

Bimal Kumar Ghosh and anr. Vs. Saikat Sarkar

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Court : Kolkata

Decided On : Apr-11-1986

Reported in : AIR1987Cal208,90CWN968

Judge : Monoranjan Mallick, J.

Acts : [Arbitration Act, 1940](#) - Sections 20 and 41; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 14, Rule 2

Appeal No. : Civil Rule No. 3725 of 1982

Appellant : Bimal Kumar Ghosh and anr.

Respondent : Saikat Sarkar

Advocate for Def. : Uma Prosad Mukherjee, Adv.

Advocate for Pet/Ap. : Tarun Sankar Bose, Adv.

Judgement :

Monoranjan Mallick, J.

1. A very short but important point arises in this civil revision which has been directed against the order No. 25, dt. 16-8-82 passed by the learned Chief Judge, City Civil Court, Calcutta refusing to consider the present petitioners' prayer for dismissal of the application under Section 20 of the Arbitration Act being not

maintainable with the observation that the question of dismissal of the suit can arise after framing of issues after filing of written statement by the defendant and after hearing the preliminary issue about maintainability of the suit at the instance of the defendant.

2. Mr. Tarun Sankar Bose, learned Advocate appearing on behalf of the petitioners has placed before me a decision of our High Court reported in : AIR1966 Cal259 , S.P.C. Engineering Co. v. Union of India in which P.C. Mullick, J. has observed that a proceeding under Section 20 of the Arbitration Act is not a suit within the meaning of Clause 12 of the Letters Patent. He has, therefore, submitted that when in the proceeding under Section 41 of the Arbitration Act, the learned Chief Judge by order No. 15 dt. 20-1-82 while disposing of the application for appointment of receiver filed at the instance of the opposite party took the view that the application under Section 20 of the Arbitration Act was not maintainable, the learned Chief Judge should not have postponed consideration as to whether the application under Section 20 of the Arbitration Act was maintainable or not at a future date after the present petitioners filed written statement and after the issues including the issues regarding the maintainability of the suit were framed.

3. Mr. Uma Prasad Mukherjee, learned Advocate appearing on behalf of the opposite party has submitted that the order passed by the learned Chief Judge is not at all illegal. He has drawn my attention to Section 41(a) of the Arbitration Act and submits that Section 41(a) of the Arbitration Act makes all provisions of the Code of Civil Procedure applicable to the proceeding initiated in any Court of law under the Arbitration Act. He has also drawn my attention to Sub-section (2) of Section 20 of the Arbitration Act in which it has been clearly stated that the application under Section 20 shall have to be registered as a suit. He contends that when the application under Section 20 of the Arbitration Act is to be registered as a suit then the application should be treated as a plaint and all the provisions regarding the filing of written statement and the framing of issues have got to be applied and the hearing regarding the maintainability of the suit cannot be taken up before issue regarding the maintainability of the suit is framed by the learned trial Judge.

4. I have heard the learned Advocate for the parties at length. Section 41(a) of the Arbitration Act states as follows : -- 'Subject to the provisions of the Act and of rules made thereunder-- (a) the provisions of the Civil P.C., 1908 shall apply to all proceedings before the Court and to all appeals, under this Act'. It is to be noted that the operative part of Section 41(a) is prefaced (?) by the words 'Subject to the provisions of this Act, and of rules made thereunder'. So it is clear that the Civil Procedure Code is applicable subject to the provisions of the Arbitration Act.

5. Section 20 reads as follows : --

'(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 Chap. II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants if the application has been presented by all the parties, or if otherwise between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, to arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with and shall be governed by the other provisions of this Act so far as they can be made applicable.'

Sub-section (1) of Section 20 lays down that where any person has 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 one of them instead of proceeding under Chap. II may apply to a Court having jurisdiction in the matter to which the agreement relates that the agreement will be filed in Court.

Sub-section (2) indicates that the application shall be in writing and shall be numbered and registered as a suit.

Sub-section (3) lays down some procedure as to how the application is to be disposed of. It provides that on such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants requiring them to show cause within the time specified in the notice why the agreement should not be filed.

Sub-section (4) lays that where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the agreement.

It is, therefore, clear that when an application under Section 20 of the Act is filed before a competent Court, the Court shall have to issue a show cause notice on all the parties concerned except the applicant as to why the application shall not be allowed and thereafter the Court has to dispose of the matter. There is no indication in Section 20 that a summons has to be issued on the defendant as is provided in the C.P.C., when a plaint is presented before a Court of law and there is also no obligation for the Court to frame issues before disposing of the application under Section 20 of the Arbitration Act. When I Section 41(a) clearly lays down that the C.P.C. will be applicable to all the provisions before any Court of law under the Arbitration Act subject to the provisions of the Arbitration Act and the Rules made thereunder, the special provision regarding the procedure to be

followed while disposing of an application under Section 20 clearly militates against the argument of the learned Advocate for opposite party that the C.P.C. is applicable to the whole and written statement has got to be filed by the present petitioners and issues have to be framed regarding maintainability and thereafter the contention of the present petitioners that the application under Section 20 of the Arbitration Act is not maintainable will have to be taken up for hearing, the decision of the Calcutta High Court referred to by the learned Advocate for the petitioners though primarily concerned in deciding the question as to whether an application under Section 20 of the Arbitration Act is to be treated as a suit within the meaning of Clause 12 of the Letters Patent, but P.C. Mullick, J. in that decision reported in : AIR1966 Cal259 observes as follows : -- 'The wording of Section 20(2) is the 'application shall be numbered and registered as a suit' does suggest that it is not a suit in the fullest sense of the term'. In my view also the application under Section 20 though shall have to be registered as a suit as provided in Sub-section (2) of Section 20 is not a suit in the fullest sense of the term so that the provisions of the C.P.C. in respect of disposal of a suit on a preliminary point only after framing of issues regarding maintainability cannot be held to be attracted.

6. In the circumstances, I uphold the contention of the learned Advocate for the petitioners that the petitioner raised a specific point before the learned trial Judge that the application under Section 20 of the Arbitration Act was not maintainable. In view of the decision of the learned Chief Judge by order No. 15, dt. 20-1-82 it is to be decided without forcing the present petitioners to file written statement and then to take up the matter as a preliminary issue after framing proper issues in the suit. I, therefore, set aside the order passed by the trial Judge dt 16-8-82 and direct that the learned trial Judge shall as soon as practicable and not later than two months from the date of receipt of the records from this Court dispose of the present petitioners' contention as to whether the application under Section 20 of the Arbitration Act is maintainable or not.

7. Learned Advocate for the opposite party points out that the present applicants have not filed any formal application before the trial Court that the application under Section 20 of the Arbitration Act is not maintainable.

8. Learned Advocate for the petitioners submits that at the time of hearing of the present matter on which the impugned order was passed, attention to the contention of the present petitioners in the affidavit-in-opposition to the application under Section 41 of the Arbitration Act was drawn before the learned Judge and the learned trial Judge also indicated in the impugned order that the present applicant contended that the application was not maintainable in view of the clear pronouncement made by the Court by the order dt. 20-1-82, learned Advocate for the petitioners, however, contends that the hearing can be done before the learned trial Judge on the basis of the affidavit-in-opposition filed by the present petitioners against the application under Section 41 of the Arbitration Act

9. I, therefore, direct that the learned trial Judge shall hear the question regarding maintainability treating the affidavit-in-opposition of the present petitioners as the formal application that the present application under Section 20 of the Arbitration Act is not maintainable. The present opposite parties are at liberty to file any affidavit-in-reply to the said affidavit-in-opposition before the matter is heard by the learned Judge to be treated as his objection to the petitioner's contention that the application under Section 20 of the Arbitration Act is not maintainable. The rule is thus disposed of without any order as to costs.

10. Records be sent down to the learned trial Court as early as possible.