

(1978) 02 CAL CK 0027
In the Calcutta High Court
Case No : Matter No. 1005 of 1977

Union of India (UOI)

APPELLANT

Vs

Naresh Chand Goyal and Others

RESPONDENT

Date of Decision : 15-02-1978

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1978 Cal 307

Hon'ble Judges : Salil K. Roy Chowdhury, J

Bench : Single Bench

Advocate : P.K. Sen, for the Appellant; B.K. Bachwat, for the Respondent

Final Decision : Dismissed

Judgement

Salil K. Roy Chowdhury, J.—This is an application u/s 34 of the Arbitration Act, 1940, for stay of suit.

2. The facts relevant for the purpose of this application are as follows:-- By a public auction held by the Auctioneer, the respondent No. 3, United Auctioneer, on the 21st of Feb. 1964, on behalf of Union of India 400 M.T. of scrap rails of the specification mentioned in the auction catalogue were offered for sale and the respondent No. 1 was declared to be the highest bidder and he deposited the earnest money in terms of the said sale, which included General Conditions of Sale by auction contained in the said auction catalogue. The General Conditions of Contract as contained in the said auction catalogue inter alia contain terms of inspection of the goods at various locations by the intending purchaser and also removal of the goods by the purchaser after making full payment against which release orders will be issued by the officers of the respondent No. 3 at various places where goods were lying. The said sale was on the basis of "as is where is" basis. The General Conditions of contract as contained in the auction catalogue also contained an arbitration clause in the following terms:

"In the event of any question, dispute or difference arising under these condition

or in connection with this contract..... arbitration of an Arbitrator to be appointed by the General Manager of the Administration. It will be no objection that the Arbitrator is a Government servant and that in the course of his duties as Government servant he has expressed views on all of any of the matter in dispute or differences..... " "

3. It appears that the respondent 1 made payments of the entire sum being the price of the goods purchased by him in the said auction sale amounting to Rs. 7,06,400 including the earnest money paid on 21st of Feb. 1974. 14th of March, 1974 and 17th of April, 1974, and duly accepted by the petitioner and money receipts were issued. Thereafter, the respondent No. 3 by two sale release orders dated the 3rd of April, 1974 and 24th of Sept. 1974, authorised the respondent No. 1 to take delivery of 200 M.T. of the goods and 198.294 M.T. of the goods lying at Barkakhana and Baromo and Daltonganj and Latehar respectively. It appears that the petitioner only caused delivery of about 99,999 M.T. to be taken by the respondent No. 1 from Baromo and no further delivery was taken or could be taken by the respondent No. 1. From the correspondence annexed to the petition and also to the affidavit-in-op-position it transpires that the goods were not according to the specification and also goods were not lying at the places as per terms and conditions of the "said sale. It is alleged by the respondent No. 1 that the respondent committed fraud and misrepresentation thereby inducing the respondents to believe that the goods were of the specification mentioned in the auction catalogue and thereby the contract was voidable and avoided by the respondent No. 1, Such discovery is alleged in the plaint to have been made by the respondent No. 1 in Sept. 1974. It also transpires from the correspondence that as the petitioner and the respondent No. 2 were not in a position to deliver the goods from the site where they were alleged to have been lying due to the fact that the goods were not there and not according to the specification and therefore the respondent No. 1 was not able to take delivery of the goods and it also transpires that the time to take delivery was extended from time to time until 30th of May, 1976, but as the plaintiff is alleged to have discovered the fraud and misrepresentation and also alleged mistake as to facts essential to the said contract in respect of the goods purchased in the said auction sale not being in existence at the date of the contract, instituted the suit for the refund of the balance of purchase price of the goods on the ground of misrepresentation, fraud and also on mistake and as such, was void and has been avoided.

4. The suit was filed in or about 20th of June, 1977, and after the writ of summons was served on the petitioner on or about 23rd of Sept. 1977, the notice of motion of the present application was taken out on the 7th of Dec. 1977, and ad interim stay of the suit was obtained. Thereafter, directions for filing affidavits were given on the 12th of Dec. 1977, which again was extended till 30th of Jan. 1978 and thereafter, affidavits were filed and the matter came up for hearing.

5. In the plaint the respondent No. 1 has made the petitioner, Union of India, and

two others as party defendants being one Rup Kishore Tandon, who is the Controller of Stores of the Eastern Railways working for gain at No. 17. Netaji Subhas Road, Calcutta, and United Auctioneer defendant inter alia alleging that the respondent No. 1 was induced to enter into the said contract by fraud and misrepresentation of the petitioner and the respondents Nos. 2 and 3 inter alia on the allegations that the petitioner and the respondents Nos. 2 and 3 asserted that the goods were lying at the location mentioned in the auction catalogue, though the said goods were not available at the location and the defendant in the suit including the petitioner actively concealed from the respondent No. 1 that the goods were not lying at the location. It is also alleged that the petitioner and the respondents Nos. 2 and 3 falsely represented and asserted expressly or impliedly that the goods will continue to lie and would be available for delivery to the respondent No. 1 at the location mentioned in the said catalogue. The particulars of the said fraud, and misrepresentation are set out in various subparagraphs of para 18 of the plaint and it is alleged that the said fraud and misrepresentation were discovered in or about September, 1974.

6. In the plaint it is also pleaded in the alternative that the respondent No. 1 being the plaintiff and the defendants being the petitioner and the respondents Nos. 2 and 3 under a mistake of facts that the goods were lying at and/or would be available for delivery to the respondent No. 1 at the location mentioned in the auction catalogue. It is alleged that the goods were non-existent which the plaintiff discovered the said mistake of act in or about Sept. 1974 and, therefore, the contract is void due to the mistake as to the essential facts being that the balance of the goods were not existing at the date of the contract. The plaintiff has asked for refund of the purchase price of the goods admittedly paid to the petitioner and the respondents.

7. Mr. P. K. Sen, appearing for the petitioner, strenuously argued that the suit is false and frivolous and he drew my attention to the correspondence annexed to the petition and submitted that the petitioner is always ready and willing to deliver the goods under the contract of purchases which the respondent No. 1 failed to take delivery. He submitted that never before the present suit was filed, the respondent No. 1 alleged fraud or misrepresentation or mistake and as such, the suit has been falsely filed only to wriggle out of the arbitration agreement. He submitted that all the conditions under Sec. 34 have been satisfied and no sufficient reason has been shown by the respondent No. 1 why the discretion should not be used in favour of granting stay. Mr. Sen also submitted that the respondent No. 1 cannot object to the Arbitrator being appointed in terms of the arbitration clause of Government servant as he has specifically agreed to the said arbitration agreement. Mr. Sen submits that the disputes are covered by the arbitration agreement as the arbitration clause is wide enough to include the dispute sought to be raised by the respondent No. 1. In any event, Mr. Sen submitted that the entire case now sought to be made out by the respondent No. 1 in the plaint is not borne out by the correspondence and the fact remains that the respondents have committed breach of the agreement for sale by which the

respondent No. 1 purchased the goods in the auction held by the respondent No. 3, auctioneer appointed by the petitioner. Mr. Sen further submitted by adding, the respondent No. 2 the Controller of Stores and the Auctioneer, the respondent No. 3, cannot disentitle the petitioner from obtaining the stay of the suit as both of them were the Agents of the petitioner. Therefore, Mr. Sen submitted that the stay should be granted.

8. Mr. B. K. Bachwat, appearing for the respondent No. 1 submitted firstly that the petitioner is not entitled to any stay as the suit is filed de hors the contract on the ground of fraud, misrepresentation and also on mistake. He placed the plaint and analysed the same which, in my view, seems to be substantially correct. He cited the decision in *Johurmull Parasram v. Louis Dreyfus & Co. Ltd.* AIR 1949 Cal 179 which is one of the frustration cases where the Division Bench observed that the Court is not entitled to go into the question what was in substance the nature of the claim in the suit. The Court must consider the suit as it is pleaded and framed. If the Court comes to the conclusion that the suit as pleaded is a suit independent of the contract, then the court has no power to stay the suit though it is satisfied that the frame of the suit is merely a means of avoiding the consequences of alleging the true nature of the claim. In that case it was held that the claim as framed is a claim not under the contract containing the arbitration clause but is really a claim based on Tort and an implied contract and on that basis, the stay was refused.

9. Mr. Bachwat strongly relied on the said decision and he also submitted that the present suit is based on mistake of facts by both the parties as to the existence of the entire goods under the alleged contract and therefore, the mistake relates to the fact essential to the formation of the contract and as such, the contract is void due to mistake. In any event, Mr. Bachwat submitted that these are very complicated questions both of fact and law and the matter of great complexity. As such, the Court should not exercise its discretion in favour of the stay as it is a fit and proper matter to be tried in Court. Apart from the fact that the Arbitrator has no jurisdiction to determine his own jurisdiction which depends on the existence of the arbitration agreement. Mr. Bachwat also submitted that it will be gross injustice having regard to the facts of this case and the allegation made by the respondent No. 1 against the petitioner and the other respondents that fraud has been practised on the respondent No. 1, to refer the disputes to a servant of the petitioner, as there is apprehension of bias and the petitioner cannot expect fair and impartial adjudication of the dispute in their reference to arbitration. Therefore, the matter should not be stayed.

10. Considering the respective contentions very carefully it appears to me that this is not a matter where the Court should exercise its discretion in favour of the stay, as reading the plaint as it stands, it cannot be said that the suit is based entirely on the contract between the parties. The said contract is sought to be avoided on the ground of fraud and misrepresentation of the defendants and secondly, the respondent No. 1 has also framed the suit on the basis of mistake

as to the facts essential to the contract and therefore, the contract is void. As such the Court is at this stage only entitled to look into the pleading of the plaint and not to go into the merits of the case whether the petitioner's claim is well founded or unmeritorious. The principle has been well settled both by the decisions Mr. Bachwat cited being the case in *Jahurmull Parasram v. Louis Dreyfus & Co. Ltd.* AIR 1949 Cal 179 and also the *Gaya Electric Supply Co. Ltd. Vs. The State of Bihar*, . The principle for granting stay is now very well settled as would appear from the Supreme Court decision in *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, where Gajendragadkar, J. as he then was at p. 1159 para 3 finally observed as follows:--

"Thus, the question as to whether legal proceeding should be stayed u/s 34 must always be decided by the Court in a judicial manner having regard to the relevant facts and circumstances of each case."

11. It is also well settled that stay cannot be had as a matter of course but some guiding principles in granting and refusing stay are well recognised as mentioned in the said Supreme Court decision in para 8 referred to above. Other decisions which are relevant on this question are *Asiatic Shipping Co. (Private) Ltd. Vs. P.N. Djakarta Lloyd and Another*, , *Lachminarain Jute Manufacturing Co. Ltd. Vs. Bangur Brothers Ltd.*, and *W.F. Ducat and Co. Pvt. Ltd. Vs. Hiralal Pannalal*, . In my view, the principle which is laid down in the leading English decision on the point which has been followed since then both in England and approved by the Supreme Court in various decisions including the said decision in *Gaya Electric Supply Co. Ltd. Vs. The State of Bihar*, referred to above applied with full force in the facts of the present case so far as the petitioner as defendant against whom the respondent No. 1 has filed the suit is concerned. It has been held in *Monro v. Bognor* 1914 15 All ER Reprint 523 that "the action based on fraud referred to the matter wholly outside the power of the Arbitrator with which he could possibly deal and so could not be said to be a question, dispute or difference upon or in relation to or in connection with the contract and as such, referring to arbitration under the arbitration clause."

12. There also in a building contract dispute arose during the progress of the work between the parties mainly as to the nature of the site upon which the work were to be carried out which the plaintiff alleged was different from that which he had been led to believe by the specification. The plaintiff having brought an action against the defendant claiming inter alia (damages for fraudulent misrepresentation) whereby he was induced to enter into the contract, the defendant took out a summons for stay of all proceedings and action and the matter be referred to arbitration. I have set out the above passage from Head Note of All ER reprint which, in my view, has correctly summarised both the facts and the decision. Therefore, applying the above principle the said suit should not be stayed.

13. Apart from that the suit has been filed against the other two defendants being defendants Nos. 2 and 3, the Controller of Stores and the Auctioneer,

alleging fraud and misrepresentation and making them liable and admittedly they are not parties to the arbitration agreement and as such, prima facie, the suit cannot be stayed against them although adding unnecessary parties may not make the provisions of Section 34 nugatory in the facts and circumstances of a particular case. But in this case, in my view, the suit cannot be stayed as against the defendants Nos. 2 and 3 and as a consequence thereof if the suit is stayed as against the defendant No. 1, there is a possibility of two conflicting decisions of two Tribunals which is a factor for the court to exercise its discretionary power against granting the stay. See *Taunton & Collins v. Cromie* (1964) 2 All ER 332.

14. The other question as I have already indicated is that the plaintiff has also based his claim on the ground of mistake as to the essential facts alleging that a part of the goods under the contract were not in existence at the time mentioned in the auction catalogue and, therefore the contract is void. All these questions appear to me to be complicated and complex in nature and it is not proper to stay the suit as it will be convenient for both the parties for adjudication of the said question by a Court of Law, rather by an Arbitrator who is an employee and servant of the petitioner.

15. Another question was raised on behalf of the respondent No. 1 by his counsel, Mr. Bachwat, from the Bar that having regard to the arbitration clause a Government servant is to be appointed Arbitrator and in view of the allegations of fraud and misrepresentation against the respondents Nos. 1 and 2 it might in all probability affect the mind of the Arbitrator and there is reasonable apprehension of bias and as such, the suit should not be stayed. Although the said objection cannot be raised by the respondent No. 1 under the Arbitration Clause but that cannot take away the jurisdiction of the Court to take a practical view of the matter having regard to the changing circumstances and the atmosphere in our society and government administration, wherefrom it is not unreasonable to presume that there is a risk of such apprehension in the facts and circumstances of this particular case. It cannot be laid down as a general principle but Court has to act using its common sense and experience and deal with a particular matter in the manner it should. I may here point out that under the English Law there is a specific section (Section 24) empowering the Court to remove an Arbitrator under similar circumstances. Although that has not been specifically included in the Indian Arbitration Act, but there is no bar for the Court to exercise its discretion on the principle of possibility of bias in a particular case. I am conscious of the Appeal Court observation in *Union of India v. P. K. Agarwala* (1971) 75 Cal WN 767 but the facts of that case are entirely different and clearly distinguishable from the facts of this case, particularly on the ground that specific allegations of fraud and misrepresentation have been made by the respondents in this case against the respondent No. 2, a high official of the petitioner, and the Arbitrator under the arbitration clause is admittedly a Government servant, that is, an employee of the petitioner and he is likely to be interested consciously, if not unconsciously, to vindicate the said charges against the petitioner and the respondent No. 2. Therefore, in my view, in the facts of

this case it would not be proper for the Court to exercise its discretion in favour of the stay.

16. Mr. Bachwat also cited a decision of the Judicial Committee in *Sekh Brothers v. Arnol Julious Ochsner* 1957 AC 136 where it was held that a contract is void for mutual mistake as to the essential facts for the formation of the contract. He rightly submitted that the principle laid down therein applies to the facts pleaded in the plaint if the same is established at the time of trial of the suit. Mr. Bachwat also referred to *Cheshire and Fifoot on the Law of Contract*, Latest Edition to Chapter on Mistake and submitted that having regard to the pleading of mistake and if the same is proved by the respondent No. 1 at the time of trial, the whole contract would become void and, therefore, the arbitration clause would have no application at all.

17. Considering the above contentions, I am of the view that sufficient reason has been shown by the respondent No. 1, the plaintiff who has filed the suit that the suit should not be stayed.

18. In the result, the application is dismissed. Interim stay vacated. The petitioner to file its written statement within four weeks from date and the respondent No. 1 is directed to take diligent step for expeditious hearing of the suit.

19. The petitioner to pay the costs of this application.