
(1973) 07 AP CK 0007
In the Andhra Pradesh High Court
Case No : A.A.O. 574 of 1972

Srivenkateswara Constructions and Others	APPELLANT
Vs	
The Union of India	RESPONDENT

Date of Decision : 17-07-1973

Acts Referred:

Arbitration Act, 1940 — Section 30, 34

Citation : AIR 1974 AP 278

Hon'ble Judges : Lakshmaiah, J; Krishna Rao, J

Bench : Division Bench

Advocate : N. Bapiraju and N.V. Suryanarayana Murty, for the Appellant; A. Raghuveer for Railways, for the Respondent

Judgement

Krishna Rao, J.—This appeal is filed u/s 39 of the Indian Arbitration act by the plaintiffs in a suit against an order of the learned Subordinate Judges, Vijayawada granting stay of suit in I. A. No. 1050 of 1972 in O. S. No. 442 of 1971 u/s 34 of the Indian Arbitration Act, hereinafter called "the Act".

2. The plaintiffs filed the suit O. S. No. 442 of 1971 in the court of the Subordinate Judge, Vijayawada against the Union of Indian represented by the General Manger, South central Railway, Secunderabad (1st defendant) and the Andhra Bank Ltd., Vijayawada (2nd defendant) , for a decree for Rupees 1,47,085/- in favour of the 1st plaintiff is a firm carrying on construction works by entering into contracts with the Railways. They entered into several contract with the Railways. They entered into several contracts with the Railways. The grievance is that several amounts due to them under the contracts have been wrongfully withheld. It was further alleged that with respect to one contract the 1st defendant committed breach of the contract and that the contractor the 1st plaintiff , is therefore, entitled to recover the suit claim against the 1st defendant. As soon as the suit notice was received by the Railways , they filed an application u/s 34 of the Arbitration Act stating that the dispute and the claim raised in the plaint have to be decided by an arbitrator as per the arbitration

clause by which the contract is governed and that the suit should therefore be stayed till the matter is decided by an arbitrator. The application was resisted by the plaintiffs on the following grounds : (1) The disputes between the parties are not covered by the arbitration clause . (2) Plaintiffs 2 and 3 are not parties to the arbitration agreement. Hence there cannot be a partial reference of the disputes to arbitration. (3) The appointment of the General Manger or any other Railway Official of his choice as an arbitrator is opposed to principles of natural justice. (4) The suit contract was rescinded by the 1st plaintiff under the suit notice and with it the arbitration clause also ceases to exist. (5) The suit involves the determination of intricate questions of fact and law which cannot be satisfactorily disposed of by a private arbitrator. (6) The names of the persons whom the General Manger may appoint as arbitrator have not been disclosed and hence the provisions is opposed to principles of natural justice . It was , therefore, submitted that as the relief u/s 34 of the Arbitration Act is discretionary the application for stay should be rejected. During the course of arguments another contention was raised, viz., that the Railway officials were guilty of dishonesty and fraud. All the pleas raised by the plaintiffs in opposition to the application for stay have been negatived by the Court below. Aggrieved by the order of the lower Court, the plaintiffs filed this appeal.

3. In this appeal only three points have been raised by the appellants" learned counsel viz., (1) The defendant failed to aver in their application that they were ready and willing to proceed to arbitration both on the date of the commencement of the suit and also on the date of the application, and this being an important condition for granting relief the application should be dismissed; (2) the General Manager in this particular case was a party to several letters and correspondence prior to the suit and he rejected the plaintiffs" claims in the said letters. He would have to figure as a witness at the enquiry and hence he cannot be an arbitrator. Even if he nominates another official is naturally prone to decide in favour of the General Manager; and (3) The 3rd plaintiff is not a party to the contract and hence so far as the dispute raised by him in the suit is concerned it is not covered by the arbitration agreement. There cannot be piecemeal reference to arbitration. Hence this is a case in which the matter should not be referred to an arbitration. As regards other points raised before the trial Court no arguments have been addressed before us.

4. Taking up the first question for consideration, it has to be noted that the plea was not raised in the lower Court, not argued at the stage of arguments. One of the condition u/s 34 of the Act for granting stay is that the authority before whom the application is filed should be satisfied 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. In the application filed in the lower court it is stated that the petitioner "is ready and willing to do all things necessary to the proper conduct of the arbitration." The objection raised is that there was no averment that the petitioner was also ready and willing at the time of the commencement of the suit. On this simple ground

it is urged that the application should be rejected. On a plain reading of the provisions of Section 34 of the Act, we do not find that there is any requirement as to any such specific averment being contained in the application. No doubt if the petitioner makes such an averment, the Court may consider the averment before being satisfied about its correctness. We do not agree with the extreme contention of the learned counsel that unless there is a specific averment in the petition as regards readiness and willingness the petition should be dismissed. If the objection had been raised in the lower Court, the petitioner would have certainly adduced evidence and satisfied the court about the readiness and willingness at the commencement of the proceedings. But as the objection has been raised before us for the first time, the learned counsel for the 1st defendant relied upon Ex. B-17 dated 6-12-1971 i.e. a few days before the filing of the suit in which the 1st defendant was replying to a letter of the plaintiff. It was stated therein that the plaintiffs would be taking their own risk and incurring unnecessary expenditure if they rush to a Court and the attention of the plaintiffs is drawn to the fact that there is a clause in the contract providing for adjudication of disputes by arbitration. It is urged for the 1st defendant that this clause implies that the 1st defendant was inviting the attention of the plaintiffs to the arbitration clause meaning thereby that they are prepared to go before the arbitrator and advised the plaintiffs not to rush to the court. No doubt there is no express averment that they are ready and willing for arbitration, but in the context in which the said statement is made we are inclined to think that the 1st defendant was ready and willing for arbitration even from the commencement of the proceedings. The appellant's learned counsel invited our attention to the following cases. IN *Anderson Wright Ltd. Vs. Moran and Company*, the provisions of Sec. 34 of the Act were analysed and it was pointed out that one of the conditions is that the Court should be satisfied with the readiness and willingness of the defendant at the two material points of time. In *Middle East Trading Co. Vs. The New National Mills Ltd.*, it was observed that the petitioner should satisfy the Court about his willingness for the arbitration both at the time of the commencement of the suit as well as at the hearing of the application. In *N.C. Padmanabhan and Others Vs. S. Srinivasan*, it was held that the petitioner should establish readiness and willingness even prior to the commencement of the suit. This observation goes far beyond the scope of the section and we are unable to accept this extreme view. But even so we have found from the evidence in this case that the 1st defendant was ready and willing for the arbitration even before the suit.

5. The second question which has been raised is that the General Manager cannot figure as an arbitrator. Our attention was drawn to a series of correspondence which proceeded from the office of the General Manager, but signed by some other official. The learned counsel for the Railways stated that the objection was not raised in this form in the trial Court and if it was so raised he would have let in evidence to show that the General Manager never knew any thing about the contents of the letters and that the subordinate officers were

merely putting their signatures on his behalf. But even assuming that the General Manager knew about the contents of the said letters it is stated by the learned counsel for the Railways that the said General Manager one Mr. Lee retired from service in February, 1973 and that he was succeeded by one Mr. Kaul who is now the General Manager. It should be noted that the objection based on bias is personal to the particular individual and we cannot certainly attribute bias to the present General Manager Mr. Kaul. There is, therefore, no force in the contention that the previous General Manager was disqualified from functioning as an arbitrator. It is then urged that when once a General Manager expressed an opinion in the letters the succeeding General Manager also should be disqualified on the ground of bias. No authority has been cited for this extreme proposition and we are unable to accept the same. It is then urged that if a subordinate official is nominated by a General Manager, there is bound to be departmental bias as such officers would not dare to decide against the department or the General Manager. This is also an extreme contention not supported by any authority. The learned counsel for the appellants placed strong reliance on the judgment of the Supreme Court in *Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi*, . It was observed after referring to the learned English authorities, as follows :

"It is obvious that a party may be released from the bargain if he can show that the selected arbitrator is likely to show bias or by sufficient reason to suspect that he will act unfairly or that he has been guilty of continued unreasonable conduct."

On the facts of the case before the Supreme Court it was held that the particular arbitrator who was a Registrar of the Co-operative Societies, had sufficient interest in the transaction and that therefore, the matter could not be referred to him. In *Union of India Vs. Coromandel Engineering Co., Madras*, it was held that there was reasonable apprehension of bias against the arbitrator for it was found as a fact that the particular arbitrator was a party to several documents in which he had expressed his opinion against one of the parties to the contract. In view of the fact that the particular General Manager Mr. Lee, against whom bias was alleged has since, retired, there is no scope for any reasonable apprehension of bias on the part of the present General Manager Mr. Kaul. It is stated by the counsel for the Railway that when the General Manager wants to name another official as an arbitrator, a panel of name will be furnished to the contractor and that it would be open to him to raise his objections against any particular individual. In *C. M. A. No. 268 of 1968, D/- 23-4-1970 (Andh . Pra)*, a Division Bench of this Court (*Kuppuswami and Sriramulu , JJ.*) held that where one of the parties to the contract , viz., The Superintending Engineer became the Chief Engineer , there can be no apprehension that an arbitrator who is a Superintending Engineer of another Circle would act unfairly in favour of his superior. It was further observed that in the absence of any particular set of facts constituting bias a Court cannot infer bias merely on account of one of the parties being a departmental superior to an arbitrator. In coming to this

conclusion , that learned Judges referred to the decision of the Supreme Court cited Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi, .

6. Lastly it is urged that the subject matter of the suit consists of two parts ; one in which palintiffs 1 and 2 as parties to the contract are interested and the other in which the 3rd plaintiff is interest. In respect of two contracts in which the 1st plaintiff was interested the 2nd defendant bank executed guarantee bonds in favour of the 1st defendant-Railways giving a guarantee for the due performance of the contracts by the 1st plaintiff. In the plaint it is stated that on account of the breach committed by the 1st defendant Railways the 1st plaintiff rescinded one of the contracts and with the termination of the said contract it is said that the guarantee bonds have ceased to exist and that the 1st plaintiff is discharged from his obligations under the bonds. The 2nd defendant-Bank also obtained a counter guarantee bond executed by the Contractor (1st plaintiff) and the 3rd plaintiff an independent person who gave security of her properties to the bank. It was, therefore , urged that this bond also is not enforceable in view of the fact that the 1st defendant committed breach of the contract .

7. The main argument of the appellants learned counsel is that when the suit really involves adjudication on several matters some of which only are covered by the arbitration agreement, the Court should exercise its discretion and refuse stay. In support of this contention the following cases have been cited : In Abdul Quoddoos v. Abdul Gani, (AIR 1954 Nag 332) it was observed that unless the suit refers to the whole of the subject matter referred to arbitration , the section is not attracted because the plaintiff will have to seek relief in a Civil Court for matters which are not referred to arbitration. In that case the disputes referred to arbitration only related to the settlement of accounts fro two years i.e., 1946-47 and 1947-48 whereas the suit also related to a partnership formed after 1948 in which the plaintiffs were nor partners . In that view , it was observed that there was no purpose in referring the matter to arbitration. In Central Hindustan Orange and Cold Storage Co. Ltd. v. Sir Brinjnath Singhji, (AIR 1956 Nag 61) the principle in the above case was followed. That was a clear case where the plaintiff claimed two reliefs, on against the one set of defendants and another relief in the alternative for a decree against another set of defendants which was based upon a different cause of action . The second set of defendants were not parties to the arbitration agreement. It was, therefore, held that the entire subject-matter is not covered by the arbitration agreement and hence not a proper case for granting stay. In The Printers (Mysore) Private Ltd. Vs. Pothan Joseph, the present question did not arise for consideration ; but the court was merely concerned with the general principle as to exercising discretion in granting stay u/s 34. Lastly in Asiatic Shipping Co. (Private) Ltd. Vs. P.N. Djakarta Lloyd and Another, creditor filed a suit against the principal debtor and the surety. There was an arbitration agreement only between the creditor and the debtor and the guarantor was not a party to it. The Court held that the liability of the surely has to be determined separately and as he was not a party to the agreement the suit need not be stayed.

8. Let us examine how far the above principles can be applied to the facts of the present case. A perusal of the plaint makes it clear that the reliefs claimed flow from a single cause of action and it is specifically so stated in paragraph 29 of the plaint. The three items of claim as per paragraph 29 of the plaint making an aggregate of Rupees 1,47,085/- are claimed only by the 1st plaintiff-contractor against the 1st defendant-Railways, both of whom are parties to the arbitration agreement. It is further stated in the plaint that the 2nd defendant-bank is a necessary and proper party though no relief is claimed by the plaintiff against the bank. The first prayer in the plaint only concerns the 1st plaintiff and the 1st defendant who are parties to the arbitration agreement. So far as the second prayer (b) is concerned, it is for a declaration that guarantee bonds executed by the 2nd defendant in favour of the 1st defendant are inoperative and unenforceable. No separate court-fee is paid by the plaintiffs with respect to the declaratory relief. This relief is wholly unnecessary having regard to the gist of the plaint. If the main question is decided in favour of the plaintiffs, viz., that the Railways were guilty of breach of the contract, it follows as a matter of consequence that the bank guarantee becomes unenforceable. On the other hand, if the 1st plaintiff is found to be in breach, the bank guarantee becomes enforceable. As prayer (b) is really not an independent one, the plaintiffs have not separately valued this relief though a decree for declaration is asked in favour of all the plaintiffs as regards enforceability of the bank guarantee. In fact the 1st plaintiff and plaintiffs 2 and 3 executed a counter guarantee bond dated 13-5-1969 in favour of the bank in view of the guarantee bonds executed by the bank in favour of the Railways. No relief is asked by the plaintiffs as regards this bond to which the plaintiffs on one hand and the 2nd defendant on the other are parties. It is, therefore, clear that the entire subject-matter of the suit is covered by the arbitration agreement and we are satisfied that there is no independent or distinct subject-matter de hors the arbitration agreement which requires adjudication by the Civil Court. Strong reliance is placed by the learned on *Asiatic Shipping Co. (Private) Ltd. Vs. P.N. Djakarta Lloyd and Another*, cited supra. But that was a suit filed by the creditor against the debtor and the guarantor. Though the liability of the guarantor is co-extensive with that of the debtor it would be open to the guarantor to him under law to show that notwithstanding the liability of the debtor he might be released from the obligation. Hence the Court in that case should decide the defence of the guarantor separately. But in the present case the suit is filed by the debtor for recovery of damages under the contract and the guarantor is merely added as a pro forma party without claiming any relief against the guarantor. It is not open to the 1st defendant to make any independent claim in this suit as against the 2nd defendant and hence there is no scope for any adjudication of a dispute between 1 and 2 in this suit. Hence the *Calcutta* case does not lend any support to the appellants' contention. In *Russell on Arbitration* Eighteenth Edition (1970) the above principle is stated at page 163 as follows :

"It may be desirable to stay proceedings as to part only, if only that part is

appropriate to be decided by arbitration. x x x x x x x The court's exercise of its discretion , however , will of course depend upon whether it is convenient to try the different parts of the dispute separately . Thus a stay will normally be entirely refused where only a "Subordinate and trifling" part of the dispute is agreed to be referred, or where two claims one inside and one outside the agreement turn upon substantially the same facts ."

One of the illustrations given in *Ives and Barker v. Willans*, ((1894) 2 Ch 478), a case where stay was granted in spite of the fact that a small portion of the claim was not within the arbitration clause. It is, therefore , not an absolute rule of law that in such cases stay should be refused. It is a matter entirely within the discretion of the court to see whether it would really result in a conflict of decisions between the arbitrator and the Court and whether it would be more convenient for the Civil Court to try the entire suit.

9. It often happens that in order to circumvent an arbitration clause a plaintiff adds some unnecessary parties to the suit and in such cases it has been held that the Court can grant stay of proceedings. In *Cakop v. Asian Refractories Ltd.*, ((1969) 73 Cal WN 192) it was laid down that a party to an arbitration agreement cannot defeat the agreement between the parties merely by joining a third party in the suit against whom no relief is claimed. Following the said decision, a Bench of this Court, of which one of us (Krishnarao, J.) was a member in C. M. A. No. 467 of 1966 , D/- 18-12-1969 (Andh Pra) held that though the plaintiff added a prayer as against an unnecessary defendant who was not a party to the agreement it was nevertheless a case for granting stay. We have no doubt that his case comes within the last principle stated by us. The contractor 1st plaintiff can get a decree for the entire amount even without impleading the 3rd plaintiff or plaintiff cause of action or a different subject-matter at all. This is, therefore a clear device of bringing in unnecessary parties into the arena of dispute , obviously for the purpose of preventing the 1st defendant from invoking the arbitration clause. The learned counsel for the appellants contended that the joining of the 3rd plaintiff in the suit was quite necessary as it is provided under the guarantee bond executed by the 2nd defendant in favour of the 1st defendant that as soon as a demand is made by the Government the Bank should pay the amount without any demur. It is, therefore submitted that irrespective of any breach on the part of the contractor the amount becomes payable by the bank to the Government. But the plaint again proceeds on the footing that the enforcement of the bonds is only a consequence of the main question as to who committed the breach. A perusal of the guarantee bond Ex. B-14 does not show that the amount should be paid merely on demand. It says that the amount should be paid on demand only by reason of the breach by the contractors. Hence the question whether breach was committed by the contractor or not is a collateral fact which has got to be adjudicated either by the arbitrators or by the Court. It is , therefore , clear from the very guarantee bond executed by the bank in favour of the Government that question of demand and payment arises only in case of breach and not simply on

a demand, for the demand arises only when a breach is established. There is , therefore , no independent cause of action for the 3rd plaintiff is join in this suit and as we have already pointed out there was no relief sought with respect to the guarantee bond dated 13-5-1969 executed by the plaintiffs in favour of the 2nd defendant.

10. We, therefore, reject all he contentions raised by the appellants . This appeal is accordingly dismissed with costs .

11. Appeal dismissed.