

Raman Lamba and Others Vs. D.M. Harish and Others

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Court : Mumbai

Decided On : Sep-11-1990

Reported in : AIR1991Bom311; 1991(1)BomCR49

Judge : D.R. Dhanuka, J.

Acts : [Arbitration Act, 1940](#) - Sections 2, 14(2), 21 and 31(4)

Appeal No. : Arbitration Petition No. 34 of 1987 in Award No. 128 of 1986

Appellant : Raman Lamba and Others

Respondent : D.M. Harish and Others

Advocate for Def. : K.S. Cooper and ;T.K. Cooper, Advs. i/b ;M/s. Markand Gandhi & Co.

Advocate for Pet/Ap. : Virag v. Tulzapurkar and; Vikram Nankani, Advs. i/b ;M/s. Wadia Ghandy & Co.

Judgement :

1. Relying on S. 31(4) of the [Arbitration Act, 1940](#), the Petitioners have filed this petition for a direction that the impugned award be returned to the arbitrators for being filed in the High Court of Delhi on the ground that this award could not have been filed in this Court. The relevant facts and circumstances of the case leading to the filing of this petition are as under.

2. The petitioners along with respondents Nos. 3 to 7 were carrying on business as partners in the name and style of M/s. Hotel Diplomat at 9/39, Sardar Patel Mars, Chanakyapuri, New Delhi. The deed of partnership contained an arbitration clause. Disputes and differences arose among the partners. Sometime in the month of January, 1982, an agreement of reference was executed by and between the petitioners and respondents Nos. 3 to 7 to refer all their disputes and differences with regard to the said partnership business to the arbitration of respondents Nos. 1 and 2. The said partnership business was carried on at New Delhi. The said Hotel Diplomat is situate at New Delhi. The agreement of partnership was arrived at at Bombay. Cls. (11) (15) and (16) of the said agreement of reference are of some relevance having regard to the contentions urged on behalf of the parties. The said clauses are, therefore, reproduced hereinafter:--

'11. All proceedings in the arbitration shall take place in Bombay unless the Arbitratorsotherwise direct.

15. The parties hereto agree that the Award of the Arbitrators shall be filed in the Court and decree be obtained to terms of the Award.

16. The provisions of the [Arbitration Act, 1940](#), or any statutory modification or reenactment thereof so far as is consistent herewith shall be deemed to be incorporated herein.'

3. Respondents Nos. 1 and 2 held meetings of the arbitration sometimes in Bombay and sometimes at Delhi.

4. On 25th October, 1986, respondents Nos. 1 and 2 made their award dated 28th October, 1986. Messrs Kirit N. Damania & Co., Advocates for respondent Nos. 1 and 2, served notice on the petitioners and respondentsNos. 3 to 7 of the making of the said award. Upon receipt of the said notice, on 13th November, 1986, the petitioners filed an application under S. 14(2) of the [Arbitration Act, 1940](#), in the Hon'ble High Court of Judicature at Delhi for a direction that the arbitrators be directed to file the said award in the High Court of Delhi. A similar petition was also filed by respondent No. 6 in the High Court of Delhi on 13th November, 1986. By a

telegram dated 15th November, 1986, Respondent No. 6 informed about the filing of the said application under S. 14(2) of the Arbitration Act to M/s. Kirit N..Damania & Co., Advocates, acting for the arbitrators for the purpose of filing of the said award. On 17th November, 1986, the High Court of Delhi directed that the said application under S. 14(2) of the Arbitration Act be registered as suits and notice be issued to the learned arbitrators with a direction to file the said award and the proceedings in the High Court of Delhi before 15th January, 1987.

5. On 21st November 1986, the impugned award was filed in this Court. On 15th May, 1987, the High court of Delhi disposed of the said applications under S. 14(2) of the [Arbitration Act, 1940](#), by holding that the applications made by the parties concerned were infructuous, as the award was already filed in the High Court of Bombay. Contentions based on S. 31(4) of the Arbitration Act were kept open.

6. Mr. Tulzapurkar appearing for the petitioners has invited my attention to S. 2(c) of the [Arbitration Act, 1940](#), as well as the provisions contained in S. 31 of the said Act. S. 31(1) of the said Act provides that subject to the provisions of the Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates. The expression 'Court' has been defined under S. 2(c) of the Arbitration Act as under :--

'2. In this Act, unless there is anything repugnant in the subject or context,--

(c) 'Court' means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under S. 21, include a Small Cause Court;'

If the subject-matter of the arbitration would have been the subject-matter of a civil suit, the suit could have been filed in the High Court of Bombay or in the High Court of Delhi, as both the Courts had concurrent jurisdiction to entertain such a suit. The cause of action in such a suit would have been treated as arisen in part of Bombay as well as at Delhi. The business of the partnership was carried on at Delhi. Most of the partners, i.e. the petitioners and some of the respondents, also reside at Delhi. In other words, the High Court of Delhi was a Court of competent

jurisdiction to entertain the said award under S. 31(1) of the Arbitration Act. The only question which arises for my consideration is as to whether the jurisdiction of the High Court of Delhi was ousted in any manner by operation of Cl. (11) of the arbitration agreement referred to hereinabove. Before submissions of learned counsel based on Cl. (11) of the arbitration agreement are considered, it is necessary to refer to S. 31(4) of the Arbitration Act. S. 31(4) of the said Act reads as under :--

'(14) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference, and the arbitration proceedings shall be made in that Court and in no other Court.'

Section 31(4) of the Arbitration Act was interpreted in the well-known judgment of the Hon'ble Supreme Court in the case of *Kumbha Mawji v. Dominion of India* (now the Union of India) : [1953]4SCR878 . In this case the respondent concerned had filed an application under S. 14(2) of the Arbitration Act before the Court of the Subordinate Judge at Gauhati praying that the umpire may be directed to file the award in the Gauhati Court. The umpire forwarded copies of the award to the Gauhati Court. Later on, the appellant filed the original award in the High Court of Calcutta. The question which arose before the Hon'ble Supreme Court was as to the meaning of the phrase 'in any reference' used in S. 31(4) of the Arbitration Act. Mr. Justice Jagannadha Das, speaking for the Bench, held that the phrase 'in any reference' would mean 'in the matter of a reference to arbitration' and the said phrase was comprehensive enough to cover an application under S. 14(2) of the Arbitration Act. S. 31(4) of the Arbitration Act clothes a single Court with exclusive jurisdiction to prevent conflict and scramble. If there are two Courts of concurrent jurisdiction which can entertain applications or awards under the Arbitration Act, the Court in which the first of such applications made becomes the Court of exclusive jurisdiction to entertain the award or entertain all subsequent applications under the Arbitration Act. In the present case, the petitioners filed an application under S. 14(2) of the Arbitration Act on 13th November, 1986. If the

High Court of Delhi had jurisdiction to entertain the said application under S. 14(2) of the Arbitration Act, it follows that the award itself and all subsequent applications in relation thereto could be filed only before the High Court of Delhi and before no other Court. The fact that the two applications dated 15th November, 1986 filed under S. 14(2) of the Arbitration Act were treated as infructuous in May, 1987, in view of the award having been already filed in this Court on 21st November, 1986 is totally irrelevant. The High Court of Delhi had requisite jurisdiction to entertain the said applications under S. 14(2) of the Arbitration Act. The said applications were prior applications in point of time. Therefore, the said award could not have been filed in this Court in view of the provisions contained in S. 31(4) of the Arbitration Act. Similar view has been taken by our High Court in the case of *Sree Saraswathi Mills Ltd. v. Messrs Govindji Jevat and Co.*, reported in : 1984(1)BomCR34 .

7. Mr. Cooper, learned counsel appearing for the respondents Nos. 3 to 7, contended that Cl. (11) of the agreement of reference constituted a special agreement between the parties to the effect that all the proceedings in relation to the said award and the said award itself must be filed in the High Court of Bombay only. It is well settled that whenever parties enter into an agreement to select one of the two Courts of concurrent jurisdiction and specifically provide that the necessary proceedings would be filed only in one of the two Courts of concurrent jurisdiction so selected, such an agreement would normally be respected and would be treated as valid. Sometime parties provide in their respective agreements that all disputes, claims and proceedings shall be subject to jurisdiction of particular Court only. Such clauses are described as 'forum selection clause' or as 'ouster clause'. In the instant case, Cl. (11) of the agreement of reference merely authorises the arbitrators to fix venue of the meetings at Bombay or elsewhere. In my judgment, Cl. (11) of the agreement of reference does not constitute an agreement to select particular forum for filing of judicial proceedings or the award to the exclusion of another forum having concurrent jurisdiction to entertain the same under the law of the land. The arbitrator could have fixed the meetings of the arbitration anywhere in the country or even anywhere in the world. With great respect to the learned counsel for the respondents Nos. 3 to 7, it is impossible to accept the construction of Cl. (11) to mean that an agreement was

arrived at between the parties so as to oust jurisdiction of the High Court of Delhi to entertain the said award and all subsequent applications which may be made to it under the [Arbitration Act, 1940](#). Cl. (11) of the agreement has nothing to do with the selection of forum or ouster of forum. Mr. Cooper emphasised that the award could be filed only in Bombay, as filing of the award was a part of 'proceeding in arbitration' and by virtue of Cl. (11), the arbitrator had sole discretion to choose the High Court of Bombay for filing of the award. In other words, the learned counsel submitted that the learned arbitrators had absolute discretion to choose any of the forums as they deemed fit to file an award. Cl. (15) of the agreement of reference specifically provided that the award of the arbitrators shall be filed in the 'Court', meaning thereby 'in the Court' as defined in the Arbitration Act. Cl. (16) of the agreement of reference specifically provided that the provisions of the Arbitration Act shall be deemed to be incorporated in the said agreement of reference. In this respect, I may refer in passing to the recent judgment of the Hon'ble Supreme Court in the case of A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem reported in : [1989]2SCR1a . In this case, the Hon'ble Mr. Justice K. N. Saikia, speaking for the Bench, observed that the ouster clause must be construed very strictly and exclusion of jurisdiction of the competent Court which had jurisdiction under the law of the land could not be easily inferred. It is not necessary to pursue this matter further, as a clause entitling the arbitrators to fix venue of the meeting at any place they deem fit, including Bombay, has nothing whatsoever to do with selection of forum for filing of the award or judicial proceeding. In my judgment, Cl. (11) of the arbitration agreement is totally irrelevant and reliance on the said clause is misconceived and misplaced.

8. Mr. Cooper cited several authorities which would have been relevant if I would have construed Cl. (11) of the agreement of reference as an ouster clause. Facts of this case are plain and simple. Principles of law applicable are well settled. I do not want to make this judgment unnecessarily complicated by discussing the cases cited by the counsel which would have been perhaps relevant only if there was an ouster clause in the agreement of reference and only if there was a clear agreement between the parties to the effect that all the proceedings and the award shall be filed in the High Court of Bombay only and in no other Court. There being no such agreement or ouster clause, I have come to the conclusion that the award

filed in this Court will have to be returned and taken off the file for the purpose of being presented to the High Court of Delhi. It is obvious that S. 31(4) of the [Arbitration Act, 1940](#), is clearly attracted, having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of Kumbha Mawji (supra).

9. Accordingly, the petition is made absolute in terms of prayer (a. 1). The award shall be returned for presentation to respondents Nos. 1 and 2 or to M/s. Kirit N. Damania & Co. who had filed this award on behalf of respondents Nos. 1 and 2. Having regard to the facts and Circumstances of the case, there would be no order as to costs.

Order accordingly.

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