

(1964) 10 MP CK 0013
In the Madhya Pradesh High Court
Case No : Civil Revision No. 131 of 1964

Hindustan Steel Ltd., Bhilai Steel Project	APPELLANT
Vs	
Kaushal Construction Co., Architects, Engineering Contractors	RESPONDENT

Date of Decision : 30-10-1964

Acts Referred:

Arbitration Act, 1940 — Section 33

Citation : AIR 1966 MP 249 : (1967) ILR (MP) 645 : (1966) JLJ 678

Hon'ble Judges : Shiv Dayal, J

Bench : Single Bench

Advocate : H.L. Khaskalam, for the Appellant; A.P. Sen, for the Respondent

Final Decision : Allowed

Judgement

Shiv Dayal, J.—This revision is directed against the order passed by the District Judge, Durg at Rajnandgaon on 30th December 1963 whereby he dismissed the petitioner's application u/s 33 of the Arbitration Act, 1940 (hereinafter called the Act) to have the effect of an arbitration agreement determined.

2. The Hindustan Steel Limited, Bhilai Steel Project, Bhilai (hereinafter called the Project) entered into, on 21st June 1956, a contract with Messrs. Kaushal Construction Company (hereinafter called the Company) for the construction of Gas Cleaning Plant) on the same rates as agreed with Messrs Khare and Tarkunde (P) Limited. Subsequently, on 30th August 1957, the work of Crane Track for Coal Storage in the Coal Preparation Plant, on the same contract, conditions and rates, was also awarded to the Company. The agreement is on a printed form with two clauses (Clause 39 and Clause 40) superimposed on it and is also supplemented by a typed document styled as " Special Conditions of Contract". The construction works were completed by 31st January 1960 Certain sums of money were paid from time to time by the Project to the Company during the construction of the works. The extent of the payments so made is undisputed. But some other disputes, for instance, in respect of final measurements, arose between the parties. According to the Project, final measurements had been

recorded and they had been accepted by the Company, while the Company denying that the measurement had been accepted as final, asserted that if there was any acceptance, that was brought about by coercion and was made under protest with a view to secure speech payment of out standings. It is not necessary for the purposes of this revision to state in detail the disputes that arose between the parties

3. Relying on certain clauses in the arbitration agreement (Clause 40 of the General Conditions and Clause 12-A of the Special Conditions), the Company served with a notice dated 5-6-1962, on the Project. The Company appointed Shri Dildar Hussain. Consulting Engineer, Hyderabad, as an arbitrator and asked the petitioner to appoint another. The Chief Engineer of the Project appointed Shri M.C. Chacko, Deputy Chief Engineer (General). Bhilai Steel Plant, as an arbitrator. The Project objected to the jurisdiction of the arbitrators in the matter. The arbitrators passed a very short order on the question of jurisdiction. They just said that they were competent to decide the disputes between the parties and directed them to obtain a ruling from the Civil Court with regard to their jurisdiction.

4. The Project then presented an application u/s 33 of the Act for determining the extent, scope and effect of the arbitration agreement. Proceedings before the arbitrators were stayed. In short, the question before the Court was which of the disputes fell within the jurisdiction of the arbitration and which not. When the law gives a right to the parties to get the cited of an arbitration agreement determined. In the Court, it is without meaning to say that the application made for that purpose is dismissed. Can there be a dismissal of such an application ?

5. Section 33 of the Act enacts that-

"Any party to an arbitration agreement . . . desiring to challenge the existence of validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits .

Provided that where the Court deems it just and expedient it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

It is clear enough that this section contemplates an application for three purposes" (i) when it is desired to challenge the existence of an arbitration agreement or the existence of an award, (ii) when it is desired to challenge the validity of an arbitration agreement or the validity of an award: and (iii) when it is desired to have the effect of an arbitration agreement or the effect of an award determined. When an application is made under this section for the last-mentioned purpose, it is imperative that the Court must determine the effect of the arbitration agreement or the effect of the award, as the case may be. The policy of the law is to encourage arbitration. At the same time the arbitrators cannot exceed the jurisdiction given to them under the arbitration agreement.

Where one of the parties contends that a certain dispute, which is placed before the arbitration is outside the scope of the arbitration agreement, it is his right to have the question determined by the Court.

Even after an award is made, a party may challenge it on the ground that the arbitration exceeded the jurisdiction given to it under the arbitration agreement and the Court is then bound to determine the effect of the arbitration agreement. As I read Section 33 of the Act, its language is wide enough to enable a party to move the Court for determining the effect of an arbitration agreement even during the pendency of proceedings before the arbitration and it need not wait until an award is made. This view further accords with the scheme of the Arbitration Act and is in consonance with the policy of the law that the question of jurisdiction must be determined at the earliest opportunity. Patently enough, Section 33 provides a speedy remedy for objecting to a reference of a dispute on the ground that it is beyond the scope of the arbitration agreement. The law has studiously provided for an application instead of a suit to be filed for the purpose, and the Court has further been empowered to decide the question even on affidavits, although where such a question cannot conveniently be decided on affidavits, the Court is entitled to examine witnesses.

6. Section 30 of the Act enumerates the grounds for setting aside an award. But that section does not deal with applications to set aside an award; it deals with the powers of the Court when an application is made to set aside an award. For the procedure to be followed one has to turn to Section 33. Proceedings under this section are entirely different from those under Sections 14 to 17 of the Act.

7. An arbitration agreement may come into existence in one of two ways; it may either arise out of an agreement which contains nothing else besides the arbitration agreement, or it may arise out of a term contained in a contract which deals with various other matters relating to the contract. In the latter case, Section 33 is concerned only with the terms relating to arbitration in the contract and not with the other terms of the contract which do not arise for consideration on an application under that section *Shiva Jute Baling Limited Vs. Hindley and Company Limited*,

8. for the foregoing reasons, it seems to me clear law that where, during the pendency of proceedings before an arbitration, any party to the arbitration agreement applies to the Court u/s 33 of the Act to have the effect of the arbitration agreement determined, the Court is bound to find out the questions on which the parties have joined issue and then to hold which of such issues fall within the jurisdiction of the arbitration. having regard to the arbitration agreement. The Court has no power to dismiss an application, not even on the ground that the arbitration agreement is a clause in a contract and the decision may involve a declaration as to the existence or validity of the contract itself.

9. Weighty observations were made by Takru in *Municipal Board Vs. Eastern U.P. Electric Supply Co. Ltd. and Others*,

"The learned Munsif had jurisdiction u/s 33 to decide whether the arbitration agreement was operative and effective or not. Whether it should be enforced or not or whether it was frustrated or not. or whether it fell along with the other clauses of the contract or not are all clearly questions regarding the effect of arbitration agreement and Sections 32 and 33 Arbitration Act, bar suits for decision of such questions

It would be absurd, in our opinion, to contend that an application u/s 38 of the Arbitration Act for a decision on the effect of arbitration agreement is barred by the arbitration agreement itself. An arbitrator may decide whether he has jurisdiction over the dispute or not but his decision is not binding upon the court because he cannot confer jurisdiction upon himself by a wrong decision. It is for the Court to decide exclusively whether he has jurisdiction or not and this is done through an application u/s 38. "

I respectfully concur with that view.

10. Viscount Simon in *Heyman v Darwins, Ltd.*, 1942 AC 356 (366) said :

" Whether a dispute falls within an arbitration clause in a contract must depend on what the dispute is and what disputes the arbitration clause covers. "

Observations in *Gaya Electric Supply Co. Ltd. Vs. The State of Bihar*, . and *Andhra Co-operative Spinning Mills Ltd v C. Shrinivasan*. AIR 1958 AP 158 which were cases on Section 34 of the Arbitration Act, support the above view, it was laid down in *A.M. Mair and Co. Vs. Gordhandass Sagarmull*, .. that once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the Court to enter into the merits of the dispute. In *Ruby General Insurance Co. Ltd. Vs. Pearey Lal Kumar and Another*, , the question, which was raised, was as to the validity of an award based on the ground that in spite of the Court's injunction directing the arbitrator not to pronounce any award, an award was in fact made pending an application u/s 33 of the Arbitration Act. For the first time, before the Supreme Court the applicant sought to amend his application by introducing certain additional facts and adding a prayer for declaring the award invalid.

Their Lordships observed that it was open in law to the applicant to file objections to the award in the Court where the award was filed, but not having taken that course and not having made any application in the Courts below for amending the petition u/s 33. the applicant could not ask the Supreme Court to go into the validity of the award by widening the scope of the original petition. In that case, no question of determining the effect of the arbitration agreement arose, because there was no dispute between the parties as to what it meant. That decision, therefore, does not help the non-petitioner here. The other decisions cited by Shri Sen do not take a view contrary to mine. They are : *Ratilal M. Parikh Vs. The Dalmia Cement and Paper Marketing. Co. Ltd.*, ; *Mukhlal v. Kesho Prasad*; AIR 1919 Pat 252; *Noorbhai Gulamhussein Makali Vs. M. Allabux and Co.*, ; *Nandram Hanutram Vs. Raghunath and sons Ltd.*, ; *Bajrang*

Lal Laduram Vs. Agarwal Brothers, ; Madipalli Venkatachellam Vs. Madipalli Suryanarayanamurty and Others, ; Louis Dreyfus & Co. v. Arunachala AIR 1981 PC 289; and Gannon Dunkerley and Co. Vs. Union Carbide (India) Ltd., . Shri Sen also relied on Jivarajbhai v. Chintamanrao Balaji 1961 MP LJ 1087; but that decision is not apposite here.

10-a. It was also maintained for the non-petitioner that the petitioner was estopped, having submitted to the jurisdiction of arbitrators. In my opinion, what I have already said is sufficient to reject this contention. There are no fetters imposed in Section 38 of the Arbitration Act as to the stage at which a party can get the effect of an arbitration agreement determined by the Court. No question of estoppel arises for getting the question determined which of the issues fall within the jurisdiction of the arbitration and which not.

11. Shri Sen endeavoured to rely on the English Law: but in the course of the hearing he realised that there was no provision in the English Law comparable to Section 33 of the Indian Arbitration Act.

12. The revision is allowed. The order passed by the Court below is set aside. The case shall now go back to it for deciding afresh the petitioner's application u/s 33 of the Arbitration Act. Costs of this revision shall abide the result in the lower Court. Counsel's fee Rs. 150.