

(1977) 02 AHC CK 0047
In the Allahabad High Court
Case No : F.A.F.O. No. 159 of 1974

J.K. Cotton Spinning and Weaving Mills Co. Ltd.	APPELLANT
Vs	
State of U.P. and Another	RESPONDENT

Date of Decision : 23-02-1977

Acts Referred:

Arbitration Act, 1940 — Section 20, 5, 9
Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 — Section 3, 3(1), 3(4), 3(5)

Citation : (1977) AWC 294

Hon'ble Judges : R.B. Misra, J;J.M.L. Sinha, J

Bench : Division Bench

Advocate : V.B. Singh, for the Appellant;

Final Decision : Allowed

Judgement

J.M.L. Sinha, J.—This appeal arises out of the order dated 7th February, 1974 passed by the First Civil Judge, Kanpur, on an application under Sections 5, 9 and 20 of the Arbitration Act.

2. The facts of the case, shorn of unnecessary details, can briefly be stated as follows:

On 22nd of March, 1956, M/s. J.K. Cotton Spinning and Weaving Mills, Kanpur, hereinafter to be called "the Appellant", and the Government of Uttar Pradesh entered into an agreement under which the State of Uttar Pradesh, hereinafter to be called as "Respondent No. 1", agreed to advance an amount of Rs. 90,00,000.00 for setting up a rayon factory in the State of Uttar Pradesh on the terms and conditions contained in the agreement. The agreement provided for the repayment of the principal amount of Rs. 90,00,000.00 with interest at the rate of 5 per cent per annum by 1st of September, 1967 in six monthly installments of principal and interest. The agreement further provided that in the event of the principal or interest, or both, not being paid on the due date, interest shall be charged at the rate of 6 per cent per annum. Later on the rate

of interest was slightly enhanced. As required by the agreement, the Appellant mortgaged land, building, machinery and plant as security for the loan and a mortgage deed dated 21st March, 1957 was executed in connection therewith. Since defaults were committed in paying the principal and the interest on the due dates, a proclamation for sale of the mortgaged property, as stipulated in the mortgage-deed, was issued on 1st of November, 1972. The Appellant then filed a writ petition in this Court and obtained an order staying the sale of the mortgaged property. The original agreement dated 22nd March, 1956, executed between the parties, carried an arbitration clause which was as follows:

That if at any time any dispute, doubt or question was raised between the company and the State Government or any person claiming under them touching or arising out or in respect of this deed or subject matter thereof, the same shall be referred to the two arbitrators, one to be appointed by the each party to the agreement and in case of difference of opinion between them to the Secretary to the Government of Uttar Pradesh Judicial Department and the decision of the Arbitrators as the case may be, shall be final and binding on the parties.

The Appellant accordingly served a notice dated 22nd September, 1972 on the State of Uttar Pradesh detailing the points of difference between them and appointing Sri S.S. Agrawal, Respondent No. 2, as arbitrator on their behalf for the adjudication of the dispute, and further calling upon Respondent No. 1 to appoint an arbitrator within fifteen days of the receipt of the said notice. Ultimately, Respondent No. 1 appointed Sri B.R.P. Singhal as the arbitrator on their behalf. Respondent No. 1, however, at the same time said that the arbitration shall be confined to the matters enumerated in Sub-clauses (a), (b), (c) and (d) of the letter dated 22nd of September, 1972 sent by the Appellant. In regard to the other disputes, Respondent No. 1 maintained that it could not be legally referred to arbitration. Before the two arbitrators viz Respondent No. 2 and Sri B.R.P. Singhal could enter upon a reference, the Appellant sent a letter dated 13th October, 1972 to the Respondent No. 1 taking a plea that the appointment of Sri B.R.P. Singhal being conditional was not acceptable to him and further that the appointment made by Respondent No. 1 not being a valid appointment, the arbitrator appointed by the Appellant became the sole arbitrator entitled to proceed with the arbitration. Respondent No. 2 then sent a letter to the Appellant intimating that he had fixed 9th of November, 1972 for preliminary hearing. Respondent No. 1 then filed an application under Sections 5, 9 and 20 of the Indian Arbitration Act in the court of Civil Judge, Kanpur, which has given rise to this appeal. The reliefs prayed for in the application were:

- (a) that the appointment of Respondent No. 2 as sole arbitrator be set aside or, in the alternative, his authority to act as sole arbitrator be revoked;
- (b) The agreement be directed to be filed in court and orders of reference be made in terms of Section 20 of the Arbitration Act;
- (c) costs of the proceedings be awarded to the Respondent No. 1;

(d) any other relief to which the Respondent No. 1 be entitled be passed against the Appellant and Respondent No. 2. The aforesaid application was opposed by the Appellant on several grounds which it is not necessary to mention in any detail.

3. The trial court on a consideration of the contentions raised on either side and the material on record, allowed the application and referred the dispute between the parties for adjudication to Sri B.R.P. Singhal and Respondent No. 2 as the arbitrators. The trial court also revoked the authority of Respondent No. 2 as the sole arbitrator. It is against that order that the present appeal is directed.

4. When the arguments in the appeal commenced, the learned Chief Standing Counsel, by way of preliminary objection, invited our attention to U.P. Act No. 17 of 1975 which made certain amendments in U.P. Public Moneys (Recovery of Dues) Act, 1972, hereinafter to be called as "1972 Act." These amendments have been given retrospective effect. This Act, inter alia, added Sub-sections (4) and (5) to Section 3 of the Principal Act. Sub-section (4), which is relevant for our purpose, reads as follows:

(4). In the case of any agreement referred to in Sub-section (1) between any person referred to in that sub-section and the State Government or the Corporation, no arbitration proceedings shall lie at the instance of either party either for recovery of any sum claimed to be due under the said sub-section or for disputing the correctness of such claim.

The learned Chief Standing Counsel urged that, because of the aforesaid amendment in 1972 Act, no arbitration proceedings could lie at the instance of the Appellant and, consequently, the Respondent No. 2 could not proceed with the arbitration. It was stressed by the learned Chief Standing Counsel that, in view of the aforesaid position, the appeal is obviously devoid of substance and has to be dismissed.

5. The question that, however, crops up for consideration, in the context of the aforesaid amendment of the 1972 Act, is whether the application moved by the Respondent No. 1 was maintainable. If the application was maintainable, we can certainly examine whether the arbitration proceedings, against which that application was directed, could survive the amendment. In case, however, the application itself could not lie, it will not be open to us to adjudicate upon the arbitration proceedings preceding that application.

6. We have already quoted earlier the reliefs that were claimed in the application out of which the present appeal has arisen. A perusal thereof would show that the purpose of the application was to get the dispute referred to two arbitrators in place of the sole arbitrator appointed by the Appellant. In view, however, of the clear provision contained in Sub-section (4) of Section 3 of the Act, no arbitration proceeding can lie at the instance of either party for recovery of any sum claimed to be due under the agreement or for disputing the correctness of the claim. Since the application moved by Respondent No. 1 was for the dispute,

regarding the amount due against the Appellant, being referred to arbitration, it was clearly hit by that provision and should be dismissed as not maintainable. The amendment pointed out by the learned Chief Standing Counsel therefore recoils against him.

7. Confronted with this situation the learned Chief Standing Counsel urged that the application moved on behalf of Respondent No. 1 was not only an application u/s 20 of the arbitration Act, but as well u/s 5 of that Act, which provides for the revocation of the authority of the arbitrator appointed by any party. Learned Counsel urged that this Court can in the present appeal revoke the authority of the arbitrator appointed by the Appellant, namely, Sri S.S. Agarwal, Respondent No. 2. We have given our careful thought to this contention, but we find ourselves unable to accept the same. To our mind Section 5 applies when the agreement for arbitration subsists and the authority of the arbitrator appointed by any party is sought to be revoked by that party for one reason or the other. In the instant case, the effect of Sub-section (4) of Section 3 of the Act is that no reference can be made to the arbitrator. That apart, we have to read the application submitted by Respondent No. 1 as a whole in order to find the purpose thereof. As already stated earlier, the purpose of the application was not merely to get the authority of Respondent No. 2 revoked, but also for the dispute being referred to the arbitration of two persons. That obviously was not possible in view of the amendment introduced in the 1972 Act.

8. Reference was also made to the proviso appended to Sub-section (4) of Section 3. That proviso, however, only states that, whenever proceedings are taken against any person for the recovery of any sum, he may pay the amount claimed under protest to the officer taking such proceedings; that upon such payment the proceedings shall be stated; and that the person against whom such proceedings were taken can thereafter make a reference under, or otherwise enforce the arbitration agreement in respect of the amount so paid. It is no body's case that any amount has been paid by the Appellant. That apart, it is worthy of notice that, even if the amounts were paid, it was the Appellant who could enforce the agreement for arbitration. The proviso does not confer such a right on Respondent No. 1.

9. We are, therefore, unhesitatingly of the view that the application moved by the Respondent No. 1 in the court below (out of which this appeal has arisen) was not maintainable because of the amendment introduced in Section 3 of the 1972 Act and in that view of the matter the appeal should succeed and the application that was moved by Respondent No. 1 should stand dismissed.

10. Learned Counsel for the Appellant had at one stage contended about the applicability and validity of the amending Act. In view, however, of the preliminary point raised by the learned Chief Standing Counsel, the learned Counsel said that it was not necessary for him to press those points in this appeal. We accordingly refrain from making any comments on those contentions.

11. The learned Chief Standing Counsel expressed an apprehension that, in the event of this appeal being decided against the State, the rights of the State to prevent arbitration by Respondent No. 2 may be prejudiced. The apprehension is unfounded. If the Respondent No. 1 has any remedy available to him for getting the aforesaid arbitration quashed either under the Arbitration Act or under some other provision of law, we do not see how the order proposed to be passed by us in the present appeal can stand in the way of Respondent No. 1 doing so.

12. In the result, therefore, this appeal is allowed. The judgment and order dated 7-2-1974 passed by the First Civil Judge, Kanpur, are hereby set aside and the application under Sections 5, 9 and 20 of the Arbitration Act moved by Respondent No. 1 stands dismissed.

13. In view of the particular circumstances of the case, no order is made as to costs.