

PUNJAB AND HARYANA HIGH COURT

Prem Nath L. Ganesh Dass

Vs

Prem Nath L. Ram Nath

(Tek Chand and H Khanna, JJ.)

16.07.1962

JUDGMENT

Tek Chand, J.

1. The facts so far as relevant for purposes of the point arising in this case are that during the course of execution proceedings for the execution of a money decree, the judgment-debtor filed an application under Order 21, Rule 2, for according adjustment of decree to the extent of Rs. 3,400/- which sum, it was maintained by the judgment-debtor, had been paid by him to the decree-holder. Before the executing Court, both the parties agreed that the dispute about the payment of Rs. 3,400/- should be decided by Shri Daulat Ram Tandon, Advocate, acting as the sole arbitrator. This dispute was referred to the sole arbitrator through the intervention of the Court on 21st March, 1960. On 25th August, 1960, before the award had been made, the judgment-debtor applied to the executing Court for the supersession of the reference alleging that the dispute was not referable to arbitrator during the course of the execution proceedings and consequently the proceedings before the arbitrator were void. Misconduct on the part of the arbitrator was also alleged. The executing Court framed the following issues:

(1) Whether the reference to arbitration is void on any ground and is not binding on the judgment-debtor?

(2) Whether the arbitrator is guilty of any misconduct? If so to what effect? Both these issues were decided by the executing Court against the judgment-debtor. From this order the judgment-debtor preferred execution first appeal to this Court. The matter came up before a learned Single Judge who, in the absence of clear authority of this Court on the question arising under the first issue, thought that the matter should be authoritatively decided by a Bench. The matter has thus been referred to this Bench.

(2) Shri Babu Ram Aggarwal, learned counsel for the judgment-debtor-appellant has drawn our attention to the following provisions of the Arbitration Act.

"21. 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.

47. Subject to the provisions of Section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."It is maintained on behalf of the judgment-debtor that Section 21 contemplates a difference arising between the parties in the case of a pending suit in contradistinction to execution proceedings. According to Mr. Babu Ram Aggarwal, the Court has no jurisdiction to make an order of reference in execution proceedings. He has also maintained that the proviso to Section 47 of the Act cannot be attracted as that stage had not arrived in this case as no award had been made and there was no question of any consent of the interested parties to the award.

3. In our view, this case hinges exclusively on the construction of the language of Section 21 depending upon the meaning of "suit" occurring there. Regardless of the context in which the term has been used, "suit" in its common parlance is a term of wide amplitude. Broadly, a "suit" is a proceeding in a Court of justice for the enforcement of a right denoting a legal proceeding of a civil kind. It is a proceeding in a Court according to the forms of law to enforce the remedy to which a party deems itself entitled. Lord Coke defines a suit to be. "*actio nihil aliud est, quam jus persequendi in iudicio quod sibi debetur*" meaning "an action is nothing else than the right of pursuing in a Court of justice, that which is due to one". Blackstone I simply says that a "suit" or "action" is a legal demand of one's rights. In its generic sense, a "suit" is the pursuit or prosecution of some claim. The term "suit" in its comprehensive sense may be treated as applying to any original proceeding in a Court of justice by which a party pursues the remedy which the law grants him. The modes of proceedings may be various depending upon the different stages in the litigation, that is, proceedings in the original Court, Court of appeal, proceedings in the nature of review or revision and execution proceedings. This legal signification of the word "suit" is very broad, and the term has also a much narrower meaning when it is examined in the procedural sense.

"Suit" is no doubt a judicial proceeding, but every such proceeding cannot be termed a suit. As observed by Lord Russel of Killowen in *Hansraj Gupta v. Dehra Dun-Mussoorie Electric Tramway Co. Ltd.*, 60 Ind App 13: (AIR 1933 PC 63).

"The word "suit" ordinarily means, and apart from some context must be taken to mean a civil proceeding instituted by the presentation of a plaint."

That case related to the meaning of the word "suit" as used in Section 2 of the Limitation Act, which provision distinguishes a suit from an appeal or application. The term "suit" is not defined in the Code of Civil Procedure and the above observations of the Privy Council furnish a working principle. There are, however, a large number of authorities drawing a distinction between a "suit" on the one hand and "applications", "appeals" and "executions" on the other. It is also true that for certain matters, appeals are treated as continuation of a "suit". The safe guide in all such matters is the context in which the term "suit" has been employed as it is capable of both flexibility and strict construction. Apart from this, there are also specific provisions treating proceedings under other Acts as a suit under the Code of Civil Procedure; inter alia, vide Sections 295 and 299 of Indian Succession Act, Section 63 of the Administrator General's Act, (2 of 1874).

4. The question that calls for determination in this case is whether the term "suit" as used in Section 21 of the Indian Arbitration Act is to be construed in a broad generic sense, or is to be understood in the sense indicated by Lord Russel in the above mentioned case of Hansraj Gupta, 60 Ind App 13: (AIR 1933 PC 63). The words "suit, appeal and other proceeding" which are pending in a Court are terms well known to the legislative draftsmen, and when they intend to refer to one or the other expression they ordinarily indicate their intention by the use of the particular term. By way of illustration, reference may be made to the provisions of Section 24 of the Code of Civil Procedure conferring general power of transfer and withdrawal of "any suit, appeal or other proceeding". It was equally open to the Legislature to employ a similar language if the intention was to include execution proceedings besides suit for purpose of reference to arbitration.

The Fourth chapter of the Arbitration Act is entitled "Arbitration in suits". An argument, which was advanced at the bar and which also found favour in certain decisions, was that there was no reason why parties to the execution proceedings if they so desired, could not refer a dispute arising at the execution stage to arbitration whereas they were at liberty to do so while the dispute was pending either at the original or at the appellate stage in a Civil Court. Where the words of the statute are clear it is not for the Court to fathom the intention of the Legislature in omitting a particular expression or words on the ground that there was no reasonable explanation for the exclusion. From what may be said to be an unreasonable or causeless omission, the meaning of a particular term used cannot thereby be enlarged in order to make the law reasonable or broad-based. The primary function of a Court of law is *jus dicere* (--to construe the law) and not *jus dare* (-- to make law).

A statute is to be expounded "according to the intent of them that made it". Where the words of the statute are clear and admit of no ambiguity, the words are to be construed in their natural and ordinary sense for finding the intention of the Legislature. From the precise language used, unless it leads to absurd consequences, the legislative intent is to be determined. Where the words have acquired a technical meaning, they have to be construed in their technical sense and their ordinary meaning are not to be given to them. The rule of construction, as remarked by Parke, J., in *R. v. Banbury*, (1834) 1 A and E 136 (142), is "to intend the Legislature to have meant what they have actually expressed." It is a safe guide to adhere to the *litera legis* than to try and discover the *sententia legis*. A Court of law is not justified in supplying *casus omissus*. As pointed out by Lord Brougham sitting in the Judicial Committee of the Privy Council in *Crawford v. Spooner*, (1846) 6 Moore P. C. 1: 13 ER 582 (585), "the construction of the Act must be taken from the bare words of the Act We cannot fish out what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of an Act, we cannot add, and mend, and by construction make up deficiencies which are left there".

Lord Watson in *Salomon v. Salomon and Co.*, 1897 AC 22 (38) applying this principle, said:

" 'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication "

The above observations of Lord Watson were cited with approval by Lord Uthwatt in *Lord Howard De Walden v. Inland Revenue Commissioners*, 1948-2 All ER 825 (830).

5. Thus even if it may look probable that the omission of execution proceedings in Section 21 of the Arbitration Act was due to an oversight and the Court felt satisfied about it, it could not supply the defect as by doing so it would be entrenching upon the preserves of legislation.

6. Our attention was drawn by the respondent's counsel to a decision of a learned Single Judge of Oudh Chief Court in *Jaffar v. Abdul Gaffur*, AIR 1943 Oudh 304, wherein the learned Judge expressed the view that there was no reason to restrict the meaning, of the word, "suit" occurring in Section 21 so as to exclude the execution proceedings as they were only a continuation of the suit. This matter does not appear to have received a detailed or reasoned examination at the hands of the learned Judge. It may, however, be mentioned that the emphasis laid is Jaffar's case, AIR 1943 Oudh 304 was on the fact that no objection to the invalidity of the award had been made at any stage in that case and a decree in terms of the award was allowed to be passed.

Reliance was also placed upon *Muuni Lal v. Kishan Prasad*, AIR 1948 All 443, which followed the decision of the Oudh Chief Court referred to above in which an opinion was expressed that it was not necessary to give such restricted meaning of the word "suit" in Section 21 of the Arbitration Act as to exclude execution proceedings, appeals and other proceedings before the Civil Court which are in the nature of suits, in which Civil Courts decide disputes between the parties of a civil nature.

7. Both these decisions were considered by a later Full Bench of Allahabad High Court in *Moradhwaj v. Budhar Dass*, (S) AIR 1955 All 353 (FB), and the correctness of the proposition laid in the above two decisions was not accepted. The following observations of the Full Bench are in point:

"The Arbitration Act incorporates the provisions of Schedule II of the Civil Procedure Code and is in 'pari materia' with that Code. The Limitation Act and the Civil Procedure Code apply to arbitrations under the Arbitration Act (vide Sections 37 and 41 respectively) words used in Acts 'pari materia' are to be interpreted in one and the same sense, unless the contrary appears.

* * * * In Chapters II and III the word 'suit' means the original proceeding in the Court of first instance.

There is, therefore, no reason to think that the word 'suit' in Section 21 and in the definition of the word 'Court' in Section 2(c) as applicable to that section has been used in any other sense. The word 'suit', therefore, does not include appeals or execution proceedings and the word 'Court' in Section 2(c) refers to a Court of original jurisdiction".

It was also pointed out that before the Arbitration Act, 1940, it had always been held under Civil Procedure Code that proceedings in execution cannot be referred to arbitration and reference was made to *Sarju Lal Behari Lal v. Sukhdeo Prasad*, AIR 1936 All 378, *T. Wang v. Sona Wangdi*, AIR 1925 Cal 812, *Bachan Lal v. Amar Singh*, AIR 1935 All 125, and *Ramdayal Munnalal v. Sheodayal*, AIR 1939 Nag 186 (FB). In *Zumaklall Motiram v.*

Fulchand Tarachand, AIR 1941 Bom 20, a similar view was taken, but it was held in that case that an award could be regarded as an adjustment under Order 21, Rule 2. In *Narayan Ramchandra v.*

Dhondiba Tukaram, AIR 1937 Bom 111, a learned Single Judge also expressed the view that reference to arbitration in execution proceedings at the instance of parties was without jurisdiction and the award of the arbitrator or of the Court as an umpire was illegal and without jurisdiction. A Division Bench of Andhra Pradesh High Court in *Laxminarayana v. Venkata Subbaiah*, AIR 1958 Andh Pra 679, also took a similar view. Another Division Bench of

Saurashtra High Court in *Shah Jagjivan Jetha v. Doshi Talak Chand Hirachand*, (S) AIR 1955 Sau 88, took the view that under the Arbitration Act the Court had no jurisdiction to make an order of reference in execution proceedings and dissented from the view taken in AIR 4943 Oudh 304 and AIR 1948 All 443.

8. Thus there is weight of authority in support of the view contended for by the appellant that Section 21 of the Arbitration Act restricts reference to arbitration in a matter in difference between the parties arising in the suit and precludes such reference to arbitration in execution proceedings. The clear language of the statute and the weight of authority impel me to hold that the reference to arbitration in this case during execution proceedings did not have the sanction of Section 21, and was, therefore, without jurisdiction. The reference being void is not binding on the judgment-debtor-appellant. The result, therefore, is that the appeal is allowed and the order of the Senior Sub-Judge, dated 3rd December, 1960, is set aside. In the circumstances of the case, the parties are left to bear their own costs of this appeal. The parties are directed to appear in the trial Court on 13th August, 1962, for further proceedings.

H.R. Khanna, J.

9. I agree.