
(1978) 03 KL CK 0025
In the High Court Of Kerala
Case No : C.R.P. No. 557 of 1978

Baby Paul

APPELLANT

Vs

Hindustan Paper Corporation Ltd. and Another

RESPONDENT

Date of Decision : 28-03-1978

Acts Referred:

Arbitration Act, 1940 — Section 20, 41

Citation : AIR 1978 Ker 223 : (1978) 2 ILR (Ker) 392

Hon'ble Judges : George Vadakkal, J

Bench : Single Bench

Advocate : M.A. George and K.L. Varghese, for the Appellant; M. Ramachandran, U.K. Ramakrishnan and T.K. Jayaram, for the Respondent

Final Decision : Dismissed

Judgement

George Vadakkal, J.—Alleging that without terminating the contract, and after the work has progressed to a substantial extent, the respondents entrusted the balance work to "some other agency" (not specified) and that agency started work, the petitioner moved the lower Court for interim injunction restraining the respondents, from altering, modifying or tampering with or destroying the work he has already done by themselves (the respondents) or through other agencies, till the Arbitrator inspects and measures the same. The contract mentioned above is a works-contract for construction of a road and the culverts thereon, and contains an arbitration clause, but admittedly no dispute has been referred for arbitration, though according to the petitioner disputes have arisen between the parties -- this is denied by the respondents. The petitioner invoked Section 41(b) of the Arbitration Act, 1940 and the provisions in Clauses 1, 3 and 4 in the Second Schedule to that Act. The lower Court said that no arbitration proceedings are pending and therefore Section 41 is not of any avail to the petitioner. According to the learned counsel for the petitioner before the reference of the dispute or disputes, as the case may be, for arbitration, and even before any dispute arises Section 41(b) can be invoked by a party to an

arbitration-agreement. Whether this submission is right, is the question to be decided in this case.

2. Section 41(b) confers on the Court the same power of making orders in respect of the matters mentioned in the Second Schedule to the Act as it has for the purpose of and in relation to any proceedings before the Court, for the purpose of and in relation to arbitration proceedings, but, as per the proviso thereto, without prejudice to any power vested in an arbitrator or umpire for making orders with respect to any of such matters. Whatever be the construction to be placed on the words "for the purpose of, and in relation to, arbitration proceedings" in Section 41(b), whether, under that provision the Court is, as contended on behalf of the petitioner, in view of the words therein, "for the purpose of arbitration proceedings", competent to pass any order even prior to the commencement of the reference, that is to say, before the parties refer their disputes for arbitration to the arbitrator, or not, (it is also contended that "arbitration proceedings" commence from the time of the "arbitration agreement" and this I will examine hereinafter in due course) Clauses 1 and 3 in the Second Schedule limit the power of the Court to make orders only as regards "goods which are the subject-matter of the reference" (clause) and "property or thing which is the subject-matter of the reference or as to which any question may arise therein" i.e. in the reference (Clause 3) and Clause 2 : only as regards "the amount in difference in the reference; which a priori means that the orders contemplated by Section 41(b) read with Clauses 1 to 3 in the Second Schedule can be made only when there has been a reference of the dispute or disputes, as the case may be, for arbitration. Clause 4 in the Second Schedule read with Section 41(b) confers on the Court the same power of making orders of "interim injunction or appointment of receiver" as it has for the purpose of and in relation to any proceeding before it. In relation to a proceeding before it, the Court derives its power of issuing interim injunction and appointing a receiver from the provisions contained in Section 94 (c) and (d) of the Civil P. C., 1908 and the said powers are to be exercised in accordance with Rules 1 to 5 in Order 39 and Rules 1 to 5 in Order 40 of that Code. Section 94 of the Code enables the Court to make interlocutory orders some of which are specified and enumerated in Clauses (a) and (d) as is clear from the residuary clause, Clause (e) which says that the Court may "make such other interlocutory orders as may appear to the Court to be just and convenient." An interlocutory order is an order made during the course of a main proceeding as incidental and ancillary to the object of the principal proceeding. The principal proceeding so far as Section 41(b) is concerned is an arbitration proceeding the object of which is an award by the arbitrator. Obviously, therefore, the Court's power of making orders in respect of matters set out in items 1 to 4 of the Second Schedule to the Arbitration Act, 1940 is only to make interlocutory orders in interlocutory proceedings during the course of arbitration proceedings pending determination of the rights of the parties thereto finally by an award passed by the arbitrator, and the Court is not competent to pass any order in respect of those matters anticipating a reference.

3. The above discussion is sufficient to hold that the lower Court is right in rejecting the petitioner's motion for injunction invoking Section 41(b) of the Act and Clauses 1, 3 and 4 in the Second Schedule thereto. I have for that purpose assumed without deciding that the words "for the purpose of arbitration proceedings" in Section 41(b) may indicate that the parties to an arbitration agreement can't approach the Court before a reference, holding that the limitation on its power, namely, that the Court can pass such orders as are contemplated by Clauses 1 to 4 only after the reference of the dispute for arbitration, arises by reason of the very nature of the matters set out in these clauses. In deference to the arguments advanced by both sides, and for the sake of completeness, it is necessary also to advert to the same with reference to the one remaining clause, Clause 5, in the Second Schedule,

4. Section 41(b) read with Clause 5 invests the Court with the same power as it has in the matter of appointment of guardian for a minor or person of unsound mind for the purpose of and in relation to, any proceeding before it, "for the purposes of arbitration proceedings" as well. The Court's power to appoint a guardian to defend a suit during its pendency which continues until the same has been finally disposed of and complete satisfaction or discharge has been obtained, is to be found in Rules 3 and 15 in Order 32 of the Civil P. C., 1908. The former Rule makes it the duty of the Court to appoint a proper person "to be guardian for the suit" for a minor and the latter, makes Rule 3 applicable to a defendant who is of unsound mind. This is an inherent power of the Court founded on the principle that it is the duty of the Crown as *Parens Patriae* to protect the interest of minors and persons of unsound mind and is to be exercised wherever necessary. However, this power arises only on the institution of a suit. On that analogy Section 41(b) may not empower the Court to appoint a guardian to one of the parties to an arbitration agreement till there is a reference. But it may be that it is necessary to appoint a guardian even prior to actual submission or reference as for instance where "the parties have not named the arbitrator in the arbitration agreement wherefore it is necessary to nominate one before the actual reference and this cannot be done because one of parties at the relevant time is not of sound mind, or, he is dead, and his legal representative by or against whom the arbitration agreement is u/s 6 (1) of the Act enforceable is a minor. In view of the provision "for the purposes of arbitration proceedings" in Section 41(b) and in Clause 5 in the Second Schedule, the Court may, perhaps, be competent to appoint a guardian to a party to the arbitration agreement even prior to the actual reference, but since that question does not arise in this case, it is not necessary to finally decide the same herein.

5. The decisions cited at the bar are of no assistance to the petitioner. In *Ranjit Chandra Mitter Vs. Union of India (UOI)*, and in *Mohinder Singh v. Executive Engineer*, AIR 1971 JK 130 it was held that relief u/s 41(b) can be granted by the Court only in some pending proceeding or suit. In the Calcutta case there was no reference to arbitration and therefore, an application for injunction was held to

be incompetent. In the Jammu and Kashmir case the disputes had been referred for arbitration and therefore, an injunction application was held to be competent though the same was dismissed on merits. Adverting to an earlier decision of Das, J. in (1948) 52 CWN 45 on which strong reliance is made by the learned counsel for the petitioner, Mallick, J., in *Ranjit Chandra Mitter Vs. Union of India (UOI)*, said that "the learned Judge (Das, J.) did not feel called upon in the view taken by him to give a meaning to the expression "arbitration proceeding" in Section 41" and therefore, that decision is no authority "for the proposition that the Court can issue an injunction even in the absence of any arbitration proceeding provided there is a dispute which can become the subject-matter of an arbitration proceeding under an arbitration agreement subsisting between the parties." *Chedilal v. Brit Over Ltd.* (1948) 52 CWN 45 was a case where a suit was filed for damages for breach of implied condition as to quality and fitness of goods (Radio sets) supplied by the defendant to the plaintiff for sale in India. The plaintiff moved for temporary injunction restraining the defendant from operating on a letter of credit opened by the plaintiff in favour of the defendant and from forfeiting certain amounts deposited by the plaintiff with the defendant. The Court issued an interim injunction. Defendant invoking Section 34 of the Arbitration Act, 1940 sought for stay of the suit. Before the suit was stayed the injunction application came up for final orders. Relying on Section 41 of the Arbitration Act, 1940 it was contended on behalf of the defendant that the application for injunction was not competent, since there was no pending arbitration proceeding. This contention was repelled on the ground that the application for injunction was filed in a suit and that the proceedings therein had not been stayed. Das, J. said that even after staying the suit u/s 34 the Court is competent to grant injunction and appoint a receiver, and referred to *Zalineff v. Hammon*, (1898) 2 Ch 92 where the Court appointed a receiver and then stayed the suit, and to *Willesford v. Watson*, (1873) 8 Ch 473 where the Court issued an injunction after staying the suit and during the operation of stay. Therefore, the passing observation made by the learned Judge that the power of the Court u/s 41 "is not in terms limited to pending arbitration proceedings" and that there is no reason to add the word "pending" to that section cannot, with respect, and as pointed out by Mallick, J, in the subsequent decision of that Court, be considered as an authority for the proposition stated therein.

6. In *Daulat Ram Phoolchand Vs. Shriram and Others*, , the parties had referred the question of partitioning their joint family properties to the arbitrators and they had entered upon the reference, and therefore, arbitration proceedings were pending when the Court was moved for appointment of a receiver.

7. In *Nagarchand Goenka Vs. Surendra Nath Sarkar*, , along with an application by a partner u/s 20 of the Arbitration Act, 1940 for compelling reference to arbitration, an application for appointment of a receiver for the partnership-business was moved and the lower Court allowed the same. It was contended before the High Court that until actual reference to arbitration is made, that is to say, till the application u/s 20 of the Act is allowed, the Court has no jurisdiction

to appoint a receiver. The argument was that a proceeding u/s 20 of the Act is not an arbitration proceeding till the Court orders filing of the agreement and makes an order of reference to the arbitrator appointed by the parties or by the Court, as the case may be as envisaged in sub-s. (4) of Section 20. Reliance was placed on sub-s. (5) of Section 20 which says that "thereafter the arbitration shall proceed and Section 41(b) which speaks of "arbitration proceedings". It was held that a proceeding u/s 20 is one to enforce- an agreement for arbitration wherefore it is a proceeding for arbitration from the very start, and that the words "arbitration proceeding" in Section 41(b) would include a proceeding u/s 20 of the Act. The Court said;--

"Furthermore, there is a great danger in putting such a narrow construction upon the words "arbitration proceedings". Because if the contention of Mr. Baldeo Sahay is accepted, the Court will be completely powerless to pass any order for the preservation or safety of the properties in dispute involved in the subject-matter of the agreement for arbitration, and the opposite party may take his own time in showing cause why the agreement should not be filed and reference should not be made to the arbitrators by which time the entire property may be completely wasted. In that case there will be no point in empowering the Court either to appoint an arbitrator or to pass an order of injunction by way of saving the property concerned long after the proceeding began. I am, therefore, of opinion that this contention of the appellant's learned Advocate has no force." With respect, it seems to me, that at the stage the proceedings u/s 20 of the Act are pending in Court and prior to the making of an order of reference to the arbitrator (which may or may not be made), the Court has, in respect of and in relation to the said proceedings, all the powers invested on it by the Civil P. C., 1908, the provisions of which shall, as per Section 41(a) of the Act, apply to all proceedings before it, and it is not Section 41(b) that is to be looked into for its source of jurisdiction to issue interim orders, so that the difficulty mentioned in the above passage need not compel one to extend and widen the meaning of the expression: "arbitration proceedings" in Section 41(b) of the Act to include a proceeding before Court to compel arbitration.

8. In *Jammu Forest Co. v. State*, AIR 1968 J & K 86, the question that arose for consideration was whether, on making an order of reference u/s 20(4) of the Act to the arbitrator, the Court can issue a temporary injunction, and relying on *Daulat Ram v. Shriram*, AIR 1964 Madh Pra 219, It was held that the Court is competent to do so. In the course of the discussion the decision seems to proceed on the basis that Section 41(a) empowers the Court in that behalf for it is stated therein that "the case will be deemed to be proceeding before the Court right from the time that an application u/s 20 is made in a particular case up to the time the Court finally disposes of the matter either by accepting the award or setting it aside" but it appears to me, that the decision is ultimately rested on Section 41(b) of the Act on which rested the decision in *Daulat Ram Phoolchand Vs. Shriram and Others*, which has been relied on in *Jammu Forest Co. v. State*, AIR 1968 J & K 86.

9. Therefore, the expression "for the purpose of in Section 41(b) is of no assistance to contend that the Court can make orders in respect of any of the matters set out in Clauses 1 to 4 in the Second Schedule to the Act before and in anticipation of a reference to arbitration, and this is so even if the words: "arbitration proceedings" would include stage prior to actual reference of the dispute or disputes for arbitration, for the matters set out in Clauses 1 to 3 concern goods and properties forming the subject-matter of a reference, or amount in difference in the reference, and those set out in Clause 4 enable the Court to pass only interlocutory orders.

10. When does "arbitration proceedings" commence, is the next point debated at the bar. I am not prepared to subscribe to the view canvassed for on behalf of the petitioner that from the time an arbitration agreement is made arbitration begins, much less, arbitration proceedings start. That thereafter disputes have arisen also does not mean that arbitration has begun or arbitration proceedings have arisen. The parties to the arbitration agreement may or may not have named the arbitrator therein, and in the latter case, they might have nominated one subsequent to the agreement, but neither the nomination by the agreement itself nor the subsequent nomination is of any consequence in this regard, for arbitration begins and arbitration proceedings commence only on the arbitrator getting authority to act. An arbitrator's authority to act arises by actual submission of particular dispute or disputes to the authority of a particular arbitrator by the parties, or by one of the parties to an arbitration agreement requesting the arbitrator appointed by the arbitration agreement itself or subsequent thereto to enter upon the reference in respect of particular dispute or disputes, or by the Court making an order of reference to the arbitrator as contemplated by Section 20 of the Act or where the Court by order refers the matter or matters in difference to the arbitrator as provided for in Chap. IV of the Act. On his authority arising the arbitrator shall "use all reasonable dispatch in entering on and proceeding with the reference and making an award" as otherwise the Court may remove him, Section 11 (1). So also an arbitrator "who has misconducted the proceedings" is liable to be removed, 3. 11 (2). These provisions make it clear that arbitration proceedings commence only on the arbitrator getting authority to arbitrate, and act in that behalf. The provision in Section 37 (3), for the purposes of limitation, by a fiction pushes back the date of commencement of arbitration to a date anterior to when the arbitrator derives his authority to act, namely, when one of the parties to the arbitration agreement serves on the other or others a notice requiring the appointment of an arbitrator, or where an arbitrator has already been nominated, requiring that the dispute be submitted to that person. In the case on hand not even that stage has been reached. There is no merit in the contention that from the stage of the arbitration agreement "arbitration proceedings" commence and that Section 41(b) can be invoked from that stage.

I dismiss this civil revision petition with costs.