
(1948) 10 AHC CK 0027
In the Allahabad High Court

Abdul Latiff

APPELLANT

Vs

Dost Mohammad and Co., Ltd.

RESPONDENT

Date of Decision : 08-10-1948

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1949 All 304

Hon'ble Judges : Agarwala, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Agarwala, J.—This is a plaintiffs appeal. The appellant filed a suit for the taking of accounts of a dissolved partnership. The defendant made an application u/s 34, Arbitration Act, alleging that in the partnership agreement there was a clause by which all disputes and differences whatsoever in connexion with or arising out of the partnership between the parties thereto shall be referred to the sole arbitration of Haji Dost Mohammad and that, therefore, the present suit should be stayed. The plaintiff objected to the stay of the suit on the ground, inter alia that the arbitrator mentioned in the arbitration agreement, namely, Haji Dost Mohammad, being himself a share-holder in the defendant company "Dost Mohammad and Co. Ltd." (which was arrayed as defendant 1 in the suit) there was sufficient reason why the Court should decide the case itself and not stay it. The learned Judge of the Court below considered that the parties had themselves agreed to the arbitration of Haji Dost Mohammad and that, therefore, they were bound by the agreement. In the result, he allowed the application u/s 34, Arbitration Act, and stayed the suit. Against that order, the plaintiff has come up in appeal to this Court.

2. The partnership agreement between the parties recites that the disputes and differences arising in connection with the partnership shall be referred to the sole arbitration of Haji Dost Mohammad. Now, Haji Dost Mohammad was admittedly a share-holder in the concern "Dost Mohammad & Co. Ltd.", which was arrayed as

defendant 1 in the suit. His son, Mohammad Rafique, is the managing director of the said concern. His other son, Mohammad Shafique represents it in the present suit. He remained a share-holder up to 31st December 1946, on which date he seems to have transferred his shares to his son. The suit was filed on 15th November 1946. Thus Dost Mohammad was a share-holder of the defendant company on the date of the suit and even for some time after it. Allegations of fraud and criminal misappropriation were made against the plaintiff by defendant 1 in respect of the "accounts. The plaintiff does not want that the dispute should be decided by Haji Dost Mohammad. It is clear from the admitted facts on the record that the arbitrator is a person who is vitally interested in the result of the suit. As he was a share-holder in the defendant company which had made serious allegations against the plaintiff, it is possible that he may be a witness also of the facts that may have to be gone into in the suit. In a case of this nature, it is well settled that the Court is not bound to stay the proceedings pending before it and to allow the case to be decided by the arbitration of such a person.

3. Section 34, Arbitration Act, runs thus:

Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at anytime before filing a written statement or taking any other steps in the proceedings apply to" the judicial authority before which the proceedings; are pending to stay the proceedings; and if satisfied; that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

The section clearly contemplates that the suit is to be stayed only "when the Court is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement."

4. The section gives a discretion to the Court either to stay a suit or not to stay it. Normally, a Court will give effect to the terms of the arbitration agreement and will stay a suit. But there are certain cases in which it will refuse to do so.

5. In *Dinabandhu Jana v. Durga Prasad Jana* AIR 1919 Cal. 479, it was laid down that:

Where for the determination of the controversy between the parties two competent tribunals are available, the Court and the arbitrators; and the plaintiff chooses the latter but in fact has recourse to the former; it is not open to his opponent to enforce specific performance of the contract or to plead the contract as a conclusive bar to the suit, but he may apply to the Court to stay the suit in the exercise of its judicial discretion so as to enable either of the parties to obtain

a reference to the arbitrators. When the Court is apprised that the suit has been instituted in contravention of an arbitration agreement the Court has a discretion to stay the suit. The burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not on the defendant to show that no such reason exists; it is the prima facie duty of the Court to act upon the agreement between the parties.

6. Now, one of the reasons for which the Court will refuse to stay proceedings before it has been thus described in, Halsbury's Laws of England, Hailsham edition, vol. 1, para. 1090 : "An order to stay will not be granted if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter, or that it is for some reason improper that he should arbitrate an the dispute."

In *Bristol Corporation v. John Aird & Co.* 1913 A.C. 241 a contractor had agreed that disputes arising under the contract shall be referred to the engineer of the other party to the contract. Lord Atkinson observed as follows:

But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shewn in fact that there is any reasonable prospect that he will be so biased as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land.

In *(Firm) Hormusji and Daruwalla v. District Local Board, Karachi* AIR 1934 Sind 200, it was laid down that:

Although the Court is bound to start with a strong bias in favour of maintaining the special bargain between the parties, it must at the same time, consider all the circumstances of the case with vigilance to see that it is not driving either, the parties to a tribunal where there is a likelihood" of his not getting substantial justice.

7. In the present case, it is quite clear that the defendant is vitally interested in the result of the suit and in view of the fact that he was a share-it older in the Company even after the institution of the suit and now his son holds his shares, he is not a proper person to arbitrate on the matter in dispute between the parties. The plaintiff can have no confidence in such an arbitrator, specially when serious allegations of fraud and misappropriation have been made against him. The Court was not bound to stay the suit. We are of opinion that this was a case in which the suit should cot have been stayed and should have been allowed to take its normal course and decided according to law.

8. We, therefore, allow this appeal and set aside the order of the Court below. The suit will now proceed according to law. The appellant is entitled to his costs

in both the Courts.