R. MCDILL AND COMPANY PVT. LTD.

v.

GOURI SANKAR SARDA AND OTHERS

MARCH 13, 1991

[N.M. KASLIWAL AND K. RAMASWAMY, JJ.]

Arbitration Act, 1940: ss. 34, 41—Application for stay in a suit—Provisions of Code of Civil Procedure—Whether applicable.

Code of Civil Procedure, 1908: Order XXIII—Suit pending before High Court—Joint application by two defendants under s. 34 of Arbitration Act—Permission to withdraw with liberty to make a fresh application—Two separate stay applications moved—Maintainability of.

In a suit filed by plaintiff-respondent no. 1 before the High Court, defendant-appellants filed a joint application under s. 34 of the Arbitration Act for staying proceedings of the suit and referring the matter to arbitration. In view of some formal defects in the said application, the High Court on 25.2.1966 without mentioning the defects ordered, "Application withdrawn with liberty to make a fresh application". On 21.3.1966 the appellants submitted two separate applications for staying the suit in so far as it related to them or in the alternative for stay of the entire suit. The plaintiff-respondent resisted the applications as not being in terms of the order dated 25.2.1966. Upholding the objection, Learned Single Judge refused to stay the suit.

On appeal, the Division Bench of the High Court held that the liberty was granted to 'make a fresh application' and as such, under the provisions of Order XXIII, C.P.C., the appellants had no right to move two separate applications to stay the suit.

In appeal by special leave to this Court it was contended that provisions of Order XXIII, C.P.C. were not applicable to applications filed under s. 34 of the Arbitration Act; and that the High Court committed an error in taking a technical view that as liberty was given to withdraw the application in order to make a fresh application, the appellants were not entitled to make separate stay applications. Respondent no. 1 supported the impugned judgment.

Allowing the appeals, this Court,

A **HELD: 1. In view of s. 41 of the Arbitration Act, 1940, subject to provisions of the Act, Code of Civil Procedure, 1908 apply to all proceedings before the Court. No provision in the Arbitration Act takes away the provisions of Order XXIII, C.P.C. from being applied to applications filed under s. 34 of the Arbitration Act in a suit. [814F, 816B]**

B *Hakam Singh* **v.** *M/S Gammon (India) Ltd.*, **[1971] 3 SCR 314, relied on.**

Nawab Usman Ali Khan **v.** *Sagarmal*, **[1965] 3 SCR 201, held inapplicable.**

C *Munshi Ram* **v.** *Banwari Lal*, **[1962] Supp. (2) SCR 477;** *Hansraj Gupta* **v.** *Official Liquidator Dehradun-Mussoorie Electric Tramway Co.*, **[1932] L.R. 60 I.A. 13;** *Union of India* **v.** *Mohinder Singh & Co.*, **AIR 1971 JK 10;** *Union of India* **v.** *Rup Kishore*, **[1957] All. 504;** *Executive Engineer* **v.** *Thingom Iboyaima Singh*, **AIR 1970 Manipur 76;** *Abdul Gani* **v.** *Reception Committee,* **AIR 1936 Bom. 250;** *Ram* D *Bharosey* **v.** *Peary Lal,* **AIR 1957 All. 265;** *Shrinath Bros.* **v.** *Century Spinning & Wvg. Co.*, **AIR 1968 Bom 443;** *Indian Minerals Co.* **v.** *Northern India Lime Making Association*, **AIR 1958 All. 69;** *Ganeshmal* **v.** *Keshoram Cotton Mills*, **AIR 1952 Cal. 10;** *Governor-General in Council* **v.** *Associated Live Stock Farm (India) Ltd.*, **AIR 1948 Cal. 230;** *Soorajmull Nagarmull* **v.** *Sagar Mal*, **AIR 1978 Cal. 239;** *Ram*E *chand* **v.** *Governor General in Council*, **AIR 1947 Sind. 147 and** *Scottish Union of National Insurance Co.* **v.** *Saraswati Sajnani*, **AIR 1960 Cal. 22, referred to.**

2. In the instant case, apart from s. 41 of the Arbitration Act providing for application of Code of Civil Procedure and there being F **no provision taking away provisions of Order XXIII, C.P.C. from being applied to the applications for stay filed under s. 34 of the Arbitration Act, the proceeding started on a plaint filed by the plaintiff and in such a suit if any application was filed under the Arbitration Act, the same ought to be governed by the provisions of the Code of Civil Procedure. [816A-C]**

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3.1 The High Court was not right in dismissing the applications on the ground that two applications were not maintainable as the same were not covered withing its order dated 25.2.1966. [820E-F]

3.2 The term 'a fresh application' in the order dated 25.2.1966 H **used in singular had no more significance than the fact that as both the**

appellants had submitted one joint application, liberty was given to make a fresh application, The main purpose of moving the applications under s. 34 of the Arbitration Act was to stay the suit proceeding, The intention and purpose of moving two such separate applications was also the same. The explanation given by the appellants was that they were given a legal advice to move two separate applications as there were two different agreements between appellants no. 1 and 2 and the respondent no. 1 There being no element of *mala fide* in the two applications having been submitted within 30 days of the order dated 25.2.1966, the same were maintainable. [820A-C]

CIVIL APPELLATE JURSIDICTION: Civil Appeal Nos. 2012-2013 of 1974.

From the Judgment and Order dated 2.2.1973 of the Calcutta High Court in Appeal No. 211 of 1966.

B. Sen, Mrs. Geetanjali Mohan and Bishan Lal for the Appellant.

Dr. Shanker Ghosh, Darshan Singh, Praveen Kumar, I.B. Gaur and Ms. Shaifali Khanna (NP) for the Respondents.

The Judgment of the Court was delivered by

KASLIWAL, J. These appeals by special leave are directed against the order of the Calcutta High Court dated February 2, 1973. Brief facts necessary for the determination of these appeals are that Shri Gouri Sankar Sarda (hereinafter referred to as Respondent No. 1) filed a Suit No. 1783 of 1965 in the Calcutta High Court against R. McDill and Company Pvt. Ltd. (in short Appellant No. 1), Misrilal Dharamchand (Pvt.) Ltd. (in short Appellant No. 2) and Shri Misrilal Jain for the recovery of some amounts as well as for some other reliefs. On or about 15th December, 1965 both the appellant Nos. 1 and 2 who were also defendants in the suit submitted a joint application in the High Court for staying proceedings of the aforesaid suit, under Section 34 of the Arbitration Act, 1940 (hereinafter referred to as 'the Act'). In view of some formal defect in the application the High Court by order dated 25th February 1966 gave permission to withdraw the said application with liberty to file a fresh application. As the entire case hinges on the above order dated 25th Feb. 1966, relevant portion of the said order is reproduced as under:

"Application withdrawn with liberty to make a fresh application. Cost to be paid by the applicant".

Though the above order does not make a mention of the formal defect, but according to the appellants the permission to withdraw was sought as no copy of the plaint was annexed with such application. Thereafter, on March 21, 1966 the appellant Nos. 1 and 2 instead of making a joint application submitted two separate applications for staying the suit against the respective appellants and in the alternative for stay of the suit as a whole. These applications were resisted by the plaintiff-respondent No. 1 on the ground that separate applications were not in terms of the order dated 25.2.1966 and hence no stay should be granted. Learned Single judge upheld the objection raised by the plaintiff and refused to stay the suit. On appeal the Division Bench of the Calcutta High Court by order dated 2nd February, 1973 dismissed the appeal. The Division Bench took the view that liberty was granted to make a fresh application and as such under the provisions of Order XXIII of the Code of Civil Procedure, the appellants had no right to move two separate applications for staying the suit.

Aggrieved against the aforesaid Order of the High Court dated 2nd February, 1973 the appellants have filed these appeals by the grant of special leave. Order XXIII C.P.C. as it existed at the relvant time is reproduced as under:

ORDER XXIII:WITHDRAWAL AND ADJUSTMENT OF SUITS

1. Withdrawal of suit or abandonment of part of claim:

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.

(2) Where the Court is satisfied-

(a) That a suit must fail by reason of some formal defect, or

(b) That there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim.

It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of claim. A

(3) Where the plaintiff withdraws from a suit, or abandon part of a claim, without the permission referred to in sub-rule he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. B

(4) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw the consent of the others". C

It was contended on befalf of the appellants that the provisions of Order XXIII were not applicable in the matter of applications filed under Section 34 of the Arbitration Act. It was contended that the provisions of Order XXIII could only apply to the proceedings of a suit D and not in respect of any applications filed under the Act. It was submitted that the High Court committed an error in taking a highly technical view of the matter that initially a joint application was submitted for stating the suit and liberty was given to withdraw the same and to make a fresh application and as such the appellants were not entitled to submit two separate applications though for the same E purpose. It was contended in this regard that there were two separate agreements between the plaintiffs and appellants Nos. 1 and 2 containing an arbitration clause and as such the appellants were given a legal advice to submit two separate applications for staying the suit and the High Court should not have dismissed the applications on the ground that liberty to file fresh application was given in respect of one application only. Learned counsel for the appellants in support of this contention placed reliance on *Nawab Usmanali Khan* v. *Sagarmal*, [1965] (3) SCR 201. F

On the other hand it was argued on behalf of the respondent No. 1 that provisions of Order XXIII C.P.C. were applicable in respect of G an application under the Act. It was contended that basically the proceeding had arisen on account of a suit filed by the plaintiff-respondent and in that suit an application was submitted for staying the suit and referring the matter to Arbitrator under Section 34 of the Act. The Order as such passed by the High Court on 25th February, 1966 would be governed by the provisions of Order XXIII of the Code of Civil H

A Procedure and fresh application could only lie in accordance with the terms and conditions imposed at the time of permitting the withdrawal of the first application. It was contended that it was an admitted position that a joint application was filed for staying the suit and the permission was granted to withdraw the same with liberty to make a B fresh application and the defendants-appellants had no right to submit two separate applications in violation of the order of the Court dated 25th February, 1966. Reliance in support of the above contention was placed on *Munshi Ram* v. *Banwari Lal*, [1962] Supp. (2) SCR 477 and *Hakam Singh* v. *M/s Gammon (India) Ltd.*, [1971] 3 SCR 314.

We would first deal with the question whether the provisions of C Order XXIII C.P.C. apply or not to an application for stay of suit filed under Section 34 of the Act. Section 41 of the Act reads as under:

> 41 Procedure and powers of Court.
>
> D "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
>
> E (b) The Court shall have, for the purpose of, and in relation to, arbitration proceeding 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.
>
> F 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 of such matters".

According to the above provision the provisions of the Code of Civil Procedure, 1908 shall apply to all proceedings before the Court G subject course to the provisions of The Arbitration Act and of any rules made thereunder. It has been laid down in various decisions from time to time that the following provisions of the Code of Civil Procedure shall apply to proceedings under the Act. In the 'Law of Arbitration' by R.S. Bachawat (2nd 1987 Ed., 585) under the Heading 'Applicability of Code of Civil Procedure to Court Proceeding' it has H been mentioned as under:

Subject to the provisions of the Act and the Rules made thereunder the provisions of the Code of Civil Procedure apply to all proceedings before the Court and to all appeals under the Act, Section 41(a). A

The following provisions of the Code of Civil Procedure have been held to apply to certain proceedings under the Act: B

(1) Section 20 *Hakam Singh* v. *Gammon (India) Ltd.*, AIR 1971 SC 740: (1971) 1 SCC 286.

(2) Section 96(3) *Union of India* v. *Mohinder Singh & Co.*, AIR 1971 JK 10.

(3) Section 24 *Union of India* v. *Rup Kishore,* AIR 1957 All 504. C

(4) Section 114 read with Order 47 *Executive Engineer* v. *Thingom Iboyaima Singh,* AIR 1970 Manipur 76.

(5) Order 1 Rule 8 *Abdul Gani* v. *Reception Committee,* AIR 1936 Bom. 250: ILR 60 Bom. 645: 38 Bom. LR 380.

(6) Order 3 Rule 5 *Ram Bharosey* v. *Peary Lal,* AIR 1957 All 265. D

(7) Order 5 *Shrinath Bros.* v. *Century Spinning & Wvg. Co.*, AIR 1968 Bom. 443.

(8) Order 6 Rule 17 *Indian Minerals Co.* v. *Northern India Uime Marketing Association,* AIR 1958 All 69. E

(9) Order 9 Rule 13 *Ganeshmal* v. *Keshoram Cotton Mills,* AIR 1952 Cal 10: ILR (1951) Cal. 196.

(10) Order 23 Rule, 3 *Munshi Ram* v. *Banwari Lal,* AIR 1962 SC 903. F

(11) Order 30 Rule 3 *Governor-General in Council* v. *Associated Live Stock Farm (India) Ltd.*, AIR 1948 Cal. 230: 52 CWN 288.

(12) Order 30 Rule 4 *Soorajmull Nagarmull* v. *Sagar Mal,* AIR 1978 Cal. 239.

A proceeding under Section 14 or Section 17 under the Act is not a suit and the provisions of Section 86(1) C.P.C. read with Section 87 C.P.C. does not apply to such a proceeding *Usman Ali Khan* v. *Sagar Mal,* AIR 1965 SC 1798. Nor does the provision of Section 80 C.P.C. apply to a proceeding under Section 20 *Ramchand* v. *Governor-General in Council,* AIR 1947 sind 147. The following provisions of the Code Civil Procedure apply to appeals under the Act: G H

A (1) Section 96(3) *Union of India* v. *Mohinder Singh & Co.*, AIR 1971 JK 10; (2) Order 41 Rule 5 *Scottish Union of National Insurance Co.* v. *Saraswati Sajnani,* AIR 1960 Cal. 22: 63 CWN 800.

Apart from the above cases Section 41 of the Act itself provides B that the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court. We do not find any provision in the Act so as to take away the provisions of Order XXIII C.P.C. from being applied to applications filed under Section 34 of the Act, in a suit. That apart the case before us has started on a plaint filed by the plaintiff and in such a suit if any application is filed under the Act, the same ought C to be governed by the provisions of the Code of Civil Procedure.

In *Munshi Rám* v. *Banwari Lal*, (supra) the facts were that the Arbitrator gave an award. The award was filed in the Court by the Arbitrator. The appellants made application for setting aside the award and the respondents filed their replies to the application. There- D after, the parties came to terms and asked for a decree to be passed in accordance therewith. The court passed a decree on the award modified by the compromise. In execution, the appellant contended that the decree was a nullity as the Court had no jurisdiction to modify the award by compromise. It was argued that after a dispute is referred to arbitration and an award has been obtained and filed in Court, it is E not open to the Court to record the compromise under Order XXIII Rule 3 of the Code of Civil Procedure, because an award can be set aside or modified as laid down in the Arbitration Act, there is no provision in the Arbitration Act for recording the compromise. the above contention was not accepted and it was held as under:

F "When an award is given, the parties cannot, under the Act, challenge it except as laid down there. The powers of the Court are indicated by the Act. They are limited to accepting the award, if there be no objection and passing a decree in accordance therewith, or superseding the reference or revoking or modifying the award or remitting it for G further consideration, as laid down in the Act. But, the Act does not disable the parties from terminating their dispute in a different way, and if they do it could not be intended by law that a dispute, which had been successfully terminated, should again become the subject of litigation. If the parties are dissatisfied with the award and want to substitute it by a H compromise involving matters alien to the original dispute

which are inseparable, the Court may supersede the submission, and leave the parties to work out their agreement in accordance with the law outside the Arbitration Act". A

In *Nawab Usmanali Khan* v. *Sagarmal*, (supra) on which reliance has been placed by learned counsel for the appellant it was held that a proceeding under Section 14 read with Section 17 of the Act for B the passing of a Judgment and decree on an award does not commence with a plaint or a petition in the nature of a plaint, and cannot be regarded as a suit and the parties to whom the notice of the filing of the award is given under Section 14 (2) cannot be regarded as "suit in any Court otherwise competent to try the suit" within the meaning of Section 86(1) read with Section 87B, Civil Procedure Code. In the C above case the appellant was the Ruler, or the former Indian State of Jaora. He had money dealing with the respondent. The respondent after obtaining a decree in terms of the award started execution proceedings against the appellant. The Central Government gave a certificate under Section 86(3) read with Section 87B of the Code Civil Procedure, 1908 consenting to the execution of the decree against the D properties of the appellant. The Executing Court passed the prohibitory order under Order XXI Rule 46 of the Code of Civil Procedure in respect of sums payable to the appellant on account of the privy purse. On an objection raised by the appellant by order dated march 15, 1958, the Court recalled the decree and cancelled the certifcate as prayed for, on the ground that the amount receivable by the appellant E on account of his privy purse was not attachable. The respondent preferred appeal before the High Court. The High Court allowed the Appeal No. 33 of 1958. Usmanali Khan (appellant) filed an appeal before this Court. This Court held as under:

"Section 86(1) read with s. 87B confers upon the Rulers of F former Indian States substantive rights of immunity from suits. Section 141 makes applicable to other procedings only those provisions of the Code which deal with procedure and not those which deal with substantive rights. Nor does s. 41(a) of the Indian Arbitration Act, 1940 carry the matter any further. By that section, the provisions of the G Code of Civil Procedure, 1908 are made applicable to all proceedings before the Court under the Act. Now, by its own language s. 86(1) applies to suits only, and s. 141, Code of Civil procedure does not attract the provisions of s. 86(1) to proceedings other than suits. Accordingly, by the conjoint application of s. 41(a) of the Indian Arbitra- H

tion Act and ss. 86(1) and 141 of the Code of Civil Procedure, the provisions of s. 86(1) are not attracted to a proceeding under s. 14 of the Indian Arbitration Act, 1940. It follows that the Court was competent to entertain the proceedings under s. 14 of the Indian Arbitration Act, 1940 and to pass a decree against the appellant in those proceedings, though no consent to the institution of those proceedings had been given by the Central Government".

The following observations in *Hansraj Gupta* v. *Official Liquidator, Dehra Dun—Mussorrie Electric Tramway Co.*, [1932] L.R. 60 I.A. 13, 19 made by Lord Russell of Killowen were quoted.

> "The word 'suit' ordinarily means, and apart from some context must be taken to mean a civil proceeding instituted by the presentation of a plaint".

The following observations made by Shah, J. in *Bhagwat Singh* v. *State of Rajasthan*, AIR 1964 SC 444 were also quoted with approval:

> "The appellant is recognised under Art. 366(22) of the Constitution as a Ruler of an Indian State, but s. 86 in terms protects a Ruler from being 'sued' and not against the institution of any other proceeding which is not in the nature of a suit. A proceeding which does not commence with a plaint or petition in the nature of plaint, or where the claim is not in respect of dispute ordinarily triable in a Civil Court, would *prima facie* not be regarded as falling within s. 86, Code of Civil Procedure".

The above observation made by Lord Russell of Killowen and Shah, J. go to show that for a suit the civil proceeding is instituted by the presentation of a plaint. In the aforesaid background it was held that a proceeding which does not commence with a plaint or petition in the nature of plaint, or where the claim is not in respect of dispute ordinarily triable in a civil court, would prima facie not be regarded as falling within Section 86, Code of Civil procedure. In the case before us as already mentioned above a suit by presenting a plaint was instituted by the respondent No. 1 and therafter it was sought to be stayed by submitting application under S. 34 of the Act. Thus we are clearly of the view that the above case of *Usmanali Khan* v. *Sagarmal*, (supra) is clearly distinguishable and does not help the appellants in the case before us. It may be noted that Bachawat, J. who delivered the Judgment in *Usmanali Khan* v. *Sagarmal*, (supra) has himself in his

book on the 'Law of Arbitration' under the heading 'Applicability of Code of Civil Procedure to Court Proceeding' has mentioned a number of decisions wherein the provisions of Code of Civil Procedure have been held to apply to proceedings under the Act. We have already extracted the above passage from the book of Bachawat, J.

In *Hakam Singh* v. *M/s Gammon (India) Ltd.*, (supra) it was held that the Code of Civil Procedure in its entirety applies to proceedings under the Arbitration Act by Virtue of Section 41 of the later Act. The jurisdiction of the Courts under the Arbitration Act to entertain a proceeding for filing an award is accordingly governed by the provisions of the Code of Civil Procedure. By the terms of Section 20(a) of the Code of Civil Procedure read with Explanation (II) thereto, the respondent company which had its principal place of business at Bombay, was liable to be sued at Bombay. Thus in the above case dispute arose between the parties and the appellant submitted a petition to the Court of the Subordinate Judge at Varanasi for an order under Section 20 of the Indian Arbitration Act, 10 of 1940 that the agreement be filed and an order of reference be made to an Arbitrator or Arbitrators appointed by the Court to settle the dispute between the parties in respect of the construction works done by him. In order to determine the place of suing, it was held that Section 20 of the Code of Civil Procedure would govern the case.

Thus we do not find any force in the submission made by learned counsel for the appellants before us that the provisions of Order XXIII of the Code of Civil Procedure will not apply to the Order passed by the High Court on 25th February, 1966.

We would, now, consider the scope and effect of the order dated 25th February, 1966 considering that the said order would be governed by the provisions of Order XXIII of the Code of Civil Porcedure. Admittedly, appellant Nos. 1 and 2 were defendants in the suit filed by respondent No. 1. A joint application was submitted on their behalf for staying the proceedings of the suit, under Section 34 of the Act, Though the order dated 25th February, 1966 does not make a mention of the formal defect on account of which the said application was withdrawn, but the appellants have categorically stated that the same was withdrawn on account of the fact that copy of the plaint was not annexed with such application and in the absence of any counter made by the respondent, we take that the reason for withdrawing the application was that copy of the plaint was not annexed with such application. The said application was allowed to be withdrawn with liberty to

A make a fresh application. To our mind, the term 'a fresh application' used in singular had no more significance than the fact that as both the appellants had submitted one joint application as such the liberty was given to make a fresh application. The main purpose of moving the application by the appellant was to stay the proceedings of the suit under Section 34 of the Act. the intention and the purpose of moving
B two separate applications is also to stay the proceedings of the suit under Section 34 of the Act. The explanation given by the appellants for moving two separate applications is that they were given a legal advice to move two separate applications as there were two different agreements between the appellant Nos. 1 and 2 and the respondent No. 1. There was no element of *mala fide* in doing so and the two
C applications were also submitted on March 21, 1966 i.e. within 30 days of the order dated 25.2.66. Learned counsel for the respondent No. 1 submitted that there was no merit in the applications submitted by the appellants under Section 34 of the Act and the proceedings of the suit have already remained stayed for nearly 15 years in this Court and now there is no justification for further staying the suit. So far as the
D pendency of this appeal in this Court is concerned, no party is at fault and it would have been proper if the respondent had been advised not to take such objection of non maintainability of two applications before the High Court and would have contested the applications on merits. We are not deciding the question of maintainability of the applications under Section 34 of the Act on merits and we make it clear
E that respondent No. 1 would be free to take all objections as he likes against the grant of such application and the same would be decided by the High Court on merits in accordance with law. We are, however, clearly of the view that the High Court was not correct in dismissing the applications on the ground that two applications were not maintainable as the same were not covered within the order passed by the
F High Court dated 25th February, 1966. In view of the fact that it is an old matter, we request the High Court to dispose of the applications filed by the appellants Nos. 1 and 2 under Section 34 of the Act. At the earliest.

G In the result, these appeals are allowed, the order of the High Court dated 2nd February, 1973 is set aside and the case would now be decided by the High Court in the manner indicated above. The parties are left to bear their own costs.

R.P. Appeals allowed.