Case No. 78

2001-2-L.W. 572

MADRAS HIGH COURT

21st March 2001/ CRP No.3589 of 2000

Prabha Sridevan, J.

Mankanner Jain School Welfare Society by its Secretary.
7, 1st Floor, Rattan Bazaar, Chennai - 600 003 Appellant

Vs

Anilkumar J. Doshi Respondent

A comprehensive arbitration clause in the agreement between the society and the member- member subsequently expelled - dispute to be resolved only through arbitration - Section 16 of the Act - arbitrator can rule on his own jurisdiction including the maintainability of the arbitral proceedings - arbitral proceedings can continue and conclude notwithstanding the pendency of the application under Section 8- such an award not void or illegal - civil court's jurisdiction ousted in so far as dispute covered by arbitration clause.

The petitioner - Society passed a resolution on 21.8.1997, expelling the respondent from primary membership. The respondent sent a lawyer's notice on 8.12.1997 calling upon the petitioner to revoke the expulsion. The petitioner sent a reply on 29.12.1997 advising the respondent to address his grievance by resorting to arbitration. To this, the respondent sent a rejoinder stating that after he was expelled, the cannot be compelled to seek arbitration, since the bye-laws would bind the members alone. On 7.3.1998 the respondent received a copy of the letter addressed by the petitioner to the Arbitrator appointing the Arbitrator with the terms of reference. According to the respondent, this unilateral appointment was not binding on him. The respondent therefore, filed the suit for a declaration that the expulsion dated 21.8.1997 is illegal and not in accordance with the bye-laws of the Society before the City Civil Court and he filed I.A.No.6927/98 for injunction restraining the petitioner from giving effect to the order of expulsion. The petitioner filed his counter stating that since the bye-laws of the petitioner-Society provided for arbitration, and since

arbitration had also been conducted, the suit itself was not maintainable. On 30.3.1999, the petitioner filed I.A.No.5653/99 under Section 9 and/or Order 7 Rule 11(d) C.P.C. This was dismissed. Hence this revision has been filed, and learned counsel for the petitioner referred to the provisions of Arbitration and Conciliation Act, 1996. According to the learned counsel, the provisions of the Act clearly barred the suit and therefore, the order rejecting his application was erroneous.

Learned counsel for the petitioner submitted that when the Act has provided for every contingency and has also laid down the parameters within which there may be judicial intervention, the conclusion is that the Civil Court's intervention is barred, except when permitted under the Act.

Held: In the instant case, the respondent denies that the dispute between them is arbitrable because of the expulsion. According to him, when the respondent is no longer a member of the petitioner-Society, he will not be bound by the arbitration clause. But, the terms of the reference to the Arbitrator show that the first question that the Arbitrator was called upon to decide was." The legality or otherwise of the resolution dated 21.8.97 of the Managing Committee of the Society expelling Mr. Anil Kumar J. Doshi from his primary membership in the Society."

Therefore, the legality of the expulsion which is attacked by the respondent in the suit is the prime issue before the Arbitrator.

From the scope of the various sections, it is seen that the complaint of the petitioner could very well have been redressed by appearing before the Arbitrator in view of the fact that there is no arbitration clause. It is not the case of the respondent that there is no arbitration clause. It is his case that the arbitration clause does not bind him and he has no faith in the sole Arbitrator. We have already seen that the Arbitrator has the power do decide his own jurisdiction, and therefore, the first issue raised by the respondent can be answered by the Arbitrator himself and with regard to the second issue also, the Arbitrator provides for the procedure to be adopted if a party does not accept the Arbitrator who has been appointed.

We have already seem from the paragraphs discussed above that even from a reading of the plaint and the documents filed along with, it is apparent that there was an arbitration clause in the agreement between the parties and that the petitioner had directed that the dispute be resolved by arbitration and had in fact appointed a sole Arbitrator. The Arbitrator had commenced proceedings and issued

notice. All these facts emerge from a reading of the plaint itself. Upon receipt of the reply notice from the petitioner, it was open to the respondent to move the appropriate forum under the Act to have an Arbitrator appointed, or if he was aggrieved by the choice of the Arbitrator, for that also, remedy is provided under the Act, and even regarding his grievance that the Arbitrator had no jurisdiction to decide the dispute, Section 16 empowers the arbitrator to decide the issue. Therefore, mere reading of the plaint shows that for all the rights asserted by the respondent, the remedy is provided under the Act itself and even after the award was passed, it was open to the respondent to have it set aside.

The Act permits the continuance of arbitral proceedings and the conclusion notwithstanding the pendency of an application under Section 8 of the Act. Therefore, an award so passed is neither void nor illegal, and the party aggrieved can only have it set aside in a manner known to law under the Act. Even otherwise, the respondent cannot proceed with the suit, since this issue has already been decided. Since, the Act bars judicial intervention except where provided under the Act, we must take it that the Civil Court's jurisdiction is ousted, at least as far as the dispute between the parties is concerned. The Court below erred in dismissing the application.

"Law relating to Arbitration and Conciliation", Second Edition, 1997 by P.C. Markanda;

P. Sowrayya & Bros v Abdul Khader (A.I.R. 1995 Andhra 29)

D. Venkata Reddy v B.Bhushi Reddy (A.I.R. 1971 A.P.87)

Umesh Jha v State (A.I.R. 1956 Patna 425)

Firm I.S. Chetty & Sons v State of Andhra Pradesh (A.I.R. 1964 S.C.322)

Ashrafi Lal v Mohan Lal (A.I.R. 1970 Allahabad 125)

Dhulabai v State of M.P. (A.I.R. 1969 S.C.78)

Makhani Devi v Union of India (A.I.R. 1981 Orissa 11)

State of U.P. v Mohammad Din (A.I.R. 1984 S.C. 1714)

Hope Plantations Ltd v Taluk Land Board, Peermade & another (J.T. 1998 (7) S.C. 404)

M/s. Sundaram Finance Ltd. v M/s. Nepc India Ltd. (A.I.R. 1998 S.C.565=1999-3-L.W. 335)

State of U.P. v M/s. Thakur Kundan Singh (A.I.R. 1994 Allahabad 161)

State of Bombay v Adamjee & Co. (A.I.R. 1951 Calcutta 147)

Appavu Rowther v Seeni Rowther (A.I.R. 1918 Madras 719= (1917) 6 L.W. 243)

Shanker Lal v Phul Chand (A.I.R. 1930 Allahabad 584)

(K. Raman Nair v K. Krishnan Nair) A.I.R. 1976 Kerala 22

(Valliammal v Saroja) (1979 (1) M.L.J. 65 =92 L.W. 301
Sanjay Kaushish v D.C. Kawshish (A.I.R. 1992 Delhi 118)
Orissa Mining Corporation Ltd. v M/s. Klockner and Company (A.I.R. 1996 Orissa 163)
Orient Transport Co. v M/s. Jaya Bharat Co. & I. Co. Ltd. (A.I.R. 1987 S.C. 2289)
Ishit M. Prabhu Verlekar v Chandranath (A.I.R. 1986 Bombay 46)
Mohanlal Sukhadia University, Udaipur v Solomon A.I.R. 1999 Rajasthan 102
Purnmasi Yadav v Narbedeshwar Tripathy, (A.I.R. 1998 Allahabad 260)
Sukhpal Singh v State of Rajasthan & Others (A.I.R. 1998 Rajasthan 103)
Konkan Railway Corpn. Ltd and Others v Mehul Construction Co. (2000 (7) S.C.C. 201 =2001-1-L.W.
72);2000 (7) S.C.C. 497 (Nimet Resources Inc. v Essar Steels Ltd.)
A.I.R. 1970 Allahabad 125, (Asharfi v. Mohan Lal)
A.I.R. 1969 S.C. 78 (Dhulabhai v State of M.P.)
A.I.R. 1971 A.P. 87 (D. Venkata Reddy v B. Bhushi reddy)
(A.I.R. 2000 M.P. 231 (Mukesh Kumar Agrawal v Raj Kumar Agrawal)
A.I.R. 2000 Calcutta 207 (Nissho Iwai Corpn. v Veejay Impex)
A.I.R. 2000 Punjab & Haryana 301 (M/s. S.S.Fasteners v Satya Paul Verma); and
Referred to

C.R.P. allowed.

Mr. Ashok Viswanath for Petitioner.

Mr. P. Valliappan for Respondent.

Order

This revision deals with the maintainability of a suit, when there is a provision for Arbitration between the parties. The respondent became a member of the petitioner Society. The objective of the petitioner was to create and cultivate the habit of thrift and saving among the members of the society. The society also receives deposits from its members and grants loans to them against their deposits, which is secured by the other members. In or about 1996, the respondent sent a circular to other members regarding some irregularities in the functioning of the petitioner-society. Subsequent to that, one of the members of the petitioner-society lodged a complaint against the respondent on the ground that the respondent was acting against the interest of the petitioner. The complaint is dated 25.2.1997, whereunder expulsion of the respondent is sought for. The respondent sent his reply on 7.5.1997

and 16.5.1997. The petitioner directed the respondent to appear before the Managing Committee on 21.8.1997 failing which the respondent was informed that the question of expulsion would be decided ex parte. The respondent sent a reply but the petitioner passed a resolution on 21.8.1997, expelling the respondent from primary membership. Thereupon, the respondent set a lawyer's notice on 8.12.1997 calling upon the petitioner to revoke the expulsion. The petitioner sent a reply on 29.12.1997 advising the respondent to address his grievance by resorting to arbitration. To this, the respondent sent a rejoinder stating that after he was expelled, he cannot be compelled to seek arbitration, since the bye-laws would bind the members alone. On 7.3.1998, the respondent received a copy of the letter addressed by the petitioner to the Arbitrator, appointing the Arbitrator with the terms of reference. According to the respondent, this unilateral appointment was not binding on him. The respondent therefore, the filed the suit for a declaration that the expulsion dated 21.8.1997 is illegal and not in accordance with the byelaws of the Society. This suit was filed be for the XIII Assistant City Civil Court on 16.4.1998. Pending suit, he filed I.A.No.6927/98 for injunction restraining the petitioner from giving effect to the order of expulsion.

2. At this stage, a chronological narration of the dates and events subsequent to 7.3.98 may be useful to appreciate the case. Just prior to the filing of the suit, the Arbitrator addressed a letter to the petitioner and the respondent directing them to appear before him on 19.4.1998. The first hearing was on 19.4.1998. On 24.4.1998, the Arbitrator forwarded a copy of the proceedings of the first meeting to both the parties. On 4.5.1998, the petitioner submitted his statement of case. The injunction petition which is I.A.No.6927/98 had come up before the Court be then and notice was ordered, though injunction was not granted and the petitioner received a notice in the said I.A. on 6.5.1998. on 7.5.1998, the second having was held by the Arbitrator. The petitioner did not appear in person or through counsel. The letter dated 4.5.1998 from the respondent's counsel was received by the Arbitrator and it was placed on record. On 8.6.1998, the Award of the Arbitrator was passed, but it must be the remembered, the suit had already been filed and was pending. On 9.6.1998, which was the first date of hearing in I.A.No.6927/98, the petitioner filed his counter stating that since the bye-laws of the petitioner-Society provided for arbitration, and since arbitration had also been duly conducted, the suit itself was not maintainable. On 30.3.1999, the petitioner filed I.A.No.5653/99 under Section 9 and/or Order 7 Rule 11(d) C.P.C. This was dismissed. Hence the revision has been filed.

3. Mr. Ashok Viswanath, learned counsel for the petitioner referred to the provisions of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") and also Section 8 C.P.C. Section 9 C.P.C. reads as follows:

"Courts to try all civil suits unless barred. The Courts shall (subject to the provisions herein contained) have jurisdiction to by all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

According to the learned counsel, the provisions of the Act clearly barred the suit and therefore, the order rejecting his application was erroneous. He referred to Section 2(3) of the Act, Section 5 which deals with extent of judicial intervention, Section 8(3), which gives the judicial authority; the power to refer parties to arbitration where there is an arbitration agreement, Section 13(1) which provides for the challenge procedure and Section 16(6), which gives a party aggrieved by an arbitral award to make an application for setting said the award in accordance with Section 34, Section 34, which deals with the application to set aside an arbitral award and Section 35, which is the first section of Chapter 8, which deals with finality of arbitral award.

4. Learned counsel for the petitioner submitted that when the Act has provided for every contingency and has also laid down the parameters within which there may be judicial intervention, the conclusion is that the Civil Court's intervention is barred, except when permitted under the Act. According to the learned counsel, all the grievances aired by the respondent in the plaint could be resolved by resort to the Act, since specific sections have been enacted for each of such contingencies. He relied on the following decisions to support his case: Nissho ------- Corporation v Vijay Impex and Others A.I.R.2000 Calcutta 207; Mukesh Kumar Agrawal v Raj Kumar Agarwal and Others (A.I.R. 2000 M.P.231) for the purpose of showing that no judicial authority may intervene in cases where arbitration clauses exist, except where provided under the Act. He also relied on the judgment reported in P. Sowrayya & Bros. V. Abdul Khadar (A.I.R.) 1995 Andhra 29), which lays down the principles to be followed for ousting Civil Court's jurisdiction; D. Venkata Reddy v B. Bhushl Reddy (A.I.R. 1971 A.P. 87), which is also a case which deals with ouster of jurisdiction of the Civil Court; Umesh Jha v State(A.I.R. 1956 Patna 425) again on the same point; Firm I.S. Chetty & Sons v State of Andhra Pradesh (A.I.R. 1964 S.C.322) in which the Supreme Court held that exclusion of jurisdiction of Civil Court to entertain civil causes will not be assumed unless the relevant statute contains an express provision to that effect or leads to a necessary, and inevitable implication of that nature.

Ashraf Lal v Mohan Lal (A.I.R. 1970 Allahabad 125) again on the question of jurisdiction; Dhulabai v State of M.P. (A.I.R. 1969 S.C. 78) where the Supreme Court summarises the law as regards exclusion of jurisdiction of Civil Court; Makhani Devi v Union of Jindia (A.I.R. 1981 Orissa 11); State of U.P. V Mohammad Din (A.I.R. 1984 S.C. 1714); Hope Plantations Ltd v Taluk Land Board, Peermade & another (J.T. 1998 (7) S.C. 404) for the purpose of demonstrating that the suit will be barred by constructive resjudicata since the questions raised in the suit have already been decided by the Arbitrator and an Award had been passed; the finding in M/s. Sundaram Finance Ltd. v. M/s. Nepa India Ltd. (A.I.R. 1998 S.C. 565 = 1999-3-L.W. 335) where the Supreme Court inter alia held that the provisions of the New Act should be construed uninfluenced by the principles underlying the Arbitration Act 1940. Therefore, the learned counsel submitted that for all these reasons, the respondent was barred from approaching the Civil Court for a remedy when his grievance could have been redressed before the Arbitrator.

5. Mr. P. Valliappan, learned counsel for the respondent, on the other hand, submitted that neither Section 9 nor Order 7 Rule 11(d) could come to the said of the petitioner since as per Section 9, there should be an express ouster of jurisdiction or there should be an implied bar by the Civil Court's jurisdiction and in the Act, there is no such clause which bars a civil suit. Further, according to the learned counsel for the respondent, the Order 7, Rule 11(d) cannot be invoked in this case, because a plaint can be rejected under the provisions only if on a plain reading of the plaint statements, it is borne out that the suit is barred by law. If the Court has to resort to examination of further materials or if further investigation is required, then the suit cannot be rejected under Order 7, Rule 11(d). He also submitted that having filed a counter and taken part in the proceedings, the petitioner cannot be heard to say that the suit is not maintainable. He also submitted that the arbitration clause which governs the members of the petitioner-society takes within it a wide range of disputes and such an arbitration clause is not legal. It was also his submission that Section 5 of the Act is not strictly an ouster clause and therefore, the Civil Court's jurisdiction cannot be so easily ousted.

6. Learned counsel relied on the following decisions: State of U.P. v M/s. Thakur Kundan Singh (A.I.R. 1984 Allahabad 161), in which a Division Bench of the Allahabad High Court held that the suit on the original cause of action is not barred merely on the ground that the dispute which forms part of the cause of action has been referred for arbitration; he relied on State of Bombay v Adamjee & Co. (A.I.R. 1951 Calcutta 147) to show that every person has a right to bring a suit of a civil

nature under Section 9 C.P.C. and unless there are express terms or necessary implication, the right cannot be taken away; Appavu Rowther. V. Seeni Rowther (A.I.R. 1981 Madras 719=(1917) 6 L.W. 243) in which Division bench of this Court held that once a suit was filed, the Arbitrators became functus officio and their award was ultra vires; Shanker Lal v Phul Chand (A.I.R. 1930 Allahabad 584 was relied on to show that decree passed in terms of the final award would not operate as resjudicata in respect of the suit in which the award was impeached by the plaintiff; (K. Raman Nair v K.K. Krishnan Nair) A.I.R. 1976 Kerala 22 was relied on for the purpose of showing that when award was not made the Rule of Court, the suit based on an agreement antecedent to the award is not maintainable; (Valliammal v Saroja) 1979 (1) M.L.J. 65 = 92 L.W. 301 was relied on to show that when the original award had not been filed into court, the award cannot be relied upon as a defence by the defendant Sanjay Kaushish v D.C. Kaushish (A.I.R. 1992 Delhi 118) was relied on to show that the purpose of deciding the Application under Order 7, Rule 11, the court must presume the fact stated in the plaint as correct and the court should come to the conclusion for rejecting the plaint from a bare reading of the plaint and the admitted documents and facts coming out in the statement of the plaintiff; Orissa Mining Corporation Ltd. v M/s. Klockner and Company (A.I.R. 1996 ORISSA 163) was a case where the Orissa High Court set aside the order rejecting the plaint on the ground that the suit was barred under Section 32 of the Arbitration Act on the ground that the Court had failed to notice that it was the case of the plaintiff that the entire agreement was null and void and not merely the Arbitration Agreement; Orient Transport Co. v M/s. Jaya Bharat C. & I. Co. Ltd. (A.I.R 1987 S.C. 2289) was relied on since the Supreme Court held in that case that a suit challenging the validity of the contract is not barred by Section 32 merely because it contains an arbitration clause; Nishit M. Prabhu Verlekar v Chandranath (A.I.R. 1986 Bombay 46) in which the Panaji Bench held that the defendants without filing written statement cannot pray for rejection of the plaint; Mohanlal Sukhadia University, Udaipur v Solomon A.I.R. 1999 Rajasthan 102, which is again a case under Order 7, Rule 11 (d); Purnmasi Yadav v Narbedeshwar Tripathy (A.I.R. 1998 Allahabad 260) in which the Allahabad High Court held that the Court should not take into account materials beyond the plaint for rejecting it and finally to Sukhpal Singh v State of Rajasthan & others (A.I.R. 1998 Rajasthan 103) Which was again on the question of Order 7Rule 11 (d) and the jurisdiction of the court was challenged by invoking the provisions of Order 7, Rule 11 (d). Therefore, he would submit that the Revision deserved to be dismissed.

7. In the present case, the Arbitration Clause is laid down in bye-law No.22:

"1) All matters, disputes, claims questions, doubts, clarification, differences

arising either in the course of the conduct of the Society's affairs or

"2) Arising in the course of or out of transaction the members inter-se may have, in connection with their role and in consultation with and/or in connection with their relationship with the Society or in the course of any transaction, business in any manner whatsoever which the Society, may have with one or more of the members and any dissatisfaction with any decision of any office-bearer, Managing Committee, Loan Committee or any other person or member or any other matter, dispute, claims, questions, doubts, clarifications and dissatisfaction with any decision whatsoever arising in any manner whatsoever shall be settled only by Arbitration by a sole arbitrator to be nominated and appointed by the Managing Committee and all and every provisions of the law relating to Arbitration shall apply to such Arbitration."

8. This is a comprehensive arbitration clause to which the parties are signatories. The case of the plaintiff is that this expulsion was unilateral and illegal. It is also his case that after expelling him, the petitioner cannot ask him to seek arbitration, since thereafter be is not bound by the Byelaws of the petitioner-Society. It is also his case that the unilateral appointment of sole Arbitrator is neither fair nor is it binding on the respondent. According to the plaint, the respondent, has no faith in the sole Arbitrator. The following statement is also found in the plaint:

"The Arbitrator has no jurisdiction, unless the plaintiff aggress for reference:

9. From this, three facts emerge. The respondent does not deny that there is an arbitration clause. The respondent has no faith in the Arbitrator appointed by the petitioner. The Arbitrator has no jurisdiction to decide on the dispute (a) because the respondent has no faith in the Arbitrator and (b) since he is expelled, he is not bound by the Bye-laws. Section 5 of the arbitration clause reads thus:

"Notwithstanding anything contained in any other law, for the being in force, in matters governed by this part, no judicial authority shall intervene, except where so provided in this part."

"This part" refers to part 1 of the Act which comprises of the Section upto Section 43. Part 2 of the Act refers to enforcement of certain foreign awards and does not apply to this case. Section 7 of the Act deals with Arbitration agreement and we see therefrom that the Agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Bye-law No.22 extracted above

makes it clear that all disputes shall be settled only be arbitration. It is mandatory and therefore, it is an arbitration agreement as per Section 7 of the Act. Section 8 deals with the power to refer parties to arbitration where there is an arbitration agreement. Section 8(1) empowers the Judicial Authority before which an action is brought regarding a matter which is the subject of an arbitration agreement, to refer them to arbitration. But, Section 8 (3) says that notwithstanding that an application has been made under Sub-section 1 and that the issue is pending before the Judicial Authority, arbitration may be commenced, continued and an arbitral award made. This section clearly demonstrates that it is the intention of the legislature to give an opportunity for resolution of disputes through arbitration, rather than by adjudication in Court and therefore, the Courts should also see that parties adhere to their commitment made in the contract. Therefore, a party who intends to give the arbitration agreement a go-by has to be deterred from doing so on a proper construction of this section. Section 12 gives a party, the right to challenge an Arbitrator Section 13 lays down the challenge procedure. Section 16 is a very important provision since it deals with the competence of Arbitral Tribunal to rule on its own jurisdiction. In this regard, in a recent decision of the Supreme Court in Konkan Railway Corpn. Ltd and Others v Mehul Construction Co. (2000 (7) S.C.C. 201 = 2001-1-L.W. 72), it was held as follows:

"Section 16 empowers the Arbitral Tribunal to rule on its own as well as on objections. With respect to the existence or validity of the arbitration agreement. Conferment of such power on the arbitrator under the 1996 Act indicates the intention of the legislature and its anxiety to see that the arbitral process is set in motion. This being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an arbitrator. If this approach is adhered to, them there would be no grievance of any part and in the arbitral proceeding, it would be open to raise any objection, as provided under the Act. But certain contingencies may arise where the Chief Justice or his nominee refuses to make an appointment of an arbitrator and in such a case a party seeking appointment of an arbitrator cannot be said to be without any remedy."

10. This is referred to in 2000 (7) S.C.C. 497 (Nimet Resources Inc. v Essar Steel Ltd), where the respondent denied the existence of any agreement between the parties to submit to arbitration any disputes between them and also denied any legal relationship between them and it was held that in a matter where there has been

some transaction between the parties, and existence of the arbitration agreement is not challenged, the proper course for the parties is to thrash out such question under Section 16 of the Act. In the instant case, the respondent denies that the dispute between them is arbitrable because of the expulsion. According to him, when the respondent is no longer a member of the petitioner-Society, he will not be bound by the arbitration clause. But, the terms of the reference to the Arbitrator show that the first question that the Arbitrator was called upon to decide was:

" The legality or the Resolution dated 21.08.97 of the Managing Committee of the Society expelling Mr. Anil Kumar, J. Doshi from his primary membership in the Society."

Therefore, the legality of the expulsion which is attacked by the respondent in the suit is the prime issue before the Arbitrator. If the Arbitrator had come to the conclusion that the expulsion was illegal, the respondent would have got the relief that he seeks in the suit. Section 21 of the Act sets out the manner in which arbitral proceedings commence. In the book "Law relating to Arbitration and Conciliation". Second Edition, 1997 by P.C. Markanda, it is stated that if in substance, a party communicates: (1) an intention to resort to arbitration and (2) the requirement that the other party should do something on his part in that regard, this will generally suffice to define the commencement of arbitration. As per para 14 in the plaint, the petitioner has sent a letter on 29.12.1997 advising the respondent to seek redressel through arbitration. Therefore, this is sufficient to commence the arbitral proceedings. The Arbitrator admittedly had called upon both the parties to state their case. This is seen from the cause of action para which refers to the notice issued by the Arbitrator on 3.4.1998 and 8.4.1998 to submit to his jurisdiction. The Arbitrator had thereupon passed an award.

11. Section 34 of the Act provides for the manner in which and the reasons for which an arbitral award can be set aside. It clearly states that recourse to a Court against an arbitral award may be made only by an application in accordance with the provisions of the Section. The word "Court" in this Section refers to the Principal Civil Court of Original Jurisdiction in a District and includes the High Court in exercise of its Ordinary Civil Jurisdiction. This is as per Section 2(2) of the Act.

12. Section 35 of the Act Categorically states that an arbitral award is final and binding on the parties. The Act provides for Appeal against the award and Section 36 provides for enforcement in the same manner as if it were a decree of the Court.

Section 36 is a new section. From the scope of the various section referred to above, it is seen that the complaint of the petitioner could very well have been redressed by appearing before the Arbitrator in view of the fact that there is no arbitration clause. It is not the case of respondent the there is no arbitration clause. It is his case that the arbitration clause does not bind him and he has no faith in the sole Arbitrator. We have already seen that the Arbitrator has the power to decide his own jurisdiction, therefore, the first issue raised by the respondent can be answered by the Arbitrator himself and with regard to the second issue also, the Arbitrator provides for the procedure to be adopted if a party does not accept the Arbitrator who has been appointed.

13. In the decision reported in A.I.R. 1970 Allahabad 125, (Asharfi v. Mohan Lal) referred to by the petitioner, which dealt with the ouster of jurisdiction of Civil Courts in matters to which U.P. Temporary Control of Rent and Eviction Act applied, the Court held.

"The Civil Courts would be entitled to see whether in making the Impugned Order, the Statutory Authority complied with the provisions of the Statute or whether it acted in conformity with the Fundamental Principles of Judicial Procedure. The jurisdiction of the Civil Courts would be barred if it is found that the scheme and machinery of the Act provides adequate or sufficient remedy to the person aggrieved against the impugned order,"

14. Similarly, in A.I.R. 1969 S.C. 78 (Dhulabhai v State of M.P.), the Supreme Court referred to the following principles for deciding the ouster of jurisdiction:

"(1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts" jurisdictions must be held to be excluded If there is adequate remedy to do what the Civil Court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the Civil Court.

When there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) …….

(4) ……

(5) ……

(6) ……

(7) An exclusion of jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

15. The following paragraph from A.I.R. 1971 A.P.87 (D.Venkata Reddy v B. Bhushi reddy) is also useful.

"A reading of the aforesaid decisions clearly show that whether a Tribunal has been given the exclusive jurisdiction to decide a particular circumstance depends upon the language of the Act and aims and objects for which the Act has been enacted. If a given Act postulates that on the existence of certain state of facts, the Tribunal will have jurisdiction to decide the matter entrusted to it under the Act, the Tribunal will, no doubt, the competent to decide whether that state of facts exists but the existence of such state of facts being a jurisdictional factor it cannot give to itself jurisdiction by a wrong decision as to the existence of such state of facts. Such a decision would be in regard to a collateral fact and can be questioned in a Civil Court and the jurisdiction of the Civil Court is not barred in such cases. Whereas in cases where the tribunal has been given exclusive jurisdiction to decide the existence of facts on the basis of which it could proceed to pass certain orders, the decision of those facts would also be final and conclusive and cannot be questioned in a Civil Court."

16. The three decisions reported in A.I.R. 2000 M.P. 231 (Mukesh Kumar Agrawal v Raj Kumar Agrawal), A.I.R. 2000 Calcutta 207 (Missho Iwai Corpn. v Veejay Impex) and A.I.R. 2000 Punjab & Haryana 301 (M/s. S.S. Fasteners v Satya Paul Verma) all arise under the new Arbitration Act and though they are not directly on the point, they shed light on the issue in the instant case. In the M.P. case, this is what the learned Judge held:

Once the parties have appointed an arbitrator or arbitrators rights or wrong, there is procedure provided in the Act to challenge his authority. The applicant cannot by-pass that procedure and directly file an application under Section 11 of the Act before the Chief Justice or the person or institution designated by him. This is clear from Section 12 of the Act read with Section 13 thereof. That apart, the jurisdiction of the Arbitration Tribunal can be challenged under Section 16(1) of the Act. Therefore, once the arbitrator has already been appointed, there is no occasion for the Chief Justice or his designate to exercise his powers under Section 11 of the Act. The arbitrator is already seized of the matter and it is for him to decide whether he was validly or invalidly appointed."

17. In the case decided by the Calcutta High Court, the learned Judge held while referring to Section 5 as follows.

"Nowhere in this Part any Civil Court is conferred with jurisdiction expressly to decide the question of factual existence or validity and legality of the arbitration agreement. This Section is coupled with non-obstante clause. So it is of mandatory nature. By this Section, the Civil Court particularly this Court is stripped off jurisdiction conferred upon it under Clause 12 of the Letters Patent."

18. Again in the decision reported in A.I.R. 2000 Punjab and Haryana 301, the learned Judge held as follows:

"Furthermore, under Section 16 of the Act of 1996, the Arbitral Tribunal is competent to rule on its own jurisdiction, with respect to the existence or validity of the arbitration agreement and plea that the Arbitral Tribunal does not have jurisdiction shall be raised before the arbitrator and the Arbitral Tribunal shall decide on this plea and where the Arbitral Tribunal takes a decision rejecting the plea, it can continue with the arbitral proceedings and make an arbitral award. It is further provided therein that a party aggrieved by such an arbitral award can make an application for

setting aside such an Award in accordance with Section 34 of the said Act. Section 5 of the Act of 1996 provided that notwithstanding anything contained in any other law for the time being in force, in matters governed by the said Act, no judicial authority shall intervene except where so provided in this part."

19. In addition to this, we also have the warning issued by the Supreme Court in Sundaram Finance case to construe and interpret the provisions of the New Act independently and that in fact, the reference to the 1940 Act may actually lead to mis-construction.

20 The decisions cited by the learned counsel for the respondent except the decision reported in A.I.R. 1918, Madras 719 (Appave Rowther v Seeni Rowther), arise out of the 1940 Act.

21. Section 8, Sub-section 3 which is a new sub-section now leads the proceedings into a different direction. Under the old Act, the High Courts followed the decision reported in Doleman & Sons v Offfset Corpn. and held that once a Civil Court is seized of the matter, the Arbitrator becomes functus officio. The conclusion arrived at in A.I.R. 1918 Madras 719=(1917) 6 L.W.. 243 was also similar. Now, this rule is changed, since Section 8 (3) allows the Arbitration to be commenced and continued, notwithstanding the pendency of proceedings before a Judicial Authority.

22. Learned counsel for the respondent also made his submissions regarding the petitioner's right to file an application under Order 7, Rule 11 (d) when the question of bar of suit requires investigation and is not apparent from a mere reading of the plaint.

23. It is needless to say that for the purpose of deciding an application under Order 7, Rule 11 (d), the Court can look into the statements made in the plaint and the documents filed along with it. We have already seen from the paragraphs discussed above that even from a reading of the plaint and the documents filed along with it, it is apparent that there was an arbitration clause in the agreement between the parties and that the petitioner had directed that the dispute be resolved by arbitration and had in fact appointed a sole Arbitrator. The Arbitrator had commenced proceedings and issued notice. All these facts emerge from a reading of the plaint itself. Upon receipt of the reply notice from the petitioner, it was open to the respondent to move the appropriate forum under the Act to have an Arbitrator appointed or if he was aggrieved by the choice of the Arbitrator, for that also, remedy is provided under the Act and even regarding his grievance that the Arbitrator

had no jurisdiction to decide the dispute. Section 16 empowers the arbitrator to decide the issue. Therefore, mere reading of the plaint shows that for all the rights asserted by the respondent, the remedy is provided under the Act itself and even after award was passed, it was open to the respondent to have it set aside. If we compare the first terms of reference and the first prayer in the suit, it is seen that they are identical and therefore, for the same relief, he has approached the Civil Court in spite of the existence of an Arbitration agreement. The Act permits the continuance of arbitral proceedings and the conclusion notwithstanding the pendency of an application under Section 8 of the Act. Therefore, an award so passed is neither void nor illegal and the party aggrieved can only have it set aside in a manner known to law under the Act. Even otherwise, the respondent cannot proceed with the suit, since this issue has already been decided. Since, the Act bars judicial intervention except where provided under the Act, we must take it that the Civil Courts jurisdiction is ousted at least as far as the dispute between the parties is concerned. The Court below erred in dismissing the application.

The order of the Civil Court below is set aside. The C.R.P. is allowed. No costs CMP 19026/2000 is closed. It is open to the respondent to challenge the Award in the manner provided for in the Act.