
(1973) 08 AHC CK 0027
In the Allahabad High Court
Case No : F.A.F.O. No. 192 of 1969

Ram Baboo Lal

APPELLANT

Vs

Harish Chandra Burman and Others

RESPONDENT

Date of Decision : 22-08-1973

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1974 All 433

Hon'ble Judges : K.C. Agarwal, J;K.B. Asthana, J

Bench : Division Bench

Advocate : Ashoke Gupta and Barman, for the Appellant; Deokinandan, for the Respondent

Final Decision : Dismissed

Judgement

Asthana, J.—The defendant-appellant was lessee of a Cotton Spinning Mill. The lease was reduced into a registered document and its term was five years. There is no dispute that the term of the lease expired on 28-4-1966. The defendant did not hand over possession of the mills in the same shape and form as was given to him on the expiry of the lease and continued to remain in possession. The plaintiff, who was the lessor, is said to have served upon the defendant, the lessee, a notice invoking the arbitration clause in the deed of lease and asking the defendant to appoint his arbitrator. It is said that the defendant replied to the notice intimating his choice of an arbitrator. It transpired that nothing was referred to the arbitrators. The plaintiff then commenced a suit for eviction of the defendant from the mills premises, for the possession thereof in the same shape and form as it was let out, and for recovery of mesne profits amounting to over a lakh of rupees. When the summons of the suit was served upon the defendant he filed an application u/s 34 of the Arbitration Act, 1940 praying for the stay of proceedings of the suit. This application was opposed by the plaintiff. The learned Judge trying the suit rejected the application of the defendant for stay of proceedings mainly on the ground that the subject-matter of the suit was not

such as was agreed upon to be referred to arbitration under the arbitration clause of the lease deed. The defendant has now come up in appeal from this order of rejection of his application for stay of proceedings in the suit u/s 34 of the Arbitration Act.

2. We have heard Sri Ashoke Gupta for the defendant-appellant. Learned counsel urged that the Court below is in error in holding that the subject-matter of dispute involved in the suit did not arise out of the contract of lease and that it was not otherwise a case in which the defendant was entitled to invoke the arbitration clause. The learned counsel further suggested that the conduct of the plaintiff showed that the arbitration clause should be invoked as he served upon the defendant notice for nominating an arbitrator and referring the dispute to arbitration under the arbitration clause in the contract of lease. It was also emphatically urged by the learned counsel that the Court below fell into a grave error in observing that the defendant not having filed his written statement it could not be known as to what dispute actually he was raising in the suit, therefore the Court was not in a position to judge the validity of the claim made by the defendant for stay of proceedings, u/s 34 of the Arbitration Act. It was submitted that as Section 34 of the Arbitration Act itself provides that the defendant has to make an application under that section before filing a written statement, therefore, non-filing of the written statement could not be used as ground for rejecting of the defendant's application for stay of proceedings.

3. We have given our due consideration to the submissions of learned counsel for defendant-appellant and we find that no case has been made out for interfering with the order of the Court below. The suit which was instituted by the plaintiff is an ordinary suit filed by a landlord against the tenant after the expiry of the lease, and for recovery of mesne profits. The right of the plaintiff for delivery of possession of the demised premises arises independently of the contract of lease. So any dispute with regard to that right cannot be said to arise out of the contract of lease unless the defendant pleaded that the lease had not expired and the suit was premature. Likewise the right to recover mesne profits will not arise out of the contract of lease as it is an independent right which accrues to the plaintiff on account of illegal or wrong retention of possession of the mills. The suit is not for recovery of rent. We think that the defendant was under a duty to place before the Court all the grounds on which he wanted the invocation of Section 34 of the Arbitration Act, and to establish that the subject-matter of dispute arising in the suit was one which was agreed upon to be referred to arbitration. We think that it is in that context that the observations of the learned Judge of the Court below in regard to the non-filing of the written statement of the defendant are to be read. What the Court below meant was that the defendant has not placed any facts or information before the Court as to the nature of the dispute which his defence would disclose against the plaintiff's claim for eviction and recovery of mesne profits. The defendant not having done so, he is to be blamed for it. Even before us the learned counsel for the defendant-appellant was not able to disclose as to what the real nature of the

dispute would be on the pleadings of the defendant. Certainly the law requires that an application u/s 34 of the Arbitration Act has to be filed before the defendant files his written statement, but that does not absolve the defendant from his duty to bring material before the Court to enable it to record an objective finding on the question whether the subject-matter of dispute before it was one which was agreed upon under the contract to be referred to arbitration. There being complete absence of any such material before the Court it was certainly justified in throwing out the defendant on that score. We have already observed above that the subject-matter of dispute which arises in the suit is wholly extraneous to the contract of lease which expired on 28-4-1966.

4. Sri Ashoke Gupta referred us to certain observations made by the learned Judges of the Supreme Court in the case Union of India (UOI) Vs. Salween Timber Construction (India) and Others, . The learned Judges in that case observed that-

"The test for determining whether a dispute is one "arising out of the contract" or "in connection with the contract" is whether recourse to the contract by which both the parties are bound is necessary for the purpose of determining whether the claim of the party is justified or otherwise. If it is necessary to take recourse to the terms of the contract for the purpose of deciding the matter in dispute, it must be held that the matter is within the scope of the arbitration clause and the arbitrators have jurisdiction to decide that dispute."

5. Clause 22 of the contract of lease in the instant case shows that-

"all proceedings regarding the meaning, interpretation or effect of the various terms and conditions contained herein and all other matters arising out of or having any bearing on this agreement shall be settled by means of arbitration

6. It was strenuously urged by the learned, counsel for the defendant-appellant that the arbitration clause in the instant case quoted above is wide enough to cover the dispute which will arise in the suit, as the right for eviction and recovery of the mesne profits would have a bearing on the terms of the contract of lease and recourse will have to be taken to the terms of the contract for the purpose of deciding the matter in dispute. We fail to appreciate this line of argument. The right to evict the defendant and obtaining possession of the mills from him is not based on the contract of lease and by no stretch of imagination it can be said that recourse will have to be taken to the terms of the contract for determining whether the, plaintiff has that right when it is not disputed that the lease expired on 28-4-1966, and the defendant had not exercised his option for further renewal of the lease in accordance with the terms of the contract of lease.

7. Coming to the claim of the plaintiff for recovery of mesne profits at the rates pleaded by him in the plaint, it will appear that under the law the mesne profits do not represent rent. So the suit is not for recovery of rent. It may be that to claim mesne profits pleaded in the plaint the plaintiff may refer to the lease for showing the intention on the part of the parties that after five years¹ if the

defendant retained possession he will have to pay certain amount every month. Likewise, the defendant may refer to other clauses in the contract of lease, to show that the intention on the part of the parties was to claim a lesser amount. But for the determination of the right of the plaintiff to recover mesne profit the terms of the lease will have no bearing. At best, the document of lease may be referred to by the parties as collateral evidence for determination of the figure or the amount. When it is said by the Supreme Court in the case cited that in deciding the dispute recourse has to be taken to the terms of the lease, or when it is said that in deciding the dispute the lease will have a bearing, it always means that when recourse has to be taken for determining a right which is in dispute, or without referring to the lease that right cannot be determined, then alone it can be said that the arbitration clause in the lease will come into play. Here we find that no right claimed by the plaintiff in the suit, that is, for delivery of possession on the expiry of the lease and for the recovery of mesne profits, requires any reference to the terms of the lease for its determination by the Court. In rejecting the application of the defendant u/s 34 of the Arbitration Act the Court below has not in anyway gone against the law laid down by the Supreme Court in Union of India (UOI) Vs. Salween Timber Construction (India) and Others, . We think that the decision of the Court below is in accordance with the law laid down by the Supreme Court.

8. We agree with the Court below that the mere fact of the plaintiff having given notice to the defendant for appointment of an arbitrator in accordance with the arbitration clause would not militate against the decision of the Court refusing to stay proceedings in the suit in exercise of its jurisdiction u/s 34 of the Arbitration Act. It was conceded by Sri Gupta for the defendant-appellant that the said fact cannot be used as estoppel in the case. This circumstance has no material bearing.

9. We also do not otherwise think that it was a fit case which ought to have been stayed u/s 34 of the Arbitration Act. Assuming that the arbitrator had arbitrated upon the dispute, he would have certainly declared the plaintiff entitled to delivery of possession and also for recovery of some amount of mesne profits. The matter would have again come before the Court for passing of a decree which could be executed by a Court of law. Since the matter has become sufficiently old and a reference to arbitration, if at all in law the matter could be referred, would further delay the matter. In this view also the rejection of the application of the defendant will be amply justified.

10. For the reasons given above we dismiss this appeal with costs.