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RAMVALLABH TIBREWALLA

v.

DWARKADAS & CO.

August 31, 1965

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[K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.]

Arbitration Act (10 *of* 1940), *s.* 20—*Scope of.*

After the appellant instituted a suit against the respondent claiming a money decree the parties entered into an agreement for reference of the disputes to arbitration. The agreement provided for the withdrawal C of the suit and the suit was withdrawn on or about the same date as that of the agreement. There were changes in the arbitrator, and also extensions of time, but no award was made. The appellant therefore applied to the Court for filing of the arbitration agreement, under s. 20 of the Arbitration Act, 1940, but the application was rejected on the ground that the section was not attracted.

In the appeal to this Court,

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HELD : In the light of the other parts of s. 20, its heading, and the general scheme of the Act, the words "before the institution of any suit with respect to the subject matter of the agreement or any part of it" in the section, mean, "while no suit with respect to the subject matter of the agreement or any part of it is pending"; and not "where no suit has been instituted". Therefore, the section is attracted to an arbitration agreement entered into while no suit with respect to its subject matter E is pending. [691 G-H; 692 H; 693 A-B]

Since on a proper interpretation of the agreement in the present case the withdrawal of the suit was the essential condition, the agreement would become operative only upon its fulfilment. Thus the effective arbitration agreement came into existence when the suit was withdrawn and may properly be said to have been entered into while no suit with respect to its subject matter was pending. Therefore, the agreement could be filed under s. 20. [694 A-C]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 460 of 1965.

Appeal by special leave from the judgment and order dated February 21, 1964, of the Bombay High Court in Appeal No. 58 of 1960.

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P. R. Mridul, G. L. Sanghi, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for the appellant.

A. V. Viswanatha Sastri, D. R. Dhanuka, B. R. Agarwala, and *H. K. Puri*, for the respondent.

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The Judgment of the Court was delivered by

Bachawat, J. This appeal raises a question of construction of s. 20 of the Indian Arbitration Act, 1940. The appellant instituted

Suit No. 1712 of 1949 in the Bombay High Court against the respondent claiming a decree for money said to be due on account of various dealings between the parties. On or about February 18, 1954, the parties entered into an arbitration agreement for reference of the disputes to the arbitration of Sri Ramrikhdas Parasrampuria. The agreement also provided for withdrawal of the suit. In view of the agreement, the suit was duly withdrawn. Sri Parasrampuria was subsequently removed, and in his place, two other arbitrators were appointed. These arbitrators were also subsequently removed, and in their place, Sri S. V. Gupte was appointed the arbitrator. The time for making the award was extended by orders of Court from time to time up to March 21, 1958. Two more applications for extension of time were rejected by the Court. Sri S. V. Gupte was unable to make the award by March 25, 1958.

On April 3, 1958, the appellant applied to the Court for (a) the filing of the arbitration agreement under s. 20 of the Indian Arbitration Act, 1940, (b) extension of the time of Sri. Gupte to make the award, (c) in the alternative, reference of the disputes to some other person, and (d) an order for exclusion of the time from February 18, 1954 up to April 3, 1958 so as to save the bar of limitation, if any. The prayer for extension of the time of Sri. Gupte to make the award was rejected by K. K. Desai, J. and also by the appellate Court, and that prayer is no longer pressed by the appellant. Both Courts also rejected the appellant's prayer for the filing of the arbitration agreement under s. 20. K. K. Desai, J. held that in order to attract s. 20, the applicant must prove that the subject-matter of the arbitration agreement was not the subject-matter of any suit already instituted. The appellate Bench held that the arbitration agreement having been entered into five years after the institution of the suit, could not be said to be an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement as contemplated by s. 20(1). The appellant now appeals to this Court by special leave.

The respondent contends that the opening words of s. 20 preclude the filing of the arbitration agreement dated February 18, 1954, as the agreement was entered into after the institution of a suit with respect to the subject-matter of the agreement. The appellant contends that (1) s. 20 permits the filing of an arbitration agreement entered into during the pendency of such a suit, if the suit is not pending when the party applies for the filing, in the alternative (2) s. 20 permits the filing of an arbitration

A agreement entered into while no such suit is pending, though such a suit might have been instituted previously, and (3) the arbitration agreement dated February 18, 1954 was intended to be operative upon, the withdrawal of the suit and was thus an agreement entered into while the suit was no longer pending and it could properly be filed under s. 20.

B Sub-section (1) of s. 20 reads :

> "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
> C 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."

The dispute turns on the proper meaning to be given to the
D words "before the institution of any suit with respect to the subject-matter of the agreement or any part of it". Four alternative interpretations of these words are suggested : (1) The word "before" suggests precedence in point of time; the section contemplates an arbitration agreement followed by a suit with respect to its subject-matter and if there is
E no such suit, the section is not attracted; (2) The words "before the institution of any suit" mean "where no suit has been instituted"; the section precludes the filing of an arbitration agreement entered into after the institution of the suit, even though the suit may have been withdrawn before the making of the agreement. (3) The words "before the institution of any suit" mean "while no suit
F is pending"; the section permits the filing of an arbitration agreement entered into while no suit is pending, though previously such a suit was instituted; and (4) the words "before the institution of any suit" etc. qualify the words "may apply"; the section permits the filing of all arbitration agreements provided the application for filing is made while no suit is pending.

G The object of the opening words is to restrict the operation of s. 20 to a limited class of arbitration agreements. It is obvious that the opening words admit of more than one meaning. For the purpose of resolving the ambiguity, it is legitimate to refer to the other parts of the section, the heading of Chap. III and the general
H scheme of the Act.

The Arbitration Act, 1940 contemplates three classes of arbitrations : (1) arbitration without intervention of a Court under

Chap. II; (2) arbitration with intervention of a Court where there is no suit pending, under Chap. III, and (3) arbitration in suits under Chap. IV. An arbitration agreement between the parties to a pending suit for reference of any dispute in the suit entered into while the suit is pending, may be enforced under Chap. IV only by obtaining an order of reference from the Court in which the suit is pending and not by proceeding under Chaps. II and III. But an arbitration agreement entered into while no suit with respect to its subject-matter is pending cannot be enforced under Chap. IV, and there is nothing in Chap. IV or the general scheme of the Act, which precludes the enforcement of such an agreement under Chaps. II and III. The effect of a subsequent suit with respect to the subject-matter of the agreement is considered and dealt with in ss. 34 and 35 of Chap. V.

The heading of Chap. III shows that the subject-matter of s. 20 is "arbitration with intervention of a Court where there is no suit pending". The heading is wide enough to include arbitration under an arbitration agreement entered into while no suit with respect to the subject-matter is pending.

The words "instead of proceeding under Chapter II" in s. 20 suggest that the parties may proceed under Chap. III where they could proceed under Chap. II. Reading Chap. II with s. 2(a), it is plain that an arbitration agreement entered into while no suit with respect to its subject-matter is pending may be enforced under Chap. II. Since such an agreement is enforceable under Chap. II, *prima facie* it is also enforceable under Chap. III.

The opening words of s. 20 contemplate that a suit with respect to the subject-matter of the arbitration agreement may or may not be filed. In order to attract s. 20, it is not, therefore, necessary that the arbitration agreement should be followed by a suit with respect to its subject-matter. The word "before" is not used in the strict grammatical sense of priority in order of time. In the light of the other parts of s. 20, its heading and the general scheme of the Act, we think that the legislature used the words "before the institution of any suit" in the sense of "while no suit is pending" and not in the sense of "where no suit has been instituted." The former meaning, is more in harmony with the real intention of the legislature. If the agreement is entered into while no suit with respect to its subject-matter is pending, the fact that its subject-matter was the subject-matter of a previously instituted suit would not preclude its enforcement under Chaps. II and III. We think, therefore, that the words "before the institution of any suit with respect to the subject-matter of the agreement or any

A part of it" mean "while no suit with respect to the subject-matter of the agreement or any part of it is pending". These words qualify the preceding words "an arbitration agreement" and not the succeeding words "may apply". In other words, s. 20 is attracted to an arbitration agreement entered into while no suit with respect to its subject-matter is pending. If it is entered into while B such a suit is pending, it cannot be enforced by an application under s. 20, though the application is made when the suit is no longer pending.

Learned counsel for the parties cited before us the following cases decided under paragraph 17 of Sch. II of the Code of 1908, C viz., *Kokil Singh* v. *Ramasray Prasad Choudhary*(1), *Lal Chand* v. *Sri Ram*(2), *Hira Ram* v. *Ram Ditta*(3) and *Dinkarrai Lakshmiprasad* v. *Yeshwantrai Hariprasad*(4). It is to be noticed that the heading of Chap. III "Arbitration with intervention of a Court where there is no suit pending" and the words in s. 20 "before the institution of any suit with respect to the subject-matter of the D agreement or any part of it" and "instead of proceeding under Chapter II" do not find any counterpart in the corresponding provision of Sch. II of the Code of Civil Procedure, 1908. In the circumstances, we think that the cases decided under paragraph 17 of Sch. II of the Code of 1908 are not decisive on the question of construction of s. 20 of the present Act, and that section must E be construed in the light of its own language and the scheme of the present Act.

Now, the question is whether the agreement dated February 18, 1954 is an agreement, to which s. 20 is attracted. The relevant operative portion of the agreement reads :

F "All matters in disputes in suit No. 1712 of 1949 (Ramvallabh Tibrewalla v/s. Messrs. Dwarkadas & Co.) in Bombay High Court including the question of whether the accounts were made up and adjusted and/or settled between the parties as pleaded in the written statement of the Defendants and the costs of the suit be G referred to the sole arbitration of Ramrikhdas Parasrampuria....The intention of the parties is that the said matters in dispute between them be decided by arbitration and it is agreed that the said suit will therefore be withdrawn."

H The agreement was signed on February 18, 1954, while the suit was pending. Before us, it is admitted by counsel for both parties

(1) (1924) I.L.R. 3 Patna 443.
(2) A.I.R. 1930 Lah. 1066.
(3) A.I.R. 1935 Lah. 59.
(4) (1930) I.L.R. 54 Bom. 197.

that the suit was withdrawn on or about the same date. The parties obviously intended that the pending suit would be withdrawn immediately so that the disputes might be resolved by arbitration without recourse to litigation. On a proper interpretation of the agreement, the withdrawal of the suit was the essential condition, upon the fulfilment of which the agreement would become operative. Thus, the effective arbitration agreement came into existence when the suit was withdrawn and may properly be said to have been entered into while no suit with respect to its subject-matter was pending. The agreement can, therefore, be filed under s. 20.

The ground upon which the Courts below dismissed the application for filing the arbitration agreement under s. 20 cannot, therefore, be upheld. A technical objection as to the frame of the application based on Rule 391 of the High Court Rules is no longer pressed. But the respondent also contends that (1) the appellant elected to proceed with the arbitration under Chap. II, and having so elected, he cannot now claim arbitration under Chap. III; (2) the application is barred by limitation, and the prayer for exclusion of time under s. 37 ought not to be allowed; and (3) the parties intended that the arbitration would be by Ramrikhdas Parasrampuria only, and as he is not willing to act and/or has been removed, there can be no further arbitration. The Courts below have not considered these contentions of the respondent. Having heard learned counsel on both sides, we think that the respondent is entitled to ask for the final disposal of the application after consideration of these points by the lower appellate Court, and for that purpose, this case should be remanded.

In the result, the appeal is allowed, the judgment and decree dated February 21, 1964 of the Bombay High Court in Appeal No. 58 of 1960 are set aside and the aforesaid Appeal No. 58 of 1960 is remanded to the Court below for disposal in accordance with law. The respondent shall pay to the appellant the costs of this appeal.

Appeal allowed.