
(1959) 06 CAL CK 0018
In the Calcutta High Court
Case No : Award No. 57 of 1959

Ferro Alloys Corporation Ltd.

APPELLANT

Vs

A.K. Ghosh and Bros.

RESPONDENT

Date of Decision : 26-06-1959

Acts Referred:

Arbitration Act, 1940 — Section 31(1), 31(2), 31(3), 31(4)

Citation : AIR 1960 Cal 421

Hon'ble Judges : P.C. Mullick, J

Bench : Single Bench

Advocate : Sachin Sinha and Banerjee, for the Appellant; Santosh Kumar Basu and Purnendu Sekhar Basu, for the Respondent

Judgement

P.C. Mullick, J.—This is an application for an order that a judgment upon award passed by me on 6-1-1959 be set aside and that the award be taken off the file.

2. Subject matter of dispute between the parties is the claim of the contractor for the construction of certain residential buildings at Garividi. The respondent is the contractor. One D.B. Sen, Architect, is named as the arbitrator in the contract who would adjudicate whatever disputes that might arise between the parties with respect to this contract. The contractor's claim for the construction work having been disputed, sometime in July, 1958 the contractor referred the dispute to the arbitration of the said D.B. Sen. The company contended that D.B. Sen was not competent to arbitrate on the ground that he was financially interested in the matter. Nevertheless the company filed a Written Statement but took no further step in the arbitration proceedings even though due notice was given by the arbitrator of all meetings held by him. On 10-9-1958 the company made an application to the Subordinate Judge at Srikakulam to leave to revoke the authority of the arbitrator u/s 5 of the Indian Arbitration Act. No order to stay or injunction was, however, obtained in the said proceedings though notice of this proceeding was given both to the contractor and the arbitrator. In due course, the arbitrator made his award in favour of the contractor on 25-9-1958 and sent

the award to the Registrar of the Calcutta High Court for being filed u/s 14 of the Indian Arbitration Act. The contractor thereupon took steps, paid the necessary fees and having been directed by the Registrar to serve notice, served notice u/s 14(2) of the Act on the company at Calcutta. I should have stated that even though the registered office of the company is at Tumsar in the State of Bombay, the company had a Calcutta office at No. 7C, Lower Circular Road. According to the affidavit of service filed by Prodyot Kumar Banerjee, a clerk in the employ of the Supreme Court Advocate of the contractor, the notice was served on November 28, 1958 by tendering a copy of the notice to one B.P. Mallick alleged to be the Calcutta Manager of the said company. B.P. Mallick was identified as such by one Sri Raghubans Sahai, one of the employees of the company. The said B.P. Mallick, however, after receipt of the notice, refused to sign the acknowledgment on the back of the original. Notice was not thereafter served by affixing. That is how this notice is alleged to have been served. The company did not make any application to set aside the award. In the usual course the matter came up for judgment on award and on the application of the contractor a judgment was passed by me on January 6, 1959.

3. The present notice is taken out by the company to set aside the decree passed by me on January 6, 1959 and for a further order that the award be taken off the file of this Court.

4. Mr. Santosh Kumar Basu, learned Counsel appearing to oppose the application, contended that notice has been properly served and the present application does not lie. It is clear from the letters of the company, copies of which have been annexed to the petition that the company had a Calcutta office. Having regard to this evidence the company did not make out a clear case that the company had no Calcutta office. The case made in the petition is equivocal. It is stated in the petition that one Lazalo Paul Moulner was one of the Directors and Technical Adviser of the company and he had an office at 7C, Lower Circular Road. This sort of allegation is not enough to enable a court to hold that the company had no Calcutta office, in the face of the evidence to the contrary to be found in the company's own letters. B.P. Mallick admits to be an employee of the said L.P. Moulner, the Director and Technical Adviser, though he denies that he had authority to accept the notice or in fact the notice was tendered to him as alleged by Banerjee. There is no denial that Raghubans Sahai was an employee of the company. On the materials placed before me I am not prepared to hold that the notice was not tendered to B.P. Mallick, who I hold is an important official in charge of the Calcutta office of the company. On this finding, can I hold that notice has been served according to law having regard to the fact that the copy of notice was not affixed at a conspicuous part of the premises? Mr. Basu contended that u/s 42 of the Arbitration Act and Rule 14 of the Rules framed under the Act as also under Chapter VIII, Rule 26 of the Rules of this Court, the procedure for service as laid down in Order 5 of the CPC would not apply to the instant case. The procedure as laid down in Order 5 would have applied had there been no provision as to how the notice is to be served in the Act itself. But

Section 42 provides how such notice is to be served. The section provides that notice required by the Act to be served otherwise than through the court may be served either by delivering it to the person on whom it is to be served or by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in India. Notice required to be served u/s 14(2) is to be served by the party and not through the Court. In Mr. Basu's submission, Section 42 is not limited to service of notice during the pendency of arbitration proceeding but is wide enough to cover cases of service of notice u/s 14(2) of the Act. In the case of *Ganeshmal Bhawarlal Vs. Kesoram Cotton Mills Ltd.*, , Bachawat, J. held that the service of notice u/s 14(2) of the Act is to be governed by the provisions of Order 5 of the Code of Civil Procedure. Mr. Basu submitted that Section 42 itself provides the manner of service and therefore the provisions of the Code as to service are not applicable. Bachawat, J. did not consider whether Section 42 of the Act provides for the service of notice u/s 14(2) of the Act. There may be something to be said in favour of this argument advanced by Mr. Basu. But on the facts of this case I am inclined to give an opportunity to the company to contest the award. All notice in the Arbitration proceedings were served in the Registered office. Only for the purpose of serving notice u/s 14(2), the cause title of the proceedings before the arbitrator was amended so as to indicate that the company carries on business at Calcutta. The notice might have been made over to B.P. Mallick, but admittedly he was not apprised of the Arbitration proceedings. He states that he had no authority to accept. I would therefore give the benefit of doubt to the company and hold that properly the notice should have been served in the Registered office of the company as all the previous notices were served in the Arbitration proceedings.

5. In the instant case, while I passed judgment on award it was not brought to my notice that prior to the award having been filed in this Court, an application u/s 5 was made by the company in another court and the same was still pending there. As stated before, that application was made on 10-9-1958 and I passed judgment on award in January 1959. Had this fact been brought to my notice, I would certainly have considered how far I had jurisdiction to pass a judgment on award, having regard to Section 31 of the Indian Arbitration Act. Section 31, Sub-section (4) lays down that

"..... where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone would have jurisdiction over the arbitration proceedings and all applications arising out of that reference, and the arbitration proceeding shall be made in that Court and in no other court."

I am apt to think that once an application is made with reference to an arbitration agreement in one Court, no matter whether before or after filing of the award, that Court will have the exclusive jurisdiction to deal with all matters in connection with the reference including filing the award and passing Judgment in terms of the award. In that view of the matter, I would not have passed a judgment on award, had I known at the time that already an application had

been pending in another court in connection with the self-same arbitration. I would have directed the Registrar of this Court to forward that award to the learned Subordinate Judge who is dealing with the application u/s 5 of the Arbitration Act.

6. Mr. Basu submitted that Sub-section (4) of Section 31 relates to proceedings upto the making of the award. The previous Sub-sections deal with the jurisdiction of the Courts after the award is made. There are innumerable authorities to the effect that the making of the award is an end of the arbitration proceedings. Subsequent proceeding in connection with the reference is the filing of the award and making it a Rule of the Court. These subsequent proceedings are dealt with in Sub-sections (1), (2) and (3) of Section 31 and the last Sub-section deals with all proceedings prior to the making of the award. In the case of *Re. In Re: Arbn. Charu Chandra Das, Prafulla Ch. Das and Another and The Judgment upon Award*, Khundkar J. held that an application in any reference made under the Arbitration Act to any court competent to entertain it, takes away the jurisdiction of all other courts over such arbitration proceedings. In the above case an application was made in a court at Dacca, before the award was made u/s 11 of the Arbitration Act for removal of the Arbitrator. The application was not proceeded with and was eventually dismissed. There was a second application for removal in the same court. But during the pendency of the second application the arbitrator made his award and caused it to be filed in this court. Thereupon an application was made in this Court for setting aside the award, Khondkar, J. held that this Court had no jurisdiction to pass a judgment on award and the only court competent to do it is the Dacca Court. The learned Judge directed the Registrar to send the award to the Dacca Court to be dealt with by that court which alone had jurisdiction in the matter. Apart from this decision no other authority was cited on the point. Mr. Basu submitted that the decision does not appear to be a well-considered judgment. Mr. Basu sought to make a distinction between filing of an award by the party and filing of an award by the arbitrator. He is prepared to concede that the court will not have jurisdiction under Sub-section (4), if the award is filed by the party but the court will have jurisdiction if the award is filed by the arbitrator. In my judgment no such distinction can be and has been made in the Act. The arbitrator does not file the award but only "causes the award to be filed" He only forwards the award u/s 14 to the court and according to the Act and the Rules of our Court, on receipt of the award the Registrar causes notices to the parties to enable either of the parties to pay the necessary fees and costs so that the award may be filed. Then notice u/s 14(2) is directed to be issued by the Registrar to enable either party to make an application for setting aside the award. If no such application is made or if such an application is dismissed when made the court "proceeds to pass judgment on award." The judgment on award is made on, the application of the award holder. There must be an application for judgment on award even though such an application need not be by petition: such an application for judgment on award may not be an application in the arbitration proceeding but it certainly

arises out of the reference. Wording of Sub-section (4) is very comprehensive. The words are:

"that Court alone shall have jurisdiction, over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in the court and no other court".

The intention to be gathered from the words used in the section is that only one court will deal with all matters in relation to a reference whether during the pendency of the arbitration proceedings or after its termination by an award. With respect I agree with the views expressed by Khundkar J. In the case cited above. In the result, the judgment upon award passed by me must be set aside. I direct the Registrar to transmit the award to the Court of Subordinate Judge at Sarikakulam. In the facts of this case the petitioners will bear their own costs. All costs of the contractor including the costs of this application will abide by the result of the proceedings in the Sarikakulam Court.