
(1995) 09 AP CK 0011

In the Andhra Pradesh High Court

Case No : Appeal Against Order No. 713 of 1993

Bharat Heavy Plates and Vessels Ltd. and Another

APPELLANT

Vs

Balaji Catering Services

RESPONDENT

Date of Decision : 01-09-1995

Acts Referred:

Arbitration Act, 1940 — Section 20, 20(1)

Citation : (1995) 3 ALT 514

Hon'ble Judges : V. Bhaskara Rao, J; Syed Shah Mohammed Quadri, J

Bench : Division Bench

Advocate : C. Poornaiah, for the Appellant; M. Ravindranath Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Syed Shah Mohammed Quadri, J.—This is an appeal u/s 39 of the (Indian) Arbitration Act. The defendants in O.S.No.444 of 1990 on the file of the I Addl. Subordinate Judge, Visakhapatnam are the appellants. The respondent filed the suit against the appellants for a direction to the appellants to file the original agreement dated 1-5-1989, entered into between the appellants and the respondents, and to refer the dispute between the parties to an impartial and independent arbitrator. By his judgment dated 18-3-1993 the learned I Addl. Subordinate Judge, Visakhapatnam decreed the suit, which is now the subject matter of this miscellaneous appeal.

2. The first appellant is a Government of India undertaking and the second appellant is its Managing Director. Under the Factories Act, the appellants are bound to maintain a canteen. For the purpose of running a canteen, the respondent entered into a contract with the appellants on 1-5-1989. It appears that while the respondent was running the canteen, he expressed various difficulties with regard to the fixation of prices of food articles to be supplied in the canteen, payment of wages etc. and was agitating for enhancement of the rates on the ground that the request for enhancement was not being acceded.

On 4-6-1990 the respondent sent a notice Ex.A2 to the appellants to take that letter as a last and final notice requesting them to relieve him from running the canteen from that day onwards. Thereafter the appellants by a letter dated 15-6-1990 replied that the abandonment of the contract by the respondent was contrary to the terms of the contract and was in violation and therefore, he would be guilty of breach of contract and also liable for the said breach. In July, 1990 the respondent also raised various claims and made a demand from the appellants. Thereafter he also requested for a reference of the dispute to an arbitration and to appoint an independent arbitrator by a letter dated 11-8-1990. The appellants, however, replied by letter dated 20-8-1990 (Ex. A-10) that as the respondent had abandoned the running of the canteen which resulted in appellants making alternative arrangements for running the canteen, his request to invoke arbitration clause was unjustified. It was "in that background that the said suit was filed.

3. Indeed the very same facts are narrated in the pleadings of the parties. The trial Court framed the following issues:

1. Whether the plaintiff is entitled to invoke the Arbitration clause in the given circumstances ?

2. Whether a direction to the defendants to appoint an arbitrator is to be given as per the arbitration clause of the agreement ?

3. To what relief?

4. No oral evidence was let in. However, the respondent got marked Exs. A-1 to A11 of which Ex. A1 is the original contract and Exs. A2 to A10 are the letters addressed by the parties. On a consideration of the evidence placed before the trial Court, issue Nos. 1 and 2 were found in favour of the respondent.

5. Sri C. Poornaiah, the learned counsel for the appellants, contends that on the abandonment of the contract by the respondent, the contract did not exist as such the question of invoking arbitration clause would not arise and the trial Court gravely erred in decreeing the suit. He further contends that the respondent himself being the party at fault, cannot invoke the arbitration clause, as such, the suit ought to have been dismissed on that very ground. In any event, submits the learned counsel, the agreement itself provides that defendant No. 2 - Managing Director of the first appellant, the second appellant, should be the arbitrator and the trial Court was in error in directing the second appellant to nominate an independent arbitrator.

6. Sri Ravindranath Reddy's contentions are that by repudiating the contract, even if it is accepted, the contract does not cease to exist. Therefore, the respondent was very much in his right to invoke the arbitration clause and the trial Court is justified in decreeing the suit. Regarding the second contention of the appellants, it is submitted that this point was not urged before the trial Court and is being raised for the first time here. But even so, there is nothing in

Section 20 of the (Indian) Arbitration Act, which debars the party repudiating the contract to invoke the arbitration clause. Direction of the trial Court to the second appellant to nominate an independent arbitrator is within the scope of the arbitration clause. Therefore, the said direction cannot be said to be illegal.

7. The short question that arises for consideration in the case is, whether the respondent has forfeited his right to invoke arbitration clause even assuming that he was at fault in repudiating the contract.

8. It would be useful to read here Section 20 of the (Indian) Arbitration Act, which runs thus:

20. Application to file in Court arbitration agreement:-

(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them instead of proceeding under Chapter II, may apply to Court having jurisdiction in the matter to which the agreement relates that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered as registered and suit between one or more of the parties interested or claiming to be interested plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise or where the parties cannot agree upon an arbitrator to an arbitrator, appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

Sub-section (1) of Section 20 lays down the condition under which an application could be filed. There are only two conditions contained in that Section viz. (1) the arbitration agreement should be in existence before the institution of any suit with regard to any differences; and (2) the differences have arisen between the parties with reference to the subject matter of agreement or any part of it. If these two requirements are satisfied, the parties may, instead of proceeding under Chapter II of the (Indian) Arbitration Act, may apply to the Court having jurisdiction in the matter to which the agreement relates that the agreement be

filed in the Court. Sub-sections (2) and (3) are procedural. Under sub-section (3) notices will have to be issued to the parties to the agreement except the applicant, requiring them to show cause why the agreement should not be filed. Sub-section (4) provides that in the absence of showing sufficient cause by the other parties of the agreement, the Court shall make an order for filing of the agreement into the Court and for reference of the matter to the arbitrator appointed by the parties whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, the Court can appoint the arbitrator. Sub-section (5) says that the conduct of proceedings by the arbitrator shall be in accordance with the other provisions of the (Indian) Arbitration Act.

9. Ex.A-1 is the agreement. It was admittedly entered into before the dispute arose. Clause 54 of the agreement, which is in the nature of arbitration agreement, reads as follows:

"54. In the event of any dispute arising between the parties, it should be referred to arbitration of the Managing Director or his nominee of the Company whose decision shall be final subject to the provisions of the (Indian) Arbitration Act, 1940."

The arbitration clause is contained in the agreement dated 1-5-1989. The argument of Sri Poornaiah, the learned counsel for the appellants is that on repudiation of the agreement by the respondent, the agreement dated 1-5-1989 does not subsist, therefore, along with the agreement, the arbitration clause viz. Clause 54 perishes. An agreement can be put an end to either by discharge or by mutual consent or by novation, substituting one contract by another. By wrongful repudiation of the contract by one of the parties, the contract will not automatically come to an end. (It must be observed that, even if one of the parties wrongfully repudiates all further liability or has been guilty of a fundamental breach, the contract will not automatically come to an end. Since its termination is the converse of its creation, principle demands that it should not be recognised unless this is what both parties intend). Cheshire, Fifoot and Furmston's Law of Contract- Eleventh Edition, page 528.

10. It would be useful here to refer to the observation of the Supreme Court in Damodar Valley Corporation Vs. K.K. Kar, (J. Reddy, J.), In that case, the respondent therein entered into a contract with the appellant to supply coal, but he failed to do so in accordance with the terms of the contract. The appellant unilaterally repudiated the contract and paid the respondent for the supply of coal. The appellant's case was that the demands made by him coupled with the return of deposited amount finally settled the claims of the respondent. However, the respondent claimed damages for repudiation of the contract and on the demand not being fulfilled, gave notice of his intention to refer the matter to an arbitration under the Arbitration Clause. The contention urged was that in view of the final settlement, the arbitration clause had perished and that would bar the reference for arbitration. The Supreme Court laid down that "repudiation by one party did not alone terminate the contract and that the contract subsisted for the

determination of the rights and obligations of the parties. Consequently the arbitration clause would survive. It was further held that the question whether the termination was valid or not and whether the damages were recoverable for such wrongful termination did not affect the arbitration clause or the right of the respondent to invoke it for appointment of the arbitrator. It was explained that whether the plea was that the contract was void, illegal or fraudulent etc. in which case the entire contract along with the arbitration clause was non-est or voidable and it was pointed out that whether between the parties concerned the contract itself did not subsist either as a result of being substituted by a new contract or by rescission or alteration that dispute could not be referred to the arbitration as the arbitration clause itself perished, if the averment was found to be invalid.

11. Speaking for the Bench His Lordship Justice Jaganmohan Reddy, observed-

"The questions of unilateral repudiation of the rights and obligations under the contract or of a full and final settlement of the contract relate to the performance or discharge of the contract. Far from putting an end to the arbitration clause, they fall within the purview of it. A repudiation by one party alone does not terminate the contract. It takes two to end it, and hence it follows that as the contract subsists for the determination of the rights and obligations of the parties, the arbitration clause also survives."

The learned Judge further observed-

"In certain circumstances, it may be that there has been a termination of the contract unilaterally and as a consequence the parties may agree to rescind the contract. In such a situation the rescission would put an end to the performance of the contract in future, but it may remain alive for claiming damages either for previous breaches or for the breach which constituted the termination".

12. If the principles laid down in the above judgment are kept in mind, the conclusion is obvious that the contract (Ex.A-1) subsists and the arbitration clause there a viz. Clause 54 also subsists. In this view of the matter, we uphold the judgment of the trial Court on this issue.

13. From the above discussion it also follows that the right of a party at fault or innocent party, is not treated separately under Section 20 of the (Indian) Arbitration Act. u/s 20 of the (Indian) Arbitration Act rights are conferred on the parties to the contract irrespective of the nature of performance of the contract, be it fulfilment of the contract to the satisfaction of the other party or be it repudiation of the contract giving rise to inconvenience and hardship to the other party. For this reason also, we are unable to disturb the finding recorded by the trial Court.

14. Insofar as the second aspect is concerned viz, whether the trial Court is justified in issuing a direction to the second appellant herein to nominate an independent arbitrator, it is to be noted that the order of the trial Court is not

based merely on the ground tha the second appellant is the Managing Director. The learned trial Judge found, there was also a dispute between the first appellant and the respondent and the direction was issued on the ground that the case of the respondent was that he had reasonable apprehension of bias against the second defendant-appellant and on the facts of the case, particularly the correspondence between the parties, he accepted the plea and directed the second defendant to nominate the independent arbitrator. From a perusal of Clause 54 extracted above, it is evident that reference to arbitration can be to the Managing Director or to a person nominated by the Managing Director. In view of the above, the trial Court directed the second respondent to nominate an independent arbitrator. We don see any reason to interfere with the direction in view of the finding that there was a reasonable apprehension of bias against the respondent by the second appellant.

15. For the above reasons, the appeal fails and we accordingly dismiss the same. In the circumstances of the case, there shall be no order as to costs.