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In Re: Indian Arbitration Act
 In Re: Babaldas Khemchand

None

Court: Bombay High Court

Date of Decision: Dec. 12, 1919

Acts Referred:
Arbitration Act, 1899 â€" Section 19

Citation: (1921) ILR (Bom) 1

Hon'ble Judges: Pratt, J

Bench: Single Bench

Judgement

Pratt, J.
The plaintiff sues his two partners for am account of a partnership which he says was dissolved on the 14th of November 1917.

2. This is a petition by the 1st defendant partner for stay of the suit u/s 19 of the Indian Arbitration Act, 1899, on the ground that the partnership-

agreement included a submission, to arbitration.

3. The submission is in Clause 12 of the agreement, which is as follows:

When any one of ourselves the above named partners shall desire to separate, he shall give three months previous notice in writing and shall

separate-without raising any objection after making up the accounts. If it does not" become possible to come to proper understanding the (dispute)

shall be brought to settlement by appointing three arbitrators of the three partners. This is agreed to by the above named these partners. If despite

this any one of the partners shall take further steps (proceedings) the same shall be on his account and at his risk.

4. For the respondent-plaintiff Mr. Kanga contends that the submission providing for a reference to three arbitrators is outside the scope of the

Indian Arbitration Act and that the Court has no jurisdiction to stay the suit u/s 19.

5. It has recently been decided that the Court cannot act u/s 8 or Section 9 of the Act in the case of a reference to three arbitrators: Gopalji

Kuverji v. Morarji Jeram (1919) 43 Bom. 809. But the dicta in that case of Scott C.J. that ""the Act does not attempt to provide for every case

and of Hayward J. that the Act ""applies primarily to the ordinary commercial contracts"" are limited to the provisions contained in Sections 8 and 9

for the specific enforcement of the submission. Section 2 of the Act is general in its terms and applies the Act to cases where the subject matter

could be, as here, the subject of a suit in a Presidency town. The intention of the legislature was evidently to apply the Indian Arbitration Act to all

such cases and to leave other cases subject to the Civil Procedure Code. Although the Court is only able to enforce the submission by appointing

arbitrators for recalcitrant parties" in the usual cases of a reference to one or two arbitrators, yet other cases are still within the scope of the Act.

For instance, an award passed by three arbitrators could be filed and given the status of a decree u/s 15. And even if the Court cannot give direct

assistance by nominating an arbitrator it can do so indirectly by staying a suit filed in defiance of the submission. The case of Manchester Ship

Canal Co. v. Pearson & Son, Limited [1900] 2 Q.B. 606, and a dictum of Hayward J. in Gopalji Kuverjl v. Morarji Jeram (1919) 43 Bom. 809

support this view.

6. It is true that the power to stay in Section 19 is limited to the case of ""a submission to which this Act applies,"" and on these words Mr. Kanga

contends that the power of stay is limited to submissions which came enforced u/s 8 or Section 9. This construction is inadmissible for the section

says ""this Act"" not ""Section 8 or Section 9 of this Act"". But, says Mr. Kanga, these words cannot be mere surplusage and some meaning must be

attached to them. In my opinion they are intended to provide for the case where a suit is filed in an up-country Court in an area to which the Act

has not been applied though part of the cause of action has arisen in a Presidency town. That Court, though not the Court defined in Section 4(a),

would have power to stay the-suit if the submission was one to which the Act applies or in other words if the suit could with leave or, otherwise

have been filed in a Presidency town. I am aware that this construction conflicts with the case of Ralli v. Poor Mahomed (1906) 31 Bom. 236. But

I venture respectfully to differ from that case. The definition of ""Court"" in Section 4(a) is subject to a proviso of repugnancy in the subject or

context. The Courts in Section 4(a) are this Courts enforcing the machinery of arbitration in the areas where the Act applies. To apply this

definition to the Court in Section 19 would give the Bombay High Court a power to stay a suit perhaps in a Court in the Punjab which would

conflict with the provision of Section 56(b) of the Specific Relief Act. The Legislature could not have intended that, a Court that had not

cognisance of the dispute should intervene and decide whether the Court of trial should or should not give way to the arbitrator. The Court of trial

is in a better position to decide whether there should or should not be arbitration. This is also the rule is England : Morriston Tinplate Co. v.

Brooker Dore & Co. [1908] 1 K.B. 403.

7. Section 19, therefore, applies; and that being ""so, ia there any reason for not holding the parties to their agreement and staying the suit?

8. It is contended that the last sentence in the submission--""If despite "this any one of the partners shall take further steps (proceedings) the same

shall be on his account and at his risk ""--gives any partner liberty to file a suit. That construction would reduce the whole clause to a nullity. The

words are not happy but they seem to me to be designed not to limit but t& enjoin the duty to arbitrate.

9. It is next suggested that the dispute does not fall within the scope of the submission as the defendant petitioner has contended that the

partnership has not been dissolved. But the date adopted for the dissolution is, a matter which is ancillary to the taking of the account. The suit as

filed is a. suit by the plaintiff who says he went out of the partnership in November 1917 and claims an account. That is the very subject-matter of

the submission.

10. Then, it is said that the Court should not exercise its discretion to stay because it cannot enforce the arbitration. But I do not think it reasonable

that the Court should refuse indirect assistance merely because it cannot give direct assistance. And it is not suggested that there would be any

difficulty in constituting a competent tribunal of three under the terms of the submission.

11. There is a formal defect in the petition, in that it? is not accompanied by an affidavit that the respondent was willing to arbitrate at the time the

suit was filed. Mr. Desai undertakes to file this affidavit, and I accordingly grant the petition with costs and stay further proceedings of the suit.