

(1996) 03 MAD CK 0134
In the Madras High Court

Bharat Process and Mechanical Engineers Limited	APPELLANT
Vs	
The Salem Chemical Industries and Others	RESPONDENT

Date of Decision : 27-03-1996

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (1996) 2 MLJ 12

Hon'ble Judges : Abdul Hadi, J

Bench : Division Bench

Judgement

Abdul Hadi, J.—The 2nd defendant has preferred this Civil Miscellaneous Appeal against the judgment and decree dated 7.9.1982 in O.S. No. 310 of 1970 filed by the respondent herein u/s 20 of the Arbitration Act for appointing an Arbitrator and referring the matter in dispute to him, to adjudicate the question of damages claimed. By the said judgment and decree, the arbitrator was appointed.

2. Ex. A-1 dated 15.5.1964 is the agreement between the plaintiff and the 1st defendant, (who has not been made party in this civil miscellaneous appeal), under which the 1st defendant has supplied machineries and erected and commissioned an Alum Plant at Salem for the benefit of the plaintiff. But, according to the plaintiff, the machineries supplied were defective and the plant was erected and commissioned not as agreed and that on the said account, the plaintiff sustained damages to the tune of Rs. 5 lakhs.

3. The court below by its above referred to judgment and decree appointed the arbitrator for assessing the quantum of damages, if any, sustained by the plaintiff. The court below also decreed that the said arbitrator can, inter alia examine the "parties of persons connected with them" as witnesses. It also decreed that after submission of the award by the arbitrator, notice to "both parties" shall be issued for filing objections, if any, aggrieved by the said judgment and decree, the 2nd defendant has preferred this civil miscellaneous appeal.

4. Admittedly, pursuant to the Bird and Company Limited (Acquisition and Transferal Undertakings and Other Properties) Act, (67 of 1980) (hereinafter referred to as "the Act"), the 2nd defendant was impleaded in the above said suit by order dated 10.12.1981. The 1st defendant Bird and Company Limited, Calcutta is the above said Bird and Company Limited, referred to in the above said enactment. The said enactment, as per Section 3 thereof says, "on the appointed day, the undertakings of the company and the right, title and interest of the company in relation to its undertakings shall, by virtue of this Act, stand transferred to, and vest in, the Central Government". The above said appointed day is 25.10.1980 as per Section 2(a) of the Act. Further, the term "Company" in Section 3 refers to the 1st defendant-company as per Section 2(c) of the Act. Then, as per Section 7 of the Act, the Central Government may direct by notification that the undertakings of the company (1st defendant) and the right, title and interest thereof, which have vested in the Central Government u/s 3 shall, instead of continuing to vest in the Central Government, vest in the Government company either on the date of the Publication of the notification or on such earlier or later date, as may be specified in the notification and accordingly the said Government company shall, on and from the date of such vesting, be deemed to have become the owner in relation to such undertakings and all the rights and liabilities of the Central Government in relation to such undertakings shall, on and from the date of such vesting, be deemed to have become the rights and liabilities, respectively, of that Government company. The appellant is such a Government company, which has become such owner, as spoken to under the above said Section 7.

5. In the above back ground, the only argument of learned Counsel for the appellant is that under the above said enactment, pursuant to Section 6 of the Act, the appellant is not liable to any liability of the 1st defendant-company "in respect of any period prior to the appointed day" (25.10.1980), that in such a case, the 1st defendant alone is liable and that hence even while appointing the arbitrator, the court below should have specifically exonerated the appellant from any obligation, arising from its above said judgment and decree.

6. On the other hand, learned Counsel for the respondent submits that, pursuant to Section 5(6) of the Act, the suit shall not abate in view of the appellant's taking over of the 1st defendant's undertakings and the suit may be continued against the appellant also. Secondly he also submits that all that the decree of the court below has done, is only to appoint an arbitrator and if really, the appellant is not liable for the suit claim pursuant to any provision under the above said Act, the appellant could very well agitate the said question before the Arbitrator and that, therefore, there is no warrant for exonerating the appellant at this stage itself. Thirdly he also submits that even earlier by the above referred to order dated 10.12.1981, overruling the objection by the appellant, the appellant was made a party in the suit, So, according to the said learned Counsel, the appellant cannot reagitate the matter once again.

7. Regarding the first of the above referred to counter submissions of learned Counsel for the respondent, learned Counsel for the appellant submits that Section 5(6) will not apply at all to the present suit since the present suit cannot be termed as "in relation to any property, which has vested in the Central Government", since the claim by the plaintiff is only a bare money claim for damages and it is not in relation to any property vested in the Central Government under the above said Act on the above said date 25.10.1980. He further points out that the properties which were supplied by the plaintiff to the 1st defendant in erecting the above said plant pursuant to the above referred to agreement dated 15.5.1964, were supplied prior to this suit of 1970 and the plaintiff's claim cannot at all be said to be in relation to the properties of the 1st defendant, which got vested with the Central Government, much later on 25.10.1980. Therefore, according to the said learned Counsel, Section 5(6) of the Act will have no application.

8. Regarding the second of the above said counter submissions of learned Counsel for the respondent, learned Counsel for appellant submits that, if under the Act, the appellant is not liable for the suit claim, the appellant, should not be fastened with the responsibility to face the full trial of the proceeding before the Arbitrator.

9. Regarding the third counter submission, learned Counsel for the appellant submits that even though despite 2nd defendant's opposition to the above said impleading proceeding, the impleading has been allowed, that does not mean that when the suit is taken up finally, the appellant is precluded from agitating the said question, if the law is clear that the appellant cannot at all be made liable for the claim made by the plaintiff.

10. We have considered the rival submissions. For the following reasons, we have to allow this appeal. No doubt, as per Section 3 of the Act, the "undertakings" of the 1st defendant- company stood transferred to and vested in the Central Government on 25.10.1980 and pursuant to Section 7 of the Act and the notification thereunder, what was vested in the Central Government, subsequently vested, on the date of the publication of the notification, in the Government company, that is, the 2nd defendant- company. Now, the word "undertakings" used in Section 3 as well as 7, no doubt means the entire business of the going concern of the 1st defendant- company. It has also been held in *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, , in connection with Banking Companies (Acquisition and Transfer of Undertakings) Act (22 of 1969) thus:

The word "undertaking" is used in various statutes of our country, viz., the Indian Electricity Act, 1910(Sections 6, 7, 7A), Indian Companies Act (Sections 125(4) (f), 293 and 394), Banking Regulation Act, 1949 Section 14-A), Cotton Textiles Companies (Management of Undertaking, Liquidation and Reconstruction) Act, 1967 (Sections 4 (1), 5(1) (2)). By the word undertaking is meant the entire organisation. These provisions indicate that the company

whether it has a plant or whether it has an organisation is considered as one whole unit and the entire business of the going concern is embraced within the word "undertaking.

11. However, it is made clear from Section 6(1) that the liabilities of the 1st defendant- company, which was taken over ultimately by the 2nd defendant, in respect of any period prior to 25.10.1980, shall be enforceable against the 1st defendant only, and not against the 2nd defendant. Sub-section (1) of Section 6 of the Act runs as follows:

Every liability of the company in respect of any period prior to the appointed day, shall be the liability of the company and shall be enforceable against it and not against the Central Government, or where the undertakings of the company are directed, u/s 7, to vest in a Government company, against such company.

Further, Section 5 also fortifies the above said conclusion reached. Section 5(2) says that all properties, which have vested in the Central Government, shall by force of such vesting, be freed and discharged from any obligation, mortgage and all other encumbrances affecting them. So even with reference to the properties, which got vested with the Central Government under the Act, the Central Government takes those properties free from liabilities thereunder. Further, Section 8 of the Act says that in view of the above said vesting in the Central Government, there shall be paid by the Central Government to the (1st defendant) company an aggregate amount of Rs. 283 lakhs and Section 8(4) provides that the liabilities of the (1st defendant) company shall be met from the above said amount. There is also a similar provision u/s 5(4) of the Act. Further, Section 13(1) of the Act also provides that the Central Government shall, for the purpose of disbursing the amounts payable to the (1st defendant) company u/s 8, appoint a Commissioner of payments, and as per Section 14(1), the Central Government shall, within a specified period, pay to the said Commissioner, for payment to the (1st defendant) Company, the amounts specified in Section 8 and Section 16 says that every person having a claim against the 1st defendant) company, shall prefer such claim before the said Commissioner. Further, as per Section 15(2), it is clear that in case the 2nd defendant or the Central Government, as the case may be, had discharged any liability of the 1st defendant- company in relation to any period prior to 25.10.1980, the 2nd defendant or the Central Government, as the case may be, could make a claim to the above said Commissioner with regard to any such payment by the Central Government, or the 2nd defendant, after the said dated 25.10.1980. All these provisions make it clear that the plaintiff in the present case cannot claim its alleged dues from the first defendant company from the 2nd defendant company and instead, it could make the claim before the above said Commissioner under the above said Act. Therefore, in the present suit, the 2nd defendant has necessarily to be exonerated and in the teeth of the above referred to specific provisions under the Act, the 2nd defendant cannot be compelled to continue to remain as a party even when the proceedings before the Arbitrator go on

pursuant to the impugned Judgment and decree in the suit.

12. No doubt, it may be a meet question whether the plaintiff should initially go before the Arbitrator pursuant to the decree in the suit, and, if and when the Arbitrator assesses the quantum of damages due to the plaintiff, make a claim thereafter before the above said Commissioner as per Section 16, or whether independently the plaintiff could straightaway make a claim before the said Commissioner without waiting for the Arbitrator's award. Anyway, there is no necessity to decide that aspect in this appeal by the 2nd defendant, and it is for the plaintiff to work out his rights, in accordance with law, including the provisions of the above said Act.

13. All that has to be decided in this appeal is whether the 2nd defendant is liable or not, for the above said alleged claim of the plaintiff. On this aspect, it is clear to us, as also mentioned above, that the 2nd defendant has to be exonerated.

14. No doubt, while the present suit was pending, the 2nd defendant was impleaded by the above said order dated 10.12.1981 in I.A. No. 697 of 1981 presumably on the footing that the 2nd defendant was a necessary party to the suit. But, that by itself will not debar us from holding in this appeal that the 2nd defendant should be exonerated as stated above. The decision in *Jasraj Inder Singh Vs. Hemraj Multanchand*, is also to the effect that when an appeal is made to a higher court, the entire subject matter is available for adjudication in the said appeal, including interlocutory orders passed by the lower court. The relevant observation by the Supreme Court is as follows:

The appeal before the Supreme Court is from the suit as a whole and, therefore, the entire subject matter is available for adjudication before us. If, on any other principle of finality statutorily conferred or on account of *res judicata* attracted by a decision in an allied litigation the matter is concluded, we too are bound in the Supreme Court. Otherwise, the whole *lis* for the first time comes to this Court and the High Court's finding at an intermediate stage does not prevent examination of the position of law by this Court. Intermediate stages of the litigation and orders passed at those stages have a provisional finality.

Now, coming to the argument in relation to Section 5(6), we must state that Section 5(6) will not be of any assistance to the plaintiff. No doubt Section 5(6) speaks of no abatement of a suit against the company taken over under the Act. But that sub-section will apply only to a suit in relation to any property which has vested in the Central Government under the Act. But the present suit cannot be said to be a suit in relation to any such property which got vested in the Central Government on 25.10.1980, In fact, the suit was filed in 1970 itself and it was for the appointment of an Arbitrator, pursuant to Section 20 of the Arbitration Act. The plaintiff's claim for which arbitration is sought for is only a money claim for damages and it cannot be said to be in relation to any property, much less, the property which came to be vested long after the filing of the suit viz.,

25.10.1980. In this regard, the court below has erred in deciding additional issue No. 2, framed by it on 29.6.1982, which ran as follows:

Whether the plaintiff is not entitled to proceed against the 2nd defendant?

The court below appears to proceed as if Section 5(6) would apply to the present suit. That is not correct. Its further observations that the present suit filed against the 1st defendant- company could be continued either against the Central Government or the 2nd defendant and that the question whether the plaintiff is entitled to proceed against the 2nd defendant, would figure only after adjudication by the Arbitrator, are all not correct.

15. The net result, is, the above referred to findings of the court below, in so far as the above referred to additional issue No. 2 is concerned, are set aside. It is needless to say that in other respects the judgment and decree of the court below shall stand. In fact, the subject-matter of this appeal is not with reference to those other aspects. Accordingly the appeal is allowed. In the circumstances of the case, there will be no order as to costs.