(2003) 12 AHC CK 0175

In the Allahabad High Court

Case No : C.M.W.P. No. 8380 of 1981

Jupiter Chit and Fund (P.) Ltd. APPELLANT

Vs

IInd Addl. Civil Judge and Others RESPONDENT

Date of Decision : 19-12-2003

Acts Referred:

Arbitration Act, 1940 — Section 20, 37(3), 37(5)
Limitation Act, 1963 — Article 137

Citation : (2005) 3 AWC 2090 : (2005) 2 AWC 2090

Hon'ble Judges : Janardan Sahai, J

Bench : Single Bench

Advocate : Prabodh Gaur, J, for the Appellant; S.M. Dayal, S.C., for the Respondent

Final Decision : Dismissed

Judgement

Janardan Sahai, J.—The petitioner is a company engaged in the business of Chit Fund. The petitioner''s case is that respondent No. 3 C.P.L. Rai Ramanand was a subscriber of the Chit Fund Scheme of the petitioner and on 8.6.1965 obtained the Chit amount and entered into another agreement containing an arbitration clause. According to the petitioner the subscriber respondent No. 3 stopped paying the monthly instalment and a dispute having arisen a reference was made by the petitioner, to a named arbitrator on 25.10.1965. The arbitrator gave his award on 28.12.1965. The award was set aside by the Court on 9.8.1974 on the ground that it was given on a unilateral reference made by the petitioner. The petitioner then invoked provisions of Section 20 of the Arbitration Act, 1940 by filing an applicated dated 27.9.1974, seeking intervention of the Court. The Munsif, Kanpur dismissed the application u/s 20 by his order dated 22.8.1977 on the ground that it was filed beyond the period of limitation. The appeal against the order was dismissed by order dated 10.12.1980 passed by the II Additional Civil Judge, Kanpur. The courts below have held that Article 137 of the Limitation Act, 1963 is applicable to a proceeding u/s 20 of the Arbitration Act, Article 137 is a residual article which provides a period of limitation of three years from the date the right to apply accrues. It was found that the right to apply had accrued when the dispute had arisen and when the reference was made to the named Arbitrator. It was held that the petitioner was not entitled to exclusion of any time u/s 37(5) of the Arbitration Act whereunder the time taken between the commencement of an arbitration proceeding and the date of setting aside of the award is excluded in computing the time prescribed by the Limitation Act. The commencement of the proceedings has been defined u/s 37(3) of the Arbitration Act as the date when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated. The finding of the court below is that the petitioner having not given any notice to the other parties and having made an unilateral reference, there was no commencement of the arbitration proceeding and as such Section 37(5) of the Arbitration Act was inapplicable.

2. I have heard Shri Prabodh Gaur, learned counsel for the petitioner.

3. Two submissions were made by Shri Prabodh Gaur. First that the right to apply u/s 20 of the Arbitration Act accrued only after the award was set aside by the Court and in case the date of setting aside of the award is treated to be the starting point of limitation, the application was filed within time. He also submitted that the petitioner was entitled to the exclusion of time u/s 37(5) of the Arbitration Act.

4. The first point may be taken first. The contention is that the petitioner was pursuing the remedy of resolving the dispute through arbitration provided under the contract and it was only when the award given by the Arbitrator was set aside that cause of action to file the application u/s 20 of the Arbitration Act arose. Reliance is placed upon three decisions. In Civil Revision No. 1025 of 1978, Jupiter Chit Fund (P.) Ltd. v. Shri Shitala Charan Srivastava and Ors., decided on 24.7.1979, the facts were that reference to the named arbitrator was made in July, 1969 and the award was made on 21.11.1969 and was set aside on 17.8.1972. The application u/s 20 of the Arbitration Act was filed on 30.9.1972. It was held that the previous arbitration proceeding became infructuous on 17.8.1972 when the award was set aside and treating that date to be the starting point of limitation, it was held that the application was well within time. In taking this view the Court relied upon the decision in F.A.F.O. No. 338 of 1975, Nagar Mahapalika, Kanpur v. Delip Singh Vaish, decided on 5.5.1977 and observed that the Division Bench had held that in such circumstances the right to apply accrues when the previous proceedings become infructuous. It is not clear from the judgment in Jupitar Chit Fund (P.) Ltd. v. Shri Shitala Charan Srivastava and Ors. (supra) on what ground the award was set aside.

5. In Nagar Mahapalika, Kanpur v. Delip Singh Vaish, the facts were that disputes arose between the respondent Delip Singh, the contractor and the Nagar Mahapalika over payment for certain work done whereupon the contractor

requested the defendant Nagar Mahapalika to agree in the appointment of an arbitrator but the Nagar Mahapalika did not agree. The respondent contractor then moved the Upper Indian Chamber of Commerce for appointment of an arbitrator-a provision contained in the contract itself and an arbitrator was indeed appointed by the Chamber of Commerce but that arbitrator refused to proceed with the arbitration in view of objection by the Nagar Mahapalika that the arbitrator had given an award in an identical case between the parties. It was then that the respondent contractor invoked the provisions of Section 20 of the Arbitration Act. It was held on these facts that the cause of action for filing the petition u/s 20 of the Arbitration Act arose upon the refusal of the arbitrator to proceed with the reference. The Division Bench held that the plaintiff was pursuing a remedy under the contract and it was only when that remedy had been rendered infructuous that the cause of action for recourse to proceeding under the Arbitration Act arose. In the present case no doubt the petitioner had made a reference but it was found that the reference was unilateral and no notice was given by the petitioner to the respondent-the effect being that although a contractual remedy was purported to have been followed but the procedure for making the reference for availing such a contractual remedy was not followed. In Delip Singh'' (supra) the contract itself provided that in case of no concurrence on the appointment of an arbitrator between the parties, the Upper India Chamber of Commerce could be moved for appointment of an Arbitrator. The right to apply u/s 20 of the Arbitration Act arises when difference has arisen between the parties to an arbitration agreement. If Article 137 of the Limitation Act is applicable to proceedings u/s 20 of the Act as now appears to be the position after the decision of the Apex Court in The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, , the limitation for filing an application u/s 20 would start running from the date the difference has arisen between the parties in respect of the subject of the arbitration agreement. The distinct feature in Delip Singh (supra) is that the contract itself provided that even after differences had arisen and parties had failed to concur in the appointment of an arbitrator, a party could move the Upper India Chamber of Commerce for appointing an arbitrator and it was not necessary therefore for the party to apply either under Chapter II of the Arbitration Act or u/s 20 of the Arbitration Act and it is only when the contractual remedy had become infructuous that the cause of action to apply u/s 20 of the Act arose. In the present case it is not contended that there was any term in the contract enabling a party to resort to any remedy after the parties had failed to concur in the appointment of an arbitrator like approaching the Chamber of Commerce before applying under Chapter II or u/s 20 of the Arbitration Act. The contract did not provide for any unilateral reference and the award on such a reference was therefore set aside. By making a unilateral reference which is what the petitioner did he was not pursuing any remedy in accordance with the contract. The result is that the limitation would start running from the date the difference had arisen which in any case would atleast be the date when the reference was made to the arbitrator. The judgment in Jupitar Chit Fund v. Sheetla Charan Srivastava, does not indicate the ground on which the award was set aside. It can therefore not be said whether in that case the petitioner had been pursuing the arbitration proceedings by a reference in the manner allowed by the contract.

6. Section 37(5) of the Arbitration Act provides for exclusion for computation of the period of limitation the time spent after notice is given to the other party to refer the dispute to the arbitrator up-to-date when the award is set aside. The petitioner undisputedly did not give any such notice and made an unilateral reference and as such there was no commencement of the arbitration proceeding within the meaning of Section 37(3) of the Arbitration Act. The petitioner as such was not entitled to exclusion of the period spent from the commencement to the date when the award was set aside. The decision in Pandit Daya Shanker v. Sheo Ram 1956 ALJ 40, in which there were similar facts and a similar view was taken therefore applies and the courts below have rightly held that the application was barred by limitation.

7. The other case relied upon by Shri Pramodh Gaur is Civil Revision No. 1285 of 1977, Jupiter Chit Fund (P) Ltd. v. Shri Tek Singh and Ors., decided on 5.5.1981. This case has no application to the point in issue. The point decided there was about the maintainability of an application u/s 20 of the Arbitration Act and not that of limitation.

8. In the result, the writ petition fails and is accordingly dismissed.

