

(1951) 03 PAT CK 0019
In the Patna High Court
Case No : A.F.O.O. No. 19 of 1951

State of Bihar

APPELLANT

Vs

Gaya Electric Supply Co. Ltd.

RESPONDENT

Date of Decision : 30-03-1951

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1951 Patna 157

Hon'ble Judges : Ramaswami, J; Rai, J

Bench : Division Bench

Advocate : Advocate General and Bindeshwari Pd. Sinha, for the Appellant;
Sultan Ahmad and S. Sarwar Ali, for the Respondent

Final Decision : Allowed

Judgement

Ramaswami, J.—This appeal is presented by the deft, against an order of the Subordinate Judge of Gaya refusing to stay Title Suit No. 83 of 1950 under the provisions of Section 34, Arbitration Act.

2. The pltf. Gaya Electric Supply Co. Ltd., had obtained a license for the supply of electric energy in the town of Gaya under the Electricity Act. On 23-6-1949 the Govt. revoked the license by a notification. Thereupon the pltf. instituted a suit against the State of Bihar for a declaration that the revocation of the license was mala fide & ultra vires. Subsequent negotiation took place & as a result, the parties entered into an agreement to the effect (1) that the pltf. would withdraw the suit on 25-10-1949, (2) that within 3 days of the withdrawal of the suit the State of Bihar would make an advance payment of Rs. 5 lakhs to the pltf. but simultaneously the pltf. should formally hand over the, possession of the undertaking to an authorised officer of the Govt. & (3) that both the pltf. & the Govt. will make their respective valuation within three months of taking over the undertaking & (4) "in the case of any difference or dispute between the parties over the payment of balance which may be found due after valuation, such dispute shall be submitted to the sole arbitration of a single arbitrator who

should be a high Govt. officer of the Provincial Govt. of rank equal to or higher than a Divisional Commissioner & his award shall be final & binding on both parties." The arbitration clause was contained in a letter dated 13-10-1949 from the Chief Electrical Engineer Bihar & was accepted by the pltf. in its letter dated 17-10-1949.

3. On 19-1-1950 the pltf. informed the Chief Electrical Engineer, Bihar, that the value of the undertaking was Rs. 22,06,072-2-0. In his reply dated 28-1-1950 the Chief Electrical Engineer characterised the estimate as fantastic & stated that the Govt. estimate "could not be finalised for want of certain details of some of the plant & machineries which had not been supplied by the pltf." The Chief Electrical Engineer added that according to the rough valuation of the Govt. the estimate was something in the neighbourhood of what had already been paid. In reply to this letter the pltf. did not furnish the necessary details but demanded that the valuation should be completed & the balance of the amount should be paid to him within a fortnight. On the basis of such particulars as were available the Govt. proceeded to determine the valuation. The estimate was prepared at the request of the State Govt. by an officer deputed by the Central Electricity Commission, Simla. The estimate of Rs. 5,56,221-4-10 was duly communicated to the pltf. on 6-4-1950 by the Chief Electrical Engineer Bihar. As pltf. sent no reply the Government, Bihar, referred the dispute to Mr. M. S. Rao, I. C. S., Commissioner of Chota Nagpore, who was appointed as sole arbitrator to decide the matter. On 19-5-1950 Mr. M. S. Rao was informed by the Govt. that he was appointed as sole arbitrator to decide dispute regarding valuation of the assets of the undertaking. Thereafter the pltf. issued notice u/s 80, Civil P.C., to the Govt. alleging that there was breach of contract since the Govt. did not make valuation within the time stipulated, that the agreement stood cancelled, that a suit would be instituted for recovery of possession of the undertaking or in the alternative for specific performance of contract.

4. On 28-9-1950 the pltf. commenced the present suit alleging that the Govt. had committed breach of contract, that by reason of the breach the contract stood rescinded & that the pltf. was entitled to be restored to possession of the undertaking & also to forfeit the amount of Rs. 5 lakhs paid by the Govt. in deposit. The State of Bihar appeared & filed an application that the suit should be stayed pending the decision of Mr. M. S. Rao who had been appointed as sole arbitrator to decide the dispute as to question of valuation. The Subordinate Judge rejected the application on the ground that the subject-matter of the suit was not within the arbitration clause.

5. The question to be decided in this appeal is whether the dispute in the suit is within the scope of the arbitration clause and whether the suit should be stayed u/s 34, Arbitration Act.

6. On behalf of the pltf. Dr. Sultan Ahmad contended that the question raised in the suit was not in respect of any matter agreed to be referred in the arbitration clause. Learned counsel pointed out that the pltf. alleged in para. 17 that the

deft, had failed to make valuation or to make payment upto 15-3-1950 & so committed breach of contract, that "by reason of the deft's breach of the contract the pltf. has rescinded the said agreement." The pltf. claimed as reliefs that possession of the electrical undertaking should be restored to it, that damages should be awarded from 16-3-1950 till possession was delivered & that the sum of Rs. 5 lakhs should be forfeited to pltf. But in order to ascertain the real nature of the dispute it is necessary to consider not only the plaint but the allegations of the deft. & the letters that were exchanged between the parties. Para. 1 of the agreement (printed at p. 17 of the case) stipulates that upon receipt of payment of Rs. 5 lakhs by cheque the company shall hand over

"formal possession of the undertaking to the Govt. through on instrument of conveyance making transfer of the property unconditional leaving only its valuation, open (or settlement by arbitration."

Para. 2 states that Govt. will make the valuation, within three months of taking over the undertaking & any balance of money found due to the company as per Govt. valuation will be paid to the company & in case of over payment the excess paid should be refunded to Govt. Para. 3 is the arbitration clause which has been already quoted. The company's letter dated 17th of October is also important in this connection. In this letter the company suggested that

"both the company & the Govt. will make respective-valuation within the time mentioned & in case there be no amicable settlement between the parties as to valuation the matter should be referred to arbitration of a single arbitrator whose award shall be final & binding on both parties."

Upon a perusal of the terms of contract & of the correspondence which form part of the contract, it is obvious that no stipulation was made that the compensation money should be paid within the period of three months. On the contrary the intention of the parties was that the Govt. would pay compensation money only after the award had been made by the arbitrator. The only question then at issue between the parties was the matter of valuation of the undertaking. According to the contract the valuation was to be made by the Govt., & if the pltf. did not accept such valuation the matter was to be decided by the arbitrator whose decision was to be final between the parties. In the plaint the allegation is that the Govt. of Bihar had neglected to perform the contract by failing to complete the valuation or to make payment to the pltf. within the period of three months or within the extended time-granted by the pltf. In essence the pltf's claim is that Govt. did not make valuation or make payment & pltf. claims to have rescinded the contract on that ground. In my opinion the dispute is one arising out of or "in respect of" the agreement. For the question of payment necessarily depends on the valuation of the undertaking. The question is directly within the scope of the arbitration clause which states that

"if any difference or dispute between the parties over the payment of the balance arises such dispute should be submitted to the sole arbitration of a single

arbitrator & his award shall be final & binding on both the parties."

The arbitration clause must be construed according to its language & in the light of the circumstances in which it was made. I hold that the suit instituted by the pltf. refers to a matter within the scope of the arbitration clause & since the deft, is ready & willing to do everything necessary for the proper conduct of the arbitration, the suit ought to be stayed u/s 34, Arbitration Act.

7. This opinion is supported by *Harinagar Sugar Mills, Ltd. Vs. Skoda (India), Ltd.* , in which there was a contract between the parties for supply of machinery which contained the following clause relating to payment :

"Clause 3. The payment shall be made as follows : 30% cash with orders against vendors giving Bank guarantee, 60% against shipping documents, 10% at the end of 1935-36 Season with Bank guarantee of vendees."

The pltf. alleged that the deft, had committed breach of these provisions as regards payment &, therefore, cancelled the contract. The pltf. then brought a suit for declaration that the contract had been rescinded & did not subsist & for an injunction restraining the deft, from referring the dispute to arbitration in accordance with the arbitration clause in the contract. It was held by Panckridge J., that the dispute was one arising out of the agreement & that the deft, was entitled to an order u/s 19, Arbitration Act, staying the suit. The same view was taken in *Governor-General in Council Vs. Associated Live-stock Farm (India) Ltd.*, in which the pltf. made a tender for supply of meat for troops in a certain area in Eastern Command subject to the conditions & stipulations specified in the said tender & in the "instructions to tenderers." The tender was duly accepted & the contract was sanctioned by the Q.M.G. in India. There was an arbitration clause in the contract to the effect that

"any dispute or difference arising out of the contract shall be referred to the arbitration of the officer sanctioning the contract whose decision shall be final & binding."

It was alleged by the pltf. that there was a breach of contract since the demand was "far above the local requirements of the army," the deft. "wrongfully employed other contractors at much higher rates" & that the supplies were "taken wrongfully." It was held by the High Court that the dispute between the parties arose out of the contract & that the suit ought to be stayed under the Arbitration Act. On behalf of the pltf., Dr. Sultan Ahmad placed reliance on *N. K. Jain v. S. B. Sugar Mills, Ltd.* 27 Pat 930. But the facts of that case are widely different from those of the present case. An unregistered lease was executed by S on the one side & N on the other by which S gave in lease to N a sugar factory for a term of five years. It was stipulated in the lease that in default of the lease money by the lessee or in the event of a breach of any of the terms & conditions embodied in the, lease the lessor shall be entitled to terminate the lease & re-enter upon the premises demised & it was also stipulated that all disputes between the lessor & the lessee shall be decided by an arbitrator. The lessee

defaulted in payment of the lease money & the lessor instituted a suit for ejectment of the lessee on the ground that the lessee was a mere trespasser & not on the ground of any breach of any of the terms of the lease. On an application by the lessee u/s 34, Arbitration Act, to stay the suit it was held that the dispute in the suit was independent of the contract & was outside the ambit of the arbitration clause in the lease. The true nature of the dispute in that case was not whether there had been any breach, all or partial, of the substantive stipulation of the contract but whether the defendants were in possession as trespassers. Upon this ground the High Court held that Section 34, Arbitration Act, was not applicable & the suit could not be stayed.

8. The next question is whether the arbitration clause is effective, whether the arbitration clause can still be invoked in spite of the repudiation by the plaintiff. The principle is clear. Where a contract contains an arbitration clause, & one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself. "Where, however, a party seeks to avoid the contract for reasons dehors it, the arbitration clause cannot be resorted to, since the whole contract including the arbitration clause is set aside. In other words, a party cannot rely on a term of the contract to repudiate it & still say the arbitration clause should not apply. In *De La Gardes v. Worsnop & Co.* (1928) 1 Sch 17, there was an agreement in writing for the sale of a business subject to certain conditions. The plaintiff refused to complete the purchase owing to non-fulfilment of one of the conditions, the effect of which, he contended, was that he was no longer bound by the agreement. The defendants insisted that the condition was satisfied & went to arbitration. The plaintiff issued a writ claiming a declaration that the agreement was determined, & the arbitration clause was not effective. Clausen J. rejected the argument as fallacious:

"If it be the fact that the condition has not been fulfilled, the result, no doubt, is this that the obligation of the plaintiff to purchase has come to an end & cannot be enforced against him; but it has come to an end, not by reason of the occurrence of some event outside the consideration of the contracting parties, but by reason of certain events which have occurred & which by reason of the non-fulfilment of a condition, namely, the condition stated in Clause 5, subject to which the contract was expressly made, have resulted in his no longer being, under an obligation to purchase,"

9. To a similar effect is the important case *Heyman v. Darwins, Ltd.*, (1942) 1 ALLER 337, in which the respondents contracted with the appellants, an American firm, whereby the latter were to act as their selling agents over a wide area. The agreement contained an arbitration clause in these terms:

"If any dispute shall arise between the parties thereto in respect of this agreement or any of the provisions herein contained or anything arising thereout the same shall be referred for arbitration....."

A dispute arose between the parties & the appellants, having intimated to the

respondents that their letters showed that they had repudiated the agreement, issued a writ against them claiming a declaration that the respondents had repudiated the agreement & damages under a number of heads. The respondents claimed that the action should be stayed pursuant to the Arbitration Act, 1889, Section 4, in order that the matters in dispute might be referred under the arbitration clause. The appellants contended that the respondents having repudiated the agreement as a whole & the appellants, by the issue of the writ, having accepted that repudiation the contract had ceased to exist for all purposes & the respondents could not afterwards rely on the arbitration clause. It was held by the House of Lords that the dispute between the parties was a dispute within the arbitration clause & the appellants' action ought to be stayed. At page. 341 Lord Viscount Simon states:

"Even so, I do not see how this claim, however expressed, together with the other claims in the writ, can be regarded otherwise as than involving a dispute 'in respect of the agreement' & in respect of something out of it. The fallacy of the other view arises from supposing that, if the respondents have so acted as to refuse further performance of the agreement, this amounts to saying that they deny that the agreement ever existed. If the respondents were denying that the contract had ever bound them at all, such an attitude would disentitle them from relying on the arbitration clause which it contains; but that is not the position they take up. They admit the contract, & deny that they have repudiated it. Whether they have, or have not, is one of the disputes arising out of the agreementAs Viscount Finlay said, in *Sanderson & Son v. Armour & Co.* (1922) S C(H L) 117 "The proposition that the mere allegation by one party of repudiation of the contract by the other deprives the latter of the right to take advantage of an arbitration clause is unreasonable in itself, & there is no authority to support it"."

In his speech Lord Macmillan also states:

"Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligation (thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. Even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, & the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach, or a breach going to the root of the contract, & this relieves the other party of any further obligation to perform what he for his part "has undertaken. Now, in this state of matters why should it be said that the arbitration clause, if the contract contains one, is no longer operative or effective?"

10. Applying these principles to the present case I hold that the arbitration

clause is still effective, that the dispute about the payment of compensation is a matter within the scope of the arbitration agreement, that the suit instituted by the pltf. ought to be stayed.

11. Upon these grounds I would set aside the order of the learned Subordinate Judge dated 18-12-1950, & direct that the suit instituted by the pltf. should be - stayed u/s 34, Arbitration Act.

12. I should allow the appeal with costs. Hearing fee ten gold mohars.