

A SUPREME CO-OPERATIVE GROUP HOUSING SOCIETY

v.

M/S. H.S. NAG AND ASSOCIATES (P) LTD.

MAY 9, 1996

B [K. RAMASWAMY, FAIZAN UDDIN AND G.B. PATTANAJK, JJ.]

Arbitration Act, 1940 :

C Ss. 2(a), 20, 60, 90, 93—Co-operative housing society—Agreement for construction of houses stipulating for reference of dispute to arbitrator—Later some more work awarded to contractor—Dispute regarding—Application u/s. 20 for producing the agreement and referring the dispute to arbitration—Objection by Society that matter being arbitrable u/s. 60, suit was not maintainable by virtue of s. 93 and even otherwise, in absence of a notice u/s. 90, suit was liable to be dismissed—Held, bar of jurisdiction of Court, gets attracted among members, past members, between members and Society etc. as envisaged in clauses (a) to (d) of s. 60(1)—Though application u/s. 20 is treated as suit, it is procedural part—Mandatory requirement of s. 90 does not get attracted to such proceedings—Contention that there was no arbitration agreement with respect to the construction in dispute not tenable, since jurisdiction to arbitrate the dispute is founded upon an agreement entered with consensus ad idem under which the parties excluded established courts and submitted to jurisdiction of arbitrator—Terms of agreement clearly indicate that award of work during course of execution is a part of agreement originally entered into—Clause of agreement containing settlement of dispute by arbitration is an arbitration agreement within the meaning of s. 2(a)—Application u/s. 20 would be maintainable.

Kalyan People' Co-operative Bank Ltd. v. Dullhanbibi Aqal Aminsaheb Patil & Ors., AIR (1966) SC 1066; referred to.

G CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 11037 of 1996.

From the Judgment and Order dated 8.3.96 of the Delhi High Court in F.A.O.(OS) No. 44 of 1996.

H K. Madhava Reddy, U.U. Lalit and Satish Vig for the Petitioner.

The following Order of the Court was delivered :

A

This special leave petition arises from the order of the Division Bench of the High Court of Delhi made on 8.3.1996 in F.A.O. (OS) 44/96. The petitioner had entered into a contract on September 4, 1986 with the respondent with covenant contained therein as under :

B

"And whereas the contractor has also agreed to execute the work of seven towers with 100% external works with the said contract amount in the first instance and further work of the balance towers that would be entrusted to him within 4 months of the date of award of work at the same per sq. m. rates arrived at the above lump sum price for each tower and for the alternate specifications.

C

And whereas the employer has accepted the offer of the contractor the said contract amount subject to the terms and conditions set forth herein and mutually agreed to by both the parties".

D

Therein clause 32 relates to settlement of dispute by arbitration which read as under :

"32-Settlement of Disputes by Arbitration :

If any dispute, question of controversy, the settlement of which is not herein specifically approved for, shall at any time arise between the owner and the contractor relating to this contract or any clause or thing contained or the construction thereof or any portion of the same or the rights or duties or liabilities of either party, then in every such cases the matter in dispute shall be referred to the Arbitration of the Hony. Director, owner or his nominee and his decision shall be final and binding on both the parties....."

E

F

In furtherance of the agreement, apart from 7 towers entrusted for construction, the construction of 3 more towers was awarded on December 12, 1988 and 4 more towers on March 12, 1990. Dispute and differences had arisen in construction of the latter 7 towers. The respondent invoking clause 32 of the agreement filed application under Section 20 of the Arbitration Act, 1940 (for short, the 'Act') for calling upon the petitioner to produce the agreement and to have the dispute referred to arbitration. It was numbered as a suit on the original side of the High Court. Therein, the petitioner filed I.A. No. 7860 of 1994 in Suit No. 2760/93 under Order

G

H

A 7, Rule 11, CPC to dismiss the suit. Two grounds were mainly pressed for consideration in support thereof. The first contention urged was that the petitioner being a co-operative society registered under the Delhi Co-operative Societies Act, 1972, the dispute is arbitrable under Section 60 of that Act and Section 93 thereof puts an embargo on the power of the civil Court to decide the dispute and that, therefore, the suit is not maintainable. The learned single Judge and the Division Bench negated the contention and in our view rightly, on the ground that Section 60 of the Co-operative Societies Act would apply to a dispute among members, past-members or person claiming through them or between them and the society or the members of the committee or officers or agents etc. as envisaged in clauses (a) to (d) of Section 60(1) of the Co-operative Societies Act. By operation of the *non obstante* clause, the bar of suit attracts only if the dispute falls within the parameters of clauses (a) to (d) thereof and the bar of jurisdiction of the Court under Section 93 gets attracted in respect of the specified subjects in sub-section (1) of Section 93 thereof. Therefore, the plea of the bar of Sections 60 and 93 is devoid of substance.

It is then contended in this Court that notice as required under Section 90, is a pre-condition to lay the suit. Since the proceedings under Section 20 of the Act was a suit, absence of notice meets with dismissal of the suit. We find no force in the contention. As *per ratio* in *Kalyan Peoples' Co-operative Bank Ltd. v. Dullhanbibi Aqal Aminsaheb Patil & Ors.*, AIR (1966) SC 1066, prior to CPC 1976 Amendment Act, insistence upon a notice under Section 80 CPC in a suit under Order 21 Rule 63 renders no assistance to the petitioner. Even analogy of Section 80 CPC sought for in support of reference is of no avail, since rigour of notice under Section 80 CPC was softened by CPC 1976 Amendment Act in directing, in an appropriate case, posts-suit notice. Though application under Section 20 of the Act is treated as suit, in proceedings under the Act, it is a procedural part. The mandatory requirement of Section 90 does not get attracted to proceedings laid under Section 20 of the Act.

A serious contention raised by Shri K. Madhava Reddy, learned senior counsel for the petitioner, is that contract for arbitration is a pre-condition to avail arbitration. Since the agreement for the 7 towers does not contain such arbitration clause, the application under Section 20 is not maintainable and, therefore, the suit deserves to be dismissed. We

find no force in the contention. Undoubtedly, jurisdiction to arbitrate the dispute is founded upon an agreement entered with consensus *ad idem* under which the parties excluded established courts and submitted to the jurisdiction of the arbitrator for settlement of differences and disputes having arises thereunder. Otherwise, court is devoid of jurisdiction to refer such disputes under Section 20 for arbitration. It is seen that the above quoted terms of the agreement and clause 32 of the contract read together clearly indicate that the award of the work during the course of execution is a part of the agreement originally entered into. Therefore, clause 32 of the agreement containing settlement of disputes by arbitration is an arbitration agreement within the meaning of Section 2(a) of the Act. Therefore, application under Section 20 would be maintainable. We do not find any substance in the special leave petition.

The special leave petition is accordingly dismissed.

R.P.

Petition dismissed.