

(1944) 08 BOM CK 0018

In the Bombay High Court

Case No : O.C.J. Award No. 6 of 1944

In Re: All India Groundnut Syndicate Ltd.

Date of Decision : 09-08-1944

Acts Referred:

Arbitration Act, 1940 — Section 34, 35

Citation : AIR 1945 Bom 497 : (1945) 47 BOMLR 420

Hon'ble Judges : Blagden, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Blagden, J.—Some years before the present war, and for aught I know to the contrary since, a man used to stand outside the Courts of Justice in London with a banner inscribed on one side with the words "Arbitrate, Don't Litigate" and on the other with the words "Beware of Lawyers." Lord Justice Goddard once remarked to me that he thought that man was the best friend of the legal profession. I must say that the present case seems to show that the learned Judge was perfectly right. The history of the matter has been most unfortunate from, the point of view of both the parties. The present applicant, Mr. R.S. Chetty, who as his name suggests comes from a district in the Madras Presidency, entered into an agreement with the respondents on April 23, 1941, under which the petitioner was to supply a considerable quantity of groundnuts to the respondents. Clause 10 of this agreement provided as follows:

All disputes whatsoever, which shall arise between the parties hereto out of or in connection with this agreement, or as to the construction or application thereof, or the respective rights and obligations of the parties hereunder, or as to any clause or thing therein contained, or any account or valuation to be made hereunder or as to any other matter in any way relating to these presents, shall be referred to arbitration, in Bombay City....

Certain amounts of goods were supplied pursuant to this agreement, but as summer developed so disputes developed between the parties. I am not in the least concerned now with the merits of those disputes and I do not propose to

say anything about them. Towards the end of July it seems clear that an interview took place at the Mount Everest Hotel, Madras, between the representatives of the respondent company and the present petitioner. Whether any fresh agreement was arrived at on that occasion is in dispute. If it was, it is also in dispute whether such fresh agreement superseded the original agreement or was a mere modification or working out of that agreement. I do not think it is necessary to express any opinion about that because it seems to me quite clear that this agreement which I may perhaps term the "Mount Everest Agreement" was at all events "related" to the original agreement. Whether the relationship was akin to that of a new born Hindu with the head of his joint family or whether it was merely the relationship of heir to ancestor does not seem to matter, provided the relationship was there. It was of course quite competent for the parties if they wished to make a fresh agreement expressly excluding Clause 10 of their original agreement and I dare say that now they both wish they had done so. Equally they could have made a fresh agreement which by necessary implication excluded Clause 10 as for example if they had provided that any particular specified Court should have jurisdiction over their disputes. But they did not do this, and I cannot see anything in the alleged terms of the Mount Everest Agreement (which were set out very clearly in a letter written not long thereafter by the respondents' solicitors to the petitioner) which is at all inconsistent with the continuance in force of Clause 10 of the original agreement. The Mount Everest Agreement did not succeed in laying the parties' disputes to rest. Indeed, they seem to have got somewhat more complicated after that, and eventually, on October 3, 1941, the present respondents appointed an arbitrator pursuant to Clause 10 of the original agreement. On the 25th of that month the petitioner appointed his arbitrator. On November 22, a preliminary meeting took place before the arbitrators at which Mr. Dastur, the solicitor to the respondents, suggested that a formal submission should be signed by the parties. In the course of the next fortnight this document was signed by¹ both the parties. It recites in full Clause 10 of the original agreement and further that disputes and differences arose between the respondents and the petitioner "in respect of matters relating" to the said contract. As I have already said, I think that recital is quite accurate. It is necessary now to examine in a little detail what took place before the arbitrators in the course of the following months. Preliminary directions were given on November 22 and the next following meeting occurred on December 20, 1941, when proceedings were adjourned at the present petitioner's request to January 10, 1942. On that occasion the submission paper was put in and discussion took place as to the issues. The arbitrators, no doubt fired with a laudable desire of saving time, seem to have conceived the idea of framing issues before the pleadings. On January 14 there was further discussion about the issues and on the 17th of that month (on which date not only had no pleadings been delivered, but there was no direction as to pleadings as yet) a witness was called and some two hours were taken up in examining the witness. On February 7 particulars of the present respondents' claim were filed and the present petitioner was directed to file his reply. Another document or two were

produced and the proceedings were adjourned to the 11th. A reply and counter-claim was filed on that date and the solicitor to the present respondents took an objection to jurisdiction of the arbitrators to deal with part of the counterclaim. The following day the witness one Mr. Venkataramaya on behalf of the respondents continued his evidence and he apparently on that day gave evidence for an hour and forty minutes in the afternoon after which proceedings were adjourned again to February 24, 1942. On that day they were adjourned again at the present petitioner's request, to March 14, On March 14 sundry papers were put in and a little mild abuse was exchanged between the parties and the time occupied was from 11-30 a.m. to 1-5 in the afternoon. A very wise suggestion came from the arbitrators towards the end of this discussion, which consisted in their pointing out the obvious fact that time was getting on. I do not think that they merely suggested that the usual time for the midday meal was approaching ; they suggested that the time for making their award was running out and they suggested to the parties that an application to this Court to extend the time should be made. This was accordingly done, and a consent order extending the time was obtained, which order was made on June 26 and carried the time for making an award up to August 26. Fortified by this extended time the parties returned, to carry on the proceedings, to the arbitrators' room, and for the first time on July 11, 1942, the present learned Counsel for the petitioner was instructed, who promptly, when he came on the scene, took the second point that has been taken before me on the present application (which is to set aside the award). That point is this, namely, that the arbitrators had no jurisdiction on the ground that the questions between the parties arose not under the agreement which contained Clause 10, that is, the April agreement, but under the Mount Everest Agreement. For the reasons already given I think, with all due respect, that this point was not well founded. But assuming I am wrong about that, the respondents here contend, and I think rightly, that in view of all that had happened by that date, the point was taken too late and in fact the petitioner is estopped from setting it up. He had not taken this point in his reply, and though I appreciate that in considering the jurisdiction of arbitrators the same strictness ought not to be applied which would be applicable if it were a question of submission to the jurisdiction of a Court, yet much had happened by this time : pleadings had been exchanged, issues had been settled, quite a quantity of evidence had been adduced and documents produced and so on?all on, the assumption that the proceedings were before a competent tribunal, and I do not think it would have been just to the respondents if at that stage the arbitrators had allowed it to be contended or held that the whole of these proceedings were coram non judice. The matter has been considered in this Court in two judgments of my learned predecessor the first of which is Chetandas Daga Vs. Radhakisson Ramchandra, where Mr. Justice Blackwell says that (p. 1093):

In my judgment it is clear that if a party to a submission appears before the arbitrator and merely takes part in a preliminary discussion, he does not thereby

waive his right to object to the jurisdiction of the arbitrator before the arbitrator actually enters upon the consideration of the matters upon which he makes his award.

Applying that standard here, the arbitrators in this case had certainly entered upon the consideration of the matters on which they ultimately made their award before the objection to their jurisdiction was taken. The other decision of my learned predecessor is Rambaksh Lachhandas Vs. The Bombay Cotton Company, and, so far as material, is very much to the same effect. It does, however, make this much clear that if after objecting to the jurisdiction and such objection having been overruled, he proceeds with the case, under protest, to defend himself, he does not lose his right thereafter to say that the arbitrators acted without authority. Well, that I think deals with the second point that has been taken before me, namely that the arbitrators exceeded their jurisdiction. I do not think they did, and in my opinion the point was taken too late. It is unnecessary to follow in any detail the further proceedings on the arbitration. The present applicant seems to have eventually lost patience with it and he eventually instituted a suit or attempted to institute a suit in the Court of the Subordinate Judge at Chittoor in his own presidency. The plaint in that suit was lodged on or about September 15, 1942, but the case had a somewhat curious history. It (the plaint) was not immediately put on a file and; numbered. In the course of a week it was returned to the legal adviser of the plaintiff who appears in the Subordinate Judge's record under the somewhat algebraical symbol "M.S.S.R." (which manner of representing people is not uncommon in the presidency from which the present petitioner comes) for amendment. It was duly amended and re-presented. In its re-presented form it contained a Clause No. 120(a) in which the present petitioner then plaintiff strongly complained of the way the arbitration was going on, or, rather, was not going on, and expressly asked the Chittoor Court to take jurisdiction over the subject-matter of the suit superseding the arbitration. For the rest, the plaint did not deal with all the matters that were in dispute before the arbitrators : it is sufficient to say that in his plaint the plaintiff asked merely for an account of the goods which he had supplied to the present respondents, reserving his right to claim damages for non-acceptance of those which he had not supplied, which latter claim he was making before the arbitrators. In one sense, therefore, the plaint did not cover the whole of the ground covered by the arbitration. But in another sense it did, because it was sought by the plaintiff to have the arbitration itself superseded. The trouble which this plaint caused to the learned Subordinate Judge was mostly in connection with the question whether he had jurisdiction or not; at some stage, I do not quite know when, the plaint was put on file and numbered, but eventually after the lapse of a considerable time over a year a judgment was pronounced on that plaint not on its merits but on the ground of want of jurisdiction. It was not dismissed, but it was handed back to the plaintiff to be presented at a proper Court. Meanwhile, the present respondents had filed a petition in the Chittoor Court u/s 34 of the Indian Arbitration Act asking to have

the suit stayed. The learned Subordinate Judge took the same somewhat curious course of considering first whether he had jurisdiction to entertain the suit and not whether on the application of some of the defendants?for in addition to the present respondent company the petitioner had made several of its directors and arbitrators in person parties to the suit?he would stay the suit. The result was, when he reached the negative conclusion about the jurisdiction, that he had no option but to dismiss the present respondents' application because there was nothing left for him to stay. There was, therefore, no pronouncement at all on the merits either of the suit or of the petition as both of them were thrown back to the people who had started them. Well, that was what happened on December 13, 1943. Now since the respondents had notice of that suit there had been no meetings before the arbitrators. The only steps in the arbitration, if they can be called in the arbitration, which had been taken were some three or four further applications to this Court for extension of time. As soon as the present respondents knew of that suit, they drew the attention of this Court to the fact that it was pending, and, sitting as Miscellaneous Judge here I granted one of the extensions of time. I think it was on the very ground that the suit was pending and the arbitration could not therefore proceed further that I granted the extension of time but in that my recollection may be playing me false. The later extensions of time were not in a true sense of the word "consent" orders which the first had been, but the present petitioner had notice of each of the applications and did not attend. The Chittoor plaint having, as I said, been returned to the plaintiff on December 13 and the time for making an award having been extended up to March next, the present respondents and the arbitrators thought that they had a completely free hand and although the arbitrators must have almost forgotten each other, because they had never held a meeting from October 29, 1942, to December 13, 1943, they met again on January 8, 15, 17 and 18, 1944. Of these meetings, which were not attended by the present petitioner, the present petitioner had due notice, and it was no fault of the arbitrators or of the respondents that he was not present or represented. But he had on January 6, 1944, given to the arbitrator appointed by him notice that he was appealing from the judgment of the Chittoor Court, and one of the things I have got to decide is what, if any, effect that notice had. It was not literally accurate because he was not in the actual process of appeal, but what he actually meant, and it was perfectly true, was that he intended to appeal as soon as he could. He did not in fact get a copy of the judgment and of some other documents that were necessary to prepare his memorandum of appeal till some considerable time later and it was not in fact till March 7 that his appeal was actually presented. It has been suggested faintly by the present respondent that there was undue delay on his part, but I am not satisfied about that ; I think it must have taken some time to get the necessary copies even though he had employed all reasonable diligence. Meanwhile, on January 28, 1944, the arbitrators made an award against the petitioner which is the award which it is now sought to be set aside. That award was duly filed in this Court on February 12 and notice thereof was given to the petitioner on March 2?as it happens, five

days before he filed his appeal to the District Judge, Chittoor. I have already dealt with one ground on which it is sought to have the award set aside. The other ground, which is of more general importance, raises a question of law which I understand is not covered by any decided case so far Section 34 of the Indian Arbitration Act, 1940, provides as follows:

Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings, are pending to stay the proceedings ; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

That section is akin to the corresponding English section and in one form or another it was in existence a considerable time before the present Arbitration Act No. X of 1940. It will readily be seen that it creates an exception to the general law relating to procedure : viz. that it empowers the Court which has jurisdiction to decide a dispute to refuse to do so, where an arbitration is in existence, although for it to decline jurisdiction which it had would normally be as bad as to exercise jurisdiction which it had not. I thought it necessary to read it because the really material section, Section 35, is the corollary, or counterpart of that section. Section 35 is new and is clearly intended to modify the English common law rule in relation to the matters in question which had prevailed in this country before 1940. Sub-section (1) of Section 35 reads as follows:

No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted u/s 34, be invalid.

The second sub-section is immaterial for the present dispute and I need not trouble about it. It is noticeable that the legal proceedings which are liable to be stayed u/s 34 are proceedings "in respect of any matter agreed to be referred." But the legal proceedings which, if notice is given of them to the arbitrators or umpire, may render invalid subsequent proceedings in the arbitration must be legal proceedings "upon the whole of the subject-matter of the reference." It has been contended by Mr. Maneksha that the plaint in the Chittoor suit did not cover the whole of the subject-matter of the reference and clearly in my opinion, if it had not been for Clause 12(a) of that plaint, that contention would be well

founded. Whether it is brought within the mischief of Section 35 by reason of the inclusion of Clause 12(a) appears to me somewhat doubtful point. No doubt what the Legislature had in mind by "the subject matter of the reference" was the questions which arose on the pleadings, if any, in the reference or, at all events, the questions which the arbitrators were investigating. But it would be an absurdity if a legal proceeding which had for its object or one of its objects the ousting of the arbitrators from jurisdiction and the complete supersession of the arbitration as a whole could have been taken and yet the arbitration could go on merrily in spite of those proceedings even if no stay had been granted u/s 34 or otherwise. Whether the Legislature actually had in mind such a situation as that arising in this case I don't feel certain. Whether they intended to include such a claim as that set up by Clause 12(a) of the Chittoor plaint in the proceedings referred to in Section 35(1) or not, they have used language which in my opinion is grammatically wide enough to include such a claim and, as it produces a more sensible result than the other possible construction, I think I ought to come to the conclusion that the Chittoor proceedings while they lasted were proceedings upon the whole of the subject-matter of the reference. But now comes the point of difficulty. Nothing was done by the arbitrators which offended against the literal meaning of Section 35(1), that is to say they took no steps at all while the Chittoor suit was actually pending except to apply to this Court once or twice or more times for extension of time, and the highest point of Mr. Banaji's argument is that an application to this Court for an extension of time for making award is a proceeding "in a pending reference." within the meaning of Section 35, that therefore the extensions of time which this Court from time to time granted were all invalid by virtue of that section. If that is correct it means that at the time the arbitrators purported to make their award their time had never been extended and unless on an application made now (which has not yet been made) the Court were to extend time although it has elapsed (which, of course, it could do in a proper case) the whole of the proceedings which he seeks to impeach must fall to the ground. In my judgment, however, the act of applying to the Court for an extension of time to make an award is not what the Legislature contemplated and intended to include in the phrase "further proceedings in" a pending reference. It is true that the application would be entitled "In the matter of the Arbitration Act and In the matter of the reference?" but I think there is a distinction between doing something "in" something else and doing something "in the matter of" or "in relation" to something else. To take a simple example one might well see workmen engaged in making an excavation in relation to a house for the purpose of connecting up the drains of the house with the main sewer : yet they would not be conducting the excavation "in" the house. I think Mr. Maneksha's argument is well founded when he says that the arbitrators may become for the time being *functi officio*, or have their power suspended, by reason of litigation, but the Court which has jurisdiction to extend time never becomes *functus officio*; its functions it always has to perform in a proper case, and it has neither the right nor the power to lay them aside or to abdicate. Therefore merely by applying to Court for an extension of time the arbitrators or

the respondents were not offending against either the letter or the spirit of the Section 35. Now comes the question how long Section 35 continues in operation. The rule which existed before Section 35 came into force was that laid down in England by the Court of Appeal, reversing, a decision of Mr. Justice Scrutton, as he then was, in *Doleman & Sons v. Osset Corporation* [1912] 3 K.B. 257 and that was that the moment a party to an arbitration¹ started a suit touching the matter referred to the arbitrators, the arbitrators become as it was put in that case "functi officio" on the ground that there cannot be two tribunals concurrently exercising jurisdiction over the same dispute. It may be that the party commencing the suit does so in breach of his agreement to refer the dispute to arbitration, and that the other party might have damages out of him for that breach, but the Court would not specifically enforce that agreement by refusing to exercise its jurisdiction. Indeed I think that under the English common law it had no power to refuse to exercise jurisdiction. I am not sure of that. Therefore it was held that the domestic forum must give way to the public forum. That rule was adopted in this country both by the Calcutta and Lahore High Courts in *Ram Prosad Surajmull v. Mohan Lal Lachminarain* I.L.R (1920) Cal. 752 and *Ghanesham Dass-Gowderdan Dass v. Tek Chand* I.L.R (1935) Lah. 291 and it seems also to have been adopted in Madras in *Appavu v. Seenii* I.L.R (1917) Cal. 752. I have no doubt till the Legislature intervened, that it was good law in this country as it was in England. For some reason the Legislature decided to modify it rather considerably and the result is Section 35 which I have already read. The modifications seem to me to be these (1) that the rule no longer applies unless the legal proceedings are upon the whole of the subject-matter of the reference, (2) that the rule does not come into operation until notice has been given to the arbitrators or the umpire and (3) that it is only the further proceedings which, unless a stay has been granted u/s 34, will be invalid, the old rule having been that if there was anything left to arbitrate about after the legal proceedings were finished, the arbitration had to start de novo. Now, in the ordinary case which all decided cases so far have contemplated and which our Legislature contemplated when it introduced Section 35, by the time the public forum has disposed of the matter there is nothing left for the private forum to do ; the matters in dispute have been decided by a competent tribunal. But what is to happen where, as happened in this case, the public tribunal does not decide the matter or its merits but refuses to exercise jurisdiction, as it did here, on the ground it has not got jurisdiction? Clearly the arbitrators are not, I think, intended to sit for all time with their hands tied behind their backs. Mr. Banaji does not seriously contend that such a very extreme result follows, but what he stresses is this since, as everybody knows, ,a party has very often a right of appeal from the decision or judgment of a Court of first instance, and some times successive rights of appeal, and since for many purposes an appeal is considered only to be a continuation of the original proceedings, Section 35 continues in operation and the arbitrators are functi officio until either the last possible appeal in the legal proceedings has been disposed of, or until the last time for appeal has run out without an appeal being filed ; and he says that if this is not the

literal construction of the language of the section it is necessary to force that construction on it in order to achieve a sensible result. It is certainly a very forced construction because it means saying with one breath that Section 35 only applies where legal proceedings are pending but with the other that a pending proceeding includes a future and hypothetical proceeding which (if and when it is started) will be for many purposes a continuation of a proceeding which has finished. On the one hand in Section 10 of the CPC the word "suit" obviously includes an appeal and the word "proceedings" is a wider term than "suit." But still it is making the word "proceeding" swell to extraordinary dimensions if "pending proceedings" includes a hypothetical proceeding which may or may not come into existence, provided that it does in fact come into existence by the time the question arises. On the other hand, if one looks at another part of the Code, one cannot help feeling that by analogy Order XLI, Rule 5, is very helpful to the respondents. It provides that in general, subject to certain exceptions and the possibility of stay orders being made, an appeal shall not operate as a stay of proceedings under a decree or an order appealed from. Now the Legislature seems to have thought that a sensible result could be achieved although it allowed in the absence of an order to the contrary, an order under appeal to be executed. The remedy of the party who was appealing is to obtain a stay from a competent Court if he can get it, and Mr. Maneksha contends with very great force, I think, that, if the present petitioner did not want that to happen which has happened, he could have taken at least one of some three courses, viz. (1) commenced proceedings in this or some other competent Court for an injunction to restrain the arbitrators and the respondents from proceeding further with the arbitration pending his appeal, (2) applied to this Court under the Arbitration Act for a stay of proceedings in the arbitration, or (3) possibly, gone to the District Judge at Chittoor and asked for an injunction against the petitioners and the arbitrators, who as I have already indicated were parties to the Chittoor suit. He did not take any of these steps, and so Mr. Maneksha says, he must bear the consequences however unfortunate they may be for him. Another useful analogy in this connection, for as I said the matter is completely uncovered by any direct authority, would be found in the express provisions of law relating to divorce, which prohibit the parties to a successful divorce suit from remarrying pending the time of appeal. Applying by analogy Order XLI, Rule 5, the parties could remarry as soon as the decree or order of divorce was signed, drawn or otherwise perfected, running the risk (in an appropriate case) that if there was a successful appeal, they might find that they were both retrospectively bigamists. Those enactments are there, and presumably the Legislature would not have put them there if they were unnecessary. If Mr. Banaji's argument as to what constitutes a pending legal proceeding is right, they would be unnecessary because the divorce suit would not have been effectively disposed of until the expiry of the last possible period of appeal or the dismissal of the last possible appeal. I do not think it is necessary to get a sensible result to put such a wide construction on the section. I think that the position on the facts as they are today is simply this : There is what at the moment seems to be a valid award. It

may hereafter turn out that it should not have been made. That will depend first on what the result of the appeal in Chittoor District Court is, and if that appeal succeeds, I think it will further depend on the result of the hearing on the merits in the Chittoor Court. It is largely in view of that possibility that I do not wish to say anything about the merits of this case. I do not think I can set aside, as I am invited to, an award" which was made at a time when no actual legal proceedings were pending at all, merely on the ground that one of the arbitrators had notice that such proceedings were intended and that subsequently such proceedings were in fact commenced, though I should say in passing that I am disposed to think that notice to one of two joint arbitrators is, for the purposes of Section 35, notice to both?in the same way that notice to one partner of a firm is notice to all the partners. The result therefore is that I cannot make the order which I am asked to make. The question arises whether I ought to dismiss this application or whether I should adjourn it for an indefinite period to see what happens in the Chittoor appeal. I thought at one time the proper course would be to adjourn it. But I think I am right in saying that if an application is made to this Court for a decree on the award even if the formalities prescribed by the rules are in order, the Court would not be bound to make a decree on the award. Unless I am much mistaken, it would be entitled to, and I am inclined to think it would, adjourn the application for a decree until it knows whether the award really is a valid one or not. Where, as here, the proceedings are pending as a result of which the award may turn out to be invalid, I think it would be just not to make a decree immediately. In these circumstances, the proper course would be for me to dismiss the petition, with costs.