

(1980) 02 DEL CK 0027
In the Delhi High Court
Case No : First Appeal No. 28 of 1970

Union of India

APPELLANT

Vs

Sarju Prasad Jagdish Prasad

RESPONDENT

Date of Decision : 21-02-1980

Acts Referred:

Citation : AIR 1980 Delhi 162 : (1980) 17 DLT 511 : (1980) RLR 503

Hon'ble Judges : S.N. Kumar, J;Rajinder Sachar, J

Bench : Division Bench

Judgement

Rajinder Sachar, J.

(1) This is an appeal against the order of the learned Single Judge by which he dismissed the application filed u/s 33 of the Arbitration Act and also rejected the prayer of the appellant to treat the said application as made under Sections 31 and 32 of the Arbitration Act.

(2) The appellant filed an application u/s 33 of the Act in this court on the allegation that in response to the tender issued by it, the respondents offered to supply 444 M.T. of Dal Channa. This offer was said to have been accepted and the respondents were alleged to have been informed of the acceptance by a telegram which was followed by the acceptance of the tender No. 11/75/494/64-Pur Iii dated 29-4-1964 which contained the usual terms including the arbitration clause. The appellant alleged that the respondents filed the security deposit to carry out the terms and conditions of the contract. It was alleged that the respondents did not supply the contracted quantity and the appellant was compelled to purchase 444 M. Tonnes of Dal Channa from other sources and have suffered a loss of Rs. 1,48,818.00 . The respondents having refused to remit the said amount the dispute had arisen.

(3) The respondents by their letter of 6th October, 1964 addressed to the Secretary to the Government of India, Ministry of Food and Agriculture asked him to refer the dispute to arbitration. Acting on this representation the secretary by

his letter of 30th January, 1965, referred the dispute to the arbitration of Mr. Iyer, Additional Legal Adviser, Ministry of Law. Mr. Iyer entered upon the reference on 6th February, 1965. The appellant filed his statement of claim dated 5th March, 1965. The respondent also filed his written statement on 12th April, 1965 and also raised the objection that there was no valid and binding contract between the parties. This objection was followed up by the submission before the arbitrator not to proceed with the case. In view of the respondent's plea that there was no binding contract, and hence no arbitration clause which formed a part of the main contract, arbitrator directed the respondents to move the court u/s 33 of the Arbitration Act which permits a party to challenge the existence or validity of an arbitration agreement to apply to the court for this purpose. The respondents, however, did not take any steps and after awaiting for over two months the appellant moved this application u/s 33 seeking a declaration that there was a valid and binding contract including the agreement to refer the dispute to arbitration between the parties which came into being by means of acceptance of 29th April, 1964. Objection was taken by the respondents before the learned Single Judge mainly on the ground that an application u/s 33 of the Act seeking the affirmance of the existence of an arbitration agreement is not maintainable. The learned Judge has found this in favor of the respondents and the Union of India has come up in appeal.

(4) That Section 33 does not permit the party to seek the affirmance of the existence of an arbitration agreement is no longer in doubt in view of *Jawahar Lal Burman Vs. Union of India (UOI)*, . Mr. Chopra, the learned counsel, however, makes a grievance that the learned Judge was in error in not treating the application u/s 32 of the Act and also in holding that Section 32 was not the proper remedy for the appellant. Now Prakash Narain J. noticed that the Supreme Court in that case had found that though an application for affirmance of existence of arbitration agreement u/s 33 of the Act was not maintainable, however, held that Section 32 of the Act impliedly recognises the inherent jurisdiction of the court to entertain an application made by a party affirming the existence of the arbitration agreement. But the learned Judge thought that notwithstanding this the remedy of a party affirming the existence 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 have recourse to Section 20 of the Arbitration Act. With respect we do not feel that that is a correct reading of the decision of the Supreme Court. The Supreme Court has clearly held in para 9 that having regard to the Scheme of Sections 31, 32 & 33 it would not be unreasonable to hold that in matters which fell within the bar created by Section 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 power provided by Section 31 and impliedly recognised by S. 32. The learned Judge sought to distinguish the Supreme Court by assuming (and we say with respect) erroneously that application before Supreme Court was u/s 28 of the Act. Rather the Supreme Court has said that S. 28 of the Act has no material bearing on the

decision on the point. As a matter of fact the application which had been filed in that case was under Ss. 32 and 33 of the Act and in para 12 the court specifically held "that the High Court was right in coming to the conclusion that petition made by the respondent was competent u/s 32 of the Act and has been properly entertained by the Trial Court". The decision of the Supreme Court was not that though there was an inherent jurisdiction under S. 32 of the Act to determine the existence of an arbitration agreement but that the remedy had to be sought only u/s 20 of the Act. The learned Single Judge possibly under a misconception has stated that Section 20 was not noticed by the Supreme Court and has held that because u/s 20 a finding could be given that an arbitration agreement exists application u/s 32 of the Act for this purpose was not permissible. That this is not a correct reading of the Supreme Court because it was said in that judgment :

"THEREFORE, in holding that Section 32 impliedly recognises the inherent jurisdiction of the Court to entertain applications made by the parties affirming the existence of arbitration agreements we are bringing the provisions of S. 32 in line with the provisions of Sections 33 and 20."

(5) We must Therefore hold, differing from the Single Judge that an application seeking the affirmance of existence of arbitration agreement was maintainable u/s 32 of the Act. The only reason on which the learned single Judge has thrown out the application is that the application was filed u/s 33 of the Act (which is admittedly not maintainable) even though request was made to him that this application be treated u/s 31 and 32 of the Act. The learned Judge, however, refused this prayer on the ground that law was settled as back as 1962 and because an application has been moved in 1966 u/s 33 of the Act the appellants were not entitled to any such consideration. It is true that normally a discretion exercised by the learned Single Judge would not be lightly interfered in appeal. But it seems to us that in the present case it is not so much a question of exercise of discretion as of refusing to exercise jurisdiction, in a matter which clearly lay within his purview. Merely because the application had been labelled u/s 33 of the Act was no reason to throw out the application because it is well settled in *The Amritsar Improvement Trust Vs. Baldeva Inder Singh and Others*, , that "if an authority has a valid power to do a particular act, the fact that it purported to do that act under a provision of Jaw which did not confer power to do that act, would not invalidate the Act". Mere fact that an application was filed u/s 33 could not preclude the court from good reason from holding that the application be treated as filed u/s 32 because admittedly the court has power to try the said application. Mere label should not defeat the appellant. In more or less a similar case *B.C. Misra J. Union of India Vs. Uttam Singh Dugal and Co. (Pvt.) Ltd.*, , held and in our opinion correctly that it is not at all material as to what label is whether it is under S. 31 or 33 and the application could be held to be maintainable u/s 32 of the Act. In the present case, there was a very strong compelling reason why discretion should certainly has been exercised in favor of the Union of India. It would be seen that originally the reference to arbitration was made at the instance of the respondent. The arbitrator had entered upon the

reference and it was thereafter that the present objection was raised as to there being no arbitration agreement. The arbitrator had then directed the respondent to seek the verdict of the court. Respondent had however chosen to keep silent. Faced with that peculiar situation the only alternative left with the appellant was to move the court seeking a declaration for the affirmance of the existence of contract including the arbitration agreement. To throw out the appellant on the hyper technical ground that the application was filed u/s 33 instead of Section 32 of the Act (in which case it certainly would have been maintainable in view *Jawahar Lal Burman Vs. Union of India (UOI)*), is to deny justice to the appellant and permitting the respondent to take advantage of his own fault. Had the respondent not in the first instance agreed and actually requested reference to arbitration, the appellant no doubt would have filed an application u/s 20 of the Act and as even the learned Judge recognise the question of existence of agreement would have had to be decided therein. We cannot appreciate how even the power of the court u/s 32 of the Act is established, the appellant should have been non suited only because of the wrong reference to the provision of law. This is to put the procedure as a master rather than as a hand maiden of justice which it should be.

(6) In the circumstances we feel that this application should be and we do order that it be treated under Sections 31 and 32 of the Act. The result is that we would allow the appeal and set aside the order of the learned Single Judge. As there was no decision on merits the application which will now be treated to be under Sections 31 and 32 of the Act and is remitted back to the learned single Judge for decision in accordance with law and merits of this case. The respondents have been served but there is no appearance on their behalf. The appellant through the counsel is directed to appear before the Deputy Registrar on 26.3.1980 for taking further proceedings.