
(1952) 04 PAT CK 0004
In the Patna High Court
Case No : A.F.O.O. No. 9 of 1952

Pramada Prasad Mukharjee	Vs	APPELLANT
Sagarmal Agarwala and Others		RESPONDENT

Date of Decision : 30-04-1952

Acts Referred:

Arbitration Act, 1940 — Section 34, 39(1)

Citation : AIR 1952 Patna 352 : (1954) 2 BLJR 135

Hon'ble Judges : Lakshmikanta Jha, C.J.;Ahmad, J

Bench : Division Bench

Advocate : Lal Narayan Sinha, Lala Atul Chandra and A.N. Chatterji, for the Appellant; B.C. De and S.K. Mazumdar, for the Respondent

Final Decision : Dismissed

Judgement

1. The question for decision in this appeal is whether an action commenced by the plaintiffs should, on the application of the defendant, who is the appellant before us, be stayed, pursuant to Section 34 of the Indian Arbitration Act, 1940 (Act X of 1940), in order that the matters in dispute between the parties may be dealt with by the arbitrators under the arbitration agreement. The trial Court has declined to stay the suit. The defendant has, therefore, come up to this Court in appeal.

2. The defendant has a lease-hold interest in a colliery in village Patlaoari in the Jharia Coalfield in the district of Manbhum, fully specified in Schedule A to the plaint. On the 28th of June 1948, there was an agreement between the plaintiff No. 1 (hereinafter referred to as the plaintiff: other plaintiffs being junior members of his family) and the defendant, under which the latter granted what is described as a managing agency of the colliery for a term of seven years to the plaintiff on certain terms and conditions fully set out in the agreement and made over possession of the colliery together with the machinery, building and structures appertaining thereto, to the plaintiff, and the plaintiff came into possession of the colliery on the 29th of June 1948. The agreement contains 25

clauses. Clauses 1 to 24 set out the obligations which the parties undertook towards each other and Clause 25 is the arbitration clause which reads as follows:

"That if any dispute arises between the parties regarding this Agreement and in respect of the Managing Agency the same shall be referred for decision to two Arbitrators one to be nominated by each party and in case of difference between the arbitrators on any point the same shall be referred to an Umpire to be appointed by the Arbitrators before proceeding with the Arbitration which shall be governed by the provisions of the Indian Arbitration Act now in force or of any Act of the Legislature passed in substitution or modification thereof."

It is alleged in the plaint that the plaintiff started working the colliery and in pursuance of the terms of the agreement he paid to the defendant Rs. 20,000/- as "salami". deposited Rs. 30,000/- with him as security and thereafter paid Rs. 8,000/- on the 1st of September 1948, as the price of coal raised from the colliery and a sum of Rs. 6,500/- as the minimum royalty up to July 1948.

3. Sometime in June 1949. disputes arose between the parties. According to the defendant, there were various breaches of the terms and covenants on the part of the plaintiffs and so under Clause 25 of the agreement he nominated an arbitrator and called upon the plaintiff to nominate his own. The plaintiff accordingly nominated his arbitartor and thereafter the parties appeared in the arbitration proceedings and submitted their respective case. On the 31st of July 1949, the arbitrators after hearing the lawyers of the parties framed issues. One of them was:

"Whether the Managing Agency dated 287671948 is vitiated by fraud and misrepresentation of the petitioner P.P. Mukherjee and voidable at the option of the opposite party Sagarmal Agarwal?"

On the 15th of February 1950, the parties were informed by the arbitrators that evidence would commence on the 21st of February 1950. On that date a sitting of the arbitrators was held and the parties filed a joint petition praying for extension of time. The sitting was adjourned to the 13th of March 1930, for evidence on behalf of the present plaintiff and the plaintiff was called upon to come ready with evidence on that date. The plaintiff, however, did not appear or adduce any evidence before the arbitrators on the date fixed and later on he along with other members of his family, instituted the present suit on the 31st of May 1951, in the Court of the Subordinate Judge at Dhanbad for a declaration that the agreement is not a managing agency but a lease and is void for want of registration and is further vitiated by fraud and misrepresentation. The particulars of fraud are set out in paragraphs 4, 6, 10, 12, 15 and 17 of the plaint. The fraud alleged, in substance, is that the defendant represented to the plaintiff that the colliery in dispute would give immense profit if worked, although he knew that the mine did not contain any coal and was closed from 1929 to 1944 because it was not found a profitable business; that the agreement was drafted by the defendant and it was not shown to him nor was he given an

opportunity to get the draft examined by a local expert or to get the coal mine examined by a mining expert. On these allegations, amongst others, the plaintiff asked for the following reliefs :

"(a) That the Court may be pleased to declare that the agreement dated 28/6/1948 between the parties is vitiated on the ground of fraud and misrepresentation and is therefore inoperative and not binding upon the plaintiffs.

" (b) That the Court may be pleased to declare that the agreement dated 28/6/1948 between the parties is a void lease for want of registration and hence is inoperative and not binding upon the plaintiffs.

"(c) That the Court may be pleased to give the plaintiffs a decree for Rs. 55,000/- against the defendant as per account given in Schedule B below.

"(d) Cost of the suit and interest during the pendency of the suit and interest till realisation be decreed to the plaintiffs, against the defendants.

"(e) Any other relief or reliefs to which the plaintiffs may be found entitled under the facts and circumstances of the case may also be awarded to the plaintiffs against the defendant."

4. Before filing a written statement or taking any steps in the suit on the date fixed for his appearance, the defendant applied to stay the suit and to refer it to arbitration u/s 34 of the Indian Arbitration Act. His case as set out in his application u/s 34 of the Arbitration Act read with the affidavit filed on his behalf in connection with it is that the agreement referred to in the plaint is a managing agency and not a lease and as such not void for want of registration nor is it vitiated by any fraud or misrepresentation. In short, his case is that the agreement is "still binding upon the parties." The learned Subordinate Judge has held that the dispute does not fall within the purview of the arbitration clause, and in that view of the matter he has rejected the application for stay of the proceedings.

5. It is clear that the dispute between the parties is as to the factum and validity of the agreement itself. On the allegations of the parties, two questions emerge for decision in the suit: (1) whether the agreement is vitiated by fraud or misrepresentation or both, and (2) whether it is a lease and as such void for want of registration. The point for consideration is whether these questions can go to the domestic tribunal for decision under the arbitration clause. The contention of Mr. Lal Narayan Sinha is that the words of Clause 25 are of sufficient amplitude and confer power on the arbitrators to decide the dispute raised in the suit. This contention, in our view, is not correct. There is nothing in the deed to show that the arbitrators were empowered to decide the question of legality or fraud going to the very root of the contract. The attack is on the contract as a whole and the dispute is whether there is a binding contract between the parties. If the plaintiff's allegation of fraud and misrepresentation is proved or the document, on construction, is held to be a lease, and as such void

for want of registration, the arbitration clause which is only a part of the contract must perish along with the other clauses. It is well-settled that if there be in a suit allegations and counter-allegations of fraud or misrepresentation in bringing a contract into existence, such a suit is independent of the contract, and the dispute must be decided by the Court and not by the domestic tribunal, for the repudiation is of the contract itself, and not of the obligations arising out of the contract. The points in dispute cannot, therefore, go to the arbitrators under the submission clause and the suit cannot, in our view, be stayed u/s 34 of the Indian Arbitration Act, which provides:

"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 any time 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."

6. From the language of the section it is clear that a party can apply to stay a legal proceeding only when the repudiation is of the right or obligation in respect of any matter "agreed to be referred", and not when the very existence of the agreement is repudiated. The present case is fully covered by the decision in "MONRO v. BOGNOR URBAN DISTRICT COUNCIL" (1915) 3 KB 167. In that case the plaintiff, who was a contractor, entered into a written contract with the defendants for the construction of certain sewerage works. The contract contained an arbitration clause in these terms:

"If at any time any question, dispute or difference shall arise between the council or their engineer and the contractor upon or in relation to or in connection with the contract the matter shall be referred to and determined by the engineer..."

7. After the plaintiff had done some amount of work under the contract he refused to complete the work, alleging that he had been induced to enter into the contract by fraudulent misrepresentations made in the specifications as to the nature of the sub-soil of the ground where the work was to be done, and he brought an action to recover damages for the alleged misrepresentation and claimed "a declaration that the said contract is void and that it be rescinded." The defendant took out a summons u/s 4 of the English Arbitration Act, 1889, which corresponds to Section 34 of the Indian Arbitration Act, 1920, to stay the proceedings and refer the dispute to arbitration under the arbitration clause in the contract. The stay was refused and Pickford, L. J., in rejecting the application for stay observed:

"It is, therefore, in no sense an action on the contract at all. Nor do I think that it is an action in relation to or in connection with the contract..... I do not think that it is an action which comes within the arbitration clause at all, and therefore I think there was no power to stay it."

"In *"NARSINGH PRASAD v. DHANRAJ MILLS"* 21 Pat 544 Harries, C.J., held that where an agreement is impeached on the ground of fraud and the dispute is as to the factum or validity of contract, such a dispute does not fall under the arbitration clause and should be decided by the Court.

8. The conflicting authorities bearing on the interpretation of Section 4 of the English Arbitration Act, 1889, came up for discussion by the House of Lords in *"HEYMAN v. DARWINS"* 1942 AC 356. That was a case in which the main question for consideration was the effect of a repudiation of the contract by one of the parties and the acceptance of such repudiation by the other. On a review of the authorities Viscount Simon, L. C., stated the law thus:

"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 had 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 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."

Lord MacMillan in the same case observed:

"If it appears that the dispute is whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate. The greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject-matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end, I can see no reason why the arbitrator should not decide that question. It is clear, too, that the parties to a contract may agree to bring it to an end to all intents and purposes and to treat it as if it had never existed. In such a case, if there be an arbitration clause in

the contract, it perishes with the contract. If the parties substitute a new contract for the contract which they have abrogated the arbitration clause in the abrogated contract cannot be invoked for the determination of questions under the new agreement."

9. The decision of the House of Lords was considered by a Bench of this Court in "N.K. JAIN v. S.B. SUGAR MILLS, LTD." 27 Pat 930, wherein the defendant was sued as a trespasser. It was held in that case that where a suit is independent of the contract, such a suit cannot be stayed u/s 34 of the Act, and Das, J., observed :

"If the very fact or existence of the contract creating the tribunal is denied, it is obvious that the very basis of the jurisdiction of the domestic tribunal is challenged."

In our view, therefore, the defendant's application for stay of the suit is not maintainable u/s 34 of the Arbitration Act.

10. The next contention of Mr. Lal Narain Sinha is that the words of the arbitration clause are severable and are so wide that it can be said that the parties intended that the arbitrators may decide any dispute as to whether the contract is void or voidable on the ground of fraud or misrepresentation, and in support of this contention he relied upon an observation of Lord Wright in "HEY-MAN'S CASE" 1942 A C 356, which reads thus:

"I see no objection to a submission of question whether there ever was a contract at all, or whether if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question."

We do not think that the words of Clause 25 of the agreement, which we have already quoted, warrant this extreme contention. In order to oust the jurisdiction of the Court the words conferring jurisdiction on the arbitrators must be clear, precise and unambiguous, for, as a rule, the arbitrator cannot clothe himself with jurisdiction. The opening words of paragraph 25, relied upon by Mr. Lal Narain Sinha, are:

"That if any dispute arises between the parties regarding this agreement and in respect of the Managing Agency....."

These words, though wide, are not of such amplitude that it can be said that the jurisdiction of the Court was ousted and the arbitrators were empowered to decide a dispute going to the very root of the contract, including the submission clause. These words clearly indicate that the parties intended that the arbitrators should decide questions arising on the basis of a valid and subsisting contract. Reading the arbitration clause as a whole, it cannot be said that it was the intention of the parties that the arbitrators should decide, under the arbitration clause, a dispute relating to the validity of the contract challenged on the ground of fraud or misrepresentation or any other ground, legal or equitable. Therefore, even if it be assumed that the arbitration clause is severable, it cannot be said

that the parties intended that the arbitrators should decide the dispute regarding fraud or the legality of the contract.

We are, however, extremely doubtful whether when the whole document is challenged, the submission clause, which is ancillary to the main contract, can stand and give jurisdiction to the arbitrators to decide the question of fraud and the like. In making this observation we are not unmindful of the weighty observation of Lord Wright in "HEYMAN'S CASE" 1942 A C 356 at p. 385, relied upon by Mr. Lal Narain Sinha, which we have already quoted. Therefore, this argument of Mr. Lal Narain Sinha must also fail.

11. Mr. Lal Narain Sinha has further contended that even assuming that there is an attack on the validity of the contract on the ground of fraud, mere allegation of fraud in the plaint is not sufficient to defeat an application u/s 34 of the Arbitration Act. His contention is that the Court must be satisfied that a "prima facie" case has been made out before refusing stay, and in support of this contention he relies upon the following observation of Harries, C. J., in "NARSINGH PRASAD BOOBNA V. DHANRAJ MILLS" 21 Pat 544 at p. 569:

"If the party resisting an application to stay a civil suit is the party making a charge of fraud, different considerations arise as the person charged does not desire trial by a Civil Court. In such a case the Court will stay the suit unless a prima facie case of fraud is made out."

This contention, in our view, is not sound. When the suit is independent of the contract, the allegation of fraud in the plaint is enough to oust the jurisdiction of the arbitrators and stay should be refused. Even if the contract be admitted and the obligation arising on the breach of the contract be repudiated on the ground of fraud, stay should be refused if a "prima facie" case of fraud is made out. This was the view of Harries, C. J., in "NARSINGH'S CASE", and with that view we respectfully agree; because fraud is a serious charge and the investigation of fraud must be made by a Court and not by a lay arbitrator. The argument of Mr P. Rule Das, appearing for the appellant, in "NARSINGH PRASAD BOOBNA'S CASE" 21 Pat 544, to quote the language of the learned Chief Justice himself was in these words:

"Even if this was not a case where the whole contract was impeached and, therefore, not within the principles laid down in "KITTS v. MOORE" (1895) 1 Q B 253, and other cases already cited in this judgment, yet the proceedings should not be stayed because serious allegations of fraud were involved in the dispute. He urged that where a prima facie case of fraud was made out a civil suit should not be stayed."

This argument was on the hypothesis that the whole contract was not impeached. Dealing with this argument, Harries, C.J., held (at page 570) :

"A prima facie case of fraud has been established and, that being so, the allegations of fraud should, in my view, be investigated by a Civil Court which is

a far more competent tribunal to decide such questions than a lay arbitrator."

While dealing with the question of stay when there is repudiation of the contract itself and not of the obligations arising thereunder, the learned Chief Justice observed (at page 553) :

"It is clear that if the contract containing the arbitration clause is impeached then the suit should not be stayed and the matter should be decided by a Civil Court."

In "JOHURMULL PARASRAM v. LOUIS DREY-PUS & CO" 52 Cal W N 137 at p. 139, Harries, C. J., held that if the Court comes to a conclusion that a suit as pleaded is a suit on the contract or arising out of the contract, then the suit should be stayed. But on the other hand if the suit as pleaded is a suit independent of the contract, then the Court has no power to stay the suit though it is satisfied that the frame, of the suit is merely a means of avoiding the consequences of alleging the true nature of the claim. Regarding his own observation in "NARSINGH PRASAD BOOBNA'S CASE" 21 Pat 544, the learned Chief Justice said:

"The case of "NARSINGH PRASAD v. DHANRAJ MILLS", was a case in which a suit had been brought on the contract and the question arose whether or not it was a fit case to be stayed u/s 34 of the Arbitration Act. In the present case the point to be decided is entirely different. Here the suit is based on causes of action wholly apart from the contract and therefore entirely different considerations apply. That being so, this Patna Bench decision based upon English cases has no relevance at all in the recent dispute."

Therefore, Mr. Lal Narain Sinha is not right in his contention that a prima facie case of fraud must be made out before an application for stay can be refused.

12. The last contention of Mr. Lal Narain Sinha is that, in view of the fact that the plaintiff nominated his own arbitrator and attended the arbitration proceedings, he is estopped from challenging the contract and therefore the suit should be stayed. This argument is equally fallacious. The question of estoppel is not a question arising out of the contract; it is independent of the contract. The arbitrators are, therefore, not competent to decide the question of estoppel. The question of estoppel, if any, has got to be decided in the suit if the defendant raises this question in his defence. Moreover, the question of stay has to be decided on the plaint as it stands, for what has to be considered for the purpose of stay is the nature of the suit as pleaded. Matters like estoppel or ratification can be decided in the suit and the suit itself may be dismissed by the Court on any of these grounds; but they are not grounds upon which the Court can stay a suit under Section; 34 of the Arbitration Act. In "MONRO v. BOGNOR URBAN DISTRICT COUNCIL" (1915) 3 K B 167, the plaintiff wrote a letter to the defendant ratifying the contract which was alleged to have been vitiated by fraud. It was contended, therefore, that the suit should be stayed and the matter should go to arbitration. In repelling this argument Pickford. L. J., (at page 171) observed :

"That seems to me to be a matter which, if it be correct, is a matter to be decided in the action. It may show that the action cannot be maintained."

Therefore, this contention must also fail.

13. It may be observed that this appeal is directed against an order passed by the learned Subordinate Judge in the exercise of his discretionary power u/s 34 of the Arbitration Act. The learned Subordinate Judge on consideration of all the matters placed before him has declined to stay the suit, and in so doing he has not followed any wrong principle of law. His discretion should not, therefore, be interfered with by us sitting in appeal.

14. In the result, therefore, the appeal must fail and is dismissed with costs.