

(1970) 01 DEL CK 0013
In the Delhi High Court
Case No : Suit Appeal No. 508 of 1966

Union of India

APPELLANT

Vs

Sarju Prasad Jagdish Prasad

RESPONDENT

Date of Decision : 22-01-1970

Acts Referred:

Citation : (1970) ILR Delhi 711

Hon'ble Judges : Prakash Narain, J

Bench : Single Bench

Advocate : J.P. Chopra and B.S.C. Singh, for the Appellant;

Judgement

Parkash Narain, J.

(1) The principal point for decision in this matter is the construction to be placed on Section 33 of the Arbitration Act, 1940. This question arises on account of an application moved by the Union of India u/s 33 of the Arbitration Act, 1940. Briefly stated, the facts leading to the moving of this application are as follows.

(2) On 13th April, 1964, the Assistant Director of Purchase, Ministry of Food & Agriculture (Department of Food), Army Purchase Organisation, Government of India, New Delhi, for and on behalf of the President of India, issued a tender enquiry for supply

"the petitioner, Therefore, prays as follows: (i) it be declared that a valid and binding contract (including agreement to refer disputes to arbitration) between the parties came into existence by means of Acceptance of Tender No. 11/75/494/64-Pur. Iii dated 29-4-1964 that both of the parties are bound by the said contract. (ii) Even apart from and/or in addition to the con- tract mentioned in clause (i) above, an independent agreement to refer the disputes to arbitration exists between the parties. (iii) The appointment of Shri V. Ramaswamy Iyer, Additional Legal Adviser (Arbitration), Ministry of Law, New Delhi as the sole arbitrator is perfectly valid and binding on the parties and he has jurisdiction to proceed with the arbitration and make an award. (iv) Costs of the present

proceedings be allowed any other relief that the Hon"ble Court deems fit may also be granted to the petitioner.

(3) On notice of the petition being served on the respondent herein it filed a reply and, *inter alia*, raised the objection that a petition u/s 33 of the Arbitration Act, 1940 was not maintainable in Law, as the existence and validity of the entire contract was denied. On the pleadings of the parties, the following issues were settled on 4th January, 1966: 1. Whether the petition has been signed and verified by a competent person; 2. Whether there was any valid contract between the parties; 3. Relief.

(4) On the motion of the respondent and additional issue was framed by Hardy, J on 22nd January, 1969. that reads as under:

"WHETHER the application u/s 33 of the Arbitration Act is competent on the allegations made in the petition;"

(5) Issue No. 1 has not been contested by the respondent because of the evidence brought on record. Accordingly, this issue is decided in favor of the petitioner.

(6) Issues No. 2 and the additional issue numbered as 2-A may be taken together. In fact if Issue No. 2-A is decided in favor of the Respondent It will not be necessary to comment on the other issue. The objection of the respondent to the maintainability of the present application is that no declaration as to the existence of an arbitration agreement can be sought u/s 33 of the Arbitration Act. For this purpose reliance has been placed by the learned counsel for the respondent on a decision of the Supreme Court in *Shiva Jute Baling Limited Vs. Hindley and Company Limited*, . Wanchoo, J. (as he then was), giving the opinion of the Court had observed as under:

"THE part of S, 33 of the Arbitration Act, relevant for our purpose, lays down that any party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement or to have its effect determined shall apply to the Court and the Court shall decide the question. It will thus be clear that S. 33 contemplates an application for three purposes, namely, (i) when it is desired to challenge the existence of an arbitration agreement, (ii) when it is desired to challenged its validity, and (iii) when it is desired to have its effect determined. An arbitration agreement may come into existence in one of two ways; it may either arise out of an agreement which contains nothing else besides the arbitration agreement, or it may arise out of a term contained in a contract which deals with various other matters relating to the contract, which is the present case. Where one is dealing with an arbitration agreement of the second kind, S. 33 is concerned only with the term relating to arbitration in the contract and not with the other terms of the contract which do not arise for consideration on an application under that section."

(7) This judgment of the Supreme Court was, however, unfortunately not noticed

in a later decision of that Court on which the learned counsel for the petitioner has laid great reliance. That is a decision in *Jawahar Lal Burman Vs. Union of India (UOI)*, . Relying on this later decision Mr. J. P. Chopra, the learned counsel for the petitioner has urged that the Court has inherent jurisdiction to give the declaration sought for. In my opinion, the later judgment does not, in any way, differ from the decision in the earlier judgment of the Supreme Court. It will be advantageous here to quote from the opinion of Gajendragadkar, J. in the case of *Jawahar Lal Barman v. Union of India*. His lordship observed as follows :

"BEFORE answering this question we may conveniently consider the scope of S. 33 and its effect. Section 33 consists of two parts. The first deals with a challenge to the existence or validity of an arbitration agreement or an award, and it provides that the persons therein specified can apply to the Court to have a decision on its challenge to the existence or validity of an arbitration agreement or an award. In other words, there is no doubt that it is only persons who challenge the existence of the arbitration agreement that can apply under the first part of S. 33. This position is also not disputed. The second part of the section refers to applications made to have the effect of either the arbitration agreement or the award determined. The question which we have to consider is whether a person affirming an arbitration agreement can apply under the latter part of S. 33 Even assuming that the requirement that an application can be made under the first part of S. 33 only by persons desiring to challenge the arbitration agreement does not apply to, its latter part, it is difficult to hold that an application to have the effect of the arbitration agreement determined can legitimately cover the dispute as to the existence of the said arbitration agreement. It is clear that the first part of S. 33 refers to the existence or validity in terms and Ss. 31 and 32 also refer separately to the existence, effect or validity. Therefore, the effect of an arbitration agreement is treated as distinct from the existence of the agreement, and where it was intended to refer to the existence as well as the effect of such an agreement both the words "existence and effect" have been specifically used. Thus under the later part of S. 33 an application can be made to have the effect or purport of the agreement determined but not its existence. That means that an application to have the effect of the agreement can be made provided the existence of the agreement is not in dispute. Besides, if a person affirming the existence of an agreement is held entitled to apply to the Court under the latter part of S. 33 for getting a declaration about the said existing agreement then the first part of S. 33 would be wholly superfluous. Therefore, it seems to us that a party affirming the existence of an arbitration agreement cannot apply under S. 33 for obtaining a decision that the agreement in question exists. In fairness we ought to add that the learned Solicitor-General, who appeared for the respondent did not dispute this position."

(8) Thus what is absolutely clear is that a party affirming air arbitration agreement cannot get a declaration as to the existence of an arbitration agreement by moving a petition u/s 33 of the Arbitration Act.

(9) The question that arises for consideration is that if the party affirming the existence of an arbitration agreement cannot apply u/s 33 what is the remedy open to it. Commenting on this aspect Gajendragadkar, J. observed as follows in the above noted case of Jawahar Lal Burman Vs. Union of India (UOI), :

"THIS question takes up back to S. 32 If Section 32 has created a bar against the institution of a suit for obtaining a declaration about -the existence of an arbitration agreement, unless it is held that the creation of the said absolute bar itself involves the right to make an application under the Act it would lead to the anomalous result that a party is given no remedy to enforce the right; and it is an ordinary rule of construction that such an unreasonable and unconscionable result should as far as possible be avoided because the Legislature could not have intended such a result. In our opinion of Ss. 31, 32 and 33 it would not be unreasonable having regard to the scheme to hold that in matters which fall within the bar created by S. 32 if a suit cannot be filed it is necessarily intended that an application can be made and such an application can be made under the Court's powers provided for by S. 31 and impliedly recognised by S. 32. On this construction S. 33 cannot be treated as exhaustive of all cases where applications can be made . The Legislature has provided for the said cases under S. 33 because it was thought that they represented the usual type of cases which arise under the arbitration agreements. A contrary view would lead either to a stalemate or would in substance compel the party affirming the existence of an agreement to forego the procedure prescribed by the said agreement and sue on the contract itself. We are satisfied that a fair construction of Ss. 31, 32 and 33 does not lead to such an anomalous position. Mr. Din Dayal contends that there is really a lacuna in the Act inasmuch as having created a bar by S. 32 the Legislature has failed to provide a remedy by way of an application. On reading Ss. 31, 32 and 33 together we do not think the Court is driven to the conclusion that there is a lacuna in the Act. In this connection it is material to remember that even in dealing with applications under the first part of S. 33 the Court may accept the opponent's plea and hold that the arbitration agreement exists if the challenge to the said existence set out in the petition is rejected. In other words, in many cases applications made under the first part of S. 33 may end in the finding that the arbitration agreement exists. Similarly, in applications made under S. 20 of the Act if a dispute arose as to the existence of the arbitration agreement the Court may find in favor of the existence and make an order of reference as contemplated by S. 24. Thus, it is clear that in the applications expressly provided for by these two sections a party affirming the existence of the agreement would be entitled to prove the said existence, and if he succeeds he would obtain a decision to that effect. Therefore, in holding that S. 32 impliedly recognises the inherent jurisdiction of the Court to entertain applications made by the parties affirming the existing of arbitration agreements we are bringing the provisions of S. 32 in line with the provisions of S. 33 and 20. Indeed, S. 33 is a corollary of S. 32 and in a sense deals by way of illustrations with the most usual type of cases arising in arbitration proceedings.

Section 28 of the Act has no material bearing on the decision of this point. The power to enlarge time for making the award which is the subject-matter of the provisions of S. 28 cannot be held to include a power to entertain petitions like the present. Indeed, the learned Solicitor-General has not attempted to justify the conclusion of the High Court that S. 28 confers such a power."

(10) From a reading of the above observations it would appear, according to Mr. J. P. Chopra, that even if a petition is moved u/s 33 of the Arbitration Act to get a declaration that an arbitration agreement subsists or exists the Court has inherent jurisdiction to grant that declaration by virtue of the provisions of Sections 31 and 32 of the Arbitration Act. This is no doubt true but what has to be kept in mind is that Section 31 of the Arbitration Act deals only with the jurisdiction of the Court which may try a petition under the Arbitration Act. It specifies that only that a Court has jurisdiction to deal with a petition under the Arbitration Act which would have territorial and pecuniary jurisdiction to deal with the matter wherein an award, if made, can be filed. Once an application has been moved in such a Court it alone to the exclusion of any other court that may also have jurisdiction would be competent to entertain all future applications or petitions. Sub-section (2) of Section 31, however, does mention that such a Court shall have jurisdiction to adjudicate upon all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them. Section 32 bars suits contesting an arbitration agreement or an award and in terms lays down that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award. It was in the light of these statutory provisions brought to the notice of the Supreme Court that Gajendragadkar, J. observed that according to the scheme of Sections 31, 32 and 33 it would not be unreasonable to hold that any matters which fall within the bar created by Section 32 an application can be made and such an application could be entertained by a Court even if the application was for a relief which was not covered by the provisions of Section 33. Their lordships of the Supreme Court were really considering a judgment of the Punjab High Court in which the High Court had held that section 33 was not available to get an affirmative declaration about the existence of an arbitration agreement but that such a declaration could be given u/s 28 of the arbitration Act when, as in that case, the original application had been moved u/s 33 and section 28 of the arbitration Act. It appears that provisions of section 20 of the Arbitration Act were not brought to the notice of their Lordships of the Supreme Court. Whenever there is a reference to be made under an Arbitration agreement the parties to the agreement can either proceed under Chapter II or Chapter III of the Arbitration Act. Under Chapter II of the Arbitration Act a reference can be made out of Court if the parties to the agreement join in the reference. If, however, one of the parties chooses not to join in the reference or even otherwise at the option of the party invoking the arbitration agreement recourse can be had to the provisions of Chapter III of the Arbitration Act. Section 20 of the Arbitration Act in Chapter II is

in the following terms :

(1) where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court. (2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if, otherwise, between the applicant as plaintiff and the other parties as defendants. (3) On such applications being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed. (4) Where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitration appointed by the parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitration, to an arbitrator appointed by the Court. (5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

On a reading of this section it is quite apparent that if a party is denying the existence of an agreement, the party affirming the existence of the arbitration agreement can move for the agreement to be filed in Court and a reference made in accordance therewith. The party contesting the existence of the arbitration agreement will then have an opportunity to show cause why the agreement be not filed. In this view of the matter it would appear that although the inherent jurisdiction of the Court is saved by virtue of sections 31 and 32 of the Arbitration Act, as observed by the Supreme Court in *Jawahar Lal Barman's* case the remedy of a party affirming the existing of an arbitration agreement is either to get the other parties to the agreement to join in the reference under Chapter II or if they fail to do so or deny the existence of the arbitration agreement have recourse to the provisions of section 20 of the Arbitration Act. I would accordingly, hold that the petition as framed u/s 33 of the Arbitration Act is not competent.

(11) Mr. Chopra then urged that the petition may be treated as one under sections 31 and 32 of the Arbitration Act and the Court exercising its inherent jurisdiction on the ratio of the observations in *Jawahar Lal Barman's* case may grant the relief asked for. In my opinion, the law of the land has been settled as far back as in 1962 and it does not lie in the mouth of the petitioner when it moved the present petition in 1966 to disregard the settled law that a party affirming the existence of an arbitration agreement cannot apply u/s 33 of the Arbitration Act. The petition is, accordingly, dismissed but in the circumstances of

the case there will be no order as to costs.