

(1961) 04 CAL CK 0005
In the Calcutta High Court
Case No : Suit No. 1735 of 1960

Satyendra Nath Mitra

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 24-04-1961

Acts Referred:

Arbitration Act, 1940 — Section 34
Contract Act, 1872 — Section 230

Citation : AIR 1962 Cal 177

Hon'ble Judges : P.C. Mallick, J

Bench : Single Bench

Advocate : D.K. Sen, for the Appellant; A.M. Paul, for the Respondent

Judgement

P.C. Mallick, J.—This is an application for stay of a suit u/s 34 of the Indian Arbitration Act. The suit sought to be stayed has been instituted by the Respondent against the Union of India and one. Uma Sankar, General Manager of Calcutta Telephones at the material time. The cause of action against the Union of India as pleaded in the plaint is for breach of contract in wrongfully disconnecting the telephone service for a certain period of time, to wit, between November 15, 1959 to December 3, 1959. The plaintiff respondent is a solicitor by profession, and by reason of the stoppage of the telephone service claims to have suffered damages assessed at Rs. 10,000/-. The cause of action against the defendant Uma Sankar as pleaded in the plaint is also for damages. It is alleged, that by reason of the wrongful conduct and/Or negligence of Uma Sankar the General Manager, first, in disconnecting the telephone line and, second in not restoring connection till December 3, 1959, the respondent has been lowered in the estimation of the public generally and his reputation as a solicitor has been injured and he has been discredited to his clients, friends and relatives. Damages assessed at Rs. 25,000/- has been claimed against the defendant Uma Sankar. Mr. A. M. Pal, the learned counsel appearing for the respondent, contended that his client's claim for damages as made in the plaint as against Uma Sankar is a claim in tort, though it arises out of the contract between the Union of India and

the respondent. The claim against Uma Sankar ft made in the alternative in case it is held that the claim against the Union of India cannot be sustained in law. The respondent clearly had in view Clause 3 of the terms and conditions of the contract to he notice later.

2 The respondent is a subscriber of the telephone No. 55-4139 and had executed a telephone hiring contract in respect to that telephone.. The contract is signed on behalf of the President of the Indian Union by one S. N. Chaudhury and not the defendant Uma Sankar. The terms and conditions of the contract are set out in the schedule annexed to the contract. Reference may be made to certain terms hereunder stated :

"3. The Government shall not be liable in damages for any interruption or failure of service, but shall use every reasonable endeavour to repair defects as speedily as possible after receipt of notice in writing."

"13. If the rental or call charges or any fee, charge, expense or damage payable by the subscriber under this contract shall be due and not paid or if the Subscriber shall have failed to make a deposit when called upon to do so, the Government may without notice and without prejudice to the other clauses and conditions of this contract disconnect the Exchange line and may decline to make any connection involving an additional charge without payment of such."

"17. If any depute shall arise touching the meaning or the effect of this contract or in any way relating thereto, the decision of which is not expressly provided herein or in the conditions, the same shall be referred for the sole arbitration of the Director General of Posts and Telegraphs and his decision thereon shall be final and binding on the parties and the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof and the rules made thereunder from time to time shall apply to such arbitration"

It is contended that the disputes in suit are covered by the arbitration clause and the other conditions laid down in Section 34 of the Indian Arbitration Act have been satisfied in the instant case.

3. I will first take up the case as against the defendant Uma Sankar. It is contended by Mr. D. K. Sen learned counsel appearing in support of the application that the claim against Uma Sankar is a claim for damages for breach of contract. In any view of the matter it is a claim arising out of the contract and therefore covered by the arbitration clause which is in so wide terms as to cover all disputes relating to the contract. Mr. A. M. Pal, learned counsel for the respondent contended, that even though the claim arises out of a contract, it is a claim in tort and, as such, is outside the arbitration clause. The disputes intended to be covered by the arbitration clause are contractual disputes, that is, disputes having reference to its performance Or breach. The arbitration clause was never intended to cover a claim in tort which is independent of the contract though arising out of it. In my judgment, it is not necessary for me to decide whether the claim made is "ex contractu" or "ex delicto"" Or whether the claim if it is "ex

delicto"" is covered by the arbitration clause. In order that the suit may be stayed u/s 34 of the Arbitration Act, the first point to be considered is whether Uma Sankar is a party to the contract or a person claiming under a party to the contract, Admittedly, Uma Sankar is not a party to the contract. He has not even signed the contract on behalf of the President. He is a mere employee of the Union of India and in my judgment, he cannot be said to be a person claiming under the Union of India. The expression "claiming under a party" in Section 34 means the heirs or legal representatives or assigns. It may perhaps include an agent entering into the contract who can be sued on the contract u/s 230 of the Indian Contract Act. In my judgment, a mere employee of a contracting party to an arbitration agreement cannot be said to be a person "claiming under" the party to the arbitration agreement. In that view of the matter it must be held that this Court has no jurisdiction to stay the Suit as against Uma Sankar. It is contended by Mr. D. K. Sen that the claim against Uma Sankar is a frivolous claim which cannot be sustained in law. In an application for stay u/s 34 the Court cannot and should not decide or express any opinion on the merits of the claim made in the plaint as has been laid down by the Supreme Court in the case of A.M. Mair and Co. Vs. Gordhandass Sagarmull, . If the defendant Uma Sankar feels that there is no case disclosed against him in the plaint, the proper thing for him is to make an application to take the plaint off the file. In that proceeding the question whether the plaintiff has made any case in the plaint can be gone into. In my judgment the question cannot be gone into in an application u/s 34 of the Indian Arbitration Act. It is further contended by Mr. Sen that this claim against Uma Sankar has been made in the instant suit to prevent a stay u/s 34. I do not however think that the plaintiff has made the alternative case with the object imputed by Mr. Sen. The plaintiff had reason to think that his claim against the Union for damages may not be sustained in law having regard to Clause 3 of the Conditions of Contract He is therefore seeking to make a claim against the General Manager. Further it is clear that there is a joinder of defendants and causes of action and in fact the suit instituted is really two suits rolled into one. One suit may very well be stayed while the other may proceed. It cannot therefore be said that the object of impleading Uma Sankar and pleading a frivolous cause of action against him is to prevent the stay order against the defendant Union of India, Reliance is placed on the decision of S. R. Das J. in the case of Khusiram v. Hanutmal 53 Cal WN 505. I do not think, however, that Khusiram's case has any bearing on the point in controversy when once it is held that the person against whom a stay is prayed is neither a party to the arbitration agreement nor claiming under any of the party to such agreement. For reasons given above the suit as against Uma Sankar cannot be stayed. I am asked by Mr. Pal to note this fact that Uma Sankar does not ask the suit to be stayed as against him. The applicant for stay is Union of India only and not Uma Sankar.

4. Coming now to the suit as against the Union of India. It is conceded by Mr. Pal that the claim is for breach of contract and the dispute is covered by the

arbitration clause. Mr. Pal however contends that even though the dispute is covered by the arbitration clause the Court has a discretion in the matter and in the exercise of that discretion I should not grant a stay. The fact relied on by Mr. Pal is that even though the notice of suit was served on the Government as far back as December 24, 1959, the Government did not take any steps to refer the dispute to arbitration until November 29, 1960 when the plaintiff was compelled to institute this suit. This fact bow-ever has no relevance in the exercise of the Court's discretion in the matter of stay u/s 34. Law does riot impose an obligation on a party to refer the dispute to arbitration. All that is necessary is that after the suit is instituted he must be ready and willing to go to arbitration in order that he may apply for stay of the suit. Application for stay has to be made after the institution of the suit and the Statute gives the defendant the right to make an application for stay before taking any step in the proceeding. In. the instant case no step has been taken except filing the Warrant of Attorney. Filing of a warrant of Attorney is not in law taking a step in the proceeding. It is next argued that the arbitrator named is the Director General, Posts and Telegraphs who is an employee of the defendant Union. The Director General as such employee of the Union is bound to be biased in favour of the Union. I do not agree that a Government official acting in a judicial capacity will be biased in favour of the Government merely because he is a Government employee. I have seen in my experience awards having been made against the Government by Government employees in a number of arbitrations between the Government and citizens in which the Government servant was an arbitrator. Mr. Sen cited a decision of the Bombay High Court in the Case of The Central Government of India Vs. Chhotalal Chhaganlal Modi, in which the point raised by Mr. Pal was taken. It was held that the Director General, Posts and Telegraphs cannot be said to be biased but can very well be relied on to exercise his independent judgment and decide the dispute fairly and impartially. With, that view of the Bombay High Court I respectfully agree.

5. A ground is taken in the affidavit-in-opposition that the arbitration agreement is hard and unconscionable and should be ignored. This point is taken in Clause (g) paragraph 4 of the affidavit which reads as follows :

"(g) In any event, the said arbitration clause is harsh and unconscionable upon. the deponent in as much as the deponent was in need of the telephone and the petitioner having the monopoly of granting the telephone the petitioner was subjected to all sorts of conditions in the agreement which the petitioner dictated and the scope of preference to the arbitration to the Director General of Posts and Telegraphs is an unilateral advantage sought to be gained in the agreement which is bound to result on hardship to the deponent and as such that clause should be ignored by this Hon"ble Court."

Though not stated in clear terms, the point made is that the agreement is unenforceable in law. In the Bombay Case The Central Government of India Vs. Chhotalal Chhaganlal Modi, cited above the point was taken that the agreement

was void and unenforceable on grounds substantially the same as stated in paragraph (g) above. The Bombay High Court repelled that argument. With respect I agree with the decision of the Bombay High Court on that point. I cannot however refrain from making this observation that to make the Director General of Posts and Telegraphs having his seat in Delhi as the sole and only arbitrator in all disputes in relation to telephone service throughout India from Kashmir to Cape Comorin is to make it impossible for anybody to seek relief by taking recourse to this machinery. The Union Government has a monopoly in the matter and to get telephone connection the citizen has to sign the contract with the arbitration clause which makes the Director General, Posts and Telegraphs as the only arbitrator of all disputes wherever it occurs. Had the clause empowered the Director General, Posts and Telegraphs to nominate an arbitrator, the machinery would have suited the convenience of the party having grievance to get relief. Unfortunately, the clause does not empower the Director General, Posts and Telegraphs to nominate an arbitrator. The arbitration clause in some of the other Government contracts provide for arbitration to be made either by the Government officer or his nominee. I do not however consider the absence of such a provision makes the clause void and unenforceable. This fact might have been urged as a ground for not exercising discretion" in granting stay. No such point has however been urged in argument before me and I am not called upon to consider in this case whether on that ground discretion should be exercised against stay. In an appropriate case, if the point is taken, the point will have to be fully considered.

6. In the instant case the conditions laid down in Section 34 have been fulfilled and no acceptable argument has been advanced as to why the disputes should not be referred to arbitration. The petitioner is therefore entitled to an order for stay of the suit as against the defendant Union of India and I make an order accordingly. There will be no stay of the suit as against the other defendant. The other defendant is directed to file his written statement within three months from this date. There will be no order as to costs.