(1980) 01 AHC CK 0059

In the Allahabad High Court

Case No : Civil Revision No. 3542 of 1978

Union of India (UOI) and Another — APPELLANT

Vs

H.M. Kamaluddin Ansari and Co. — RESPONDENT

Date of Decision : 24-01-1980

Acts Referred:
Arbitration Act, 1940 — Section 20, 41

Citation : AIR 1980 All 312

Hon'ble Judges : K.N. Seth, J

Bench : Single Bench

Advocate : V.K. Burman, for the Appellant; S.N. Verma and Navin Sinha, for the Respondent

Final Decision : Allowed

Judgement

K.N. Seth, J.—This revision by the Union of India and the Director General of Supplies and Disposal is directed against the order of the learned Civil Judge, Kanpur, directing the applicants to release the amount of Rs. 99,776 forthwith in favour of the opposite party. The impugned order was passed on an application for injunction made u/s 41 of the second schedule of the Arbitration Act (hereinafter referred to as the Act) read with Order 39, Rr. 1 and 2 and Section 151, C.P.C. in a petition pending before the learned Civil Judge u/s 20 of the Act.

2. The opposite party M/s. H. M. Kamaluddin Ansari and Company, a partnership firm, carried on the business of manufacture and sale of various items of webbing and web equipments. The firm and the Director of Supplies and Disposal, Tilak Nagar, Kanpur, and the Director General of Supplies and Disposal, New Delhi for and on behalf of the Union of India entered into contracts No. A/T No. KAN/109-J/KP-5/98/HMK/ 87-PAOD dated 29-10-1974 and A/T No. KAN/6989-M/KP/5/HMK/57/PAOD dated 7-7-1975 for supply of various items of webbing and web equipments. The case set up by the firm was that according to the terms and conditions of the contracts it made supplies of the contracted items within the stipulated period and submitted the bills. According to the

payment terms 95% of the price of the goods supplied against those contracts was to be immediately made on submission of the bills along with proof of inspection and despatch of the same to the consignee, but the payment of some of the bills was Withheld. It was further asserted that there was no dispute regarding the amount of the bills but as the payment of the bills was not made in time, the firm was entitled to claim interest at the rate of 18 per cent per annum which amounted to Rs. 53,009.23 up to 30-6-1978. It was further pleaded that since the Union of India failed to nominate and appoint an Arbitrator in terms of clause No. 24 of the Agreement, the petition was filed u/s 20 of the Act praying for an order of reference relating to the claim for interest. During the pendency of the petition the firm moved an application for an ad interim injunction as noted above.

3. In the objection filed by the Union of India, which was supported by an affidavit, it was pleaded that the Union of India had a claim to the extent of Rupees 93,054 against the firm in respect of contract No. A/T. No. 109/J/KP-55/98 dated 18-10-1973. The dispute relating to the aforesaid contract has already been referred to arbitration under the order of the Delhi High Court passed in Suit No. 224A of 1975. During the pendency of the aforesaid proceedings before the Delhi High Court a restraint order was passed against the Union of India from realising or withholding or appropriating any payment which may be due to the firm on account of the supplies made in other contracts but that order came to an end on 23-5-1975 when the said Suit No. 224A of 1975 was finally disposed of on that date referring the dispute to the Arbitrator. It was asserted that since the claim for Rs. 93,054 was pending before the Arbitrator, no injunction pertaining to that amount could be granted. It was further pleaded that the general conditions of contract entitled the Union of India to adjust and recover its dues from the contractor against any contract under which the Contractor was entitled to get some payment. It was asserted that the payment due to the firm has been withheld in view of the firm''s own written undertaking in its letter dated 17-1-1976 and the application for injunction was barred by estoppel and acquiescence.

4. It is clear from the pleadings of the parties that the bills submitted by the firm in respect of contracts dated 29-10-1974 and 7-7-1975 are not in dispute. It is further not in dispute that the Union of India has made a claim against the firm for Rs. 93,054 and that dispute is pending before the Arbitrator appointed under the order of the Delhi High Court. The question for consideration is whether the learned Civil Judge has jurisdiction and a case had been made out for grant of an interim injunction directing the Union of India to make payment of Rs. 99,776 to the firm, the amount due under the contracts dated 29-10-1974 and 7-7-1975, during the pendency of the petition for reference to arbitration.

5. In the petition u/s 20 of the Act it has been asserted that there was no dispute that a sum of Rs. 99,776 was due to the firm from the Union of India under the contracts dated 29-10-1974 and 7-7-1975. The dispute was confined to the

Claim made by the firm for interest at the rate of Rs. 1''8 per cent per annum on the aforesaid amount on account of delay in making the payment. The details of interest claimed have been set out in annexure ''P-3'' to the petition. In para No. 14 of the petition it is clearly stated that the petition is valued at Rs. 53,009.23 being the total amount of interest since there exists no dispute regarding the admitted dues. It is this dispute which is sought to be referred for arbitration according to the terms of agreement.

6. Learned counsel for the applicants contended that since the petition u/s 20 was confined to the dispute relating to interest and the claim has not yet been adjudicated upon, the court below had no jurisdiction to grant a mandatory injunction directing the Union of India to pay to the firm the amount due under the contracts dated 29-10-1974 and 7-7-1975 specially when that amount was not the subject-matter of the petition u/s 20 of the Act.

7. Learned counsel for the firm contended that u/s 41 read with Second Schedule to the Act the power of the court extends to passing any order ''for the purpose of, and in relation to, arbitration proceedings'' and since the dispute related to the contracts dated 29-10-1974 and 7-7-1975, the court below had jurisdiction to pass the impugned order since there was no dispute relating to the amount due to the firm under the aforesaid contracts. It was further asserted that for an interlocutory order it is not necessary that the interlocutory order should be confined only to the relief claimed or the subject-matter of the suit but can be with regard to some other matter which may be related to the subject-matter of the suit or the relief claimed. An injunction order could be passed ''for the purpose of, and in relation to, arbitration proceedings'' and the power to grant injunction is not confined to the subject-matter of arbitration or to the relief claimed in arbitration. It was further contended that the Union of India was not entitled to withhold any amount which had become due or payable.

8. In support of his contention learned counsel relied on the decision of the Delhi High Court in Air Foam Industries Pvt. Ltd. Vs. Union of India, . In that case the Union of India was restrained from effecting recovery of the amounts claimed to be due from the other pending bills of the petitioner. The matter was taken up to the Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, . The facts of the case were that the Air Foam Industries Ltd. entered into a contract with the Union of India for supply of certain goods. The company asserted that the Union of India had committed a breach of the contract and was, therefore, liable to pay a sum of Rs. 2,35,800 by way of damages suffered by the Company by reason of the breach of the contract. The Union of India on the other hand, complained that the Company had committed breach of the contract and was liable to pay to the Union of India by way of damages a sum of Rs. 2,28,900. The company was called upon to make that payment and intimated that if it failed to do so by a certain date, the amount would be recovered from the pending bills in respect of other contracts. The matter was referred to arbitration by the Delhi High Court on an application made by the Company u/s 20 of the Act. The

arbitration proceedings were for determination of the mutual claims of the parties arising out of the contract in question. The question whether any amounts were payable by the Union of India to the respondent under other contracts was not the subject-matter of the arbitration proceedings. In these circumstances the Supreme Court observed.-

"The question whether any amounts were payable by the appellant to the respondent under other contracts was not the subject-matter of the arbitration proceedings. The Court obviously could not, therefore, make an interim order which, though ostensibly in form an order of interim injunction, in substance amounted to a direction to the appellant to pay the amounts due to the respondent under other contracts. Such an interim order would clearly not be for the purpose of or in relation to the arbitration proceedings as required by Section 41(b). But here the order of interim injunction made by the learned Judge does not, expressly or by necessary implication, carry any direction to the appellant to pay the amounts due to the respondent under other contracts. It is not only in form but also in substance a negative injunction. It has no positive content. What it does is merely to injunction the appellant from recovering, suo motu, the damages claimed by it from out of other amounts due to the respondent. It does not direct that the appellant shall pay such amounts to the respondent..... The only thing which the appellant is interdicted from doing is to take recovery of its claim for damages by appropriating such amounts in satisfaction of the claim. That is clearly within the power of the Court u/s 41(b) because the claim for damages forms the subject-matter of the arbitration proceedings and the Court can always say that until such claim is adjudicated upon, the appellant shall be restrained from recovering it by appropriating other amounts due to the respondent."

The principles that clearly emerge from the aforesaid observations are that an interim injunction could be granted in respect of a matter which is the subject-matter of an arbitration proceeding and, secondly, an interim injunction could not be granted to pay the amounts due, which was outside the purview of the arbitration proceeding as it would not be for the purpose of or in relation to the arbitration proceedings as required by Section 41(b). If a party refuses to pay such an amount on the ground that it has a valid defence then the only remedy open to the aggrieved party would be to take measures in appropriate forum for recovery of such an amount. The Supreme Court upheld the order of the Delhi High Court as the injunction issued only interdicted the Union from recovering its claim for damages by appropriating such amounts in satisfaction of the claim because the claim for damages formed the subject-matter of the arbitration proceedings and it was open to the Court to say that until the claim was adjudicated upon, the Union of India should be restrained from appropriating it from other amounts due to the Company. The Supreme Court decision is clearly against the contention of the opposite party. Since the amount pay-able to the Company under the two contracts was not the subject-matter of the application u/s 20 of the Act, it was beyond the jurisdiction of the court below to issue a mandatory injunction directing the Union of India to pay that amount to the Company. The decision of the Supreme Court in Union of India (UOI) Vs. Birla Cotton Spinning and Weaving Mills Ltd., also lends support to my view. In that case the respondent supplied to the appellant Union of India goods of the value of a large amount under a contract entered into by the parties. A part of the money was paid, but as to the balance the Union of India declined to make the payment on the plea that an amount of Rs. 10,625 was due to the Union of India from the respondent under another contract between the parties. The respondent filed a suit in the Court of the Senior Subordinate Judge, Delhi, for the realisation of that amount. The appellant u/s 34 of the Act asked for stay of that suit. The respondent submitted that there was no dispute concerning the contract which was covered by the arbitration clause and which attracted the application u/s 34 of the Act. The evidence disclosed that there was no dispute between the company and the Union of India arising under the contract on which the suit was filed. The Union accepted liability to pay the amount asserting that an amount was due from the Company to the Union under a distinct contract. The Supreme Court observed that the dispute raised by the Union was, therefore, not in respect of the liability under the terms of the contract which included the arbitration clause, but in respect of an alleged liability of the Company under another contract which had already been referred to arbitration. It was not contended that the amount of Rs. 10,625 was not due to the Company under the contract relied upon by the Company. For enforcement of the arbitration clause there must exist a dispute; in the absence of a dispute between the parties to the arbitration agreement, there can be no reference. The Supreme Court proceeded to observe:

"A dispute that the Union is not liable to pay the price under the terms of the contract is undoubtedly a dispute under the contract, and in any event in connection with the contract. But a plea that the Union though liable to pay the amount under the terms of the contract will not pay it because it desires to appropriate it towards another claim under another independent contract cannot reasonably be regarded as a dispute ''under or in connection'' with that contract under which the liability sought to be enforced has arisen."

In view of these facts and principles the Supreme Court held that the suit could not be stayed u/s 34 of the Act. In the present case also there is no dispute that the Company is entitled to the payment of Rs. 99,776 but the Union of India claims that it is entitled to damages to the extent of Rs. 93,054 in respect of other contracts between the parties. As noted earlier, the subject-matter of the application u/s 20 of the Act is confined to the claim of the Company for interest on account of delay in payment of the principal amount of Rs. 99,776. Since the matter relating to claim for damages was not the subject-matter of arbitration proceeding, it could not be regarded as a dispute under or in connection with that contract under which the liability sought to be enforced has arisen. On that ground also the court below was not justified in issuing a mandatory injunction directing the Union of India to pay the amount of Rs. 99,776 to the Company.

9. The matter may be examined from another angle. Even if the application u/s 20 of the Act is allowed and the matter is referred to the Arbitrator, the only question that the Arbitrator would be called upon to decide would be the claim of the Company for interest on account of delayed payment. The Arbitrator would not be in a position to adjudicate upon the claim of the Union of India whether it was entitled to the damages claimed in respect of other contracts and would not be in a position to grant a decree in favour of the Company in respect of the undisputed amount of Rs. 99,776.

10. There is yet another reason why it must be held that the court was not justified in granting the mandatory injunction. The dispute relating to the claim of the Union of India for damages against the Company in respect of other contracts has already been referred to the Arbitrator by the Delhi High Court. In that proceeding the Union of India has been restrained from appropriating any amount due to the Company towards its claim for damages. The interest of the Company has thus been amply protected. On the other hand, the Union of India may suffer an irreparable injury in case its claim for damages is upheld and by that time the financial stability of the Company is shaken and the recovery of the amount of damages may become well nigh impossible.

11. In support of the contention that the Court below was competent to issue an injunction even if the subject-matter of the application u/s 20 of the Act did not cover the amount of Rs. 99,776 reliance was sought to be placed on certain decisions under Order XXIII, Rule 3, C.P.C. wherein it was held that the compromise decree may relate to properties other than the properties involved in the suit. In my opinion these decisions are not at all relevant in interpreting the scope of the expression "for the purpose of, and in relation to, arbitration proceedings." As held by the. Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, this expression would not include within its ambit a matter not sought to be referred to arbitration.

12. The provision of Order 39, Rule 10, C.P.C., cannot be pressed into service in support of the impugned order. That provision applies only where the subject-matter of a suit is money or some other thing capable of delivery. As noted earlier, the subject-matter of the present proceeding is not the amount which has been directed to be paid to the Company by the Court below.

13. In the result the revision is allowed with costs. The impugned order of the learned Civil Judge, Kanpur, dated 28-7-1978 is set aside.

