one which enacts the provisions in question for the first time....."

15. I am of the opinion that the term "Court" in Section 2(c), Arbitration Act, 1940, must be construed to include an appellate Court, and that, therefore, the appellate Court may also pass an order for reference to arbitration under Section 21 of the Act.

16. I would, accordingly, upon the applications made to this Court under Section 21, Arbitration Act, 1940, by the parties to this appeal, refer the entire dispute, which is the subject-matter of the appeal, to the arbitrators named in the petitions for arbitration in accordance with the agreement arrived at between the parties. The arbitrators should submit their award to this Court by 20-7-1953.

Ramaswami, J.

17. I agree.

Order accordingly.

Cases Referred.

¹ AIR 1947 Cal 93

² AIR 1947 All 304

³ AIR 1948 All 443

⁴ AIR 1953 All 9