
(1982) 05 CAL CK 0010
In the Calcutta High Court
Case No : A.F.O.O. No. 280 of 1977

Paras Nath Dubey and Another	Vs	APPELLANT
Kedar Nath Kejriwal and Another		RESPONDENT

Date of Decision : 11-05-1982

Acts Referred:

Arbitration Act, 1940 — Section 33, 34, 35(1)

Citation : AIR 1982 Cal 578

Hon'ble Judges : Ramendra Mohan Datta, J;C.K. Banerji, J

Bench : Division Bench

Advocate : Bhabra, for the Appellant;S.K. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Ramendba Mohan Datta, J.—The appeal herein arises from the judgment and order of Subyasachi Mukharji, J. passed on May 18, 1977. The learned Judge has dismissed the application for setting aside the award and has, inter alia, passed a judgment in terms of the award.

2. The award was passed on Jan. 22, 1977 in respect of disputes arising out of a Hire-Purchase Agreement dated Nov. 25, 1972 in which there was an arbitration clause. The award read as follows :

"Whereas Messrs. Kedarnath Kejriwal, the claimant abovenamed referred to my arbitration all disputes and differences between them and the respondents pursuant to the Arbitration Agreement dated 9th day of October, 1972 between the parties and whereas I took upon myself the burden of the said reference and whereas I have read and considered the papers filed before me and also heard the evidence:

Now I make my award as follows:--

1. I award and declare that the claimant namely Kedar Nath Kejrival are the owners of the Tata Mercedes Benz Motor Vehicle bearing Police Registration No.

BRJ 2741 and No. 312.978.86. 22850 on the Engine and No. 342.050.85. 22018 on the Chassis thereof and entitled to possession thereof.

2. I hold and award that the respondents, namely (1) Paras Nath Dubey and (2) Jairam Prasad Dubey do pay the Claimant a sum of Rs. 37,250 (Rupees Thirty-seven thousand two hundred and fifty) only.

3. I further hold and direct that should the respondents fail to give possession of the said vehicle to the claimant, they do pay to the claimant a sum of Rupees 16,000 (Rupees sixteen thousand) only in lieu of the Award made herein as to declaration and possession of the said motor vehicle.

4. I further hold and direct that the respondents do pay Rs. 859 (Rupees eight hundred and fifty only) as costs of this Arbitration."

3. The hire-purchase agreement relates to the motor vehicle bearing No. BRJ 2741. In March, 1972, the disputes were referred to arbitration by the respondent, Kedar Nath Kejriwal (hereinafter called Claimant Kejriwal). On April 24, 1975 the arbitrator wrote to the petitioners Dubey (Paras Nath and Jairam Prasad) (hereinafter called Dubey) to file counter-statement of facts. Thereafter on April 25, 1975 the Dubey requested the arbitrator to grant 15 days" time. The claimant Kejriwal made an application on or about May 5, 1975 for appointment of a Receiver u/s 41 of the Arbitration Act, 1940 over the said vehicle. On or about July 17, 1975 Dubey filed an affidavit-in-opposition to the said application. Dubey also made an application in this Court under Sections 5 and 33 of the Arbitration Act for determination of the validity and effect of the arbitration agreement. On Aug. 6. 1975 Dubey filed a Title Suit being Suit No. 207 of 1975 in the Bhagalpur Court. In that suit Dubey had asked for a decree that the petitioner Paras Nath Dubey was the absolute owner of vehicles Nos. BRF 3461 and BRJ 2741 and that the defendant therein, being Kedar Nath Kejriwal had no right, title and interest therein. Dubey also asked for a declaration that the alleged hire-purchase agreement dated Oct. 9, 1972 relating to vehicle No. BRJ 2741 and the alleged hire-purchase agreement dated Nov. 24, 1972 relating to vehicle No. BRF 3461 were void and not binding on the Dubey and for the delivery up and cancellation thereof. They also asked for a decree for accounts and for such amount as might be found due and payable and/or refundable by Kejriwal and also for a decree for Rs. 5,100. There was also a prayer for mandatory injunction restraining Kejriwal from taking any step and/or any further proceeding in respect of the said hire-purchase agreement. On Sept. 29, 1975 Dubey obtained an ex parte order of injunction from Bhagalpur Court restraining Kejriwal from proceeding with the reference before the Arbitrator.

4. After the hearing of the said application under Sections 5 and 33 was concluded, the judgment was reserved by the learned Judge Roy Chowdhury, J. on the prayer of the Dubey to enable the petitioners Dubey to settle the matter but instead of settling the matter, Dubey obtained an order of injunction from Bhagalpur Court restraining the arbitrator from proceeding with the arbitration.

The matter was thereupon men-mentioned before Roy Chowdhury J. in December. 1975.

5. On March 5, 1976 Roy Chowdhury J. delivered his judgment in the application u/s 41 of the Arbitration Act, 1940 and appointed a receiver therein. The said application under Sections 5 and 33 of the Arbitration Act was dismissed by the learned Judge. Thereafter on Nov. 22, 1976 the Bhagalpur Court vacated the order of injunction. By an order dated Dec. 21, 1976 the time for making the award was extended till Feb 15, 1977.

6. On Dec. 23, 1976, the advocate Sri Abhijit Banerjee of the Dubey's gave a notice to the arbitrator u/s 35 of the Arbitration Act regarding the filing of the Title Suit No. 207 of 1975 in the Court of the Subordinate Judge at Bhagalpur. The said letter read as follows: Dated 23rd December 1976.

To Sri B.L. Sharma Advocate 6, Old Post Office Street, Calcutta-1.

Dear Sir, Re : In the matter of: Arbitration between Kedar Nath Kejriwal claimant and Paras Nath Dubey and Jairam Prasad Dubey

(Respondents).

My client: Paras Nath Dubey and Jairam Prasad Dubey.

Regarding: Notice u/s 35 of the Arbitration Act.

This is to inform you that Hon"ble Mr. Justice Salil Kumar Roy Chowdhury was pleased to extend the time till January 1977 for making the award on the Chamber Application moved on behalf of Kedar Nath Kejriwal which was opposed by my said client.

Please take notice that my clients instituted a suit being Title Suit No. 207 of 1975 in the Court of Subordinate Judge Bhagalpur impleading Kedar Nath Kejriwal for declaration, and injunction regarding the hire-purchase agreement dated 9th October 1972 and 25th November 1972 and the said suit is still pending. That the said suit is between the same parties and the whole of the subject matter of the reference is the same and identical with that of the pending suit.

In these circumstances I request you not to proceed with the reference.

Thanking you,

Yours faithfully, Sd/- Abhijit Banerjee (Abhijit Banerjee).

7. On December 27, 1976 the arbitrator Sri B.L. Sharma, Advocate fixed a meeting of the parties but Dubey's did not attend the same. The minutes of the said meeting held on December 27, 1976 read as follows:---

1st Matter.

In the Matter of Arbitration

Between

Kedar Nath Kajriwal

-And-

Paras Nath Dubey & another.

Minutes of the Meeting of the Arbitrator. held on Monday, the 27th day of December, 1976 at 11 A.M.

Present:

1. Sri B.L. Sharma, Arbitrator.
2. Sri S.K. Ghosh of M/s. P.D. Himatsingka & Co. with Sri P. Ghosh of the claimant.

Mr. Ghosh-- I do not find anybody present on behalf of the respondent.

The Arbitrator informed Mr. Ghosh that he has received a letter from the solicitor for the respondents intimating to him about the filing of the suit in the Bhagalpur Court by the respondent. Mr. Ghosh-- In my view the pendency of the Bhagalpur suit does not affect the reference. The application of the respondents in the said suit restraining my client from proceeding with the reference has been dismissed. The Calcutta High Court has delivered judgment in the application u/s 41 of the Arbitration Act made by my client and the application made by the respondent u/s 33 holding that there is a valid and subsisting arbitration agreement between the parties and in fact a receiver has been appointed over the motor vehicle in dispute. In the circumstances I submit that this arbitration should proceed.

Arbitrator-- I would like to know the view of the respondents as to the submissions made by Mr. Ghosh. I propose to send a copy of this Minutes to the respondents. I will consider the matter on the next date.

The next meeting will be held on Monday, the 17th January, 1977 at 4 P.M. No further notice will be given.

Sd. B.L. Sharma Arbitrator."

8. On Dec. 28. 1976 the Arbitrator gave notice of holding the next meeting on January 17, 1977 and along with the said notice sent a copy of the aforesaid minutes of December 27, 1976 to the Dubey at Bhagalpur. The said notice read as follows: "

B. L. SHARMA ADVOCATE

6, Old Post Office Street, Calcutta.

REGISTERED A.D.

December 28, 1976.

1. Sri Kedar Nath Kejriwal

2. Sri Paras Nath Dubey

3. Sri Jairam Prasad Dubey Dist. Bhagalpur. Dear Sirs,

1st Matter In the matter of Arbitration Between Kedar. Nath Kejriwal And Paras Nath Dubey & Anr.

I send you herewith a copy of the minutes of the meeting held by me on the 27th instant, which will speak for itself.

Please note that I will proceed with the reference on the next date. This notice is peremptory.

Yours faithfully, Sd/- B.L. Sharma Arbitrator."

9. It appears that on January 11. 1977 Messrs. P.D. Himatsingka & Co. on be half of Kejriwal wrote to Sri Abhijit Banerjee advocate in reply to his letter dated December 23, 1976 addressed to the arbitrator inter alia, disputing the validity of the notice u/s 35. The said letter read as follows:

"NH/238 January 11, 1977.

Shri Abhijit Banerjee, Advocate, Bar Association, High Court. Calcutta,

Re: Arbitration between Kedar Nath Kejriwal Versus Paras Nath Dubey & Jairam Prasad Dubey.

Our Client: Kedar Nath Kejriwal

A copy of your letter dated 23rd December. 1976 addressed to Shri B.L. Sharma, the learned Arbitrator, was shown to us at the meeting held on 27th December, 1976.

We wish to place on record that by the order dated 21st December, 1976 the time for the learned Arbitrator to make his award was extended by his Lordship the Hon"ble Mr. Justice Salil K. Roy Chowdhury till 15th February 1977 and not till January, 1977 as alleged in your said letter. Further the said Chamber application of our client was not opposed by your clients at the time when it was moved although your clients had filed an affidavit-in-opposition thereto.

We have been instructed by our client to deny the validity, legality and propriety of your said notice alleged to be u/s 35 of the Arbitration Act. In the Title Suit No. 207 of 1975 instituted by your clients in the court of the Subordinate Judge at Bhagalpur, your clients have purported to deny the existence and validity of the hire purchase agreement and arbitration agreement in respect of the vehicle BRF-3461 and have prayed for inter alia declaration that the same are void and should be cancelled and/or mandatory (sic) against our client amongst others from taking steps with regard thereto. The subject matter of the said suit therefore cannot and does not cover the subject matter of the reference. Further

the parties to the suit and the reference are not the same. Hence the provisions of Section, 35 of the Arbitration Act cannot be invoked in the instant case. There is no impediment to the learned Arbitrator proceeding with the reference in the instant case.

We deny that the said suit is between the same parties to the reference or that the whole of the subject matter of the reference is the same or identical with that of the pending suit. The contentions of your client in the said suit are barred by the principles of *res judicata* and principles analogous thereto in view of judgment and order dated 5th March, 1976 passed by his Lordship the Hon'ble Mr. Justice Salil K. Roy Chowdhury on your client's application u/s 33 of the Arbitration Act.

Please note that the learned Arbitrator by his letter dated 23rd December, 1976 has fixed 17th January, 1977 at 4-00 P.M. as the date for the next sitting of the reference. Please ask your client to attend.

Yours faithfully, Sd/- P. D. Himatsingka & Co.

Copy to: Shri B.L. Sharma,

Arbitrator 239.

10. It will be noticed from the above letter of the arbitrator dated Dec. 28, 1976 that the meeting was fixed at 4.00 P.M. and the same was peremptorily fixed on January 17, 1977, Dubey's case in the petition is that Jairam Prosad Dubey along with their advocate Sri Abhijit Banerjee attended before the arbitrator on January 17, 1977 at 4.00 P.M. The Arbitrator adjourned the meeting as nobody appeared before him on behalf of the claimant and the arbitrator personally expressed regret for causing inconvenience to Shri Abhijit Banerjee, the learned advocate." According to Dubey's they were not intimated any further by the arbitrator until a letter dated Feb. 15, 1977 was received from the arbitrator intimating, inter alia, that the award, was made and published on Jan. 27, 1977. A copy of the minutes dated Jan. 17, 1977 was sent under cover of that letter. The said minutes read as follows;

"1st Matter In the Matter of Arbitration Between Kedar Nath Kejriwal And Paras Nath Dubey & Anr.

Minutes of the Meeting of the Arbitrator held on Monday, the 17th January 1977 at 4 P.M.

Present:

1. Sri B.L. Sharma. Arbitrator.
2. Sri Dipak Dey of M/s. P. D. Himtsingka & Co. with Sri Binod Kejriwal of the claimant.

Mr. Dey: I find from the records that the learned Arbitrator duly forwarded a copy of the minutes of the meeting held on 27th December 1977 to the respondents

by registered post with acknowledgement due. The postal acknowledgment receipt duly signed by and on behalf of the respondents are in the file of the learned Arbitrator. In spite of the said fact, I find that the respondents are absent.

As regards the letter of Sri Abhijit Banerjee, Advocate dated 23rd December 1976, a reply has been sent to the said Mr. Banerji by M/s. P.D. Himatsingka & Co. by their letter dated 11th January 1977 explaining the true legal position. I respectfully submit that the learned Arbitrator should proceed with the reference and allow me to adduce evidence.

Mr. Dey examines Mr. Kejriwal and adduces evidence in support of the claim of his client. Original papers are also filed by him. I will make my award in due course,

Sd/- B.L. Sharma Arbitrator."

11. It would seem from the above that either Dubey's version is wholly incorrect or the minutes of the arbitrator dated Jan. 17, 1977 were untrue and manipulated.

12. The learned Judge has decided that question from the materials before him without taking any oral evidence of the parties. The learned Judge was of the view that since Sri Abhijit Banerjee was stated to have attended before the arbitrator on January 17, 1977 at 4 P.M. he should have come out with an affidavit particularly when the minutes speak differently of the happenings of that particular point of time. There is still another factor which weighed with the learned Judge in arriving at his conclusion. It was noticed that the petition had been signed by both Paras Nath Dubey and Jairam Prosad Dubey. It was Jairam Prosad Dubey who was supposed to have accompanied the learned advocate when they had been to the arbitrator : but strangely enough, although Jairam Prosad Dubey signed the petition yet he did not choose to verify the same as true to his knowledge and left it to Paras Nath Dubey who verified the material paragraphs as based on information received from Jairam Prosad Dubey. When the facts as stated in the petition were seriously disputed in the affidavit-in-opposition of Benod Kejriwal, Jairam Prosad Dubey along with Paras Nath Dubey this time affirmed the affidavit-in-reply but Jairam carefully avoided this time also, to state that what was stated in the relevant paragraphs of the petition dealing with the said facts were true to his knowledge. It is further to be noted that there was a supporting affidavit by Sri Dipak Dey who was appearing on behalf of Messrs. P.D. Himatsingka & Co. and who attended the meeting to say that the minutes of the said meeting held on January 17, 1977 were true and correct. In the affidavit-in-reply, that affidavit of Sri Dipak Dey was not at all dealt with although in the opening paragraph Dubey says that the Affidavit of Sri Dipak Dey was also read over and explained to them and they understood the same. In the affidavit-in-reply Jairam Prosad Dubey does not state when he attended before the arbitrator and at which point of time.

13. In para 7 (b) of the affidavit-in reply it is stated as follows:--

"We state that in view of the facts set out in paragraph 7 (a) (i) to 7 (a) (v) above it appears that though Jairam Pro-sad Dubey attended the office of the arbitrator on 17th January, 1977 the meeting was held behind our back at any suitable time after we left the office of arbitrator and the award is made ex parte."

The learned Judge also noticed that when the arbitrator forwarded the award along with the minutes of the meeting dated January 17, 1977 in the middle of February, 1977 Dubey kept silent and did not choose to point out that Jairam Prosad Dubey had attended on January 17, 1977 and was told by the arbitrator that there would be no sitting on that date. Under those circumstances, the learned Judge after taking into consideration, the previous conduct of the Dubey came to the finding that Dubey was not interested in proceeding with the reference and concluded that it must be accepted that Dubey did not attend the meeting on January 17, 1977 and the arbitrator's minutes recorded the correct facts.

14. Mr. Bhabra contends that it is a matter involving facts as to what actually happened. It is true that Jairam Prosad Dubey did not affirm the affidavit verifying the petition but in the affidavit-in-reply he has stated the position. It may be that Sri Abhijit Banerjee, advocate did not affirm the affidavit but at the same time the learned Judge should have considered that the arbitrator also did not make any affidavit although he had been made a party herein. Mr. Bhabra contends that the minutes of January 17, 1977 had not been proved by the arbitrator and the copy thereof was not sent immediately after he made the award. It was sent sometime after February, 15, 1977 though the award was made on January 22, 1977. In his award he has stated that he has examined Sri Benod Kejriwal who adduced evidence in support of the claim of the claimant. The minutes also speak of original papers being filed by the said witness. Mr. Bhabra comments that no records have been produced and there is nothing to be found in respect thereto relating to the evidence of the witness or which documents had been filed by him. Therefore, the minutes of January 17, 1977 were not borne out by the records as true. Mr. Bhabra has also pointed out that there were two arbitration proceedings in connection with two hire purchase agreements in respect of two vehicles but the minutes in respect of both of them show that both were decided at 4 P.M. on that date. Mr. Bhabra contends that these are matters which could have been verified and tested on oral evidence and without such evidence (he point could not have been decided by the learned Judge. It is contended that the learned Judge has not relied on correct materials to arrive at his decision. In support of his contention, Mr. Bhabra has relied on a decision in the case of Deokinandan Dalmia Vs. Basantlal Ghanshyamdas, and the decision in the case of Liladhar v. Firm Radha Kishan Ramsabaya, AIR 1946 Nag 5 at p. 8 and also the decision in the case of Jagdish Mahton and Others Vs. Sundar Mahton and Others, . Mr. Bhabra has also referred to Section 14 of the Arbitration Act, 1940 whereby the arbitrator was required to file the award in the circumstances mentioned therein "together with any deposition and documents

which may have been taken and proved before them.....". Mr. Bhabra contends that the learned Judge should not have taken into consideration the past behaviour or conduct of the Dubey's. It may very well be that they might have changed their mind at the very last moment and decided to contest the arbitration proceeding when all other remedies, they were seeking so far had gone against them. Mr. Bhabra contends further that in the minutes dated December 27, 1976 it was recorded that the arbitrator wanted to hear the Dubey's on the question of notice u/s 35 as served by their lawyer and for that purpose he fixed the meeting on Jan 17, 1977. Accordingly, without hearing Dubey's evidence he should not have proceeded further to make his award.

15. Mr. S.K. Gupta appearing on behalf of the respondents herein contends that the successive steps which Dubey's have taken to thwart the arbitration proceedings will go to suggest that they had no intention to appear. The fact that they had served the notice u/s 35 of the Arbitration Act a few days prior to the said meeting would go to show that they did not intend to actually appear in the said meeting in any event. Admittedly they did not attend the meeting held on Dec. 27, 1976 and no grievance was made in respect thereto at any point of time even after the copy of the minutes thereof was sent to them by the arbitrator. There is no explanation in the petition even as to why they did not appear on Dec. 27, 1976. That being so, the learned Judge was justified in, taking into consideration the past conduct of the Dubey's. Mr. Gupta contends that Jairam Prosad Dubey carefully avoided pledging his oath in the petition. Similarly, when pressed he affirmed the affidavit-in-reply herein but made statements therein in a very guarded manner. He did not mention about the time when he went there. He did not deal with the affidavit of Dipak Dey and thus he did not raise any dispute with regard to the correctness of the minutes of the meeting. He did not even give any explanation as to why his advocate Sri Abhijit Banerjee did not come forward to make any affidavit in support of the statements in the petition or in the affidavit-in-reply. There is no explanation as to why he did not verify the petition by affirming an affidavit in that respect. It is most unusual that he did not choose to have his presence recorded in the minutes of the arbitrator even though he was accompanied by his advocate. Even in the grounds of appeal any point relating to the correctness of the minutes had not been taken nor even the attendance at 4 P.M. had been asserted therein, Mr. Gupta contends that it was not incumbent upon the arbitrator to take down the evidence or to make a note in respect thereto nor was it necessary for him to file the documents unless he is requested by the parties or directed by the court in that regard. That being so, it is contended by Mr. Gupta that there were sufficient materials before the learned Judge not to rely on the affidavit of Jairam Prosad Dubey.

16. In our opinion, there is no case in the petition on this point for the learned Judge to consider whether the matter under the circumstances was to be set down for trial on evidence in the absence of the affidavit of the persons who were said to have attended the meeting on Jan. 17, 1977. In the absence of such affidavit from Jairam Prosad Dubey or from Sri Abhijit Banerjee advocate, the

court was not obliged to hear the case on evidence and could reject the allegations made in the petition as unreliable and untrue; It is unbelievable that Jairam Prosad Dubey would go before the arbitrator accompanied by his advocate and would come back without having it recorded at the meeting fixed on that date and the only conversation that would take place was that the arbitrator felt apologetic for causing inconvenience to the learned advocate. The learned advocate for Dubey in the normal course was expected to have the same recorded in writing. Save and except that some vague allegations have been made in the petition by Paras Nath Dubey, who admittedly had not been present at the appointed time, there was no material whatsoever in the petition wherefrom the court would be in a position to entertain such allegations made in the petition. That being so, the affidavit of Jairam Prosad Dubey made in reply to the affidavit in opposition of Kejriwal lost its effect altogether. In any event, Jairam Prosad Dubey even then had not stated therein that he reiterated the statements made in the petition in connection with the said facts relating to the attendance before the arbitrator. In our opinion, the learned Judge was justified in deciding the case on the affidavits before him in the manner he has done. Accordingly, the points raised by Mr. Bhabra are bound to fail.

17. The only other point urged before us is the effect of the notice u/s 35 of the Arbitration Act, Mr. Bhabra contends that the award was invalid because it was made after notice u/s 35 was served on the arbitrator. The suit was filed on August 6, 1975 at Bhagalpur by Dubey against (1) Bijay Kumar Kejriwal (2) Kedar Nath Kejriwal (3) Mis. General Investment Corporation and (4) Keirival Auto Dealers for the following reliefs:

(a) A declaration that the plaintiff No. 1 is the absolute owner of the vehicles BRF 3461 and BRJ 2741 and the defendants have no right, title or interest therein.

(b) A declaration that the alleged hire-purchase agreement dated 9th October, 1972 relating to vehicle No. BRJ 2741 and the alleged hire purchase agreement dated 25th November, 1972 relating to vehicle BRF No. 3461 are void, and not binding on the plaintiffs and the same are delivered up and cancelled.

(c) Accounts and decree for such amount as may be found due and payable and/or refunded by defendants to plaintiffs.

(d) A decree for Rs. 5,100/- against the defendants;

(e) Interim interest on the said sum of Rs. 5,100/- at the rate of 6 per cent per annum and future (interest).

(f) Mandatory injunction restraining the defendants, their assigns and/or agents from taking any steps and/or any further proceeding in respect of alleged hire-purchase agreements or arbitration agreement dated 9th October, 1972 and 25th November, 1972 in relation to vehicles Nos. BRJ 2741 and BRF 3461 or their execution of the said award cases.

18. It would appear from the above that two of the defendants in that suit are

outsiders to the arbitration agreements and the proceedings, in connection thereto. The said parties are Bijay Kumar Kejriwal and M/s. General Investment Corporation. The nature of the suit is such that there would be no existence of the arbitration agreement and that the plaintiff No. 1 Paras Nath Dubey was the absolute owner of the two vehicles Nos. BRJ 2741 and BRF 3461 and the defendants have no right, title or interest therein. Furthermore, the plaintiffs in that suit claimed a decree for Rs. 5,100/- against the defendant hut that again is not within the scope of the arbitration proceedings. Prayer (f) is; also outside the scope.

19. As stated hereinabove, the notice u/s 35 was dated Dec. 23, 1976 and the arbitrator intimated at the meeting held on Dec. 27, 1976 about the said notice to Kejriwal's advocate. Mr. Bhabra argues that the interpretation of Section 35 of the Arbitration Act requires some re-consideration. The expression "whole of the subject matter of the reference" should be restricted to the part of the claim in the plaint which would come within the scope of the arbitration agreement. Mr. Bhabra has referred to the decision of P.B. Mukharji, J. (as he then was) in the case of Banwarilal Garodia Vs. Joylal Hargulal, and to passages from Sir N.N. Sircar's *The Law of Arbitration in British India* pages 330-334. Mr. Bhabra contends that Sections 34 and 35 are to be read together to find out the meaning of the expression "whole of the subject matter of the reference" in Section 35 Mr. Gupta contends that the opening part of Section 35 is in the negative form because before the 1940 Act came into force the prevailing law in arbitration was that the filing of the suit by itself would render the arbitration proceedings invalid. Mr. Gupta has referred to the said decision in Banwarilal Garodia Vs. Joylal Hargulal, and the passage at page 469 wherein the learned Judge has dealt with that point. In any event, Mr. Gupta contends that the claim in the suit is independent of the contract relating to hire purchase for which the arbitration clause has been provided. It is also contended that two of the parties in the Bhagalpur suit are not parties in the arbitration proceedings. The claim in the suit refers to two vehicles which are the subject matter of the two arbitration references in which two awards have been made. In the plaint Dubey's are asking for delivery up and cancellation of the contract including the arbitration agreement. They have based their cause of action on forgery in respect of the said hire purchase agreement. They are claiming title to the vehicles independent of any hire purchase agreement. Accordingly. Section 35 has no application. The pleading in the plaint in fact is based on misrepresentation, fraud, collusion and so on.

20. On the question of interpretation of Section 35 arguments have been advanced before us and to our mind the section has to be read as conferring some rights by the legislature on the parties to the arbitration proceedings but making it obligatory on the party filing the suit to fulfil certain conditions precedent in order that the arbitration proceedings might be rendered invalid by the filing of the suit.

21. Section 35(1) of the Arbitration Act, 1940 reads as follows :

"35. (1) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject matter of the reference, but when legal proceedings upon the whole of the subject matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall unless a stay of proceedings is granted u/s 34, is invalid.

(2),....."

22. By this section a machinery is provided under the Act to stop the arbitration, proceeding not simpliciter by the filing of the legal proceeding but upon fulfilment of certain conditions. The underlying object is to stop the conflict of decisions between the private forum and the public tribunal. The section contemplates that mere commencement of the legal proceeding will not by itself render the arbitration proceeding invalid. To render it invalid the legal proceeding must be commenced upon the whole of the subject matter of the reference; it must be between all the parties to the reference and a notice thereof has to be given to the arbitrators or umpire as the case may be. If all these conditions are satisfied the further proceeding in the arbitration from the time of the notice upon the arbitrators or umpire in the pending reference becomes invalid. This invalidity, however, can be removed as provided by Section 35(1) as and when an application is made u/s 34 and an order is obtained there on staying legal proceeding. This is how Section 34 comes into play. In other words, what was so long to be done by the act of parties was thenceforward to be done by the court in the exercise of its discretion. This is how the two sections are interrelated and work together to reach a final decision on the point. There are conditions prescribed in both these sections and those are meant to be fulfilled. Section 34 of the Act enables the party-seeking the private forum for the decision of the disputes upon fulfilment of certain conditions as provided therein.

23. u/s 34 legal proceeding commenced by a party to the arbitration agreement in order that the same may not be allowed to proceed, need not cover the whole of the subject-matter of the arbitration proceeding. The court in granting the stay may in its discretion, depending on the facts of each case, consider to make an order for stay only with regard to that part of the legal proceeding which is covered by the arbitration agreement but the position is not exactly the same when it comes to the operation of Section 35(1).

24. In course of arbitration proceedings the party or parties may choose to commence legal proceedings in the Judicial forum and thereby may seek to stop the subject matter of the reference from being proceeding with in arbitration. But if that is sought to be done then the section provides that such legal proceedings must be commenced on the whole of the subject matter of the reference and must be between all the parties to the reference and the notice thereof has to be

given to the arbitrators or umpire. There is no question of using any discretion on the part of anybody in rendering the arbitration proceedings invalid. The section, accordingly, has to be strictly construed and complied with in order that the arbitration proceeding which was being otherwise lawfully proceeded with has to be rendered invalid

25. It is argued that in order to render the arbitration proceeding invalid the legal proceeding need not be upon the whole of the subject matter of the reference. It is contended that the first limb of the section speaks only of the "commencement of legal proceeding upon the subject matter of the reference" and not "upon the whole of the subject matter of the reference" which has been used in the second limb of the section. Accordingly, it is contended that when the legal proceedings would be commenced upon any part of the subject matter of the reference then such part would be rendered invalid if the other conditions provided in the section are fulfilled. The further contention is that Section 34 does not contemplate of putting any such fetter by introducing such Expression as in Section 35(1), Accordingly, the expression "whole of the subject matter of the reference" should be read harmoniously and the said expression should not be construed in any stricter sense.

26. In my opinion, this argument is fallacious. As observed hereinabove an arbitration proceeding which is not otherwise unlawful or invalid is sought to be rendered invalid by the act of parties to the arbitration proceeding by the commencement of the legal proceeding. It is the intention of the legislature to protect the interest of the parties to the arbitration proceeding by providing that in order that the arbitration proceeding might be rendered invalid, the legal proceeding so commenced must be on the whole of the subject matter of the reference and, if not, such commencement of legal proceeding would not be effective in rendering invalid any lawful arbitration reference. The expression "whole of the subject matter of the reference" has a special significance of its own and it is only when this is strictly complied with that it might have the force to render the arbitration proceeding invalid. The principle behind this is to have the entire disputes decided in legal proceeding without leaving any part to be decided in the pending arbitration proceeding so that there might not be any possibility of conflict of decisions, In short, the purpose is that either the "whole of the subject matter of reference" is put an end to or not at all. Unlike Section 34, in applying this section there is no scope for exercising the discretion although it is in the negative form still it is mandatory in substance. Accordingly the section has to be strictly complied with.

27. In my opinion the reasons why the whole of Sub-section (1) of Section 35 has been put in the negative form is to give only a limited right to the party commencing the legal proceeding. He cannot, by his own act by commencing the same, simpliciter render the arbitration proceeding invalid. He can effectively do so only upon fulfilling the three conditions laid down therein.

28. This point under similar circumstances came up for consideration before P.B.

Mukharji. J. (as he then was) sit-ting singly in the case of Banwarilal Garodia Vs. Joylal Hargulal, . The learned Judge discussed the principle of law involved in Section 35(1) and under similar circumstances held that the award was not invalid u/s 35 of the Arbitration Act. I entirely agree with the principle decided in that case on that point. In the case before us also Section 35 has no application because the legal proceeding "commenced by the appellant" is not upon either the whole or part of the subject matter of the reference, Such was the case also before the Division Bench of this Court in Rambilas Nandlal Vs. Imperial Oil Mills Ltd., where it was held that under such circumstances the notice u/s 35 could not render the award invalid.

29. The result, therefore, is that the decision of the Court below must be upheld and the appeal must be and is hereby dismissed with costs.

C.K. Banerji, J.

30. I agree.