

(1949) 04 MAD CK 0046
In the Madras High Court
Case No : A.A.O. No. 481 of 1947

C.M. Mathu Kutty

APPELLANT

Vs

Varee Kutty

RESPONDENT

Date of Decision : 22-04-1949

Acts Referred:

Arbitration Act, 1940 — Section 33, 34

Citation : AIR 1950 Mad 64 : (1949) 62 LW 576

Hon'ble Judges : Satyanarayana Rao, J

Bench : Single Bench

Advocate : K. Kuttikrishna Menon and D.H. Nambudripad, for the Appellant; S. Venkatachala Sastry and N. Sundara Iyer, for the Respondent

Final Decision : Allowed

Judgement

Satyanarayana Rao, J.—This is an appeal by the plaintiff in O. S. No. 15 of 1946, Subordinate Judge's Court, Ottapalam, against the order

of the learned Subordinate Judge staying the trial of the suit u/s 34, Arbitration Act, X [10] of 1940.

2. The plaintiff and the defendant are brothers and are the sons of one Cheeran Mathu who died in February 1944. After the father's death, there

were disputes between the brothers regarding the property left by the father and the suit for partition was instituted for division of the properties.

The defendant filed an application u/s 34, Arbitration Act for stay of trial of the suit on the ground that there was an agreement between the parties

to refer the disputes to five named arbitrators and that in pursuance of the agreement there was a reference to arbitrators. It was also alleged in the

petition filed by the defendant that the parties filed detailed statements regarding the disputes before the arbitrators. The agreement to refer the

disputes before the arbitrators, is dated 19th December 1945. The detailed statement was filed before the arbitrators by the parties on 20th

December 1945. The arbitrators met and recorded depositions on 20th January 1946. On 23rd January 1946 according to the case of the

defendant there was also a razinama between the two brothers, whereunder some of the disputes between them were actually settled and the

arbitrators were authorised to carry out the partition of the properties to give effect to the settlement of that date. He, therefore, claimed in the

petition that in view of the existence of an arbitration agreement between the parties under which a reference was made to the arbitrators and

which reference was pending enquiry before them, the trial of the suit should be stayed u/s 34 of the Act. This application was opposed by the

plaintiff on various grounds, the most important of which was the denial of the existence of a valid agreement referring the disputes to arbitration.

3. The sum and substance of the plaintiff's case is that some signatures on some papers were obtained by fraud and misrepresentation particulars

of which were given in the counter-affidavit filed by him. In para. 2 of the counter he categorically stated that no reference to arbitration was made

to the arbitrators and that he had not signed and in para. 5 he added that he did not even sign any deed of reference knowing the same to be a

deed of reference to arbitration or understanding the nature of the deed. He also denied the existence of the razinama between them and that he

did not even sign any such document. He also raised some other legal contentions which were overruled by the lower Court and which have not

been now pressed before me.

4. The learned Subordinate Judge who heard the application refused to take evidence on the case of fraud and misrepresentation put forward by

the plaintiff on the ground that u/s 34 of the Act no evidence on the question of the validity of an arbitration agreement could be taken as the only

right of the person raising such defence was to apply u/s 33 of the Act, and as the plaintiff had not followed that course, it was not incumbent on

him to take evidence. He, therefore, overruled the objections of the plaintiff and passed an order directing stay of the trial of the suit as, in his

opinion, there was a prima facie valid arbitration agreement entered into between the parties.

5. In this appeal by the plaintiff the only argument raised on behalf of the appellant is that the learned Judge was not justified in refusing to take oral evidence to establish his plea that the agreement was vitiated by fraud and misrepresentation.

6. The Arbitration Act, X [10] of 1910, consolidates and amends the law relating to arbitration in British India. Before this Act, the law relating to arbitration in Presidency Towns was contained in the Arbitration Act, 1899 and so far as the mofussil was concerned, the law was embodied in Schedule II, Civil P. C. All these provisions have now been consolidated and certain alterations were also introduced in the law relating to arbitration in India by the Act of 1940.

7. By Section 32 of the Act, a suit to contest the existence or validity of an arbitration agreement or award on any ground whatsoever is barred and the only manner by which those questions can be decided is by following the procedure laid down in the Act. These sections were introduced

for the first time by the Act of 1940. Section 33 enables a party to an arbitration agreement or persons claiming through such a party to challenge

the existence or validity of an arbitration agreement or an award to or have the effect of either determined by an application to the Court. That

therefore is the procedure indicated by the Act to get a decision upon the existence, effect or validity of an arbitration agreement or an award.

Then follows Section 34 which entitles a party to an arbitration agreement or a person claiming under such a party against whom a legal pro-

ceeding by way of suit or otherwise is taken to apply under the section before filing a written statement or taking any other steps in the proceeding

for stay of trial of those proceedings on the ground that there is an arbitration agreement between the parties which the applicant is ready and

willing to carry out.

8. The question that arises for consideration now is where an application u/s 34 is made alleging that there is an arbitration agreement the existence

of which bars the trial of the suit and when the respondent to such a petition raises the contention that the agreement is unenforceable by reason of

fraud, undue influence or collusion or even misrepresentation, is it incumbent upon the Court to try that question in that very proceeding or is it

obligatory on the part of the person raising such a defence to make an

independent application u/s 33 of the Act? The learned Subordinate Judge was of opinion that in such a case, the only course open to the person is to apply u/s 33 to have the matter tried and decided and this is also the argument advanced on behalf of the defendant-respondent in this Court. The very foundation for the jurisdiction of the Court to stay the trial of a suit u/s 34 is the existence of an arbitration agreement. The applicant comes to Court and asserts that there is such an agreement while the other side either disputes the truth of such an agreement or admitting its truth pleads that it is invalid by reason of other vitiating circumstances which are open under law for the objector to raise and prove. I do not see any reason why in that event when the question was raised and the validity of the jurisdiction of the Court depends upon the result of its decision on that question, the Court should not try that issue. Section 33, in my opinion, gives an independent right to a person who wishes to challenge the existence or validity of an arbitration agreement or award and to anticipate the other side and to initiate proceedings to have those questions determined beforehand. It does not in my opinion, prohibit the Court acting u/s 34 of the Act from deciding a question which is raised before it for its decision and the decision on which alone would depend the exercise of its jurisdiction. From this point of view it seems to me that the learned Subordinate Judge was not justified in preventing the plaintiff from adducing evidence on the question of fraud and misrepresentation put forward by him. If necessary, the counter filed by the plaintiff may be treated as an application u/s 33 but I think even this is not required.

9. I am supported in my view of the sections (32, 33 and 34) by a decision of a Bench of the Bombay High Court in Bhagwandas Atmasing Vs.

Atmasing Jessasing, . The judgment of the Court was delivered in that case by Kania J. (as he then was). In that case when the defendant in a suit made an application for stay u/s 34 alleging an arbitration agreement, the plaintiff denied the existence of such an agreement. The argument on behalf of the defendant who filed the application u/s 34 was that in view of Sections 32 and 33, Arbitration Act, 1940, the plaintiff was not entitled to challenge the existence of an arbitration agreement in that proceeding and that it was incumbent upon the plaintiff if he wanted to have that question decided to take out a substantive application u/s 33 of the Act

challenging the existence of the arbitration agreement and obtain a decision of the Court on that point. This argument found favour before the trial Judge, Coyajee J. but his decision was reversed on appeal by the Bench. At p. 495 of the report it was stated that the effect of these sections was not to preclude the respondent in an application u/s 34 to set up the defence of the non-existence of an agreement which was propounded by the other side. The defendant who applies u/s 34, in order to succeed in his application has to establish the existence of an agreement. If the plaintiff denies the existence of an agreement, then, it raises an issue between the parties which should be tried under-Section 34 of the Act and the learned Judges saw no impediment for the Court to adjudicate upon that issue.

The question now raised in this ap-peal, in my opinion, is clearly covered by the decision of the Bombay High Court above refer-red to. The learned Subordinate Judge before whom this case was cited, however, thought that it had no application to the facts of the present case as the dispute there was about the existence of the agreement itself but, as in the present case, the plea taken was that it was vitiated by fraud, the principle of that case had no application. I see no difference in principle whether the defence raised was the non-existence of the agreement or the validity of an agreement. The scope and the jurisdiction of the Court acting u/s 34 does not depend upon the nature of the defence raised, i. e., whether the existence of the agreement itself is disputed or whether the existence having been admitted, its invalidity on the ground of fraud and misrepresentation was raised. It is only on this ground the learned Subordinate Judge thought that the decision of the Bombay High Court had no application. For the reasons already stated, I differ from the opinion of the learned Subordinate Judge and hold that the decision in Bhagwandas Atmasing Vs. Atmasing Jessasing, , applies to the present case.

10. The learned advocate for the respondent drew my attention to some of the cases of the other High Courts. Narsingh Prasad Boobna and Others Vs. Dhanraj Mills, , was a decision under the Indian Arbitration Act of 1899 and arose out of an application for stay u/s 19 of that Act. It was held in that case that it is not within the jurisdiction of an arbitrator to decide whether a contract as propounded by one of the parties contained forged clauses or interpolations or contained clauses which were

inserted as a result of fraud or mistake and that such disputes which go to the root of the matter should be decided in a suit. The decision itself, it may be pointed out, was under an Act which did not contain provisions analogous to Sections 31 to 33 of the present Arbitration Act and the decision in that case is not relevant for the decision of the present question.

There are two decisions of the Calcutta High Court in *Manick Lal v. Shiva Jute Bailing Ltd.*, 52 C. W. N. 389 and *Baijnath Narseria v. Chhotulal Sethia*, 52 C. W. N. 397. In both the cases the question considered was whether in view of Sections. 32 and 33, Arbitration Act, a party had a right to file a suit to establish that there was in fact no agreement to refer to arbitration. The answer given by the Calcutta High Court was that such a suit was not barred. The decision of the Bombay High Court was referred to in the course of the judgment. In the first of these cases, the difficulty in reconciling the language of Sections 32 and 33 of the Act was pointed out. Section 32 of the Act as stated above bars the right of a suit even if the existence of the agreement was denied and compels the party wanting to raise the dispute to follow the procedure laid down under the Act, and the procedure even in such a case is to make an application u/s 33 of the Act challenging the existence of the agreement. But the section opens with the words "any party to an arbitration agreement" and gives to such a party desiring to challenge the existence of the agreement a right to apply under the section. It was asked in that case with considerable force, if the existence of the agreement itself was disputed how could the applicant disputing the existence of an agreement be aptly described as a party to an arbitration agreement and how could such a person apply u/s 33.

The solution suggested by Das J. was that the word "existence" should be interpreted in a restricted sense as "implying the legal existence as opposed to apparent or mere factual existence i. e., as opposed to a mere semblance of existence." The same view was also adopted in the later case. I am, however, not called upon to decide in this case and resolve the conflict referred to in the judgments of the Calcutta Court. The expression "any party to an arbitration agreements" in Section 33 taken along with the fact that he is the person who challenges the existence of the agreement must be understood as having reference to a person who is put forward as being a party to an arbitration agreement but who does not

admit its existence. It is not necessary, in my opinion, to restrict the meaning of the word "existence" in the manner in which the Calcutta Judges

have done, but may be taken as referring in the context to an agreement which is apparent and not real. The expression only describes the

applicant and does not assume the truth of the agreement. If so understood, there is no inconsistency in the language of the section. However this

may be, it is really unnecessary for the purpose of the decision of this case to express any final opinion on the point. As the matter was, however,

argued at length and the decisions were cited before me, I have thought it proper to refer to them in my judgment.

11. It follows therefore that the procedure adopted by the learned Subordinate Judge in disposing the application without recording the evidence

which the plaintiff was ready and willing to tender cannot be justified. The order of the learned Subordinate Judge is therefore set aside and this

appeal should be allowed and the application remanded for disposal according to law and in the light of the observations contained in this

judgment. The appellant is entitled to the costs of the appeal here from the respondents and the costs of the appellant in the lower Court will be

provided for in the revised order of the learned Subordinate Judge.