
(1999) 10 PAT CK 0065
In the Patna High Court
Case No : Civil Rev. No. 2409 of 1998

Manna Lal Kedia and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 04-10-1999

Acts Referred:

Arbitration Act, 1940 — Section 8, 8(1)

Citation : AIR 2000 Patna 91 : (2000) 2 PLJR 747

Hon'ble Judges : Sachchidanand Jha, J

Bench : Single Bench

Advocate : Ram Balak Mahato, A.K. Jai and S.K. Saraf, for the Appellant; Binod Kumar, JC to SC II and Shashi Shekhar Dwivedi, Amicus Curiae, for the Respondent

Final Decision : Allowed

Judgement

Sachchidanand Jha, J.—This civil revision by the defendants is directed against an order by which the Court below has rejected their application for referring the dispute to the Arbitrator and stay of further proceedings in the suit.

2. The plaintiffs-opposite party. State of Bihar and its officials, filed Money Suit No. 2 of 1995 for recovery of the price of 294.12 M.T. steel slabs equivalent to 264.715 M.T. of M.S. rod or its present market price According to the plaintiffs, the defendants had entered into an agreement for delivery / supply of 264.715 M.T. of M.S. rod but failed to make the delivery causing pecuniary loss to the State. On 9-9-96 the petitioners filed an application to dismiss the suit as not maintainable on the ground of limitation. On 9-12-96 they filed another application u/s 8 of the Arbitration and Conciliation Act, 1996, describing the same as supplementary application to the application dated 9-10-96, wherein they made a prayer for appointment of the concerned Superintending Engineer as Arbitrator and to refer the dispute to him. I shall refer to these two applications again in this order. The Court below in the impugned order held that an application for reference of the dispute to the Arbitrator under the new

Arbitration Act i.e. Arbitration and Conciliation Act, 1996, (hereinafter called "the Act") has to be made before the filing of the first statement" and since in the application filed on 9-9-96 no such prayer to refer the dispute for arbitration was made, rather a prayer was made to dismiss the suit on the ground of limitation, the prayer could not be allowed. He accordingly rejected the application by the impugned order dated 18-9-98.

3. Before proceeding further it would be apt to notice the provisions of Section 8 of the Act so far as relevant, as follows ;

"8. Power to refer parties to arbitration where there is an arbitration agreement.--
(1) 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."

Stated in simpler words, Section 8(1) requires that (a) there should be an application by a party for referring the dispute to the Arbitration, (b) such application should be filed not later than i.e. before filing the first statement by the party and (c) such statement should be on the substance of the dispute.

4. As stated above, in the present case the petitioners filed two applications on 9-9-96 and 9-12-96. In the second application he made a prayer to refer the dispute to the arbitrator. The question which arises for consideration, thus, is whether the first application dated 9-9-96 was "statement on the substance of the dispute".

5. Shri Ram Balak Mahto, learned counsel for the petitioners, referred to the provisions of the Order 6 Rules 2(1), 4 and 5, Order 7, Rules 1 and 2 and Order 8, Rules 1, 2 and 3 of the CPC and submitted that the pleading is required to contain "material facts" and particulars of the claim of the plaintiffs or defence of the defendants, as the case may be. Where the material facts are not stated and the particulars of the claim or defence are not disclosed, the statement / application cannot be said to be "pleadings" of the party. And since in the present case in the application dated 9-9-96 no "material fact" was stated regarding the claim or defence, the prayer for reference of the dispute to the arbitrator made in the application dated 9-12-96 was not barred. Counsel placed reliance on Shri Udhav Singh Vs. Madhav Rao Scindia, and State of Orissa Vs. Klockner and Company and Others, . As regards Interpretation of the clause "statement on the substance of the dispute" reliance was placed on Varun Seacon Ltd. Vs. Bharat Bijlee Ltd., and M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.,

6. It would, be proper at this stage to notice the contents of the application

dated 9-9-96, true copy whereof has been enclosed with revision petition as Annexure-1. The application contains seven paragraphs. In the first paragraph there is a general statement in the nature of submission, that money suit is not maintainable and fit to be dismissed. In the second paragraph it has been stated that the suit arises; out of an agreement executed by the a parties on 14-8-82. The particulars of the agreement have also been mentioned. In paragraph 3 Clause 23 of the Agreement has been quoted. In paragraph 4 again there is a general statement in the nature of submission that the plaintiffs have no right or authority to file the suit which is "illegal and not maintainable". In paragraph 5 again submission has been made that the claim is hopelessly barred by limitation and the suit is, therefore, fit to be dismissed. In paragraph 6 while again stating that the suit is not maintainable and bound to be, dismissed "on this score alone" meaning thereby on the score of limitation. It has been stated that the defendants i.e. the petitioners "do not consider it necessary to file their written statement in this case". In the seventh and the last paragraph again submission has been made that in the facts and circumstances of the case, it would be meet and proper to reject the money suit. The application ends with a prayer "to accept the preliminary objection" raised by the defendants and further to reject the suit as being not maintainable or to pass such other order or orders which may be deemed fit and proper.

7. The submissions of Shri Ram Balak Mahto based on the provisions of Orders 6,7 and 8 of the CPC appear to be slightly misplaced. It is not suggested by anybody that the application dated 9-9-96 should be read or treated as written statement. Nor Section 8(1) of the Act speaks about written statement. Where written statement is filed without making any prayer for stay of the suit and reference of the dispute to the Arbitrator, it would be a clear case in which the defendants would be debarred from making any such paryer subsequently. There may however be cases where without filing written statement, so called defendants may file a petition stating material facts on the substance of the dispute, such as, rejoinder to application for injunction or appointment of receiver. It is usual to find the defendant making detailed averments in such rejoinders touching upon the dispute in the suit. The question is where the defendant states his case on merit dealing with the substance of the dispute in such rejoinders, by whatever name they may be called, but no prayer is made for stay of the suit or reference of the dispute to the Arbitrator, whether he can make such prayer later in view of the bar created by Section 8(1) of the Act. In my view, Section 8 will be attracted in such cases. In other words, Section 8 is not to be understood as referring to written statement within the meaning of Order 8 of the Civil Procedure Code. If it was so, nothing prevented the legislature from using that term which is a well understood term of law. The expression "the first submission" in the context, according to me, has to be given a wider meaning to include even such petition, described by whatever name, containing statement of material facts on the substance of the dispute.

8. Now coming to the application dated 9-9-96 its contents have been noted

above. Except that the petitioners stated about the existence of an arbitration agreement and took a bald plea that the plaintiffs claim is barred by limitation nothing has been stated which could be said to be "material fact" on the substance of the dispute. As a matter of fact, in paragraph 6 of the application it was specifically stated that in view of the arbitration clause and the bar of limitation the suit was bound to be dismissed and hence it was not necessary to file written statement in the case. In *Shri Udhav Singh Vs. Madhav Rao Scindia*, , while dealing with the case of an election petition founded on the allegation of corrupt practice observed that since all material facts or basic facts constituting the ingredient of corrupt practice have to be proved before the petitioner can succeed at the trial, he is required to plead all such facts as constituting the cause of action for filing the election petition. In my opinion, in a suit in which claim for money on account of loss sustained due to non-supply/delivery of the goods is made as in the present case, the material facts to be pleaded on behalf of the defendant should be whether he failed to deliver/supply the goods as per the agreement or not, and if so, the reasons for not making the delivery or supply, and whether this resulted in any pecuniary loss to the State and so on. In the facts of the present case, these are the issues which may arise for decision when the suit is ultimately taken up for trial. Nothing has been stated in the application which could be termed as "primary facts" on the substance of the dispute. I am, therefore, inclined to think that the application dated 9-9-96 cannot be said to be the "first statement on the substance of the dispute" within the meaning of Section 8(1) of the Act.

9. In *M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.*, the Supreme Court observed that the new Arbitration Act is quite different from the Old Arbitration Act. 1940. Reference to the Old Act may lead to misconstruction and therefore, no aid should be taken from the principles underlying the old Act. If there is any doubt or ambiguity it would be rather more relevant to refer to the United Nations Commission of International Trade Law (UNCITRAL). Nonetheless, a bare reference to of Section 34 of the old Act which contained provisions somewhat analogous to the provisions of Section 8(1) of the new Act, would make the point clear. Section 34 of the old Act read as follows :--

"Power to stay legal proceedings where there is an arbitration agreement. 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 say the proceedings; and such authority may make an order staying the proceedings."

Section 8(1) of the new Act has been quoted above. I would, however, quote the provisions again with necessary emphasis to bring home the point of distinction.

"Power to refer parties to arbitration where there is an arbitration agreement--

(1) A Judicial authority before which an action is brought in 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"

10. In terms of the Section 34 of the old Act a party was required to apply for reference of the dispute to the arbitrator before filing written statement or taking any other step In the proceeding. The words "or taking any other step" were interpreted to include even application for adjournment, for filing written statement. This obviously created anomalies, not only frustrating the objects of arbitration but also resulting in injustice in many cases. In order to bring about change in this regard in the New Act in Section 8(1), provision has been made to the effect that the party intending to go in for arbitration must do so in his "first statement on the substance of the dispute" and not later than that. In other words, only if in the first statement on the substance of the dispute he does not make such prayer that he is debarred from making that prayer later. Section 8(1) of the New Act is, thus, an Improvement upon the provisions of Section 34 of the old Act. Similar view has been expressed by the Gujarat High Court in Varun Seacon Ltd. Vs. Bharat Bijlee Ltd., , in these words :-

"Section 8 make a clear departure from the legal position as contained in Section 34 of the Old Act, under which if the defendant had filed an application for adjournment for filing written statement, it was treated as taking a step in the suit proceedings and therefore, it was held that in such a case the suit was not required to be stayed at the instance of a defendant who had displayed an intention to proceed with the suit and acquiesce in the method of resolution of dispute adopted by the plaintiff, namely, filing of the suit and thereby indicated that it had abandoned its right under the arbitration agreement to get the dispute resolved by arbitration. Realising that such an interpretation was bringing about anomalous results and frustrating the laudable objects of the arbitration law, the legislature has advisedly made a clear departure from the earlier position and, therefore, now a party is disentitled from getting stay of the suit only if the party has earlier submitted its statement on the substance of the dispute, that is if earlier the defendant has filed its reply on merits".

11. Having already reached the conclusion that the application dated 9-12-96, cannot be called statement on the substance of the dispute, the impugned order rejecting the prayer for reference of the dispute to the arbitrator made by application dated 9-12-96 cannot be said to be in accordance with law. I have not gone into the question as to Whether the requirement of filing the arbitration agreement as per Section 8(2) of the Act was complied or not. If called upon, the Court below may consider this aspect of the matter.

12. In the result, the impugned order dated 18-9-98 is set aside and this civil revision is allowed.

13. Before I part with this order, I must acknowledge the assistance rendered by

Shri Shashi Shekhar Dwivedi, who appeared amicus curiae at the instance of the Court.