

Supreme Court of India

National Agricultural ... vs Alimenta S.A on 26 October, 1988

Equivalent citations: 1989 AIR 818, 1988 SCR Supl. (3) 548

Author: S Mukharji

Bench: Mukharji, Sabyasachi (J)

PETITIONER:

NATIONAL AGRICULTURAL COOPERATIVE MARKETING FEDERATION OF INDIA

Vs.

RESPONDENT:

ALIMENTA S.A.

DATE OF JUDGMENT 26/10/1988

BENCH:

MUKHARJI, SABYASACHI (J)

BENCH:

MUKHARJI, SABYASACHI (J)

RANGNATHAN, S.

CITATION:

1989 AIR 818                      1988 SCR Supl. (3) 548

1989 SCC Supl. (1) 308 JT 1988 (4) 721

1988 SCALE (2) 1612

ACT:

Arbitration Act 1940, Section 35--Two contracts for supply of goods--One of the parties invoking arbitration clause-- Arbitrator appointed--In the meanwhile one of the parties obtaining permission of Supreme Court to file money suit since claims getting barred by limitation--Money suits filed--Whether other party entitled to approach Court and obtain stay of arbitration proceedings.

HEADNOTE:

The petitioner signed two contracts, one on the 12th January, 1980 and the other on 18th August, 1980 for the supply of Indian H.P.S. Groundnut Kernels to a Swiss Company. On 20th December, 1980 the petitioner informed the respondent not to nominate any vessels to load goods as it was unable to get necessary clearance from the Government, and by a telex message on 27th January, 1981 informed the respondent that the goods could not be exported on account of executive/legislative ban.

The respondent invoked the arbitration proceedings with the Federation of Oil Seeds and Fats Association who informed the petitioner on 6th March, 1981 by a letter of the appointment of an arbitrator. The petitioner challenged

the arbitration proceedings in the Delhi High Court. On March 23rd. 1981 a stay order was passed restraining the arbitration proceedings, and on 11th December. 1981 the High Court held that no arbitration agreement existed with regard to the second contract and as such nobody was entitled to seek reference to arbitration.

The petitioner filed a special leave petition to this Court. This Court passed an interim order granting special permission to the respondent to file a money suit in any court since the claims were getting barred by time. Pursuant to this order the respondent filed a regular money suit in a foreign court, and two identical suits in the Bombay High Court for recovering damages, for which the written statements were filed.

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The petitioner moved an application in one of the suits in the High Court stating that in the interests of justice pending disposal of the three suits an injunction should be granted restraining the parties from proceeding with the arbitration, and that the arbitration be stayed under the principles of section 35 of the Arbitration Act, 1940. The High Court granted interim injunction restraining the parties from proceeding with arbitration. On 8th March, 1985, the High Court dismissed the notice of motion and held that this Court's order dated 2nd December, 1983 was clear, there was no abandonment of the pending arbitration proceedings by the respondent and therefore stay could not be granted. This order was confirmed by the Division Bench in appeal.

In the S.L.P. to this Court the question was: whether the High Court was right in declining to grant stay of the arbitration proceedings.

Dismissing the application,

HELD: 1. The High Court rightly held that Section 35 does not apply. [556A]

Sujant Singh v. Seth Mohinder Paul, AIR1964 Punj 395 ref. to.

2. In particular facts and circumstances if a party filed a suit to save limitation the same would not vitiate the award or make the award bad under s. 35 of the Arbitration Act.[555F]

3. Foreign awards automatically are not 'lifeless award' They can be enforced in this Court in accordance with law.[556G]

Oil & Natural Gas Common. v. Western Co. of N. America, AIR 1987 SC 574 ref to.

4. Whether in a particular case it would be just and equitable to the parties to direct them to proceed with the arbitration, must depend upon the facts and circumstances of a particular case having regard to the legal provisions applicable to a particular Situation.[556A-D]

In the instant case, there is a valid arbitration

agreement between the parties. In view of the direction of this Court. the continuation of the arbitration proceedings in respect of the filing of the suit would not be bad. In these circumstances if the court declined to exercise its jurisdiction under section 151 of the Code of Civil Procedure to grant stay of the proceedings of arbitration in

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London, the court has not acted in excess of jurisdiction or has not exercised its jurisdiction improperly. In such a situation the Appellate Court should not normally interfere. In the premises, it would have been improper to exercise any jurisdiction to interfere. [557B-C]

V/C Tractoroexport, Moscow v. M/s Tarapore & Co. & Anr., [1970] 3 SCR 53; Serajuddin & Co. v. Michael Goldetz & Ors., AIR 1960 Cal. 47; In re All India Groundnut Syndicate Ltd., [1945] 47 Bom. L.R. 420 and Ramji Dayawala & Sons (P) Ltd. v. Invest Import, [1981] 1 SCR 899. referred to.

#### JUDGMENT:

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil)No.6536 of 1988.

From the Judgment and Order dated 26.4.1988 of the Bombay High Court in Appeal No. 431 of 1988. G. Ramaswami, Additional Solicitor General and Mukul Mudgal for the Petitioner.

Anil B. Diwan, D.N. Misra, M.P. Bharucha and S.J. Vajifdar for the Respondent.

The Judgment of the Court was delivered by SBYASACHI MUKHARJI,J. This application for leave to appeal is from the decision of the Division Bench of the High Court of Bombay, dated 26th April, 1988. By the said decision the Division Bench summarily dismissed the appeal thereby affirming the order of the learned Single Judge of the High Court. On 12th January, 1980 the petitioner herein signed what has been treated as the first contract with the respondent for the supply of 5000 Mts. of Indian H.P.S. Groundnut Kernels Javas (hereinafter referred to as the said goods) for the year 1979-80. The second contract in respect of the same was signed for 4000 Mts. on 3rd April, 1980. On 18th August, 1980 since 3100 Mts. of the remaining first contract and total of 4000 Mts. of the second contract had not been supplied, the contract was extended for the balance quantity for the next crop season 1980-81. On 20th December, 1980 the petitioner informed the respondent not to nominate any vessels to load goods as they were unable to get necessary clearance from the Government.

PG NO 551 The petitioner on 27th January, 1981 sent a telex informing the respondent that the goods could not be exported on account of executive/legislative ban on such exports.

On 6th March, 1981 the Federation of Oil Seeds and Fats Association (FOSFA) informed the petitioner by its letter of the appointment of an arbitrator because of non-shipment due to Government's refusal. Thus the respondent invoked the arbitration proceedings with FOSFA. On

19th March, 1981 the petitioner filed a petition in the Delhi High Court challenging the arbitration proceedings by FOSFA. The Delhi High Court on 23rd March, 1981 passed a stay order and restrained the arbitration proceedings by FOSFA. On 11th December, 1981, the Delhi High Court held that no arbitration agreement existed with regard to the second contract dated 3rd April, 1980 and as such none was entitled to seek reference to arbitration. It was further held that vis-a-vis the first contract dated 12th January, 1980 there was an arbitration clause existing. The National Agricultural Cooperative Marketing Federation of India Ltd., filed a special leave petition in this Court on 1st April, 1982 challenging the decision of the Delhi High Court on the ground that there was no valid FOSFA arbitration clause incorporated in the first contract dated 12th January, 1980. On 2nd December, 1983 this Court passed an interim order granting special permission to the respondent to file a money suit in any court against the petitioner since the claims were getting barred by time. The said order stated as follows:

"The order of this court dated 30.4.1982 is modified to the extent that Alimenta S.A. is at liberty to file suit against N.A.F.E.D. in respect of its claims/disputes under the two contracts dated 12.1.1980 and 3.4.1980. It is directed that such suit shall not constitute abandonment of the pending arbitrations instituted/commenced by Alimenta S.A. against N.A.F.E.D. or in any manner prejudice the said arbitrations or any awards made therein or the enforcement thereof and shall not prejudice Alimenta's contention in any of the cases."

On 17th December, 1983 the respondent filed a regular money suit No. 488 of 1984 for an amount of US \$1,70,39,544 (equivalent to Rs. 17,93,93,440) and interest On the sum of US \$ 11,23,500 (equivalent to Rs.11,23,35,000). Written statement was filed by the respondent raising several objections, inter alia, limitation, maintainability etc. On or about 24th July, 1984, the respondent filed another identical suit in the Bombay High Court being Suit No. PG NO 552 2657/84 for recovering damages for which the written statement was filed on 20th March, 1984. The respondent also filed another identical suit No. 1241 of 1981 in the High Court on 21st March, 1985 for which also the written statement was filed. The Supreme Court on 9th January, 1987 held that there was a valid arbitration clause in the first contract dated 12.1.1980. In January, 1987 the respondents started arbitration proceedings in respect of FOSFA contract dated 12.1.1980. In 1987, the petitioner's Solicitor in London issued summons to restrain the London arbitration. The arbitrator thereafter affirmed that they would not proceed with the arbitration until the petitioner's application for stay was finally disposed of. The petitioner moved an application in suit No. 1241 of 1985 in the Bombay High Court stating that in the interests of justice pending disposal of the above three suits an injunction should be granted restraining the parties from proceeding with the arbitration and the arbitration be stayed under the principles of Section 35 of the Indian Arbitration Act, 1940. On 2nd January, 1988 the Bombay High Court granted an interim injunction restraining the parties from proceeding with the arbitration. The learned Single Judge on 8th March, 1988 dismissed the notice of motion holding, inter alia, that this Court's order dated 2nd December, 1983 set out hereinbefore was clear and, therefore, stay could not be granted. There was an appeal to the Division Bench.

On 28th March, 1988 there was an interim order in appeal No. 431 of 1988 permitting the respondent to seek clarification from this Court regarding its order dated 2nd December, 1983. This

Court disposed of the said application by stating that the Bombay High Court might make its own order. As mentioned hereinbefore the Division Bench of the High Court dismissed on 26th April, 1988 the appeal preferred from the decision of the learned Single Judge of that High Court. Hence, the petitioner seeks have to appeal to this Court.

The question concerned here is, whether the High Court was right. The High Court noted that it was an admitted position that under the first contract the defendant therein being the petitioner herein, has supplied 1900 Mts while under the second contract the defendant has not supplied anything. The High Court noted that the petitioner has pleaded that the Government had not permitted supply of any further materials to the plaintiff being the respondent herein. The respondent is a Swiss Company. As per the contract the respondent had initiated arbitration proceedings against the petitioner with the Federation of Oil Seeds and Fat Association (for brief called FOSFA London PG NO 553 in 1981 and had informed the petitioner by their letter dated 10th March, 1981 for the appointment of an arbitrator on their behalf. The defendant had contended that there could not be any such arbitration and, therefore, it filed a petition in the High Court challenging the arbitration proceedings. The Delhi High Court on the 11th December, 1981 came to the conclusion that as regards the first contract there was a valid arbitration agreement and as regards the second contract, there was no such arbitration agreement. In other words, as regards the first contract the respondent herein could have proceeded with the arbitration while with regard to the second contract there was no question of referring the dispute to the arbitrator as such. Both the parties had filed special leave petitions to this Court, being 1755 of 1982 and 1756 of 1982 from the decision of the High Court of Delhi. This Court admitted the petition but did not decide the matter immediately. In the meanwhile, the claim of the plaintiffs was getting barred by law of limitation and, therefore, they moved this Court for an early hearing. This Court instead of hearing the petition passed an order on 12th December, 1988 giving liberty to the respondent to file suit in respect of its claims. It was further stated that filing of such a suit would not constitute abandonment of the pending arbitration proceedings instituted or commenced by the respondent against the petitioner.

It is pursuant to this liberty that the respondent had filed suit No. 488 of 1984. Thereafter, without withdrawing the first suit but perhaps on the basis that there was some technical defect in the suit according to the Bombay High Court, the respondent had filed a second suit No. 2659/84 on 20th March, 1984. It had filed another suit No. 1241 of 1985 on the very next date. All these suits were pending in the High Court of Bombay. The cause of action in respect of these suits is the same. It has been stated that the present suit had been filed by way of an abundant caution and without prejudice to the rights and contentions including the arbitration proceedings. As a result of this decision the respondent started their arbitration proceedings from the stage at which it had been stayed earlier but only in respect of the first contract. The first notice of motion is for stay of these arbitration proceedings on the ground that the present suit as also the other two suits are pending and there cannot be any multiplicity of the proceedings in respect of the same cause of action. The High Court noted further that in view of the decision of this Court giving it liberty to file the proceedings the respondent was at liberty to proceed with the arbitration proceedings in respect of the first contract and having regard to this position it stated at the time of hearing of this petition PG NO 554 before the High Court and also in its affidavit that it was giving up claim in respect of the first contract.

The learned Solicitor General who had appeared in the Bombay High Court on behalf of the petitioner, which was the defendant, contended that it was not open to the respondent to forego a part of its claim. The learned Solicitor General had also argued that the cause of action was one and it was not open to the respondent to split up its cause of action. The High Court, however, did not find any substance in that argument. The High Court was of the view that there were two claims arising out of the two contracts and the claims could easily be segregated or separated and that was the reason that the High Court held that the respondent could give up part of its claims which related to the first contract.

In our opinion, the High Court was right. Relying upon the decision of this Court in *V/C Tractoroexport, Moscow v. M/s. Tarapore & Co. & Anr.*, [1970] 3 SCR 53, the learned Solicitor General had submitted before the Bombay High Court that though Section 35 of the Arbitration Act, 1940 does not apply, the principles underlying the same would apply and those principles were that arbitrators should not proceed with arbitration side by side and in rivalry or in competition with the Civil Court. It was further submitted before the High Court that it can exercise cognate or similar powers possessed by it under Section 151 of the Code of Civil Procedure and should avoid the possibility of conflict of decisions. Reliance was placed on a decision of the Calcutta High Court in *Serajuddin & Co. v. Michael Goldetz & Ors.*, AIR 1960 Cal. 47. In the said circumstance it was submitted that the proper course was to restrain the plaintiffs from getting the matter decided in London so long as the suit was pending and had not been disposed of. In view of the fact that the subject matter of the reference was the same as in the pleadings of the suit, the public tribunal should have precedence, it was submitted by the learned Solicitor General.

Reliance was also placed on the decision of *India Groundnut Syndicate Ltd.*, [1945] 47 Bom. L.R. 420. Though there was no averment relating to inconvenience with regard to the contract or proceedings in a foreign Contract learned Solicitor had relied on the decision of this Court in *Ramji Dayawala & Sons (P) Ltd. v. Invest Import*, [1981] 1 SCR 899, and submitted that it was more convenient for adjudication in India than in London. In addition to this the high costs of the arbitration and the restrictions on the availability of foreign-exchange were also highlighted before the High Court of Bombay, and in as much as the defence in action in PG NO 555 India as also the arbitration in London was the same, and the evidence was the same and the entire contract had to be performed by shipping the goods from India. Therefore, it was submitted that it was not necessary that the parties should be allowed to proceed with the arbitration in London. It was also submitted that no prejudice would be caused to the respondent if they are required to proceed with the present suit and not with the arbitration proceedings. On behalf of the petitioner, however, it had been contended that the respondent was interested in delaying the proceedings somehow or the other. In support of this the petitioner brought to the notice of the High Court that in 1980 when the breach of contract took place, the plaintiff instituted arbitration proceedings and the respondent promptly filed petition in the Delhi High Court and got stay of the arbitration proceedings. Thereafter, they lost interest in the matter and the matter came to be decided by this Court and this Court by its order dated 9.1.1987 expressed and directed that the first contract was subject to the arbitration agreement and there was no reason why the defendants could not have proceeded with such arbitration. It further appears that sometime in October, 1987 the petitioner had taken out an originating summons in the High Court of Justice in London but the summons were not served on

the respondent. The arbitrators had given the directions that they would proceed and not wait any further. And it was upon this that the respondent had brought the present proceedings in the Bombay High Court. The High Court further felt that in view of the decision of this Court on 2nd December, 1983 there was no abandonment of the pending arbitration proceedings by the respondent.

It is well-settled that in particular facts and circumstances if a party files a suit to save limitation the same would not vitiate the award or make the award bad under Section 35 of the Arbitration Act. Reference in this connection may be made to the observations of the Punjab and Haryana High Court in *Sujant Singh v. Seth Mohinder Paul*, AIR 1964 Punj 395. The High Court felt that in the facts and circumstances of this case Section 35 of the Arbitration Act does not apply, which postulates that neither any reference nor any award shall be rendered invalid by reason only of the commencement of the legal proceedings upon the subject-matter of the reference but when the legal proceedings upon the whole subject-matter of the reference have been commenced between all the parties to the reference and notice has been given to the arbitrator or the umpire, all further proceedings in a pending reference shall unless a stay of proceedings is granted under Section 34, be invalid. The High Court held, and in our opinion rightly, that PG NO 556 Section 35 does not apply. The order of this Court set out hereinbefore clearly permits the continuation of legal proceedings in suit and cannot operate to nullify the arbitration proceedings in London. The High Court, therefore, declined to grant stay of the arbitration proceedings. Was the High Court right, is the question in this application.

Reliance was placed by the learned Additional Solicitor General Mr. G. Ramaswamy before us on a decision of this Court in *Oil & Natural Gas Commn. v. Western Co. of N. America*, AIR 1987 SC 674 for the proposition that in a situation of the present type it would be improper to ask the petitioner to go on with the arbitration in London. The facts there were entirely different from the facts before us. Section 151 of the Code of Civil Procedure on the basis of which and on the principle of which stay of proceedings in London was sought, are well-settled and these principles are whether in a particular case it would be just and equitable to the parties to direct them to proceed with the arbitration, must depend upon the facts and circumstances of a particular case having regard to the legal provisions applicable to a particular situation. In the decision referred to hereinbefore this Court took into consideration the fact that there was an application under Sections 30 & 33 of the Arbitration Act for setting aside the awards rendered by the umpire in that case and that there was a possibility of the award rendered by the Umpire being stayed by the Indian court. This Court also took into consideration that in that event an extremely anomalous situation would arise inasmuch as the successful party the Western Company might well have recovered the amount awarded as per the award from the assets of the losing party in U.S.A. after procuring the judgment in terms of the award from the U.S.A. court. Such possibility of damage and danger is absent in the present case. In the said decision before this Court by the contract therein the Indian courts had exclusive Jurisdiction and it would, however, be improper to proceed on the basis that the Indian courts have exclusive jurisdiction to affirm or set aside the award in terms of the proper law of the contract, or in terms of the actual contrast between the parties. Foreign awards automatically are not 'lifeless awards'. They can be enforced in this country in accordance with law. See in this connection the Foreign Awards (Recognition and Enforcement) Act, 1961.

Furthermore, unlike the case of Oil & Natural Gas Commission this is not a case of restraining the respondent from proceeding in a foreign court. This is a case of binding the parties to their bargain for going to the arbitration. The learned Single Judge of the High Court in PG NO 557 the instant case had taken into account all the relevant facts. It had considered the contract of the parties, the arbitration agreement, the statement made on behalf of the respondent and had thereafter exercised its jurisdiction not to stay the proceedings of arbitration in relation to the first contract. There is a valid arbitration agreement Between the parties. In view of the direction of this Court, the continuation of the arbitration proceedings in respect of the filing of the suit would not be bad. In those circumstances if the court declined to exercise its jurisdiction under Section 151 of the Code of Civil Procedure to grant stay of the proceedings of arbitration in London, the court, in our opinion, has not acted in excess of jurisdiction or has not exercised its jurisdiction improperly. In such a situation the Appellate Court should not normally interfere. In the premises, it would have been improper to exercise any jurisdiction to interfere. See the observations of this Court in Ramji Dayawala & Sons (P) Ltd. (supra). There will be no stay of the arbitration in relation to the first contract only.

In the Premises, it would not be proper for us to interfere with the judgment of the Division Bench of the High Court. The application, therefore, fails and is accordingly dismissed.

N.V.K.