
(1979) 02 MAD CK 0028
In the Madras High Court
Case No : Appeal No. 960 of 1974

R. Kamalam

APPELLANT

Vs

The State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 12-02-1979

Acts Referred:

Arbitration Act, 1940 — Section 34
Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 1980 Mad 86 : (1979) 92 LW 606

Hon'ble Judges : Sengottuvelan, J;Ramanujam, J

Bench : Division Bench

Judgement

Ramanujam, J.—The plaintiff in O. S. No. 112 of 1970 on the file of the Sub-Court, Padmanabhapuram, is the appellant. The plaintiff

undertook the construction" work of Kurunthacode Panchayat Union office building for an estimated cost of Rs. 43,000/- and odd on 15-1-1965.

Since the Divisional Engineer, Highways, Nagercoil, the second defendant, was not satisfied with the progress of the work, the contract was

cancelled by him and the plaintiff was asked not to proceed with the work. On such cancellation certain articles, which the plaintiff had stored at

the work spot, were alleged to have been removed by the department on 3-9-1967. Subsequently, on the basis of certain revised estimate A,

which seem to have been accepted by the department, the plaintiff again continued the construction work and the department also extended the

time limit for completion of the work by the plaintiff Thereafter, on 21-4-1969, the 2nd defendant finally terminated the contract awarded to the

plaintiff on the ground that the plaintiff had not completed the work even within the time extended. The plaintiff has therefore filed the present suit

substantially for two relief 3 (1) for payment of the value of the work done up to the date of termination of the contract on a quantum merit basis

and (2) for value of the articles said to have been unauthorized removed by the department on 3-9-1967.

2. The said suit was resisted by the defendants, the State of Tamil Nadu and the Divisional Engineer, Highways, Nagercoil who were impleaded

as defendants I and 2 respectively. Their defense to the suit was that the cancellation of the contract under Ex. B. 165. On 21-4-1969 was justified,

as the plaintiff has not chosen to complete the work within the extended period. They did not admit the number or the value of the articles

removed but state that the articles were removed after giving an inventory to the plaintiff. Apart from this defence the defendants also took up two

preliminary objections, one is that the agreement entered into by the plaintiff attracts cl. 73 of M. D. S. S. which is marked as Ex. B. 82 and

therefore, the dispute between the parties has to be settled only by arbitration and not by a suit. The second preliminary objection is that suit has

not been brought by a notice u/s 80 of Civil P. C. and therefore, the suit has to be dismissed in limine for want of that notice.

3. The Court below had held that since the contract between the Parties contains an arbitration clause, the matter cannot be agitated in the suit and

therefore, the suit is not maintainable. On the question as to whether the suit can be maintained without notice under Sec. 80 C. P. A, the trial Court

has held that the suit cannot be maintained, the plaintiff not having given a notice u/s 80 in relation to the cancellation of the contract by the 2nd

defendant under Ex. B. 165. Apart from challenging the decision of the Court below on merits, the learned counsel for the appellant has also

questioned the findings rendered by the Court below on the two preliminary objections referred to above. Before we proceed to deal with the

appellant's claim on merits, it is necessary to first dispose of the two preliminary objections which have been upheld by the trial Court.

4. According to the learned counsel for the appellant, the lower Court is in error in taking the view that wherever there is a clause for arbitration in

a contract entered between two parties, the dispute arising out of the contract can not be agitated in a civil court and that is contrary not only to the

provisions of the Arbitration Act but also against certain decisions of the Supreme Court. Learned Counsel submits that the Arbitration Act has not

taken away the jurisdiction of the civil , court and unless there is an exclaim of civil court's Jurisdiction expressly or by necessary intendment the civil court's jurisdiction to entertain a dispute arising out of a contract cannot be said to be taken away. In the circum stances of this, case, we are inclined to agree with the learned counsel for the, appellant. There is no dispute that the contract entered into by this plaintiff with the 2nd defendant contains an arbitration clause by making a reference to of the Cl. 73 of the preliminary specification of M. D. S. S. It is true that the said arbitration clause is to take in any dispute which may arise out of the contract. In view of that the plaintiff should have clearly gone be fore the arbitration as contemplated by that provision. However, in this case straightway the plaintiff filed the suit questioning the termination notice and seeking to recover the cost of the work done by him in pursuance of the of the contract. In view of this arbitration clause. which is quite comprehensive, the defendants should have filed an application under S. 34 of the Arbitration Act and obtained stay of the trial of the suit. But in this case, the defendants did not choose to file an, application for stay of the suit and the result was the Court below had to take up the suit for trial At the stage of the trial, the defendants had taken up the plea that since the contract contained an arbitration clause the suit cannot be maintained in a civil court and that objected has been upheld by the Court below.

5. It is well established that Sec. 34 of the Arbitration Act gives discretion to the Court either to stay the suit or not, in cases where there is a binding arbitration agreement between the parties. That pre-supposes that in a case where the Court does not exercise the discretion to stay, of the suit, the suit before the civil court can proceed. Apart from this, there is no provision in the Arbitration Act which excludes the jurisdiction of the Civil Court either expressly or necessary implication. As a matter of fact, dealing with a similar situation, the Supreme Court had observed in The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another, thus:

The legal position with respect to the scope and meaning of Section 34 of the Arbitration Act admits of little doubt, the language of this section being quite plain. When a party to an arbitration agreement commences any legal proceedings against any other party to the said agreement with

respect to the subject matter thereof, then the other party is entitled to ask for such proceedings to be stayed so as to enable the arbitration

agreement to be carried out. It is, however, to be clearly understood that the mere existence of an arbitration clause in an agreement does not by

itself operate as a bar to a suit in the Court. It does not by itself impose any obligation on the Court to stay the suit or to give any opportunity to the

defendant to consider the question of enforcing the arbitration agreement. The right to institute a suit in some Court is conferred on a person having

a grievance of a civil nature under the general law. It is a fundamental principle of law that where there is a right there is a remedy. Section 9 of

the CPC confers this general right of suit on an aggrieved person except where the cognizance of the suit is barred either expressly or impliedly. A

party seeking to avail this general right of suit has to discharge the onus of establishing his right to do so and the law curtailing such general right

has to be strictly complied with. To enable a defendant to obtain an order staying the suit, apart from other conditions mentioned in Section 34 of

the Arbitration Act, he is required to present his application praying for stay before filing his written statement or taking any other step in the suit

proceedings. In the present case the written statement was "indisputably not filed before the application for stay was presented.

Therefore, so long as the defendants have not chosen to file an application for stay of the suit under Sec. 34 of the Arbitration Act and obtain a

stay in that regard, the Civil Court is entitled to proceed to deal with the matters at issue in the suit notwithstanding the existence of an arbitration

clause in the contract. We therefore do not agree with the view expressed by the lower Court that the suit has to fail in view of the existence of

the arbitration clause, and the plaintiff not having resorted to the same as per the Arbitration Act.

6. Coming to the next preliminary objection based on Section 80 Civil P. C., we are of the view that the lower Court is right in its view that the

present suit cannot be maintained for want of notice u/s 80, Civil P. C. On this question, the learned counsel for the appellant submits before us

that the notices had been issued by the plaintiff specifically u/s 80 of the CPC prior to the suit and they are Exs. A. 44 to A. 46. According to the

learned counsel though those notices had been issued with reference to an earlier termination of the contract Ex B. 29 dated 29-8-1967, the same

can be relied upon by the plaintiff for sustaining the present suit though another order of termination Ex. B. 165 has come into existence subsequent to the issue of the said three notices. We have perused the said notices "Exs. A. 44 to A. 46 and found that those notices are based on the cause of action arising out of the termination of "the contract under Ex. B. 22 dated 29-8-1967. If nothing has occurred subsequent to the said termination of contract under Ex. B. 29 dated 29-8-1967, the notices u/s 80 Civil P. C. covered by Exs. A. 44 to A. 46 could not have been taken sufficient for seeking relief based on the said termination of the contract. But here the entire plaint proceeds on the basis of the later termination of the contract under Ex. B. 165 dated 21-4-1969 and the relief claimed also is based on the revised estimate on the basis of which work was done by the plaintiff subsequent to Ex. B. 29 dated 29-8-1967. Therefore, the relief claimed in this suit is not based on the termination of the contract Ex. B. 29 dated 29-8-1967. It is significant to note that subsequent to the Commission of Inquiry and earlier termination of the contract under Respondents Ex. B. 29 the appellant has undertaken in revised rates agreed to by the department within the extended time. Therefore, the earlier termination of the contract in Ex. D. 29 cannot be taken to be, the cause of action for the present suit. The cause of action for the present suit is based on the termination of the contract under Ex. B. 165 and the relief claimed also is not based on the original estimates but on the revised estimates agreed to by the department after the earlier termination of the contract. We are clearly satisfied, on a perusal of the plaint, that the plaintiff's cause of action for the suit is only subsequent termination of the contract under Ex. B. 165 and not the termination of the contract under Ex. B. 29. The earlier notices Exs. A. 44 to A. 46 cannot be of any use to the appellant in respect of the relief sought by her based on the ultimate cancellation of the contract under Ex. B. 165. It may be in respect of the recovery of the value of the articles removed which was shown as the cause of action in the earlier notices issued under Exs. A. 44 to A. 46, the suit may be sustainable. As regards the substantial relief claimed in the plaint, there has been no notice u/s 80 Civil P. C. and therefore, the substantial claim in the suit based on the termination of the contract under Ex. B. 165 cannot be sustained. We are in agreement with the view

expressed by the lower Court on this issue regarding the necessity for a notice under S. 80 C, P. C.

7. Since the suit, as framed, cannot be entertained in "the absence of a notice u/s 80 Civil P. C . we are dismissing the suit without giving any

findings on the merits of the appellant's claim. The appeal is, therefore, allowed and the suit is dismissed for -want of notice u/s 80 C. P. C. The

plaintiff appellant is even now at liberty to issue notice under Sec. 80 Civil P. C. and file a fresh suit, if possible, by invoking Section 14 of the

Limitation Act. No costs.

8. Appeal allowed.