
(1965) 07 AHC CK 0028
In the Allahabad High Court
Case No : Civil Revision No. 96 of 1964

The State of U.P.	Vs	APPELLANT
Ram Nath Bansal		RESPONDENT

Date of Decision : 23-07-1965

Acts Referred:

Arbitration Act, 1940 — Section 2, 46

Citation : AIR 1966 All 467

Hon'ble Judges : D.S. Mathur, J

Bench : Single Bench

Advocate : H.P. Gupta, for the Appellant; A. Banerji, for the Respondent

Final Decision : Dismissed

Judgement

D.S. Mathur, J.—This is a revision u/s 115, C. P. C. by the State of Uttar Pradesh defendant against the order dated 24-9-1963 of the Additional Civil Judge of Agra allowing the appeal of Ram Nath Bansal, plaintiff and thereby getting aside the order of the Munsif Khalilabad at Agra staying the hearing of the suit u/s 34 of the Arbitration Act.

2. The plaintiff, Ram Nath Bansal was given the contract of digging ridges after he and also the Conservator or Forest Land Management Circle, U. P. had executed agreements. Disputes arose with regard to the execution of works whereupon the plaintiff instituted the present suit against the State of Uttar Pradesh for the recovery of Rs. 3,023 with costs and pendente lite and future interest. Before filing the written statement the State moved an application u/s 34 of the Arbitration Act praying that the hearing of the suit be stayed as there existed a clause for arbitration, the plaintiff had not availed of this remedy and the defendant was throughout willing to such arbitration. The application was allowed by the Munsif who stayed the hearing of the suit. Ram Nath Bansal went up in appeal before the District Judge and the learned Civil Judge hearing the appeal has set aside the Munsif's order holding that there was no valid arbitration agreement. The learned Civil Judge directed the trial Court to proceed

with the hearing of the suit in accordance with the law.

3. The point for consideration is whether Clause 25 of the agreement entered into between the plaintiff and the conservator of Forest amounts to an arbitration agreement. If so, the present suit cannot proceed and it shall be necessary for the parties to move the Arbitrator for making an award. Clause 25 of the agreement runs as below:

"Theka Key Arth Abhipravya Key Sambandh Men Emarat Ki Tayyari Key Sambandh Men Aur In Sharton Key Sambandh Men Jo Baten Paida Hon, Un Sabka Faisla Divisional Officer Karenge. Parantu Kewal Un Baton Ko Chorkar, Jahan Saf Saaf Kaha Gaya Hai Ki Unka Faisla Antim Hoga, Yadi Thekedar Aur Baton Key Faisley Say Ya Karrawai Sey Santusht Na Ho To Woh Conservator of Forest Land Management Circle Key Pas, Jinka Faisla Antim Hoga, Appeal Kar Sakta Hai."

4. The above clause contemplates two classes of disputes--one in which the decision of the Divisional Forest Officer is final and the other consisting of other disputes in which the decision of the Divisional Forest Officer can be appealed before the Conservator of Forest and the order of the Conservator of Forest is final, meaning thereby binding on the parties. In this revision we are not concerned with disputes falling in the first category and hence it is not necessary to indicate whether the decision of the Divisional Forest Officer, not appealable to the Conservator of Forest, amounts to an award and with regard to such disputes there exists an arbitration agreement necessitating the parties to move the Arbitrator, and not institute a suit before the courts of law in the first instance,

5. There is nothing in Clause 25 to show that the decision of the Divisional Forest Officer in disputes falling in the second category shall be final, if not appealed against before the Conservator of Forest, though if no appeal is preferred it can be presumed that the Contractor was satisfied with the decision of the Divisional Forest Officer. Two questions arise for consideration:

1. Whether with regard to such disputes also Clause 25 amounts to an arbitration agreement? and

2. Whether this agreement, in any way, restricts the jurisdiction of the courts of law?

6. Section 28 of the Contract Act, 1872, details which agreements in restraint of legal proceedings are void. The main clause of Section 28 provides that:

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, is void to that extent."

Exceptions to this rule are contained in Exceptions 1 and 2 to the section. Exception 1 legalises a contract "by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of

subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred". Exception 1 contemplates disputes which would arise in the future. It is further provided in Exception 1 that "when such a contract has been made, a suit may be brought for its specific performance", i.e. for reference of the dispute to arbitration, and that "if a suit, other than for such specific performance, or for the recovery of the amount so awarded is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit"

Exception 2 to Section 28 refers to disputes which have already arisen and such disputes can also by a contract in writing, be referred to arbitration. In other words, therefore the parties can agree that all their disputes which have already arisen or which may arise in the future shall be referred to arbitration, and in such a case no suit shall lie unless recourse to arbitration has been taken.

7. Exception 2 to Section 28 of the Contract Act also lays down that nothing in Section 28 shall "affect any provision of any law in force for the time being as to references to arbitration". There can be a general or special law governing references to arbitration and such enactments shall be valid and binding on the parties.

8. Two factors thus emerge out of Section 28 of the Contract Act; firstly, that the parties cannot by themselves restrict their right to seek remedy before the ordinary tribunals unless they agree to refer their disputes to arbitration; and secondly, the arbitration shall be in accordance with the general law, i.e. the Arbitration Act, or special law if any as the case may be. This is also evident from Section 47 of the Arbitration Act which clearly provides that subject to the provisions of Section 46 and save in so far as otherwise provided in law for the time being in force the provisions of this Act (Arbitration Act) shall apply to all arbitrations and to all proceedings thereunder.

9. For Disputes of the present nature, there is no special law for making reference to arbitration, nor is there any special law to lay down how the award or decision of the Arbitrator shall be questioned. In these circumstances, the arbitration must be in accordance with the Arbitration Act and in absence of an arbitration agreement as contemplated by the Arbitration Act a civil suit can lie even though in the agreement entered into by the parties there may be a provision for appeal to a higher authority.

10. The Arbitration Act does not contemplate of a decision by one authority and thereafter an appeal to a higher authority. The sob Arbitrator is a single individual who can make an award and whose award is final. Where the reference is to two arbitrators, the award is made by both and in case of disagreement, the matter goes to the Umpire whose decision takes the place of an award. Where reference is made to say, three Arbitrators the award is the majority decision of the Arbitrators. In no case is the award subject to an appeal. To put it differently,

Clause 25 of the agreement wherein there is provision for appeal does not and cannot amount to an arbitration agreement as contemplated by the Arbitration Act.

11. The Co-operative Societies Act and the rules framed thereunder do make a provision for an appeal against the award of an arbitrator; but such a reference to arbitration is under a special law and as provided in Section 46 of the Arbitration Act the provisions of the special law shall prevail over the corresponding procedure laid down in the Arbitration Act. An agreement between the parties cannot take the place of a law and cannot amount to a statutory arbitration and hence arbitration, if any, in the instant case would be governed by the Arbitration Act and any agreement to the contrary shall be void and unenforceable.

12. The decision of the Divisional Forest Officer on disputes falling in the second category cannot, therefore, amount to an award and when his decision is not an award he cannot be placed in the category of an arbitrator. When the Divisional Forest Officer is not an arbitrator, it is not necessary for the parties to refer their disputes to him for arbitration and the provision for decision of the disputes by the Divisional Forest Officer cannot amount to an arbitration agreement. Question of appeal to the Conservator of Forest arises only after the Divisional Forest Officer has been moved and has given a decision, and when it is not mandatory for the parties to refer their disputes to the arbitration of the Divisional Forest Officer, it cannot be said that while deciding the appeal the Conservator of Forest acts as an arbitrator and it is necessary for the parties to eventually refer their disputes to the Arbitration or decision of the Conservator of Forest.

13. To sum up, while giving a decision on disputes falling in the second category neither the Divisional Forest Officer nor the Conservator of Forest acts as an arbitrator and the corresponding part of Clause 25 of the agreement cannot amount to an arbitration agreement. When there exists no arbitration agreement, a civil suit can lie and the hearing of the suit could not be stayed u/s 34 of the Arbitration Act. The lower appellate Court has thus taken a correct view of the law and the present revision cannot succeed.

14. In the end, reference may be made to Clause 14 of the agreement to which my attention was specifically invited by the learned Standing Counsel. Clause 14 refers to certain orders which can be passed in case of non-execution of work within the stipulated or the extended period. This clause provides that the certificate granted by the Divisional Forest Officer with regard to deduction shall be final and binding on the contractor. It was, therefore, contended that the certificate granted by the Divisional Forest Officer amounted to an award and, in any case, the certificate so granted could not be challenged before the Courts of law. An arbitrator cannot make an award unless so directed by the Court u/s 20 of the Arbitration Act or moved by all the parties. In case the certificate amounts to an award, it would be an instance of a dispute falling in the first category

where the decision of the Divisional Forest Officer is final and binding on the parties. In such a case, the decision amounting to an award shall have to be acted upon unless set aside in accordance with the provisions of the Arbitration Act. But if the certificate is granted by the Divisional Forest Officer on his own without his being moved by the parties to the dispute, it would not be an award but would be a mere certificate which can, in certain circumstances, be challenged before the Courts of law. Beyond this it is not necessary to make any further comment. The point, if raised, shall naturally be adjudicated upon during the hearing of the suit.

15. The stay of the hearing of the suit u/s 34 of the Arbitration Act was thus not necessary and the trial can proceed in accordance with the law.

16. The revision has no force and it is hereby dismissed with costs.