

(1995) 01 MAD CK 0025
In the Madras High Court

Mrs. Zeenath Beevi

APPELLANT

Vs

N.V.K. Mohamed Sultan Rowther and Sons Limited and
Others

RESPONDENT

Date of Decision : 19-01-1995

Acts Referred:

Arbitration Act, 1940 — Section 31(2), 33, 34

Citation : (1995) 1 MLJ 639

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—This appeal is filed by the plaintiff C.S. No. 1577 of 1992. The suit is for a mandatory injunction against the first defendant

restraining it from manufacturing, marketing, dealing, supplying, selling or otherwise dealing with in scented betel nut and tobacco under the trade

names Roja, Raja and Kera and using the trade-names Roja, Raja and Kera, and the picture consisting of a red Rose with green leaves and/or in

any other names or marks, figures or pictorial representations having a similarity in visual or phonetic similarity including the name Roja, Raja Gold

or any other similar names and a mandatory injunction directing the first defendant to withdraw from the market all products manufactured and

issued for distribution being scented betel nuts and tobacco under the said trade names.

2. In short, the case of the plaintiff is as follows. The plaintiff is the daughter of N.V.K. Mohamed Sultan who was carrying on business during his

life time in the manufacture and marketing of scented betel nut powder under the trade name Roja and Raja. The plaintiff's father died on

6.6.1966. He was the sole proprietor at the time of the business under the name

and style of N.V.K. Mohamed Sultan Rowther and Sons Limited.

On his death, the business devolved on his sons and daughters. With a view to streamline the business and carry on the same effectively, the sons

and daughters of late N.V.K. Mohamed Sultan Rowther converted the business into a partnership admitting along with them the wife of N.V.K.

Mohamed Sultan Rowdier and one of his brothers-in-law. The firm was constituted soon after the demise of N.V.K. Mohamed Sultan Rowther

and it continued till 1984. In 1984, some of the legal representatives decided to incorporate the private limited company with specified objects.

There was some dispute between the parties and a compromise was arrived at to settle the same. An agreement was entered on 12.7.1984. As

per the agreement the legal heirs of Mohamed Sultan Rowther being co-owners of the trade marks, the private limited company started by them

sought the permission to use the trade marks in respect of betel nuts and tobacco. The agreement was to remain in force till 12.7.1989. The

company as the user of trade marks, pursuant to the aforesaid agreement, has to pay royalty to the sons of N.V.K. Mohamed Sultan Rowther.

Notwithstanding the agreement, there were some more disputes and the co-owners objected to the right of the company to use the trade-marks,

because the company has not kept up its commitment under the aforesaid agreement. The original agreement had expired and ceased to be

operative. The first defendant sought to create another agreement, which is purported to have been entered into in 1986. Whereby the right to use

the trade marks was stated to have been acquired by them till 1991. The plaintiff puts the defendants to strict proof of their claim and states that

the defendants have no right to use the aforesaid trade marks from July, 1989. The defendants continued to use the trade-marks unauthorisedly

under the aforesaid trade names. Even that agreement was only upto 1991. The plaintiff caused a notice to be issued putting the lawyer of first

defendant to notice on 14.3.1982 regarding the illegal use of the aforesaid trade-marks and the consequent continued violation of the plaintiff's

right and called upon the first defendant to desist from using the said marks and render accounts. The first defendant declined to receive the copy

of the notice sent by registered post. But another notice was sent by certificate of posting which appeared to have been served on the first

defendant. In spite of the notice the first defendant continues to use the trade marks and carry on the business. Thus, the plaintiff has approached

the court for the reliefs already set out. Along with the plaint, the plaintiff has filed four documents, the second of which is an agreement dated

23.9.1986. According to the plaintiff, that agreement expired in 1991, at the end of five years from its date.

3. After the defendants had been served with summons, defendants 1 and 3 have filed an application in A. No. 19 of 1993 u/s 34 of the

Arbitration Act for staying the suit. In the affidavit filed in support of the application it is stated by the defendants that after the agreement on

12.7.1984 all the assets and liabilities of the partnership were transferred and vested with the company excluding the trade marks to which the

partners were entitled after the death of N.V.K. Mohamed Sultan Rowther. As per the agreement, the company was permitted to use the trade

marks, for the goods manufactured by it. Subsequently a supplementary agreement was entered into on 24.9.1986 which was necessitated on

account of the death of S. Ameen Bibi, one of the daughters of N.V.K. Mohamed Sultan Rowther on 23.9.1986. Thus, according to the

defendants, the first defendant was entitled to have continuous use of the trade marks. Excepting a small variation regarding the rate of royalty all

the terms of agreement dated 12.7.1984 were adopted and made terms of the latter agreement. The affidavit refers to an arbitration clause found

in the agreements dated 12.7.1984. On that basis, the defendants prayed for referring the matter to arbitration and to stay the suit.

4. In the counter-affidavit filed by the appellant, it was reiterated that there was an agreement on 23.9.1986 which expired by efflux of time

23.9.1991. It is the contention of the appellant that as the agreement dated 23.9.1986 ceases to be operative on and from 23.9.1991, there was

no valid and subsisting agreement under which the matter can be referred to arbitration. It is also stated by the appellant in the counter affidavit that

the agreement was referred to in the plaint only to show that it was terminated by lapse of time and the user by the first defendant of the trade

marks was without any authority and in violation of the rights of the plaintiff who is a co-owner thereof. Thus, according to the appellant, the claim

is not based on nor founded on the agreement in question and therefore, the dispute does not arise out of the agreement.

5. The defendants filed a reply affidavit in which they have stated that the allegation that the agreement dated 23.9.1986 had expired by efflux of time on 23.9.1991 is incorrect. They again refer to the agreement dated 24.9.1986 which according to them, adopted all the terms of the agreement dated 12.7.1984 with few modifications. It is also stated in the said affidavit that notwithstanding the expiry of the agreement dated 12.7.1984, the parties continued to receive royalty upto and for the year ended 31.3.1991. According to them, the contention that the agreement had become inoperative or there was no validity therefore cannot be correct.

6. Learned Judge held that the dispute between the parties would fall within the arbitration clause contained in the agreement and therefore granted the payer for staying the suit. Learned Judge has not referred to the date of the agreement. He has not taken note of the dispute regarding the existence of the agreement dated 23.9.1986. Learned Judge has, however, referred to the agreement and the supplementary agreement as specifically providing that every dispute or difference arising out of this agreement whether during the continuance of the agreement or after the determination thereof, shall be referred to arbitration. That statement contained in the judgment leads to the inference that the learned Judge referred only to the agreement dated 12.7.1984 and the supplementary agreement dated 24.9.1986 which were referred to by the defendants.

7. However, in the course of argument before us it has been made quite clear by learned Counsel for defendants 1 and 3 that the defendants are disputing the very existence of the agreement dated 23.9.1986 to which reference is made by the plaintiff in the plaint. However, there is no specific averment in the affidavit and in the reply affidavit of defendants 1 and 3 that the agreement is operative. Learned Counsel asserts that there was no agreement on 23.9.1986. If that is the case the dispute as to whether there was an agreement dated 23.9.1986, though according to the plaintiff it comes to an end on 23.9.1991 cannot be decided by the arbitrator. The very existence of the agreement is in dispute and if there is a clause relating to arbitration in that agreement, that has to fall, if the agreement itself falls. Hence, that dispute can be decided only by the court and it cannot be referred to arbitrator.

8. Learned Counsel for the plaintiff also urges that his claim in the plaint is de

hors the agreement dated 12.7.1984 and 23.9.1986, According to the plaintiff, she being the co-owner of the trade marks the defendants user after 23.9.1991 is unauthorised and therefore, the suit is de hors the agreement between the parties and it is not a dispute arising out of the agreement. It is not necessary, however, for us to consider that contention in view of the fact that there, is a dispute regarding the very existence of the agreement dated 23.9.1986.

9. Learned Counsel for defendants 1 and 3 have invited our attention to the judgment of the Supreme Court in *Renusagar Power Co. Ltd. Vs.*

General Electric Company and Another, . While holding that the expressions, arising out of or in respect of etc. which are wide enough to include a

dispute relating to the existence of arbitration agreement, the Supreme Court has pointed out a distinction between a case where the existence of

the contract is itself, in dispute between the parties and a case relating to the interpretation of the contract. Four propositions have been laid down

by the Supreme Court in the following passage.

Four propositions emerge very clearly from the authorities discussed above; 1. whether a given dispute inclusive of the arbitrator's jurisdiction

comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself, it is a question of what the

parties intend to provide and what language they employ.

2. Expressions such as arising out of or "in respect of or "in connection with" or "in relation to" or "in consequences of or concerning or relating to

the contract are of widest amplitude and contend and include even questions as to the existences validity at effect (scope) of the arbitration

agreement.

3. Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the court to

decide those questions) but there is nothing to prevent the parties from investing him with power to decide those questions as for instance, by a

collateral or separate agreement which will be effective and operative.

4. If, however, the arbitration clause, so widely worded as to include within its scope questions of its existence, validity and effect (scope) is

contained in the underlying commercial contract then decided cases have made a distinction between questions as to the existence and/or validity

of the agreement on the one hand and its effect (scope) on the other and have hold that in the case of former those questions cannot be decided by

the arbitrator, as by sheer logic the arbitration clause must fall along with underlying commercial contract which is either non-existent or illegal while

in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration agreement, i.e., to decide the issue of

arbitrability of the claims preferred before him.

The fourth proposition is applicable to the present case.

10. The court went on to observe,

So far as Indian law is concerned the position is clarified in Shri Vallabh Pitte Vs. Narsingdas Govindram Kalani, decision on which counsel for

Renusagar relied - where the Bombay High Court has held that the jurisdiction of the arbitrators to decide the question of existence of the -

contract which contains an arbitration clause is not wholly taken away by mere denial of its existence: that the arbitrator may consider the question

of jurisdiction not to give final and binding judgment on that question but in order to determine what course they should adopt; that they may in a

case hold that they have no jurisdiction and direct the party who affirms the jurisdiction to obtain a decision of the court under the Arbitration Act,

but on the other hand if they are satisfied that they have got jurisdiction they may proceed with the arbitration and make their award; but a decree

in terms of such award may not be made by the court if at the time when one sought the court decides question of jurisdiction otherwise. The High

Court pointed out that a similar view was taken by Bachawat, J. in Pannalal Sagoromull v. Patey Chand Muralidhar (1951) Crl.L.J. 34 and that

after deciding the question in issue be affirmed the award and passed a decree in terms thereof. Similarly, it may be pointed out that there is no

difference between English law and Indian law on the point that an arbitrator to decide the question of its existence, validity or effect (scope) is

neither invalid nor void. In Heyman v. Danvins Limited, 1942 A.C. 356 Lord Wright's observations at p.385 of the report clearly suggest that

there can be a valid agreement to refer any dispute to arbitration including a dispute as to whether the contract in which the arbitration clause is

contained was ever entered into at all, or whether if there was it had been avoided or ended. As regards Indian Law in Fertilizer Corporation of

India v. Chemical Construction Corporation (1973) Bom.L.R. 335, the Bombay High Court has clarified this position while dealing with Rules 3

and 4 of Article 13 of the Rules of Conciliation and Arbitration framed by the International Chamber of commerce under which the arbitrators

were clothed with a power to decide inter alia, a question as to the existence and validity of the contract. Not only has the High Court held that the

conferral of such power on the arbitrators does not render the rules void but has further gone on to hold that if such a plea is raised by way of

defence in an application for stay of suit u/s 34 of the Arbitration Act it will be for the court to consider the validity of the arbitration agreement

itself and if in the opinion of the court the contract which contains the arbitration clause is valid no question is likely to arise before the arbitrators on

that point and even if such question were to arise the arbitrators will be concluded by the decision of the court. We may point out that following this

decision in Fertilizer Corporation's case, the court of Appeal in Dalmia Dairy Industries case (1978) 2 Lloyds L.R. 223 has held that the Rules of

I.C.C. enabling the Arbitral Tribunal to decide its own jurisdiction were not void (vide page 290 of the Report) and it has further noted without

disapproval the further observations of the Bombay High Court that if the court once itself decides the question that the arbitrators had jurisdiction

then that point would hardly be raised before the arbitrators and if it were the arbitrators would be bound by the decision of the court on the point.

In view of the position which arises from the aforesaid discussion it is really unnecessary for us to go into and decide the question whether in cases

where the arbitration clause contained in the underlying commercial contract is so widely worded as to include within its scope the question of its

existence validity or effect (scope). The decided cases have made a distinction between questions as to the existence or validity of the agreement

on the one hand and its effect (scope) on the other and have held that in the case of the former those questions cannot be decided by the

arbitrators, as by sheer logic the arbitration clause must fall along with the underlying commercial contract which is either non-existent or illegal,

while the case of the latter it will ordinarily be for the arbitrators to decide the effect (scope) of the arbitration agreement as is contended for by

counsel for C.E.C. because both under the scheme of the foreign awards Act as well as under the general law of arbitration obtaining in England

and in India, the decision of the arbitrator on the question of his own jurisdiction will have to be regarded as provisional or tentative subject to final determination of that question by the court. However, on a consideration of the rival authorities that have been cited at the bar by counsel on either side we are inclined to accept the contention of counsel for C.E.C. for the following reasons; (a) that contemptually a challenge to the existence or validity of the arbitration agreement contained in an underlying commercial contract is fundamentally different from an inquiry into the scope and effect of such agreement inasmuch as the former goes to the root of the arbitration agreement whereas the latter presupposes that the arbitration agreement exists in fact and in law and the inquiry is then undertaken as to its true scope and effect; (b) that indisputably, decided cases have made this distinction between the two concepts etc., in *Jawahar Lal Burman Vs. Union of India (UOI)*, , this Court has noted this distinction for the purposes of procedural aspects arising under Sections 31(2), 32 and 33 of the Arbitration Act, 1940, but the English cases particularly *Heyman v. Danvins Limited*, 1942 A.C. 556 and *Willesford v. Watson* (1973) 8 Ch.App. 473 have made that distinction substantively (c) that certain observation made by this Court in para 6 of its judgment in *The Reliable Water Supply Service of India Vs. Union of India (UOI) and Others*, on which counsel for Renusagar have relied in support of their contention that existence of an arbitration agreement" is the same as the effect (scope) thereof, do not, in our view, have the effect of equating the questions of the scope of the arbitration agreement with the question of its existence in that case the application made u/s 5 of the Arbitration Act to revoke the arbitration was obviously misconceived inasmuch as the ground on which the revocation was sought was that the disputes sought to be referred to arbitration were not within the purview of the arbitration clause and it was in that context that the observations were made in para 6 of the judgment to say that such a dispute was as regards the existence of the arbitration agreement; in fact, the ratio of the decision was that the controversy raised in the case fell within the scope of Section 33 of the Arbitration Act and not Section 5; in any case, in our view, the incidental observations in para 6 of the judgment in that case on which counsel for Renusagar have relied cannot outweigh the distinction which has been noticed by this Court in its well considered judgment in *Jawahar Lal Burman Vs. Union of*

India (UOI), ; that an analysis of several decisions cited at the bar, we venture to suggest shows that almost all the decisions which articulate the principle broadly by saying that an arbitrator has no power to decide question of his own jurisdiction are cases in which the questions of either the existence or the validity of the arbitration agreement was involved, whereas whenever the question of arbitration's jurisdiction depended upon the scope or effect of the arbitration agreement courts appear to have readily directed the parties to go before the arbitrators; and (e) in any event the decisions of the court of appeal in *Chancery in Willesford v. Watson* (1873) 8 Ch. App. 473 which decision has been annotated and digested in *Russel on Arbitration* (20th Edn.) is a clear authority for the proposition that where the arbitration clause was very widely worded so as to include within its scope any dispute touching the construction of the contract which contained the arbitration clause, the court would not decide but would leave it to the arbitrator to decide the question whether the matter in dispute between the parties fell within the arbitration agreement. In fact, the court of appeal in that case repelled every endeavour on the part of the appellants to require the court to do the very thing which lay within the competence of the arbitrators that is to say, to look into the whole matter, to construe the instrument and to decide whether the thing complained of was inside or outside the agreement, and directed the parties to go to arbitration by staying the suit. It would be whether in such a case where the court has expressly declined to decide the dispute involved between the parties and has directed the parties to go to arbitration, the arbitrator's decision on the question of his jurisdiction would again be subject to the court's decision. Would it not be a case similar to the case falling within the principle of a specific question of law being expressly referred to an arbitrator whose decision thereon finally binds the parties; but as stated at the outset, the aforesaid question on which we have expressed our view, does not arise for decision in this case.

11. It is clear from the above passages that the Supreme Court has held that in a case where the existence of contract is itself disputed, that question has to be decided only by the court and it cannot be referred to the arbitrator, particularly when an application is filed before the court u/s 34 of the Arbitration Act and a dispute is raised in that application itself.

12. In the present case, the dispute as to whether there was an agreement dated 23.9.1986 as alleged by the plaintiff is a matter which can be

considered only by the court and not by the arbitrator. No doubt, the defendants, have not filed their written statement, but they have made their

stand very clear before us. Learned Counsel for defendants 1 and 3 obtained instructions from the party and stated that the existence of the

agreement dated 23.9.1986 is itself disputed. According to him, there is no such agreement at all between the parties. It is open to the defendants

to file a written statement in the suit raising all the legal and factual pleas available to them in law.

13. In the result, the order of the learned Judge staying the proceedings, of the suit is hereby set aside. Appln. No. 19 of 1993 is dismissed. This

appeal is allowed. No costs.