

For these reasons I would allow the appeal with costs here and in the High Court.

BY COURT: In accordance with the majority opinion the appeal is dismissed with costs subject to the directions contained in the judgment.

Appeal dismissed.

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UNION OF INDIA

v.

BIRLA COTTON SPINNING & WEAVING
 MILLS LTD.

(B. P. SINHA C. J., J. C. SHAH and
 N. RAJAGOPALA AYYANGAR JJ.)

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 March 27

Arbitration—Balance of price of goods supplied under a contract—Liability to pay admitted—Invocation of the arbitration clause in the contract to set off money due under a different and independent contract—Whether permissible—Arbitration Act, 1940 (X of 1940), s. 34.

The respondent supplied to the appellants goods of the value of Rs. 1,06,670.89 nP. under a contract entered into by the parties and received about Rs. 93,727/- as part payment. The appellant declined to pay the balance on the plea that an amount of about Rs. 10,625/- was due to the appellant under another contract between the parties. The respondent thereupon filed a suit before the Senior Subordinate Judge, Delhi, for realisation of the amount. The appellant applied under s. 34 of the Arbitration Act, 1940, for stay of the suit alleging that a dispute had arisen between the parties and there being an arbitration agreement it could be invoked by the appellant. The respondent submitted that there was no dispute concerning the contract which was covered by any valid arbitration clause and which attracted the application of s. 34 of the Arbitration Act.

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The Subordinate Judge held that before s. 34 could be invoked the suit must raise a dispute in respect of the matter agreed to be referred to arbitration and not independent of it and as no dispute was raised by the appellant about its liability to pay the amount claimed by the respondent arising out of the contract and the only dispute which was sought to be raised was in respect of the liability of the respondent under another contract the suit could not be stayed. An appeal against this order was dismissed *in limine* by the High Court. The present appeal was by way of special leave granted by this Court.

It was contended that the terms of the arbitration agreement included a dispute relating to a refusal to meet the obligations arising under the contract even though the refusal was not founded on any right arising under the terms of the contract.

Held that for enforcement of the arbitration clause there must exist a dispute; in the absence of dispute between the parties to the arbitration agreement there can be no reference.

A plea that the appellant though liable to pay the amount under the terms of the contract would not pay it because it desired to appropriate it towards another claim under another independent contract cannot reasonably be regarded as a dispute "under or in connection" with that contract under which the liability sought to be enforced has arisen.

Uttam Chand Saligram v. Jewa Mamooji, I.L.R. 46 Cal, *Chundanmull Jahaleria v. Clive Mills Co., Ltd.*, I.L.R. (1948) 2 Cal. 297 and *Heyman v. Darwins Ltd.*, L.R. [1942] A.C. 356 distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal
No. 609 of 1961.

Appeal by special leave from the judgment and order dated April 12, 1960 of the Punjab High Court (Circuit Bench) at Delhi in First Appeal from Order No. 43-D of 1960.

N. S. Bindra and *R. H. Dhebar*, for the appellant.

G. B. Pai, *J.B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, for the respondent.

1963. March 27. The Judgment of the Court was delivered by

SHAH J.—The Birla Cotton Spinning and Weaving Mills Ltd.—hereinafter called ‘the Company’—supplied to the Union of India goods of the value of Rs. 1,06,670.89 nP. under a contract dated January 30, 1956 and received Rs. 93,727/- as part payment of the price. The Union declined to pay the balance of Rs. 12,943.89 nP. The Company then commenced Suit No. 386 of 1958 in the Court of the Senior Subordinate Judge, Delhi, against the Union of India for a decree for Rs. 10,625/- and Rs. 2,762.50 nP. as interest from October 12, 1956 till date of suit and interest *pendente lite* and costs of the suit. The Company alleged that the Union had withheld payment of the balance of Rs. 12,943.89 nP. on the plea that an amount of Rs. 10,625/- was due to the Union under another contract between the parties for a bulk purchase order No. PBI/ 7028-705 dated December 16, 1949. The Company submitted that there was no such contract and the dispute raised in that behalf by the Union had been referred to the arbitration of the Officer on Special Duty, Directorate General of Supplies and Disposals and Shri Ramniwas Agrawala but had since been adjourned *sine die* by the arbitrators.

The Union by petition dated May 19, 1959 applied under s. 34 of the Indian Arbitration Act for stay of the suit alleging that a dispute had arisen between the parties and there being an arbitration agreement which could be invoked under the circumstances and the Union being ready and willing to do all things necessary for the proper conduct of the arbitration under cl. 21 contained in form No. WSB-133. The Company resisted the petition contending that there was no dispute concerning the contract which was covered by any valid submission or arbitration clause, and which attracted the application

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of s. 34 of the Arbitration Act. The Subordinate Judge held that before s. 34 could be invoked the suit must raise a dispute in respect of the matter agreed to be referred to arbitration and not independent of it and as no dispute was raised by the Union about its liability to pay the amount claimed by the Company arising under the contract and the only dispute which was sought to be raised was in respect of the liability of the Company under another contract, the suit could not be stayed. An appeal against the order refusing to stay the suit was dismissed *in limine* by the High Court of Punjab. With special leave, the Union has appealed to this Court.

The only contention raised in the appeal is that the terms of the arbitration agreement include a dispute relating to a refusal to meet the obligations arising under the contract even though the refusal was not founded on any right arising under the terms of the contract. The arbitration agreement is contained in cl. 21, which is so far as it is material provides :

“In the event of any question or dispute arising under these conditions or any special conditions of contract or in connection with this contract (except as to any matters the decision of which is specially provided for by these conditions) the same shall be referred to the award of an arbitrator to be nominated by the purchaser and an arbitrator to be nominated by the Contractor, or in case of the said arbitrators not agreeing then to the award of an Umpire to be appointed by the arbitrators in writing before proceeding on the reference and the decision of the arbitrators, or in the event of their not agreeing of the Umpire appointed by them shall be final and conclusive and the provisions of the Indian Arbitration Act, 1940, and of the Rules thereunder and

any Statutory modification thereof shall be deemed to apply to and be incorporated in this contract.”

The arbitration clause is wide and includes not only disputes arising under the covenants of the contract but also to disputes under conditions general or special or in connection with the contract. But before an order for stay of a proceeding may be made under s. 34 of the Arbitration Act, the following conditions must co-exist :

- (i) there must be a subsisting and binding arbitration agreement capable of being enforced between the parties ;
- (ii) the subject-matter in dispute in the proceeding sought to be stayed must be within the scope of the arbitration agreement ;
and
- (iii) the petition must be made to the judicial authority by a party to the arbitration agreement or some person claiming under him at the earliest stage of the proceeding *i. e.* before the filing of the written statement or taking any other step in the proceeding.

The Judicial authority may, if these conditions exist, grant stay, if it is satisfied that the party applying is and has also been at all material times before the proceedings were commenced ready and willing to do all things necessary for the proper conduct of the arbitration and there is no sufficient reason for not referring the matter in accordance with the arbitration agreement.

The evidence recorded by the Trial Court discloses that there was no dispute between the Company

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and the Union arising under the contract on which the suit was filed. The Union accepted liability to pay the amount claimed by the Company in the suit. The Union still declined to pay the amount asserting that an amount was due from the Company to the Union under a distinct contract. This amount was not sought to be set-off under any term of the contract under which the Company made the claim. The dispute raised by the Union was therefore not in respect of the liability under the terms of the contract which included the arbitration clause, but in respect of an alleged liability of the Company under another contract which it may be noted had already been referred to arbitration. The Union had no defence to the action filed by the Company : it was not contended that the amount of Rs. 10,625/- was not due to the Company under the contract relied upon by the Company. For enforcement of the arbitration clause there must exist a dispute : in the absence of a dispute between the parties to the arbitration agreement, there can be no reference.

It was urged that mere refusal by the Union to pay the amount due is sufficient to raise a dispute "in connection with the contract" within the meaning of cl. 21 of the Arbitration agreement. We are unable to agree with that contention. A dispute that the Union is not liable to pay the price under the terms of the contract is undoubtedly a dispute under the contract, and in any event in connection with the contract. But a plea that the Union though liable to pay the amount under the terms of the contract will not pay it because it desires to appropriate it towards another claim under another independent contract cannot reasonably be regarded as a dispute "under or in connection" with that contract under which the liability sought to be enforced has arisen.

The decision of the Calcutta High Court in *Uttam Chand Saligram v. Jawa Mamooji* (1), on

(1) I.L.R. 46 Cal.

which reliance was placed by the Union does not, in our judgment, support any such proposition. In that case an award of the arbitrator was challenged on the ground that it was without jurisdiction, there being no dispute between the parties, the party applying having admitted his liability under the contract. Rankin J. held that though the existence of a dispute was an essential condition for the arbitrator's jurisdiction, the dispute may be either in the acknowledgement of the debt or as regards the mode and time of satisfying it. In that case the Court held that the defence of the applicant applying for vacating the award was that he was not under any obligation to pay the amount due. This is clear from the observation made on p. 540 where the learned Judge observed :

“x x x but in truth the petitioner's later letters to the Chamber, his petition itself in paragraphs 5, 6 and 12, paragraph 6 of the affidavit filed in this behalf in reply all show conclusively that he was withholding payment under a claim of right so to do. That the claim has little substance makes his case so much the worse.”

The Union is however not seeking to withhold payment under a claim of right so to do. What the Union contends is that under the contract they are liable to pay the amounts due but they will not pay because they have another claim unrelated to the claim in suit against the Company.

The decision of the Calcutta High Court in *Chundanmull Jhaleria v. Clive Mills Co. Ltd.* (1), on which also reliance was placed does not assist the Union. In that case the Court decided that an arbitration clause in a contract, by which the parties thereto agree to refer their disputes to arbitration; may be wide enough to include a dispute whether the

(1) I.L.R. (1948) 2 Cal. 297.

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contract itself has or has not been frustrated; but in the present case we are not concerned about any dispute relating to frustration of the contract.

The principle of the decision of the House of Lords in *Heyman v. Darwins Ltd.* (1), on which reliance was placed on behalf of the Union has also no application. It was held in that case that when an arbitration clause in a contract provides without any qualification that any difference or dispute which may arise "in respect of" or "with regard to" or "under the contract" shall be referred to arbitration, and the parties are at one in asserting that they entered into a binding contract, the clause will apply even if the dispute involves an assertion by one party that circumstances have arisen, whether before or after the contract has been partly performed, which have the effect of discharging one or both parties from all subsequent liability under the contract, such as repudiation of the contract by one party accepted by the other, or frustration of the contract, Viscount Simon, L.C., observed in that case :

"An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But in a situation where the parties are

(1) L. R. [1942] A. C. 356.

at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of," or "with regard to" or "under the contract", and an arbitration clause which uses these, or similar, expressions should be construed accordingly."

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But the Union is not seeking to go to arbitration on a dispute between the parties about a breach committed by one side or the other or whether circumstances have arisen which have discharged one or both parties from further performance. It is a case in which in substance there is no dispute between the parties "under", "in connection with", or even "with regard to" the contract. The plea raised by the Union for stay of the suit was frivolous. It is somewhat surprising that the plea should have been raised and persisted in, and even after going to arbitration in the other case have been brought up to this Court involving large costs to the public exchequer.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.
