

Case No. 63

(2004) 4 Supreme Court Cases 539

(BEFORE D.P. WADHWA AND RUMA PAL, JJ.)

P.ANAND GAJAPATHI RAJU AND OTHERS

Appellants

Vs

P.V.G. RAJU (DEAD) AND OTHERS

Respondents

Civil Appeal No.5251 of 1993, decided on March 28, 2000

Arbitration and Conciliation Act, 1996 - Section 8 - Application for reference to arbitration - language of section peremptory - obligation of court to refer to arbitration in terms of the agreement - such application to be made before submission of first statement - however no objection from opposite party to late filing of application - objection demand to have been waived.

Allowing the joint application of the parties, the Supreme Court

Held:

The conditions which are required to be satisfied under Section 8(1) and 8(2) of the Arbitration and Conciliation Act, 1996 before the court can exercise its powers are

- (1) There is an arbitration agreement;
- (2) A party to the agreement brings an action in the court against the other party;
- (3) Subject-matter of the action is the same as the subject-matter of the arbitration agreement;
- (4) The other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

This last provision creates a right in the person bringing the action to have the dispute adjudicated by the court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration, applies to the court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the court referring the parties to arbitration.

The phrase “which is the subject of an arbitration agreement” does not, in the context, necessarily require that the agreement must be already in existence before the action is brought in the court. The phrase also connotes

an arbitration agreement being brought into existence while the action is pending.

The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would not be governed by the new Act including the right to challenge the award. The court to which the party shall have recourse to challenge the award would be the court as defined in clause (e) of Section 2 of the new Act and not the court to which an application under Section 8 of the new Act is made. An application before a court under Section 8 merely brings to the court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent court within the meaning of Section 2(e) of the new Act.

Advocates who appeared in this case :

K. Madhava Reddy, N.S. Hegde and C. Sitaramaiah, Senior Advocates(Nikhil Nayar, Ms. T. Anamika, Guntur Prabhakar, A. Subba Rao, A.T. Rao, B. Parthasarathi, A.D. N. Rao, G. Nageswara Reddy, Mrs. B. Reddy and Mrs. Promila, Advocates with them) for the appearing parties.

ORDER

1. No orders on IAs Nos. 3 and 4.

2. During the pendency of this appeal all the parties have entered into an arbitration agreement. They have agreed to refer their disputes in this appeal and others to Justice S. Ranganathan, a retired Judge of this Court as the sole arbitrator. The arbitration agreement is in the form of an application and has been signed by all the parties and meets the requirements of Section 7 of the Arbitration and Conciliation Act, 1996 (new Act).

3. The question that arises for consideration is whether this Court in appeal can refer the parties to arbitration under the new Act. The Arbitration Act, 1940 expressly provided for the parties to a suit to apply for an order of reference of the subject-matter of the suit (see Sections 21 to 25, Chapter IV relating to arbitration in suits). There is also authority for the proposition under the 1940 Act that with the reference of the disputes, the suit itself may stand disposed of.

4. Part I of the new Act deals with domestic arbitrations. Section 5, which is contained in Part I of the new Act, defines the extent of judicial intervention in arbitration proceedings. It says that notwithstanding anything contained in

any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in that Part. Section 5 brings out clearly the object of the new Act, namely, that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the court's intervention should be minimal. Keeping the legislative intention in mind, Section 8 of the new Act may be construed. It reads:

8. Power to refer parties to arbitration where there is an arbitration agreement:- (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under subsection (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

5. The conditions which are required to be satisfied under sub-sections (1) and (2) of Section 8 of before the court can exercise its power are:

(1) there is an arbitration agreement;

(2) a party to the agreement brings an action in the court against the other party;

(3) subject-matter of the action is the same as the subject-matter of the arbitration agreement;

(4) the other party moves the court for referring the parties to arbitration before it submits its first statement on the substance of the dispute.

This last provision creates a right in the person bringing the action to have the dispute adjudicated by the court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the court referring the parties to arbitration.

6. In our view, the phrase "which is the subject of an arbitration agreement" does not, in the context, necessarily require that the agreement must be already in existence before the action is brought into existence while the action is pending. Black's Law Dictionary has defined the word "is" as follows

"This word, although normally referring to the present, often has a future meaning, but is not synonymous with " shall have been". It may have, however, a past signification, as in the sense of 'has been'".

7. A further question arises whether the court is in these circumstances obliged to refer the parties to arbitration and if so with what effect.

8. In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us an even more than that. As already

noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the award. The court to which the party shall have recourse to challenge the award would be the court as defined in clause (e) of Section 2 of the new Act and not the court to which an application under Section 8 of the new Act is made. An application before a court under Section 8 merely brings to the court's notice that the subject-matter of the action before it is the subject-matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent court within the meaning of Section 2(e) of the new Act.

9. We, therefore, allow the application and would refer the parties to arbitration. No further orders are required in this appeal and it stands disposed of accordingly.