

(1977) 09 KAR CK 0011

In the Karnataka High Court

Case No : Civil Revision Petition No. 982 of 1974

Mckenzie's Ltd.

APPELLANT

Vs

State of Mysore (Karnataka) and Others

RESPONDENT

Date of Decision : 23-09-1977

Acts Referred:

Arbitration Act, 1940 — Section 5

Civil Procedure Code, 1908 (CPC) — Section 115, 115 (1) (C)

Citation : AIR 1978 Kar 89 : (1978) 1 KarLJ 57

Hon'ble Judges : V.S. Malimath, J;D.B. Lal, J

Bench : Division Bench

Advocate : V. Krishnamurthy and V. Tarakaram, for the Appellant; R.N. Byra Reddy, for the Respondent

Judgement

Malimath, J.—M/s. Mckenzie's Ltd., Engineers and Contractors, Bombay, have challenged in this revision petition filed u/s 115 of the Code of Civil Procedure, the order of the Second Additional Civil Judge, Bangalore City, made in A. C. No. 14 of 1972, on the 2nd of November, 1973, u/s 5 of the Arbitration Act, 1940, (hereinafter referred to as "the Act"). The facts necessary for decision of this case may briefly be stated as follows:

The petitioner-firm entered into an agreement D/- 23-11-1959 with the 1st respondent-State of Mysore (Karnataka) in connection with construction at Linganamakki Main Dam, Section II, which is part of the Sharvathi Project. The said agreement contained an arbitration clause -- Clause 51 -- in regard to settlement of certain types of disputes between the parties. It contemplates reference of certain types of disputes to Arbitrators, each of the parties to the agreement nominating one Arbitrator. The petitioner raised certain disputes to be adjudicated by the Arbitrators and proposed Respondent 3 Shri H. C. Sharma as an Arbitrator. The 1st respondent nominated Respondent 2 Shri M. V. A. Setty, Advisor to Government, Irrigation and Power, reserving, however, the right to contend that no matter referred to in the notice of the petitioner could be decided

by arbitration under Clause 51 of the agreement on the ground that the disputes referred are not arbitrable under the agreement. The State filed its written statement dealing with the claim made by the petitioner. It appears that the State raised a contention to the effect that all the items referred to arbitration are not arbitrable, that they are barred by limitation and that they are covered by other clauses in the agreement, viz., Clauses 20, 27 and 28. The Two Arbitrators appointed an Umpire and the Board of three Arbitrators held several sittings after notice to the parties. They framed issues arising out of the pleadings, the 1st issue being:

"Are all the claims or any of them arbitrable under the contract?" Paragraph 8 of the order under revision contains a brief summary of the claim of the petitioner, which may be extracted as follows:

"The claim of the 1st respondent before the arbitrators was for certain amounts towards loss sustained on account of the piecemeal handing over the site in short stretches; because of the inconsistent and insufficient supply of surki mortar by the State of Mysore; change over from the Surki mortar to Cement mortar which involved purchase of huge quantity of sand at forbidding rate and execution of the work at certain structures of greater depths which in turn put the contractor to extra lifts and leads. In respect of the above, the 1st respondent put forward a claim to more than Rs. 8,00,000/-."

After the issues were settled, when the case was posted on the 24th of December, 1971, the Arbitrators suggested that all the questions including the questions of limitation and jurisdiction may be decided very conveniently after recording the entire evidence on the ground that the question whether any particular chum was within the clause empowering reference to arbitration and if so, to what extent, was not a pure question of law but involved questions of fact. The then Advocate General who appeared for the State appears to have agreed to this procedure. Several documents were marked on both the sides on the 23rd and the 24th of March, 1972. The then Advocate General appears to have submitted to the Arbitrators that if any oral evidence is to be led in this case, such evidence also should be led before final arguments are heard. In view of the stand taken by the then Advocate General, time was granted to the petitioner to file a list of witnesses on 24-3-1972. When the present Advocate General Sri R. N. Byra Reddy was appointed in place of the then Advocate General Shri Section O. Sundra Swamy, he raised a contention that the question regarding arbitrability of the disputes, which bears on the question of jurisdiction of the Arbitrators, should be decided in the first instance. In other words, he pressed for a decision on Issue No. 1, which we have extracted above, before the Arbitrators proceed to record evidence on the merits of the disputes. After hearing the learned Counsel for both the sides, the Arbitrators have recorded their decision, a copy of which was placed for our perusal during the course of the arguments, and it reads as follows:--

"The Arbitrators have heard both parties in regard to jurisdiction and limitation.

The Arbitrators have also studied the various citations submitted by both the parties in connection with jurisdiction and limitation. It is recalled that in the very first hearing on 10-11-1971, the Arbitrators permitted both the parties to frame such issues as they desired the Arbitrators to decide keeping in view of course their submissions made also. Both the parties submitted their issues and in consultation with them and with their acceptance thereto, the Arbitrators finalised the issues and furnished a copy of the same to both the parties. Neither party at that stage desired that the Issues Nos. 1 and 2 to be treated as preliminary issues. As such, the proceedings have been progressing thereafter. It is also recalled that both the parties have agreed to extension of time in connection with all issues and the Arbitrators have been perusing the same. Having heard both the parties and having nearly 10 sittings, justice will not be met, if we do not continue the proceedings and as such, the Arbitrators are of the opinion that the hearing of all issues should continue."

It is thus, when the attempt of the State to persuade the Arbitrators to record a finding on Issue No. 1, failed, that an application was filed u/s 5 of the Act in the Court of the Civil Judge, Bangalore City, on the 29th of June, 1972, seeking leave of the Court to revoke the authority of the Arbitrator Shri M. V. A. Shetty Respondent 2 -- appointed by the State. The said application was seriously contested by the petitioner. The learned Civil Judge has, by his order made on the 2nd of November, 1973, granted leave to the State to revoke the authority granted to the 2nd respondent Arbitrator. It is the said order that is challenged by the petitioner in this petition u/s 115 of the Code of Civil Procedure.

2. The learned Advocate General appearing for the State, filed a Memo along with an order of the State Government dated the 16th of January, 1974, revoking the authority of Respondent 2 as Arbitrator and contended that in view of the said order of the State Government, this revision petition does not survive. The order under revision was made on the 2nd of November, 1973 and the present revision petition was filed on the 30th of January 1974. It is on the Kith of January 1974, that the State Government, on the basis of the leave granted by the learned Civil Judge, passed the order, revoking the authority given to Respondent 2 as an Arbitrator. It is no doubt true that the petitioner had not obtained any order from the Court of the Civil Judge, staying the operation of its own order on the ground that they need some time for filing a revision petition in this Court. As there was no stay order operating against Respondent 1, there was also no legal hurdle in its way for revoking the authority granted to Respondent 2 having regard to the fact that it had obtained leave from the Court on the 2nd of November, 1974. But, merely because action has been taken as aforesaid by the 1st respondent to revoke the authority of the 2nd respondent, we fail to see how the present revision petition can be rendered incompetent. The right of the party to secure reliefs at the hands of this Court or the power of this Court u/s 115 of the Code of Civil "Procedure, cannot be taken away by the party obtaining the order challenged in revision. If the contention of the learned Advocate General is accepted it would mean that the right of the party or the power of the Court can

successfully be curtailed by the party obtaining leave u/s 5 of the Act revoking the authority of the Arbitrator without waste of time and well before the other party approaches this Court for relief. The learned Advocate General has not assigned any good reasons for persuading us to take the view that the order made by the State Government on the 16th of January, 1974, referred to above, has the effect of rendering this revision petition incompetent or in-fructuous. Hence, we overrule the objection of the learned Advocate General.

3. Shri V. Krishnamurthy, learned counsel for the petitioner contended that the learned Civil Judge has committed a material illegality in according leave to the 1st respondent u/s 5 of the Act. It was maintained that the Court cannot accord leave to revoke the authority of the Arbitrator, unless it is satisfied that substantial miscarriage of justice would take place in the event of its refusal. It was further contended that by recording a clearly unsustainable finding that substantial injustice will take place in the event of refusal to grant leave to remove the authority of the Arbitrator, the Court cannot exercise the power of granting leave u/s 5 of the Act. The principles to be borne in mind by the Court in the matter of granting leave u/s 5 of the Act for revoking the authority of the Arbitrator, have been laid down by the Supreme Court in *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, . The principle laid down by their Lordships of the Supreme Court in para. 13 of the Judgment, may be extracted as follows:--

"We now turn to the legal position which seems to us to be quite clear. Before the Court exercises its discretion to give leave to revoke an arbitrator's authority, it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. In considering the exercise by the Court of the power of revocation it must not be forgotten that arbitration is a particular method for the settlement of disputes. Parties not wishing the law's delays know, or ought to know, that in referring a dispute to arbitration they take arbitrator for better or worse, and that his decision is final both as to fact and law. In many cases the parties prefer arbitration for these reasons. In exercising its discretion cautiously and sparingly, the Court has no doubt these circumstances in view, and considers that the parties should not be relieved from a Tribunal they have chosen because they fear that the arbitrators decision may go against them (See *Russel on Arbitration* 16th Edition, page 54). The grounds on which leave to revoke may be given have been put under five heads:

- (1) Excess or refusal of jurisdiction by arbitrator.
- (2) Misconduct of arbitrator.
- (3) Disqualification of arbitrator.
- (4) Charges of Fraud.
- (5) Exceptional cases.

....."

The aforesaid decision was cited before the learned Civil Judge. The learned Civil Judge, after considering the principle laid down by the Supreme Court in the aforesaid decision, has summarised his findings and recorded his decision in paragraph 27 of his order, as follows-

"As I have pointed out in my discussion above, the arbitrators lack the very jurisdiction to go into the merits of the claim of the 1st respondent. The arbitrators should have first decided issue framed by them and considered whether the claims put forward by the 1st respondent were arbitrable or not in which event alone, the arbitrators would get the jurisdiction to decide the merits of the case. Their refusal to decide the 1st issue even when it was brought to their notice by the State of Mysore would amount to the arbitrators acting in excess of their jurisdiction. In not granting leave to the State of Mysore to revoke the authority but permit the arbitrators to proceed with the matter, it could be seen that there would be substantial miscarriage of justice, if ultimately, the arbitrators find that the claim is not arbitrable 1 then ultimately the entire proceedings before the arbitrator become void ab initio. The finding of the arbitrators would not enure to the benefit of either party. It is a sheer waste of public funds and unnecessarily investigating into a claim and this could easily be avoided if the arbitrators proceed to decide the first issue and find out whether they have any jurisdiction to consider the claim of the 1st respondent or not? Even though it was specifically pointed out by the State of Mysore that they had no jurisdiction, the arbitrators have not considered it fit to dispose of the question f jurisdiction.

....."

It is no doubt true that the learned Civil Judge has recorded a finding to the effect that there would be substantial miscarriage of justice, if leave prayed for the State u/s 5 of the Act, is not granted in this case. But, the reasoning given by the learned Civil Judge is that if the issue pertaining to jurisdiction is not decided in the first instance as a preliminary issue, it will lead to a sheer waste of public funds and unnecessarily investigating into a claim which could easily be avoided. He has also held that in the event of the Arbitrators ultimately finding that the claim is not arbitrable, the entire proceedings would become void ab initio. Even assuming that the findings recorded by the learned Civil Judge are correct, we fail to see how the said findings can lead to an inference that refusal to grant leave to the State u/s 5 of the Act would result in substantial miscarriage of justice. What the Arbitrators have done is not to decline to go into the question of jurisdiction raised by the State. They have, in fact, framed a specific issue -- Issue No. 1 bearing on the question of jurisdiction, so that they could go into the said question and record their finding on the said question. All that the Arbitrators have done in this case is to take the view that it is not just and convenient to record findings on all the issues, including the 1st issue pertaining to jurisdiction, until evidence is led by the parties on all the issues, including the issues bearing on the merits of the claim. It is necessary to bear in

mind that the Arbitrators appear to have taken the view that the questions as to whether particular claims are arbitrable or not under Clause (51) of the Agreement, are not pure questions of law, but, are mixed questions of law and fact and, therefore, they appear to have taken the view that without evidence being led in regard to the nature of the claims of the 1st respondent, it may not be possible for the Arbitrators to record a satisfactory finding on the question of jurisdiction. The learned Advocate General also fairly submitted that if a finding on the 1st issue pertaining to jurisdiction cannot be recorded without evidence being led, there should not be any valid objection for the Arbitrators recording evidence on the 1st issue. What he, however, maintained is that there is no justification for not limiting the leading of evidence to Issue No. 1 and permitting the parties to lead evidence in regard to all other issues as well which issues do not bear on the question of jurisdiction.

4. It is now well settled that the Arbitrators functioning under the Arbitration Act are not governed by the strict procedure prescribed by the CPC and the rules regarding evidence contained in the Evidence Act. The Arbitrators are entitled to regulate their own procedure. They are not under an obligation to frame issues as provided in the Code of Civil Procedure. The Arbitrators are also not under an obligation to record reasons for their decision. They are entitled to decide both questions of law and of fact. Such being the legal position, merely because the Arbitrators, who have framed issues pertaining to jurisdiction, limitation and merits of the case, have decided to record evidence on all issues and postponed their decision on issue No. 1 pertaining to jurisdiction to a later date, it is impossible to take the view that failure to grant permission to revoke the authority of the Arbitrator appointed by the State will result in substantial miscarriage of justice. Even if it is assumed that it may be found in this case at a later stage that some or all the claims made by the first respondent are not arbitrable, it cannot, be said that the inconvenience or trouble caused by leading evidence on all the issues will have the effect of substantial failure of justice unless permission sought for u/s 5 of the Act is granted to the State.

5. It is impossible to agree with the view taken by the learned Civil Judge that the Arbitrators lacked jurisdiction to go into the merits of the claim of the petitioner without the Arbitrators recording a finding in the first instance on issue No. 1. The nature of the case pleaded by the petitioner, the summary of which as made by the learned Civil Judge we have extracted above, clearly indicates that the question regarding arbitrability of the claims raised by the first respondent is not a pure question of law; but a mixed question of law and fact. Hence, in the very nature of things, the Arbitrators cannot record a satisfactory finding on the first issue pertaining to jurisdiction without the parties leading evidence in regard to the merits of the claim made by the first respondent. As the Arbitrators have yet to record a finding on issue No. 1 pertaining to jurisdiction, it is obvious that the Arbitrators cannot be regarded as having clutched jurisdiction which did not vest in them merely because they have postponed consideration of issue No. 1 to a further stage. That merely because the learned Civil Judge feels that it

would have been better in the circumstances for the Arbitrators to record a finding on issue No. 1 and not to postpone consideration of the said issue to a later stage, it is impossible to take the view that refusal to grant leave u/s 5 of the Act in this case would result in substantial failure of justice. This is not a case in which any allegations of bias or misconduct have been made by the first respondent against respondents 2 and 3. The way in which the Arbitrators have proceeded in this case clearly indicates that they have regulated their procedure in such a manner as to advance the cause of justice by giving full and adequate opportunities to both the parties of adducing evidence in support of their respective contentions on all the issues that arose for consideration. What is of considerable significance is that the learned Advocate General, who appeared for the State at the earlier stage of proceedings before the Arbitrators, agreed for the procedure which the Arbitrators were inclined to follow, viz., of postponing the consideration of issue No. 1 to a later stage after evidence is recorded on all the issues that arose for consideration. As the then Advocate General who appeared for the first respondent agreed to such a procedure being followed, further steps were taken in the matter of marking exhibits by consent of parties. Several documents have been marked as Exhibits on both the sides by consent of parties. The then Advocate General who appeared for the first respondent insisted that if at all oral evidence has to be led in the case, such evidence also should be led before arguments are heard on all the issues that arose for consideration. It is only when there was a change in the counsel for the State by the appointment of another Advocate General that there was change in the stand taken on behalf of the first respondent. We do not say that the State is not entitled to take an appropriate stand in support of its case contrary to the one taken at earlier stages of the proceedings, if the circumstances justify such a stand being taken. But we are narrating these facts only for the purpose of emphasizing that even the Advocate General who appeared for the first respondent at earlier stages of the proceedings was satisfied with the procedure which the Arbitrators had; prescribed for themselves in this matter. That is also a relevant matter to be taken into consideration while deciding an application for according leave u/s 5 of the Act, particularly having regard to the fact that the Court has to bear in mind the question as to whether substantial miscarriage of justice will result in the event of the Court refusing to grant leave u/s 5 of the Act. If the contesting party itself agreed with the procedure prescribed by the Arbitrators and further participated in the proceedings before the Arbitrators on that basis, it is difficult to take the view that the procedure was not the right and legal procedure to be followed by the Arbitrators. We have, therefore, no hesitation in taking the view that the learned Civil Judge was wholly unjustified in holding that refusal to accord leave u/s 5 of the Act to the first respondent will result in substantial miscarriage of justice on the ground that the procedure prescribed by the Arbitrators is likely to result in unnecessary investigation into the merits of the claim by the Arbitrators.

6. The learned Advocate General, however, maintained, that this is not a case for

interference u/s 15 of the Code of Civil Procedure, on the ground that the discretion vested in the Court below having been exercised in a particular manner, there is no scope for interference by this Court. In support of his contention, he relied upon the decision of the Supreme Court reported in *The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway*. It is clear from the judgment of the Supreme Court that on the facts of the case before their Lordships they held that the order of the first appellate Court did not suffer from any illegality. But, in the instant case, the learned Civil Judge having recorded a clearly unsustainable finding to the effect that refusal to grant leave u/s 5 of the Act will result in substantial miscarriage of justice, proceeded to exercise his discretion in favour of the first respondent. By recording a clearly unsustainable finding in regard to the aforesaid aspect, the learned Civil Judge has proceeded to allow the application of the first respondent. As we have recorded a finding to the effect that it is impossible in this case to take the view that refusal to accord leave under" Section 5 of the Act will result in substantial miscarriage of justice, it has to be held that the decision of the learned Civil Judge rendered u/s 5 of the Act is vitiated by material illegality, justifying interference by this Court u/s 115(1)(c) of the Code of Civil Procedure. We, therefore, reject the contention of the learned Advocate General in this behalf.

7. For the reasons stated above, we allow this revision petition, set aside the order of the learned Civil Judge and dismiss the application of the first respondent made u/s 5 of the Act. The petitioner is entitled to his costs.

8. The learned Advocate General orally applied for a certificate to appeal to Supreme Court under Art. 133 of the Constitution for preferring an appeal to the Supreme Court. We are not satisfied that this case involves any substantial question of law of general importance which is required to be decided by the Supreme Court, The principles of law which we have applied in this case are well settled by the Supreme Court in the decision rendered in *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, . Hence, the certificate prayed for under Art. 133 of the Constitution is refused.

9. Revision allowed.