

(2001) 01 CAL CK 0003

In the Calcutta High Court

Case No : C.S. No. 242 of 1993 and G.A. No. 2722 of 2000

Maheswari Steel Pvt. Ltd.

APPELLANT

Vs

Aravadi Leasing Ltd.

RESPONDENT

Date of Decision : 24-01-2001

Acts Referred:

Arbitration Act, 1940 — Section 17, 20, 21, 23, 25
Arbitration and Conciliation Act, 1996 — Section 8, 8(3), 85, 85(2)
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2002) 1 ILR (Cal) 199

Hon'ble Judges : Dilip Kumar Seth, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Dilip Kumar Seth, J.—In this case a very interesting question has since arisen. A suit was filed before this Court for declaring that a particular agreement was a financing agreement and praying for certain other reliefs. Admittedly the said agreement contained an arbitration clause. An application" u/s 34 of the Arbitration Act, 1940 was filed on behalf of the Defendant. The said application was filed on August 4, 1993. In the meantime the Arbitration & Conciliation Act, 1996 has since been enacted. "The said Act came into force with effect from January 25, 1996. After the said Act come into force a reference was made to arbitration by the Defendant u/s 8 of the 1996 Act. the learned Single Judge in an order dated March 11, 1997 had held that the reference u/s 8 of the 1996 Act was not maintainable and that by reason of coming" into operation of the 1996 Act, the application u/s 34 of the 1940 Act became infructuous. An appeal having been preferred, the appeal court by an order dated December 1, 1999 was unable to agree with the view taken by the learned Single Judge that the application u/s 34 of the" Arbitration Act, 1940 had been rendered infructuous. However, the Appeal Court had directed the Trial Judge to hear out the application u/s 34 of the 1940 Act on merits and in accordance with law and until disposal thereof the arbitration proceedings commenced by the Defendant shall

remain stayed. This is how this matter has come before this Court.

2. Mr. Sarkar, the Learned Counsel for the Defendant Applicant, contends that after there is an order of remand and a Court exercises its jurisdiction after remand, the jurisdiction is circumscribed within the scope and ambit of the order of remand. In support of his contention he had relied upon the case of Konappa Mudaliar Vs. Kusalaru alias Munuswami Pillai and Others, .

3. This proposition has, .however, not been disputed by Mr. Roy, appearing for the Plaintiff Respondent. It is an accepted proposition of law that whenever a matter is remanded the Court has to decide such matter on remand within the scope and ambit of the remand order. A question decided in Appeal, while remanding the matter adjudicating the respective rights, becomes conclusive between the parties and cannot be reopened on remand unless the remand is an open one and the. point remains to be agitated on remand. Thus, this proposition is not in dispute. Therefore, this case has to be decided within the scope and ambit of the order of remand..

4. Let us now examine as to how far the question that has been raised with regard to the maintainability of the application u/s 34 of the 1940 Act could be sustained as raised by Mr. Roy. In order to go into the said question it would be necessary to refer to certain more facts as well as the submissions made by the respective Counsel for the respective, parties.

5. Admittedly during the pendency of the application u/s 34 of the Arbitration Act, but after January 25, 1996 an arbitral reference was made on behalf of the Defendant Applicant purported to be one u/s 8 of the 1996 Act. Mr. Roy had contended that the Applicant himself having resorted to Section 8 of the 1996 Act the Applicant cannot approbate and reprobate on the same breath. He had also relied on Section 85 of the 1996 Act in order to contend that" after the 1996 Act "became operative it is only the 1996 Act under which an arbitral proceedings commenced after January 25,1996 would be governed and not by the 1940 Act. According to him, an application u/s 34 is not an arbitral proceeding. It is only a proceeding for stay of a suit: Therefore, no arbitral proceeding is pending on the date of commencement of the 1996 Act and the arbitral proceeding having been sought to be commenced after January 25. 1996 such proceeding is to be governed by the 19.96 Act and not by 1940 Act. Even if, assuring but not admitting, such proceeding, is commenced before the 1996 Act came, into operation in that event by agreement of parties the 1996 Act may be attracted, otherwise it would be governed by the 1940 Act. He has sought to support this question relying on a decision by the Bombay High Court in The Bombay Gas Co. Ltd. Vs. Parmeshwar Mittal and others, , as well as in the case of K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another, and Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd., . Relying on these decisions he points out that the. question can still, be gone into despite the Appeal Court's decision having regard to the. phrase used in the order of Appeal Court "and in accordance with law". Therefore, the

order of remand is an open remand for deciding the application under, Section 34 in accordance with law.

6. Mr. Sarkar, however, contends that in view of the Madras decision cited by him the Appeal Court's judgment cannot be read otherwise than what is decided therein. The phrase "in accordance with law." referred to therein relates to the disposal of the application u/s 34 according to law. It does not relate to the question of maintainability. The question of maintainability having since been upheld the same is binding between the parties, though, the Supreme Court decision may be otherwise. So long the said order remains the parties are bound by it. Therefore, this Court cannot go into the question of maintainability of the application since it has been already held by the Appeal Court that the application u/s 34, was not rendered infructuous-.

7. He also attempts to distinguish on the decisions cited by Mr. Roy and points out that the Bombay decision had in effect sought to distinguish its own earlier decision as well as that of this High Court which was then unreported but since has been reported in 1996 (2) CHN 1997. When there are two decisions of two different High Courts the one of the same High Court by a Division Bench is binding on the learned Single Judge. He also sought to distinguish the decision in Thyssen Stahlunion GmbH (Supra) on the ground that the phrase in relation to arbitral proceeding used in Section 85 includes a proceeding u/s 34 of the 1940 Act. According to him under 1940 Act pending an application u/s 34 it was not open to make a reference until the suit is stayed. Therefore, he could not have made the application until the 1996 Act had come into force and as and when the 1936 Act had come into force u/s 8 a reference was so made. Therefore, even if the reference was made u/s 8 it should include a proceeding u/s 34 of the said Act. He had also sought to make the distinction by relying upon various provisions of the Act as well as some other decisions to which reference would be made at appropriate stage.

I have heard both the Counsel at length.

8. It appears that the Appeal Court at one place had held that the application u/s 34 of the 1940 Act was not rendered infructuous.-Then while ordering remand-the Appeal Court had directed the Trial Judge to dispose of the application u/s 34 of the 1940 Act on merits and in accordance with law. Since it is already held that the application u/s 34 has not become infructuous, read with the direction following the. phrase "in accordance with law" would definitely exclude the question of maintainability of the application u/s 34 of the Arbitration Act 1940 on the principle of the jurisdiction of a Court trying a matter on remand. The Court cannot go beyond the scope of remand.

Therefore, the question with regard to the maintainability cannot to be gone into.

9. At the same time it has to be examined as to what effect could be given to an application u/s 34 of the Act. But before adverting to the said question, I may refer to one of most pertinent and important argument of Mr. Roy, namely that in

the affidavit-in-reply as well as in the application a statement has been made by the Applicant that the matter involved in the arbitration and the suit are not the same. Reference may be made to paragraph 15 of the affidavit affirmed by one Jagadish Chandra Sureka in January 1997 in G.A. No. 4084 of 1993 which is Annexure "A" to the affidavit of Biswanath Adhikari affirmed on December 14, 1999. If this statement is accepted in that event there is no scope for praying for stay of the suit.

If the questions are altogether different, then Section 34 can not be attracted. It also so appears from sub-para. 2(b) of the said Affidavit.

10. Thus, it is very difficult to accept a proposition for stay of the suit u/s 34 of the said Act. These are all matters on record. Therefore, on the basis of such statement, it is very difficult on the part of the Applicant to maintain the application u/s 34 of the Arbitration Act.

11. So far as Section 8 of the 1996 Act is concerned, it provides as follows:

8. Power to refer parties to arbitration where there is an arbitration agreements - (T) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. (2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. (3) Notwithstanding that an application has been made under Sub-section (1) -and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

12. The said provision provides that a judicial authority before whom an action is brought in a matter subject to an arbitration agreement and whenever a party so applies before submitting his statement on the substance of the dispute, such judicial authority shall refer the parties to arbitration. Sub-section (3) prescribes that despite pendency of an application under sub section (1) an arbitration may be commenced or continued and an award may be made. Thus, so far as the finding of the Learned Single Judge that the commencement of the arbitral proceedings by the Applicant was not in accordance with law and so invalid, was not dealt with by the Appeal Court. But so far as the question as to whether such a proceeding could be referred to or not during the pendency of an application under s, 34 of the 1940 Act is a question to be looked into.

13. Admittedly, in the present case, no application under Sub-section (1) of Section 8 had been made. It was contended on behalf of the Applicant that Sub-section (3) is independent of Sub-section (1). Therefore, even without making an application under Sub-section (1), a reference can be made. Sub-section (1) requires the Court to make reference. Whereas Sub-section (3) prescribes that even during pendency of an application under Sub-section (1), a reference can be made under Sub-section (3). Therefore, the question having been referred on

remand, this question may be gone into.

14. A plain reading of Section 8 shows that arbitration can be commenced without the intervention of the Court even when a suit is pending covering the subject matter of the arbitration before a Court even without making any application under Sub-section (1). By reason of Section 8, sub-, s. (3) there is no bar in proceeding with the arbitral proceedings. Therefore, if an arbitral proceeding is commenced, the same cannot remain stayed. However, the Appeal Court having directed an order of stay of the arbitral proceeding till the disposal of this application, therefore the arbitral proceeding shall stand revived after this application is disposed of.

15. Section 85 provides for repeal and saving, which runs as follows:

85. Repeal and saving.-(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal, -

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.

16. The said provisions provides that notwithstanding repeal of the 1940 Act, an arbitral proceeding, commenced before the Act came into force, may be governed by the old Act. In case the parties agree to, the provisions of the new Act, may apply, in such cases. But in relation to arbitral proceedings which is commenced on or after the 1996 Act has come into force, it is only the provisions of 1996 Act that will apply. Thus, Clause (a)"of Sub-section (2) of Section 85 has made a distinction. In case the arbitral proceeding is commenced after the 1996 Act has come into force, in that event it would be governed by the 1996 Act. But if it is commenced before the 1996 Act came into operation, in that event it would be governed by the 1940 Act unless agreed by the parties that provisions of 1996 Act would be applicable.

17. This question had come up before the Apex Court in Thyssen Stahlunion Gmbh v. Steel Authority of India Ltd. (Supra). In order to appreciate the said decision, it would be wise to refer to paras 4 and 22 of the said decision which runs as follows:

4. Disputes and differences having arisen, the arbitration proceedings commenced on 14.9.1995 under the old Act. On this date request for arbitration was made to ICC under the arbitration clause in the contract. Mr. Cecil Abraham

of the Malaysian Bar was appointed sole arbitrator on 15.11.1995. Terms of reference in the arbitration were finalised on 13.5.1996. Hearing before the sole arbitrator took place from 7.1.1997 till 28.1.1997. Award was given on 24.9.1997. By this time on 25.1.1996 the new Act had come into force. On 13.10.1997 Thyssen filed a petition in the Delhi High Court under Sections 14 and 17 of the old Act for making the award rule of the court (Arbitration Suit No. 352A of 1997). While these proceedings were pending in the High Court, Thyssen, on 12.2.1998 filed an application u/s 151 of the CPC for stay of the proceedings. On the following day Thyssen filed an application in the High Court for execution of the award under the new Act (Execution Petition No. 47 of 1998). The ground taken was that the arbitration proceedings had been terminated with the making of the award on 24.9.1997 and, therefore, the new Act was applicable for enforcement of the award. The Respondent Steel Authority of India Ltd. (SAIL) opposed the maintainability of the execution petition. SAIL also filed objections to the award on various grounds under the old Act. The question which arose for consideration is:

Whether the award would be governed by the new Act for its enforcement or whether provisions of the old Act would apply?

22. For the reasons to follow, we hold:

1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996);
2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree u/s 17 thereof and also appeal arising thereunder;
3. In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act;
4. The new Act would be applicable in relation to arbitral proceeding which commenced on or after the new Act comes into force ;
5. Once the arbitral proceedings have commenced, it cannot be stated that the right to be governed by the old Act for enforcement of the award was an inchoate right. It was certainly a right accrued. It is not imperative that for right to accrue to have the award enforced under the old Act some legal proceedings for its enforcement must be pending under that Act at the time the new Act came into force;
6. If a narrow meaning of the phrase "in relation to arbitral proceedings" is to

accepted, it is likely to create a great deal of confusion with regard, to the matters where award is made under the old Act. Provisions for the conduct of arbitral proceedings are vastly different in both the old and the new Act. Challenge of award can be with reference to the conduct of arbitral proceedings. An interpretation which leads to unjust and inconvenient results cannot be accepted ;

7. A foreign award given after the commencement of the new Act can be enforced only under the new Act. There is no vested right to have the foreign award enforced under the Foreign Awards Act (Foreign Awards (Recognition and Enforcement) Act, 1961).

18. In the said case, a request was made for reference before the 1996 Act had come into force but here the arbitration was admittedly commenced on August 11, 1996, after the 1996 Act had come into force. But, however, the proceedings under s, 34 was then pending. Therefore, whether the suit can be stayed under the 1940 Act since been repealed, by reason of the pendency of the application u/s 34 of the said Act and can be gone into when the application u/s 34 is to be decided in accordance with law. Even if the application is maintainable still then this question can be gone into by the Court even within the scope and ambit of the remand, having regard to the settled principle of law. The appeal Court's decision does not bind this Court to the extent as to the merit with regard to the question of stay of the suit on the basis of an application u/s 34 of the 1940 Act.

19. A plain reading of para. 22 of the said decision of the Apex Court shows that the phrase "in relation to arbitral proceedings" " cannot be given a narrow meaning. It will not only mean pendency of arbitral proceedings before the Court but it would also cover proceedings pending before the Court and any proceedings which are required to be taken under the 1940 Act for the award becoming a decree u/s 17 thereof and also appeal arising thereunder. This expression is unambiguous and clear. It explains the scope of the phrase in relation to arbitral proceedings. The arbitral proceedings not only include the arbitral proceeding pending before the arbitrator but also proceedings pending before the Court that are required to be taken under the old Act for the award becoming a decree u/s 17 thereof and also appeals arising thereunder. Thus, it relates to a stage for making an award a decree of the Court. A plain reading of the said expression does not purport to include a proceeding pending before a Court in relation to an application u/s 34 of the old Act. It is also laid down that an arbitral proceeding which commences after the new Act comes into force, it is only the new Act that will apply. It also proceeds to explain that once the arbitral proceeding is commenced, the right to enforce such right passed in such arbitration would definitely be governed by the 1940 Act. But in a case when arbitral proceeding has not commenced, in that event, having regard to the said decision, it is very difficult to attract the application of the 1940 Act after it is repealed. Since the provision had made it clear that even if the agreement is there but no arbitral proceeding has been commenced in respect of an arbitral

agreement entered into before the Act of 1996 has come into force, the right of the parties is not precluded. It can still be commenced and governed under the 1996 Act. It is only a procedural right and not a substantive right. The procedures are hand-maids of justice. No one can claim any right with regard to procedure unless the statute saves such procedure while repealing an old enactment. While repealing the old Act i.e. 1940 Act, the legislature thought it wise not to save anything else other than what has been provided therein, since being explained by the Apex Court which confined the meaning of the phrase to the extent as laid down therein.

20. Admittedly, the Defendant has made a reference u/s 8 of the 1996 Act. Thus, the arbitration as has commenced on the reference made u/s 8 of the said Act. Thus the arbitral proceeding was commenced after the 1996 Act had come into force. By reason of Clause (a) of Sub-Section 2 of Section 85 the arbitral proceeding having been commenced after the Act had come into force it is the provisions of the 1996 Act which will apply. The provisions of the 1940 Act cannot be applied. Once the Defendant had opted to exercise his right under the 1996 Act he is estopped from claiming to fall back on the 1940 Act so long the Plaintiff does not oppose and agrees thereto, even if the arbitral proceeding is commenced before the 1996 Act had come into force. Even if it is claimed that the proceeding would be governed by the 1940 Act on account of its commencement before the 1996 Act had come into force by reason of Clause (a) of Sub-Section 2 of Section 85 the new Act would govern the arbitral proceedings, since been agreed by the Plaintiff by reason of its no objection thereto. However, in the present case the said question is not material since the arbitral proceedings has commenced after the 1996 Act had come into force and that too on a reference made u/s 8 of the said Act. An arbitral proceeding having commenced u/s 8 of the 1996 Act it can never be governed by the provisions contained in 1940 Act. Question would have been otherwise if the reference was made before the 1996 Act had come into force. There can not be any question of commencement of arbitral proceedings under the new Act and continuance thereof under the old Act while the reverse could be contemplated.

21. Section 8 as discussed hereinbefore, permits the suit, and the arbitral proceeding covering the same subject to proceed simultaneously. By reason of Sub-section 3 of Section 8 pendency of the suit will not prevent the arbitral proceeding to continue and the making of the award. The pendency of the proceeding in no way can affect the same. There is no provision provided in the 1996 Act similar to that of Section 34 of the 1940 Act. Both the proceeding may proceed without affecting the proceeding of the other.

22. Now, let us examine whether the pendency of an application u/s 34 of the 1940 Act or filing of an application u/s 34 of the 1940 Act would amount to commencement of arbitral proceedings. "Arbitration" as defined in Section 2(1) (a) means any arbitration whether or not administered by permanent arbitral institution. Therefore, an arbitral proceeding would be a proceeding administered

by means of any arbitration. When the Court deals with an application u/s 34 does not exercise any means of arbitration. It only exercise the jurisdiction to decide as to whether the suit shall be stayed. Section 34 prescribes that where any of the party to an arbitration agreement commences a legal proceeding against the other party to the agreement, then the other party, before-filing written statement or taking any other steps in the proceeding, may apply to the Court, where the legal proceeding is pending, to stay the proceedings. The Court if satisfied upon such an application that there was no sufficient reason as to why the matter should not be referred to in accordance with the arbitration agreement, provided the other party remains ready and willing on the date when the suit was filed to do all things necessary for proper conduct of the arbitration proceedings, may stay the suit. An application u/s 34 is an independent application in the legal proceedings. Though it is of a summary nature but yet it is a proceeding in the suit before the Court. Such an application is not an application in a reference to arbitration.

23. u/s 34 of the 1940 Act the Court does not make a reference to the arbitration. It only stays the proceedings of the suit, so as to enable the parties to abide by the arbitration agreement. It is only in proceedings u/s 21 of the 1940 Act i.e. when the arbitration agreement is arrived at after the suit has been filed, that the court makes a reference u/s 23 of the 1940 Act and supercedes the reference, if that be necessary u/s 25. In a proceeding u/s 34 of the 1940 Act, all what the court can direct is to stay the proceedings of the suit. Then it is for the parties to make a reference out of Court or through an order obtained-by any of the parties upon an application u/s 20 of the 1940 Act. Neither any arbitrator can be appointed nor any reference to arbitration can be made u/s 34 of the 1940 Act. It can be done u/s 9 or such other provision of the 1940 Act. Therefore pendency of an application u/s 34 of the 1940 Act is not an arbitration proceeding nor the making thereof is the commencement of arbitration proceedings.

24. In *Union of India v. Sujit Singh Atwal* the Apex Court had held that an application u/s 34 is not an application in a reference u/s 31(4) of the Act. Or in other words even if a reference has made to the arbitration before the application u/s 34 is filed in the suit, still then it would not be an application in the reference.

25. Thus the filing of an application has nothing to do with the commencement of arbitral proceeding. It is only the question of stay of the suit in between the parties to an arbitration proceeding provided the conditions laid down in Section 34 is satisfied. Thus, filing of an application u/s 34 is neither a reference to arbitration nor commenced nor can be said to be a commencement of arbitral proceedings. The pendency of such application does not mean that an arbitral proceeding is continuing or pending. Therefore, in the facts and circumstances of the present case it can never be said that on the commencement of the 1996 Act any arbitral proceedings was pending. Therefore, the second part of Clause (a) of

Sub-Section 2 of Section 85 is attracted in the present case.

26. The reliance, on the decision in the case of Nataraj Studio Pvt. Ltd. v. Nabrang Studio AIR 1981 S.C. 537 does not help us in the present case since it was related to the question of stay of the suit pending before the Small Cause Court by the Small Causes Court in view of Section 40 of the 1940 Act. In the said decision the Court was called upon to decide as to whether by reason of Section 40 of the 1940 Act the Small Cause Court could decide an application u/s 34 of the 1940 Act and stay the proceeding before it. It was held that when deciding application u/s 34 the Small Cause Court does not decide the arbitration proceeding. Therefore, bar of Section 40 would not be attracted in such a case. Thus, this decision on the other hand supports the view I have taken that an application u/s 34 is something independent from the arbitration proceeding and is something other than an arbitration proceeding. The reliance in the case of M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., does not help us in the facts and circumstances of the case. The reliance placed thereon appears to be misplaced. Similarly, Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., is also equally misplaced and has no manner of application in the present case. The decision in the case of Renusagar Power Co. Ltd. Vs. General Electric Company and Another, also does not-help us in the facts and circumstances of the case as well as the discussion that has been made hereinbefore: The decision in the case of Renusagar Power Co. Ltd. Vs. General Electric Company and Another, is also not applicable in the present case. On the other hand in the case of The Bombay Gas Co. Ltd. Vs. Parmeshwar Mittal and others, a learned Single Judge of the Bombay High Court has held that an application u/s 34 of the 1940 Act cannot be equated with a notice u/s 121 of the said Act and therefore arbitration proceeding cannot be said to have commenced with the filing of an application u/s 34 of the 1940 Act. It is only when an application u/s 21 is made in a suit for reference to an arbitration which is altogether different from that of Section 34, and may be treated to be a commencement of the arbitration proceeding. In the said Bombay decision it was further held that since the arbitration proceeding did not commence before the Act had come into force. Therefore, there was no arbitration proceeding pending.

27. Therefore, it is the provisions of the 1996 Act that alone is attracted in the present case. In view of Section of the 1996 Act, nor no order for stay of suit on an application u/s 34 of the 1940 Act can be made. By reason of Section 8(3) both the proceeding can continue simultaneously. Be that as it may, having regard to the fact that the Applicant himself has admitted that the subject matter of arbitration and that of the suit are not the same and are different it is not open to them to seek a stay of the suit which according to their own statement is different from the subject matter pending before the Arbitrator.

28. Therefore, it appears that the commencement of the arbitration u/s 8 made by the Applicant appears to be rightly made subject to such objection that might be taken at appropriate stage. I do not want to enter into this question at this

stage. This question is kept open for being decided between the parties at appropriate stage.

29. In such circumstances, the application u/s 34 of the 1940 Act is hereby dismissed. The stay of arbitration proceedings which is continuing by reason of the order of the Appeal Court stands automatically discharged and/or vacated with the passing of this order.