

(1968) 05 CAL CK 0008

In the Calcutta High Court

Case No : Appeal from Original Order No. 207 of 1967

J.M. Dutta and Others

APPELLANT

Vs

United Industrial Bank Limited

RESPONDENT

Date of Decision : 24-05-1968

Acts Referred:

Arbitration Act, 1940 — Section 34

Securities Contracts (Regulation) Act, 1956 — Section 15, 21, 22, 23(2), 9

Citation : 72 CWN 860

Hon'ble Judges : S.K. Mukherjea, J;A.N. Ray, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.N. Ray, J.—The appeal is from the order of Sen, J. The order was made u/s 34 of the Arbitration Act. The learned Judge was pleased not to stay the suit.

2. Before the learned Judge it was contended that the allegations made in the plaint were untrue and frivolous. The learned Judge expressed the opinion that the contentions advanced were of no consequence in deciding whether the subject-matter of the suit is covered by the arbitration agreement or not. The learned Judge was pleased to dismiss the application.

3. It is well-settled as will appear from the decision of the Supreme Court in (1) A. M. Mair & Co. v. Gordhandas Sagarmull, reported in (1950) SCR 702 that the court cannot enter into the truth or falsity of the allegations, namely, the merits of the case.

4. Counsel for the appellant did not impeach the conclusion of the learned Judge.

5. What was contended at the hearing of the appeal was that the learned Judge should have gone into the question whether the contract was entered into between the parties and therefore the matter should have been tried on evidence. No such argument was advanced before the learned Judge and no ground was taken in the memorandum of appeal. It is not proper to advance

such a contention at the hearing of the appeal when it was not submitted in the trial court. The appeal court is deprived of the views of the trial court. It is also not fair to allow a party to make submissions on points which may turn on questions of fact.

6. Counsel for the appellant relied on the decision of (2) *Anderson Wright Ltd. Vs. Moran and Company*, in support of the proposition that the Court should have gone into the question as to whether the contract was entered into or not. In the present case the allegations in the plaint are that the plaintiff never entered into contract with defendant No. 1 for selling 1500 shares or any share of Hindusthan Motors Limited on the terms and conditions contained in the contract or at all. The further allegations in the plaint are that the plaintiff received a contract note dated May 23, 1966 from the defendant No. 1 and acknowledge receipt of such contract note on behalf of the Jupiter Agency. The plaintiff further alleged that the plaintiff did not enter into the alleged contract as a Principal or agent or broker or at all. The plaintiff again alleged that the plaintiff merely received the alleged contract for its constituent Jupiter Agency.

7. Counsel for the appellant contended that the allegations in the plaint in the present case were similar to the allegations in the case of *Anderson Wright Ltd. v. Maron & Co.*, (supra). I am unable to accept that contention. In the case of *Anderson Wright Ltd.*, (supra), the allegations in the plaint were that the plaintiff acted merely as broker and in that capacity brought about the two contracts of sale and purchase evidenced by the two Bought Notes mentioned in the plaint, that the real seller was a firm known as Gowrchand Danchand, and that the plaintiff not being a party to the contract could not incur any liability under its terms. There were prayers in the plaint for a declaration that the plaintiff was not a party to the contracts and that it had no liability under the same. There was a further prayer for an injunction restraining the respondent from claiming any damages in respect of the said contracts.

8. In the present case the prayers in the plaint are for a declaration that the plaintiff did not enter into the alleged contract or was not a party to the alleged contract with the defendants or any of them or in the alternative that the alleged contract is illegal, void and of no effect and for cancellation of the alleged contract. Further, in the case of *Anderson Wright v. Maron & Co.* reported in AIR 1955 SC 56, it will appear that in substance the controversy between the parties was whether the plaintiff did incur any liability in terms of the contracts evidenced by the two Bought Notes to which the plaintiff there was a signatory. In the present case the allegations are that there was no contract and that the plaintiff was not a signatory. The plaintiff in the present case was not a party to the contract either as broker or as agent. Counsel for the appellant contended that the signing of the receipt of the contract would amount to evidence that the respondent was a party to the contract. There is no merit and substance in that contention. It would be a strange proposition to hold that any party who receives a contract note on the part of a person becomes a contracting party. The ratio in

Anderson Wright Ltd. v. Maron & Co. does not apply.

9. Counsel for the appellant next contended that the arbitration clause in the present case derived its force from the rules which came into existence u/s 9 of the Securities Contracts (Regulation) Act (Act XLII of 1956). Section 9 of the Securities Contracts (Regulation) Act provides that any recognised stock exchange may, subject to the previous approval of the Central Government, make bye-laws for the regulation and control of contracts. It was therefore contended by counsel for the appellant that the bye-laws had their independent existence and one of the bye-laws provided the arbitration agreement and therefore the arbitration clause drew its vitality from the bye-laws which came into existence u/s 9 of the Securities Contracts (Regulation) Act and did not depend on the alleged contract.

10. Counsel for the respondent contended that section 15 of the Securities Contracts (Regulation) Act provides that no member of recognised stock exchange shall in respect of any securities enter into any contract as a principal with any person other than a member of a recognised stock exchange unless he has secured the consent or authority of such person and discloses in the note that he was acting as a principal. The further provisions in that section are that where the member has secured the consent or authority of such person other wise than in writing he shall secure written confirmation by such person of such consent or authority with-in three days from the date of the contract. Section 23(2) of the Securities Contracts (Regulation) Act provides that any person who enters into any contract in contravention of the provisions contained in section 15 or who fails to comply with the orders of the Central Government u/s 21 or section 22 shall, on conviction, be punishable with fine which may extend to one thousand rupees. In the present case the indisputable facts are first, that the plaintiff was not a member of the Stock Exchange whereas the defendant was, secondly, that no consent was taken. Counsel for the respondent contended that the alleged contract, if any, was ex facie illegal. Reliance was placed by counsel for the respondent on the recent decision of the Supreme Court in (3) Sunderlal and Son Vs. Bharat Handicrafts (P.) Ltd., and the earlier decision of the Supreme Court in (4) Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd. reported in (1963) 3 SCR 183 and in Khardah Company Ltd. Vs. Raymon and Co. (India) Private Ltd., in support of two propositions first that the effect of section 23(2) of the Securities Contracts (Regulation) Act, 1956 is that the alleged contract is invalid and unenforceable and secondly that when a contract which contains an arbitration clause is illegal and unenforceable the arbitrators cannot go into any question of such an illegal contract. Counsel for the appellant relied on the decision of the Supreme Court in (5) Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., and in Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., in support of the proposition that a dispute as to the validity of a contract could be the subject-matter of an agreement of arbitration in the same manner as a dispute relating to a claim made under the contract and where the arbitration agreement was independent the arbitrators could go into

the question of disputes between the parties. The Supreme Court held in Waverley Jute Mills case that where the arbitration was a part of the contract which was illegal there could be no arbitration. In the present case the bye-laws are attracted by reason of the alleged contract. It cannot be said that the existence of the bye-laws and in particular the arbitration clause is independent of the alleged contract. The contract provided reference to the bye-laws as a part and term of the contract. It was said by counsel for the appellant that if the respondent took recourse to the bye-laws to establish the illegality of the contract, it was open to the appellant to take recourse to the arbitration agreement in the bye-laws to up-hold the arbitration clause because the arbitration clause was not an integral part of the contract. As I have already indicated, the bye-laws in their entirety are a part of the alleged contract. The arbitration agreement has no independent existence.

Both the contentions advanced on behalf of the appellant fail.

The appeal is dismissed. Each party will bear its own costs.

S.K. Mukherjea, J.

11. I agree.