

State of Gujarat and anr. Vs. Sheth Construction Co.

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Court : Gujarat

Decided On : Dec-18-1989

Reported in : (1990)1GLR440

Judge : A.P. Ravani and; M.B. Shah, JJ.

Appellant : State of Gujarat and anr.

Respondent : Sheth Construction Co.

Judgement :

M.B. Shah, J.

1. The State of Gujarat has filed this appeal under Section 39 of the Arbitration Act against the judgment and order dated 8-8-1988 passed by Mr. M.M. Peshwani, Civil Judge (S.D.), narol in Special Civil Suit No. 21 of 1988. The Special Civil Suit is filed under Section 20 of the Arbitration Act on 21-1-1988.

2. In the suit it is the contention of the plaintiff-respondent that the Executive Engineer, Bhavnagar Irrigation Project, invited tender for the work of construction of earthen dam, masonry dam (excluding spillway gates), head regulator and spillway bridge for Himirpur Irrigation Scheme. The tender of the plaintiff was for a sum of Rs. 1,14,27,00/- against the estimated cost of Rs. 1,19,64,626/- and it was accepted. The work order was issued to the plaintiff on 26-4-1982. As per the agreement plaintiff was required to complete the work within 24 months from the

date of the work order, i.e. on or before 25-4-1984. It is the say of the plaintiff that the work was completed on 30-7-1984 as reported by it by its letter dated 8-9-1984. The defendants-appellants prepared the final bill on 31-1-1985. The plaintiff accepted amount of the final bill of Rs. 1,13,38,212/- under protest. Security deposit was also refunded to the plaintiff.

3. It is the further say of the plaintiff that on various grounds the plaintiff claimed certain other amount and for that the plaintiff has served notice dated 25-2-1985 to the defendants. As the defendants failed to pay the said amount. Special Civil Suit No. 258 of 1986 was filed on 16-12-1986 before the Civil Judge (S.D.), at Narol claiming in all Rs. 1,12,23,820/- and praying that as per terms of the agreement with defendants the dispute be referred to the Arbitrator as provided in the agreement. That suit was filed under Section 20 of the Arbitration Act. By judgment and order dated 12-6-1987 the Court appointed Mr. Vakharia, retired Chief Engineer, Irrigation Department, as the sole arbitrator with a direction that the arbitrator shall decide only those disputes which are exclusively falling within the scope of Clause 30 of the suit agreement and shall not decide other disputes. Against that judgment and order, First Appeal No. 744 of 1987 was filed before this Court and that appeal was summarily dismissed by order dated 8-10-1987.

4. Thereafter the plaintiff filed this Special Civil Suit No. 21 of 1988 under Section 20 of the Arbitration Act before Civil Judge (S.D.) Ahmedabad (Rural) at Narol. It is the say of the plaintiff that in the previous Special Civil Suit No. 258 of 1986, due to inadvertence and due to oversight some of the claims have not been incorporated which were based on different cause of action. The plaintiff submitted that disputes in respect of all these claims are also required to be sent to the same appointed arbitrator for the purpose of adjudication. The plaintiff has thereafter enumerated in all nine different claims on different items and has claimed Rs. 1,08,28,177/-. The plaintiff prayed that the defendants be directed to file the original agreement in respect of the suit work before the Court and after filing the same it be ordered that the disputes narrated in the plaint be sent to the arbitrator for adjudication.

5. That suit was opposed by the State Government and in the written statement it was inter alia contended that:

(i) the suit of the plaintiff was barred by Order 2, Rule 2 of the Civil Procedure Code,

(ii) the claims raised by the plaintiff are not referable as they do not come within the purview of Clause 30 of the suit agreement,

(iii) the claims of the plaintiff are barred and, therefore, are not arbitrable,

(iv) the claims put up in the plaint are notified after lapse of a period of three years and hence are time barred.

6. With regard to each and every claim details are given as to how the said claims are not tenable.

7. The learned Judge raised following issues:

1. Whether the suit is barred by Order 2, Rule 2 of C.P. Code?

2. Whether the suit is barred by law of limitation?

3. Whether the disputes raised by the plaintiff in the suit are required to be sent for arbitration to Shri M.H. Vakharia, arbitrator?

4. Whether the plaintiff is entitled to get reliefs as prayed for ?

5. What order and decree?

The learned Judge decided issue Nos. 1 and 2 in the negative and issue Nos. 3 and 4 in the affirmative and ordered that claim Nos. 1 to 9 be sent to the sole arbitrator Mr. Vakharia, retired Chief Engineer, Irrigation Department. Against that judgment and order, the State Government has preferred this appeal.

8. Mr. Pandya, learned Government Pleader, appearing on behalf of the appellants, submitted that the order passed by the learned Judge is perverse and without application of mind. He raised the following contentions:

(1) Under Section 20 of the Arbitration Act, the Court was required to determine as to whether the dispute pertains to the subject matter of the agreement and thereafter consider the cause shown by the defendants for not referring the matter to the arbitrator. The Court is further required to make appropriate judicial order either directing the defendants to file the agreement or rejecting the application. Instead of that the learned Judge, without deciding the contentions as to whether the dispute is arbitrable or not, referred the matter straightaway to the arbitrator and has not passed any order directing the Government to file the arbitration agreement before the Court.

(2) Mr. Pandya further submitted that under Clause 30(2)(I) the application for referring any dispute to arbitrator is required to be made by the contractor within 90 days of passing of the final bill for the work or within 90 days from the date of abandonment of the contract work and in this case admittedly final bill was prepared on 31-1-1985 and, therefore, this application which is filed on 28-1-1988 is not maintainable.

(3) The present application is premature as no application was filed before the authority as provided under Clause 30 and that there is no refusal by the authority.

(4) In any case this application is barred by limitation as it is not made within three years.

(5) It is barred by the provisions of Order 2, Rule 2 of the Civil Procedure Code.

9. For considering the first contention of the learned Government Pleader, it is necessary to refer to the provisions of Section 20 of the Arbitration Act. Sub-section (1) of Section 20 of the Arbitration Act reads as under:

20. (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.

10. From the language of Sub-section (1) of Section 20 of the Arbitration Act, it would be clear that following conditions are required to be satisfied before referring the dispute to the arbitrator:

(i) parties have entered into an arbitration agreement with respect to the subject matter.

(ii) this agreement is before the institution of the suit.

(iii) difference has arisen between the parties to the agreement with respect to the subject matter of the agreement or any part of it,

(iv) parties can apply to the Court having jurisdiction in the matter to which agreement relates and pray that agreement be filed in a Court,

(v) this application can be filed instead of proceeding under Chapter II of the Arbitration Act, i.e., Chapter which relates to arbitration without the intervention of the Court.

11. Sub-section (2) of Section 20 of the Arbitration Act provides that the application shall be in writing and shall be numbered and registered as a suit. Sub-section (3) of Section 20 provides that the Court is required to issue notices to all parties to the agreement to show cause as to why the agreement should not be filed. Under Sub-section (4) of Section 20, the Court is required to pass appropriate order after considering the cause shown by the defendants. If no sufficient cause is shown the Court is required to order that the agreement to be filed. Thereafter the Court is required to make an order of reference to the Arbitrator. Sub-section (5) of Section 20 provides that the arbitrator is required to proceed with the arbitration proceedings in accordance with and is to be governed by, the other provisions of the Arbitration Act so far as they can be made applicable. That means, the provisions of Section 14 and 19 alongwith other provisions are made applicable.

12. From Sub-section (1) and (2) of Section 20 of the Arbitration Act, it is therefore apparent that the Court has to judicially decide whether arbitration agreement should be filed in the Court or not and this is a judicial function. For this purpose it

has to decide whether necessary conditions for making reference to the arbitrator are fulfilled or not. The Court is required to determine first whether there exists dispute between the parties with regard to the subject matter of the agreement. The Court is further required to determine whether as per the said agreement the dispute is required to be decided by the arbitrator that is, whether the dispute is within the jurisdiction of the arbitrator or not. The Court is required to determine that issue by considering objections raised by the defendants and find out whether sufficient cause is shown by the defendants that the arbitration agreement is not required to be filed in the Court. For this purpose the Court is required to determine the questions as to the existence or validity of the agreement and the scope of the arbitration clause. Therefore, it would be for the Court first to decide issue of arbitrability of the dispute and it cannot be left to the arbitrator for determination. This aspect would be clear by referring to various decision.

13. In the case of A.M. Mair & Company v. Gordhandas Sagarmull reported in : [1950]1SCR792 , the Supreme Court held that once the dispute is found to be within the scope of arbitration clause, it is not a part of the province of the Court to interfere into the merits of the dispute. But the dispute raised by the parties must fall within the scope of the arbitration clause.

14. In the case of Dhanrajamal Gobindram v. Shamji Kalidas & Co. : [1961]3SCR1029 the Supreme Court considered the provisions of Sections 20 and 47 of the Arbitration Act and held as under:

(25) Learned Counsel for the buyers contends that nothing is saved of the Act. This is not correct. To being with, questions as to the existence or validity of the agreement are saved from decisions by arbitrators or umpires, however appointed since such a plea can only be raised in bar of an application by persons seeking a reference to arbitration, at least that portion of the Act still applies, and that power can only be exercised by the Court. Other provisions of Chap. II, like Secstion 15 and 16, still remain applicable. We need not give a list of all the provisions which may be saved, because that will involve an examination side by side, of the sections of the Act and the provisions of the Bye-laws. So long as something is saved, it cannot be said that the Court after receiving the agreement and ordering

that it be filed, becomes completely functus officio.

(26) But the crux of the argument is that the provisions of Sub-section (4) of Section 20 read with Sub-section (1), *ibid.*, cannot apply, and the Court, after filing the agreement, will have to do nothing more with it, and this shows that Section 20 is not applicable. This argument overlooks the fact that this is a statutory arbitration governed by its own rules, and that the powers and duties of the Court in Sub-section (4) of Section 20 are of two distinct kinds. The first is the judicial function to consider whether the arbitration agreement should be filed in Court or not. That may involve dealing with objections to the existence and validity of the agreement itself. Once that is done, and the Court has decided that the agreement must be filed, the first part of its powers and duties is over. It is significant that an appeal under Section 39 lies only against the decision on this part of Sub-section (4). Then follows a ministerial act of reference to arbitrator or arbitrators appointed by the parties. That also was perfectly possible in this case, if the parties appointed the arbitrator or arbitrators. If the parties do not agree, the Court may be required to make a decision as to who should be selected as an arbitrator, and that may be a function either judicial, or procedural, or even ministerial; but it is unnecessary to decide which it is.

15. From the aforesaid paragraphs, it is clear that it is the function of the Court to decide the questions as to the existence or validity of the agreement and it cannot be left to the decision of the arbitrator. That power can only be exercised by the Court. It is a judicial function of the Court to consider whether the arbitration agreement should be filed in the Court or not. Against that order appeal under Section 39 of the Act lies.

16. While dealing with the provisions of Section 20 of the Arbitration Act and the jurisdiction of the Court, the Allahabad High Court in the case of *Godhu Mal v. Sm. Ganga Hasso Mal Idnani* : AIR1958 All26 held that jurisdiction of the arbitrator being a creature of contract, the determination of the question of whether any particular dispute or difference that has arisen between the parties is referable to arbitration must depend on whether the dispute or difference in question is one to which in the language of Section 20 of the Arbitration Act, 'the agreement applies'

and that, agreement must be in existence and legally binding on the parties. The Court held that the question as to arbitrability of the dispute is required to be decided by the Court. The relevant discussion is as under:

(12) Now it is important to distinguish between the two questions that arise in such cases the questions, that is, (1) whether the particular dispute between the parties is within the jurisdiction of the arbitrator or the Court, and (2) who is to decide this question of jurisdiction? To put the second question in other words: Is the first question to be decided by the Court to which an application for filing the award and reference to arbitration is made, or is that question also to be referred to the arbitrator? As noticed already, the Court below has held that that question is also for the arbitrator to decide. The short point for determination in this appeal therefore is whether it was right in doing so, or whether, on the contrary, it should have itself decided that issue.

It may be noted that the dispute in this case related inter alia, to whether the contract of partnership between the parties stood discharged, as pleaded by the appellant, by waiver because of a subsequent agreement that the contract was no longer to bind the parties.

(13) The clue to the answer to the second question posed above is to be found in Section 20 of the Arbitration Act itself. Before a person applies under that section that the agreement be filed in Court four conditions must be satisfied, namely (1) that he has entered into an arbitration agreement with some person or persons, (2) that the agreement has been entered into before the institution of any suit with respect to the subject-matter of the agreement or any part of it, (3) that a difference has arisen between the parties to which the agreement applies, and (4) that the Court to which the application is made has jurisdiction in the matter to which the agreement relates. If any of these conditions is absent, the filing of an application under that section and the passing of orders by Court that the agreement be filed in Court and a reference to arbitration be made would be barred. It follows necessarily therefore that all these questions must be decided by the Court to which an application under the section is made before it proceeds to make an order that the agreement be filed and reference to arbitration be made.

(14) In the present case the parties are not at issue on the first two conditions, and the finding recorded by the Court below on the fourth is not impugned in this appeal. That Court has however abstained from recording any finding on the issue relating to the third condition and left the decision of that issue to the arbitrator. It may be that according to the terms of the arbitration clause in a particular agreement the question of whether the particular dispute is to be decided by the Court or by the arbitrator may also be left to be determined by the arbitrator. If so, that will also be a matter of 'difference to which the agreement applies', but the Court to which the applicable is made will have to say so and then refer that point too to arbitration. That is not so in the present case. It is manifest therefore that in refusing to record a finding on the issue relating to the third condition the Court below has shirked performance of a duty which the section expressly enjoined on it, and that the order passed by it that the agreement be filed was for that reason incompetent.

17. In the case of Renusagar Power Company Ltd. v. General Electric Company : [1985]1SCR432 the Supreme Court inter alia considered the provisions of Section 33 of the Arbitration Act and held that the claims laid down by the parties were required to be referred to the Court of Arbitration. The Supreme Court held that the reference can be made depending upon.

(a) what disputes are covered by the arbitration agreement; and

(b) what is the real nature of these claims under reference;

The Court held that this aspect depending upon the language used in the arbitration agreement, the construction of which would be relevant for deciding both the question-

(1) Whether it emphasis even the question of its existence, validity and effect (scope) particularly the last which depends on the arbitrability of the claims; and

(2) Whether the claims fall within the scope or purview; in other words; the language of the arbitration agreement is wide enough to cover either of the questions or both.

After considering various decisions, in para 25 of the Court held that following four propositions emerge very clearly from the authorities discussed:

(1) Whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ.

(2) Expressions such as 'arising out of or 'in respect of or 'in connection with' or 'in relation to' or 'in consequence of or 'concerning' or 'relating to' the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.

(3) Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the Court to decide those questions) but there is nothing to prevent the parties from investing him with power to decide those questions, as for instance, by a collateral or separate agreement which will be effective and operation.

(4) If, however, the arbitration clause, so widely worded as to include within its scope questions of its existence, validity and effect (scope), is contained in the underlying commercial contract then decided cases have made a distinction between questions as to the existence and/or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of former those questions cannot be decided by the arbitrator, as by sheer logic the arbitration clause must fall alongwith underlying commercial contract which is either non-existent or illegal while in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration, agreement, i.e. to decided the issue of arbitrability of the claims preferred before him.

18. From the aforesaid propositions, it is clear that:-

(a) Ordinarily, as rule, an arbitrator cannot decide his own jurisdiction. It will be for the Court to decide that question.

(b) Parties can agree that the arbitrator would decide the question whether the dispute requires to be determined by the arbitrator or not by separate agreement.

(c) For deciding the issue of arbitrability of the claims, the Court is required to consider the terms of the contract and find out whether given dispute inclusive of arbitrator's jurisdiction comes within the scope of the arbitration clause.

If the clause is of wide amplitude then it would be for the arbitrator to decide that question. If the arbitration clause provides that limited disputes are required to be referred to the arbitrator for deciding them it is for the Court to decide the issue, that is, the issue of arbitrability of the claims preferred by the Court.

19. In the present case, instead of considering this question, the learned Judge without considering the arbitration clause straightway has passed order that the matter be referred to the arbitrator. Therefore, Mr. Pandya, learned Government Pleader rightly submitted that the learned Judge has not applied his mind to Clause 30 of the agreement which provides for arbitration with regard to limited disputes. Clause 30 reads as under:

30(1)(1) The disputes relating to this contract, so far as they relate to any of the following matters, whether such disputes arise during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person who is holding or has held a post not below the rank of Superintending Engineer, under the public works department of the State of Gujarat, namely,

(i) The rates of payment under Clause 5 for any tools plants materials and stores in or upon the works or by the site thereof belonging to the contractor or procured by him and intended to be used for the execution of the work or any part thereof of which possession may have been taken by the Engineer-in-charge under the said Clause 5.

(ii) The reduction in rates made by the Engineer-in-charge under Clause 9 for the items of work not accepted as completed fully in accordance with the sanctioned specifications.

(iii) The rates of payment for any class of work which is included in the additional or altered work carried out by the contractor in accordance with the instructions of the Engineer-in-charge under clause No. 14 and the rate for which is to be determined under the said Clause 14.

(iv) The rates of payment for materials already purchased or agreed to be purchased by the contractor before receipt of notice given by the Engineer-in-charge under Clause 15 and/or the amount of compensation payable to the contractor under the said clause for loss in respect of such material.

(v) The amount of compensation which the contractor shall be liable to pay under Clause 17 in the event of the failure to rectify remove or reconstruct the work within the period specified in the written intimation or the amount of expenses incurred by. The Engineer-in-charge under the said Clause 17 in rectifying removing or re-executing the work or in removing and replacing the materials or articles complained of.

(vi) The reduction of rates as may be fixed by the Engineer-in-charge under Clause 17 for the inferior work or materials as accepted or made use of.

(vii) The amount of compensation payable by the contractor for damages as estimated and assessed under Clause 23.

(viii) The amount payable to the contractor for the work carried out under Clause 33 in accordance with the instructions and the requirements of the Engineer-in-charge in a case where there is no specifications.

(2) The provisions of the Arbitration Act, 1940 and rules made thereunder shall apply to the arbitration proceedings under this clause subject to the following provisions:

(a) The arbitrator shall be a person who is holding or has held that post not below the rank of Superintending Engineer or equivalent rank and such arbitrator shall be appointed by the Government of Gujarat, P.W.D.

(b) If the person appointed as an Arbitrator is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever any other eligible person may be appointed to act as an Arbitrator.

(c) The arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.

(d) Where a person who is in Government service is appointed as an Arbitrator, he shall not be entitled to any fees for arbitrator.

(e) The Arbitrator may from time to time with the consent of the parties, extend the time for making and publishing the award.

(f) The arbitration proceedings shall be held at such place as may be fixed by Arbitrator.

(g) The contractor shall alongwith his application for referring the dispute to arbitration deposit with the Government in cash a sum equal to 5 per cent of the amount of the claim or any amount that may be fixed by the Government subject to maximum of Rs. 5,000/- towards the cost of Arbitration. The cost of arbitration shall be shared equally between the contractor and the Government. If the share of the contractor in respect of the cost of arbitration proceeding exceeds the amount deposited by the contractor he shall be liable to pay the difference and such share is less, he shall be entitled to refund the difference.

(h) The award of the Arbitrator shall be final and binding on both the parties.

(i) The application for referring any dispute to arbitration shall be made by the contractor with details of matters and disputes within 90 days of passing of the final bill for the work or within 90 days from the date of the abandonment of the work.

(j) The reference to arbitration proceedings under this clause shall not:

(i) After the right of the Engineer-in-charge under Clause 5 to take possession of all or any tools, plants materials and stores in or upon the works or site thereof or belonging to the contractors or produced by him and intended to be used for the

execution of the work or any part thereof.

(ii) Proclude the Engineer-in-charge from utilising the materials purchased by the contractor in any work or from removing such materials to other place, during the period the work is stopped or suspended in pursuance of notice given to the contractor under Clause 15.

(iii) Entitle the contractor to stop the progress of the work or to carrying out the additional or altered work in accordance with the provisions of Clause 14 or as the case may be Clause 14 or as the case may be Clause 33.

At present the material clause is Clause 30(1)(i) which specifically provides that the disputes relating to the contract, so far as they relate to any of the matters specified therein, shall be referred to sole arbitrator. By this clause, only limited disputes as provided in the said clause, are required to be referred to the sole arbitrator. Therefore it cannot be said that the clause is of widest amplitude. The arbitration clause is narrowly worded and it provides that only the disputes mentioned in Sub-clause (i) to (viii) are required to be referred to the arbitrator.

20. However, Mr. Dayani, learned Advocate for the respondent, submitted that Clause 30 of the agreement is of widest amplitude because it commences with the phrase 'disputes relating to this contract' and, therefore, the arbitrator will have jurisdiction to decide the issue of arbitrability of the claim raised by the respondent and the Civil Court under Section 20 of the Arbitration Act is not required to determine it.

21. In our view this is total misreading of Clause 30 of the agreement. It no doubt starts with the phrase 'disputes relating to this contract'. But thereafter it provides that 'so far as they relate to any of the following matters, where such disputes arise during the progress of the work or after the completion or abandonment thereof shall be referred to sole arbitration' that is, Sub-clauses (i) to (viii) of Clause 30(1). Therefore by no stretch of imagination it can be said that this clause is of widest amplitude. It only provides that the matters mentioned in Clause 30(1)(i) to (viii) shall be referred to sole arbitrator. No other matter or claim is required to be referred to the arbitrator.

22. Mr. Dayani learned Advocate for the respondent, concedes that the learned Judge has not applied his mind to the aforesaid questions. The learned Judge has referred to some decisions and has determined issue No. 3 by holding that as the plaintiff due to inadvertence and due to oversight failed to raise some claims in the Special Civil Suit No. 258 of 1986, the claims raised by him in the present suit also should be referred to the arbitrator and that it would be proper to refer the matter to the same arbitrator. From the discussion by the learned Judge it seems that the learned Judge has merely quoted the judgments cited before him and has not considered the same at all. In paragraph 26 of the judgment, a passage from the discussion of the Patna High Court in the case of Heavy Engineering Corporation Limited v. S.P. Arya and Anr. : AIR1983 Pat64 is quoted by the learned Judge. In that it has been specifically held that whether the particular dispute was within the scope of the arbitration agreement or not is required to be determined by the Court. In paragraph 27 of the judgment, it seems that the learned Judge has referred to the decision of the Calcutta High Court without any purpose. In paragraph 29, the learned Judge has referred to the decision of the Orissa High Court in the case of Fertilizer Corporation of India Limited v. Ravikumar and Ors. : AIR1979 Ori19 In the passage which is quoted by the learned Judge it has been specifically stated that under Section 20 of the Arbitration Act the Court has decided whether the dispute or differences have arisen and after directing the parties to file agreement, the Court has to make reference of the disputes to the arbitrator. It seems that the learned Judge has not at all considered the decisions which were referred to him by the learned Advocates. He has merely quoted the paragraphs without applying his mind to what has been laid down therein. In this view of the matter, Mr. Pandya, learned Government Pleader, is right in his submission that there is total non-application of mind on the part of the learned Judge. He further submitted that before referring the matter to the arbitrator he has not directed the Government that the arbitration agreement be filed in the Court. He relied upon the decision in the case of Didar Singh v. State Bank of India where the Court has held as under:

The learned single Judge has not recorded any finding on the issue. He has not even noticed, let alone considered and discussed, that issue. That apart, we find that the order passed by the learned Judge under Section 20 of the Arbitration Act

also suffers from another legal infirmity inasmuch as while directing the dispute to be referred for arbitration to the Chief Engineer, Public Health Engineering Department, Jammu, no direction was issued for 'filing' the arbitration agreement in the Court, which direction is a sine qua non for allowing the application under Section 20 of the Act and referring the dispute to the arbitrator. The scope of enquiry under Section 20 of the Act is a limited one and is normally to be confined to an enquiry as to whether there is a written agreement, the terms whereof provide for arbitration and as to whether there was a dispute raised in terms of the agreement. The order to be made would depend upon the result of the enquiry. No such enquiry was held by the learned single Judge and that is a legal infirmity.

From the entire judgment and order passed by the learned Judge, it nowhere appears that he has passed an order under Sub-section (4) of Section 20 directing the Government to file agreement before the Court. He has straightway passed an order that the matter be referred to the arbitrator.

23. In this view of the matter, the judgment and order passed by the learned Judge referring the matter to the arbitrator is required to be quashed and set aside as he has not considered whether the claims raised by the plaintiff are required to be determined by the arbitrator and that he has not passed any order directing the Government to file arbitration agreement before the Court.

24. The next question which requires determination is whether application for referring the dispute to the arbitrator is required to be made by the contractor within 90 days of the passing of the final bill or within 90 days from the date of abandonment of the contract work as per Clause 30(2)(i) which is quoted in proceeding paragraph. This Sub-clause (2) of Clause 30 in terms provides that the provisions of Arbitration Act, 1940 and rules made thereunder shall apply to the arbitration proceedings under this clause subject to the provisions specified therein. One of the main conditions is that the application for referring any dispute to arbitrator shall be made by the contractor with details of matters and the disputes within 90 days of passing of the final bill for the work or within 90 days from the date of the abandonment of the work. Therefore, this arbitration clause itself provides that for resorting to arbitration, contractor is required to file

application with details of matters and disputes within 90 days.

25. Admittedly in this case, respondent has not filed the application for referring any dispute for arbitration within 90 days of passing of the final bill. The final bill was prepared on 31-1-1985. It was accepted by the respondent under protest. But he never made application within the stipulated period for referring the matter to the arbitrator. Mr. Dayani, learned Advocate for the respondent, contended that this question was also required to be determined by the arbitrator and not by the Court as it pertains to the issue whether the application under Section 20 filed by the respondent is barred by limitation or not. For this purpose he relied upon decision of the Supreme Court in the case of Wasir Chand v. Union of India : [1967]1SCR303 In that case the Court after considering the provisions of Section 37(1) of the Arbitration Act held that Section 37(1) does not confer authority upon the Court to reject an application for filing arbitration agreement under Section 20 of the Arbitration Act because the claim is not made within three years from the date on which the right to apply arose. The Court further held as under:

In dealing with an application for filing an arbitration agreement, the Court must satisfy itself about the existence of a written agreement which is valid and subsisting and which has been executed before the institution of any suit, and also that a dispute has arisen with regard to the subject matter of the agreement which is within the jurisdiction of the Court. But the Court is not concerned in dealing that application to deal with the question whether the claim of a party to the arbitration agreement is barred by the law of limitation : that question falls within the province of the arbitration to whom the dispute is referred.

In our view this contention of the learned Advocate for the respondent cannot be accepted. At present we are not dealing with the issue whether the claim of the plaintiff is barred by law of limitation or not.

26. At this stage the Court is required to consider whether the condition precedent for referring the matter for arbitration as per agreement between the parties is existing or not. In other terms Court is required to consider whether agreement for arbitration subsists or does not exist because time prescribed by the agreement for referring the matter has expired. The question would be whether the parties to the

agreement have complied with the conditions of the arbitration agreement for referring the matter to the arbitrator. If they have not complied with the conditions of the agreement or condition precedent for referring the matter to the arbitrator is absent then the dispute cannot be referred to the arbitrator. Respondent was required to take steps to commence arbitration proceedings within the time fixed by the agreements, that is, within 90 days of passing of the final bill and as it has not been done the Court had no jurisdiction to refer the dispute to the arbitrator.

27. In some cases if there is undue hardship to the parties, the Court has jurisdiction to extend the time fixed by the parties in the interest of justice, on certain terms. Sub-section (4) of Section 37 of the Arbitration Act provides for it. It reads as under:

37. (4). Where the terms of an agreement to refer future differences to arbitration provides that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

This Section recognises the right of the parties to provide for in the arbitration agreement that unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other steps to commence the arbitration proceedings is taken within the time fixed by the agreement and if that is not done, then the result would be that the Court would have no authority to refer the matter to the arbitrator. However, this Section further empowers the Court to extend the time in case of undue hardship.

28. In the present case there is no question of extending the time as no such contention was raised before the trial Court nor any point is made out before this Court that there would be undue hardship to the respondent. The word 'undue hardship' were considered by the Supreme Court in the case of S.G. Insurance

Co. Ltd. v. Planters Airways Private Limited : [1975]3SCR136 and the Court held that 'undue' must mean something which is not merited by the conduct of claimant, or is very much disproportionate to it. In the present case there is nothing on record to show that there would be any hardship to the respondent and, therefore, probably he has not made out any such claim before the trial Court. It is unfortunate that the learned Judge has not considered Clause 30 of the agreement at all.

29. Mr. Dayani, learned Advocate for the respondent, however relied upon a decision of the Delhi High Court in the case of Jai Chand Bhasin v. Union of India : AIR1983 Delhi508 . In that case the Court considered Clause 25 of the agreement which provided that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving intimation from the Government that the bill is ready for payment, the claim of the contractor will be deemed to have been waived and absolutely barred and the Government shall be discharged and released from all the liabilities under the contract in respect of those claims. The Delhi High Court held that the provisions of Clause 25 providing that the claim will be deemed to have been waived has no relevance in the proceedings under Section 20 of the Arbitration Act. The Court further held that the question whether the claim made by the contractor is time barred or abandoned can be decided only by the arbitrator when the matter goes before the arbitrator and it cannot be decided at this stage. In our view, this decision has no bearing because the arbitration Clause 30 provides that if the contractor intends to avail of remedy of referring the dispute to the arbitrator then he is required to file an application for referring the dispute to the arbitrator within 90 days of the passing of the final bill. This condition is a part and parcel of the arbitration clause. It clearly means that after 90 days of passing of the final bill for the work or after 90 days of the abandonment of the work, the contractor would not have any right of seeking reference to arbitration for deciding the dispute. Further with respect to the learned Judges it is difficult for us to accept the following proposition laid down in the aforesaid decision:

In our view when there is no admission by the applicant that demand for arbitration in respect of any claim is beyond 90 days the question of invoking Section 37(4) is

premature and does not arise. In all cases arising under Section 37(4) of the Act including *Sterling General Insurance Co. Ltd* : [1975]3SCR136 (supra), the Court was moved because the applicant himself accepted that time had run out and he was seeking extension.

In our view, before referring the matter to the arbitrator, the Court is required to consider whether the terms and conditions of the arbitration clause are complied with or not. If they are not complied with then there is no question of referring the matter to the arbitrator. In some cases on the ground of undue hardship, the Court may extend time fixed by the parties for taking appropriate steps as contemplated in the agreement for referring the dispute to the arbitrator. This would clearly mean that before referring the matter to the arbitrator the Court is required to apply its mind to the facts of the case. In this case as this application is not filed within 90 days of passing of the final bill and no application for extension of time is made by the respondent-plaintiff in our view there is no question of referring the matter to the arbitrator as the term of the arbitration clause is not complied.

30. The next question for decision is whether the application filed by respondent/plaintiff is premature because before filing the present application the plaintiff has not filed any application before the Government raising the dispute and for referring the matter to the arbitration as required by Clause 30(2)(g) of the agreement. The said sub-clause provides that the contractor shall alongwith his application for referring the dispute to the arbitrator deposit with the Government a sum equal to 5% of the amount of the claim or of any amount that may be fixed by the Government subject to the maximum of Rs. 5,000/- towards the cost of arbitration. It is contended that straightway application is filed before the Court and, therefore, it is premature. As against this Mr. Dayani, learned Advocate for the plaintiff, submitted that no such contention was raised by the respondent before the trial Court and in any case it was open to the trial Court to treat this application as an application by the plaintiff to the Government. If the Government was willing to accept the application then the plaintiff would deposit the cost as required by Clause 30 of the agreement. He further relied upon the decision of the Delhi High Court in the case of *Jindal Refrigerations v. Himachal Pradesh Horticulture Produce Marketing and Processing Corporation Limited* 1982 (2)

Arbitration Law Reporter 65. In this case the Court has held that the application before the Court under Section 20 of the Arbitration Act could be treated as an application requesting the Government to appoint arbitrator. We are also of the view that once the application is filed before the Court it is always open to the Government to treat the application as an application to it and refer the matter to the arbitrator. Therefore, the application filed by the plaintiff cannot be thrown out on the ground that it is premature.

31. The next contention which requires consideration is whether the application filed by the plaintiff requires to be rejected on the ground that it is filed after a period of three year from the date when the right to apply accrued. Final bill was prepared on 31-1-1985 and respondent has filed the present application on 25-1-1988. Therefore, it cannot be said that it is filed after lapse of three years from the date of accrual of cause of action. Mr. Pandya, learned Government Pleader, submitted that even though the application was filed on dated 25-1-1988 the summons was served on the appellants on 6-2-1988 and therefore, it is barred. In our view for determining the period of limitation date of filing of the application before the Court is required to be taken into consideration and not the date when the defendant is served with summons. Further whether claims of plaintiff are barred by period of limitation or not is required to be decided by the arbitrator. Hence, it cannot be said that the present application filed by the plaintiff is barred by limitation.

32. The next question which requires determination is whether this application is barred under the provisions of Order 2 Rule 2 of the Code of Civil Procedure. The trial Court took into consideration the fact that prior to the present suit the plaintiff had filed Special Civil Suit No. 258 of 1986 before the Civil Judge (S.D.) at Narol for referring the dispute between the parties with regard to the subject matter of the contract to arbitrator. By order dated 12-6-1987 the arbitrator was appointed and matter was referred to him for decision. The trial Court held that in that suit plaintiff had submitted claims and/or disputes which are exclusively falling within the scope of Clause 30 of the tender agreement. Due to inadvertence and oversight some of the claims have not been incorporated and therefore, the plaintiff has rightly filed this suit. He further held that as the matter is pending

before the arbitrator and arbitrator has not declared the award it cannot be said that the plaintiff omitted to claim in respect of some claims or intentionally relinquished any portion of his claim. He relied upon the decision of this Court in the case of Kothari and Associates, Baroda v. State of Gujarat 1984 Arbitration Law Reporter 72 and held that causes of action in both the cases are different. He therefore, held that the suit is not barred by the provisions of Order 2 Rule 2 of the Code of Civil Procedure.

33. For considering this issue it would be necessary first to decide whether the entire Civil Procedure Code is made applicable to the arbitration proceedings. Under Sub-section (2) of Section 20 of the Act, the application filed by the plaintiff for direction that the agreement be filed in the Court and the dispute be referred to the arbitrator is required to be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiff and remainder as defendant or defendants. Therefore, the application which is filed before the Court would be numbered and registered as suit between the parties. Section 2(c) of the Arbitration Act defines 'Court' and 'Court' means Civil Court having jurisdiction to decide the questions forming the subject matter of the reference if the same had been the subject matter of the suit. Section 41 provides for the procedure and powers of the Court which reads as under:

41. Subject to the provisions of this Act and of Rules made thereunder:

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court;

Provided that nothing in Clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any such matters.

34. In view of this Section, Mr. Pandya, learned Government Pleader, submitted that as the entire Civil Procedure Code is made applicable under Section 41(a), Order 2 Rule 2 of the Civil Procedure Code is applicable and therefore the present suit filed by the respondent for the dispute arising out of the same contract and same clause of action is barred under Order 2 Rule 2 of the Civil Procedure Code.

35. As against this, Mr. Dayani, learned Advocate for the plaintiff, submitted that even though marginal note of Section 41 of the Act mentions that procedure and powers of the Courts, yet only procedural part of the Civil Procedure Code is made applicable and not the substantive part. He further submitted that even if for the time being it is presumed that Order 2 Rule 2 of the Civil Procedure Code is made applicable yet in the present case as the arbitration proceedings in the previous matter are not over the plaintiff is entitled to file amendment application under Order 6 Rule 17 of the Civil Procedure Code for referring the additional disputes to the arbitrator. He relied upon the decision of the Supreme Court in the case of *H.M.K. Ansari and Company v. Union of India* : [1983]3SCR607 In that case the Supreme Court considered the scope and ambit of Section 41 of the Arbitration Act and held that Clause (a) of Section 41 of the Arbitration Act makes only the procedural rules of the Civil Procedure Code applicable to the proceedings in the Court under the Arbitration Act. This clause does not authorise the Court to pass order of injunction. This power is conferred by Clause (b) of Section 41 of the Arbitration Act. The source of power, therefore, cannot be traced under Clause (a). The Court further held that if Clause (a) of Section 41 gives wide powers to pass order of injunction Clause (b) of Section 41 would become otiose. This decision is relied upon and followed by the Supreme Court in the case of *J. & K. State Forest Corporation v. Abdul Karim Wani* AIR 1982 SC 1498. The Court held that so far as Clause (a) of Section 41 is concerned, it makes only the procedural rules of the Civil Procedure Code applicable. So far as Clause (b) is concerned, it circumscribes the Court's powers within the limits indicated in the second schedule and further qualifies it by declaring in the proviso that it cannot be used to the prejudice of any the powers of the arbitrator. The interim direction can be issued only for the purpose of arbitration proceedings and not to frustrate the same. As against this, Mr. Pandya, learned Government Pleader, relied upon the decision of the Supreme Court in the case of *Hakam Singh v. Gammon (India) Limited* :

[1971]3SCR314 wherein after considering Section 41 of the Arbitration Act the Court held that the Civil Procedure Code in its entirety applies to the proceedings under the Arbitration Act. The jurisdiction of the Court under the Arbitration Act to entertain a proceeding for final award is accordingly governed by the provisions of Civil Procedure Code. He also submitted that in view of the aforesaid decision, assuming for the time being that only procedural part of the Civil Procedure Code is applicable, yet Order 2 Rule 2 of the Civil Procedure Code is procedural and it mainly provides the form of the suit and what the plaint should contain and the consequences if the plaintiff fails or omits to include any of his claim.

36. As against this Mr. Dayani submitted that assuming for the time being that Order 2 Rule 2 of the Civil Procedure Code is procedural Rule under Order 6 Rule 17 of the Civil Procedure Code plaintiff is entitled to file an amendment in the plaint and add to its original claim. He submitted that normally amendment in the plaint would be granted by the Court if the suit is pending before the Court. As the suit is not decided by the arbitrator, the matter is still pending before the Court as the arbitrator would be required to file the award before the Court and thereafter the Court would pass appropriate decree in terms of award. He further submitted that application under Section 20 of the Arbitration Act is to be numbered and registered as a suit. Therefore, till there is a final award by the Court he can file an application under Order 6 Rule 17 of the Civil Procedure Code for amending the plaint. For this contention he relied upon decision of the Delhi High Court in the case of Delhi Development Authority v. Alkarama : AIR1985 Delhi132 In that case after award has been made plaintiff made another request for referring some items of dispute to the arbitrator. After considering the decision of the Calcutta High Court the Court held that administration of justice would require that there should not be multiplicity of proceedings and the parties should not be permitted to raise disputes over and over again once the disputes have been settled either by the pronouncement by a Court of competent jurisdiction or by the award by an arbitrator. The Court further held that if the principles of Order 2 Rule 2 are made applicable then the principles governing Order 6 Rule 17 would also be made applicable. The Court considered that during the pendency of the suit the plaintiff has right to apply for amendment of the plaint under Order 6 Rule 17 of the Civil Procedure Code in order to enlarge scope of the suit and if so desired can raise

additional pleas praying for larger relief than what he had prayed for originally. The Court finally held in Para 16 as under:

16. To put it differently, just as the principles analogous to Order 2 Rule 2 are applicable to the arbitration proceedings, similarly, principles analogous to Order 6 Rule 17 would also be applicable. We are unable to agree with the learned single Judge that in no case would the provisions of Order 2 Rule 2 be applicable. While the learned single Judge has rightly held that the principles of res judicata apply to arbitration proceedings, but we are unable to agree with him that the provisions of Order 2 Rule 2, which according to the learned single Judges are draconian in nature, would never be applicable. In our opinion, the provisions of Order 2 Rule 2 would apply, as we have already stated hereinabove, if the request for referring more disputes to arbitration is made after the making of the award. Once an award has been made, a party cannot be permitted to raise more disputes which he/it could and ought to have raised earlier. Where, however, an award has not been made, it is open to a claimant to ask for more disputes to be referred to arbitration provided the arbitration proceedings are not yet over. In such an event, if the authority competent to appoint an arbitrator and to refer the disputes, fails to do so, the Court has the jurisdiction to order the filing of the arbitration agreement and to direct the Engineer Member to refer the disputes to arbitration.

37. Mr. Pandya, however, submitted that Order 6 Rule 17 of the Civil Procedure Code would be applicable only if no final order is passed by the Court. Under Sub-section (4) of Section 20, once the Court passes the final order by directing the Government to file the agreement before the Court and referring the matter to the arbitrator then it cannot be said that the proceedings before the Court are pending. As against this Mr. Dayani submitted that merely by referring the matter to the arbitrator the Court does not become functus officio. The other provisions of the Arbitration Act are made applicable under Sub-section (5) of Section 20 of the Arbitration Act and therefore, under Sections 41, 43 and 45 read with Second Schedule the Court can pass appropriate orders. He relied upon the decision of the Bombay High Court in the case of *Sherbanubai v. Hooseinbhoy* AIR 1948 Bombay 292. In that case the Court considered the question whether the parties appearing before the Arbitrator can by consent confer additional powers upon him.

The Court held that they cannot extend the arbitrator's jurisdiction. They cannot ask the arbitrator to consider the matter which is not referred to under the order of reference. The Court further held that if parties desire that the arbitrator should have wider powers or different powers from those originally conferred upon him by the order of the Court, the proper procedure for the parties is to go back to the Court and get a fresh order of reference or get the original order of reference amended or altered but the parties cannot by their own consent upon the arbitrator powers different from those which the Court had originally conferred. The Court has a duty to discharge and supervise the proceedings of the arbitrator and in seeing that the arbitrator is acting under the order made by it. Mr. Dayani therefore submitted that till the award is made decree of the Court the proceedings remain pending before the Court and the Court can pass appropriate order of amendment in the claims and refer the additional disputes to the arbitrator.

38. In our view taking into consideration our findings on the first and second contentions, this controversy is not required to be dealt with in this appeal and hence we are not deciding it and keep this question open.

39. Mr. Dayani, lastly submitted that appeal filed by the State Government is not maintainable. In our view this submission is without any substance because Section 39 Sub-section (1) provides that an appeal shall lie from the following orders passed under this Act and (from no others) to the Court authorised by law to hear the appeal from original decrees of the Court passing the order.

40. The appeal shall lie from the following orders:

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;

(vi) setting aside or refusing to set aside an award.

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

41. From the judgment and order passed by the trial Court, it is implied that he has passed an order directing the Government to file an arbitration agreement before the Court and so he has referred the matter to the arbitrator. Therefore, under Clause (4) of Sub-section (1) of Section 39 of Arbitration Act, appeal against the impugned order is maintainable before this Court. In this appeal we are not deciding whether the matter should be referred to a particular arbitrator. We are concerned only with one question whether the arbitration agreement be filed before the Court or not.

42. The next question is whether the appeal from order or First Appeal would lie before this Court. Section 39 of the Arbitration Act provided that appeal shall lie from the orders mentioned therein. Rule 15 of Chapter V of the High Court Appellate Side Rules provides as under:

15. Appeals presented under Special Acts, such as the Indian Succession Act, XXXIX of 1925, the Guardian and Wards Act, VIII of 1890, etc., shall be registered to the ordinary way as First or Second Appeals, as the case may be.

43. This appeal is under a Special Act, that is the Arbitration Act. Sub-section (2) of Section 39 of the Arbitration Act specifically provides that no Second Appeal shall lie from an order passed in appeal under this Section. Therefore, in this case, there is no question of registering this appeal as Second Appeal. It is required to be registered as First Appeal. Hence, it cannot be said that this First Appeal before this Court is not maintainable.

44. In this view of the matter, there is no substance in the aforesaid contention also. In the result, the appeal is allowed. The judgment and order passed by the Civil Judge (S.D.) at Narol in Special Civil Suit No. 21 of 1988 on 8-8-1988 is quashed and set aside. The suit filed by the plaintiff for referring the matter to the arbitrator is dismissed. There will be no order as to costs all throughout.

