
Brahmagiri Vs T. Joseph

C.R.P. 428/90-C

Court: High Court Of Kerala

Date of Decision: March 29, 1990

Acts Referred:

Arbitration Act, 1940 & Section 41, 8#Civil Procedure Code, 1908 (CPC) & Section 151, 41

Citation: (1990) 03 KL CK 0042

Hon'ble Judges: Radhakrishna Menon, J

Bench: Single Bench

Advocate: C.M. Devan, for the Appellant; M.M. Abdul Aziz, for the Respondent

Judgement

Radhakrishna Menon, J.

C.R.P. 428/90 is directed against the order in I.A. 2936/89 whereas C.R.P. 429/90 is against the order in I.A,

2937/89.

2. Disposing of I.A. 2936/89 and 2937/89 by the common order, the Court below has issued a temporary injunction as prayed for by the Plaintiff,

restraining the Defendant from disposing of the property which is the subject-matter of the dispute.

3. The Respondent filed a petition u/s 8 of the Arbitration Act for the appointment of an Arbitrator to settle the dispute said to have arisen between

the parties and in regard to the contract dated 28th May 1987. The above I.As. were filed in the said application.

4. The only question that arises for consideration is whether the Court below was justified in issuing the injunction before the commencement of the

arbitration proceedings.

5. The answer depends upon the construction of Section 41 of the Arbitration Act. It reads:

41. Procedure and powers of Court.- Subject to the provisions of this Act and of rules made thereunder-

(a) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court and to all appeals, under this

Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the

matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in Clause (b) shall be taken to prejudice any power which may be vested in an Arbitrator or umpire for making orders with

respect to any of such matters.

Construing this provision the Supreme Court in H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, held that:

....clause (a) of Section 41 makes only the procedural rules of the CPC applicable to the proceedings in Court under the Arbitration Act.

and consequently observed that:

this clause does not authorise the Court to pass an order of injunction. The power is conferred by Clause (b) of Section 41. The source of power,

therefore, cannot be traced to Clause (a)..... Besides, if Clause (a) of Section 41 gave wide powers to pass an order of injunction, Clause (b) of

Section 41 would become otiose.

(emphasis supplied)

That means the Court can grant an injunction only under Clause (b) of Section 41 and not under Clause (a). Such an order of injunction can be

passed only on the party showing that the Arbitrator has already commenced the arbitration proceedings. That is a well established position is clear

from the decision of this Court in Thresia v. State of Kerala 1979 KLT 924 where it has been held thus:

...The Court can exercise its powers u/s 41(b) read with items 1 to 4 in the second schedule thereto only after the arbitration commences.

That means prior to the order of reference the position is that the Court has no jurisdiction to issue a temporary injunction.

6. The learned Counsel for the Respondent however contended that the Court in the exercise of its inherent power could direct to preserve status

quo during the pendency of the proceedings before it, seeking a reference of the dispute to arbitration. According to him until a valid award is

passed, the Court retains its jurisdiction, which on the arbitration proved abortive will be revived enabling the Court to hear and decide the dispute

on merits. On the other hand the learned Counsel for the Petitioner submits that in view of Section 41 of the Arbitration Act such a power cannot

be recognised. It is all the more so, because the otherwise plenary powers of the Court to deal with matters coming before it, the counsel further

submits, is circumscribed by the Arbitration Act.

7. The question therefore is: Has the Court the inherent power to pass orders preserving the status quo until the dispute is finally disposed of? That

the procedural rules of CPC are applicable to proceedings in Court under the Arbitration Act is no more a debatable point in view of the decision

of the Supreme Court in H.M. Kamaluddin Ansari and Co. Vs. Union of India (UOI) and Others, . That Section 151 CPC is not a substantive

provision conferring any right on any party to get any relief but only a mere procedural provision which see Padam Sen and Another Vs. The State

of Uttar Pradesh, enables a party to have the pending proceedings conducted in a manner consistent with justice and equity, is a well established

proposition. Similarly the cessar of the jurisdiction of the Court, on the dispute being referred to arbitration, is only provisional and therefore ""until a

valid award is passed, the Court retains its underlying jurisdiction, which in certain circumstances it will be entitled to resume"" is also a well

established principle. [(See page 123 of Commercial Arbitration 1982 edition, by Mustill and Boyd and the decision of this Court in The Food

Corporation of India v. P.A. Ahammed Ibrahim 1989 (1) KLT 251. It should in this connection be remembered that every Court is constituted

only for the purpose of doing justice according to law and as such it must be deemed that every such Court possesses as a necessary corollary and

as inherent in its very constitution, such powers as may be necessary to do the right thing in the course of administration of justice. Why it is said so

is this: "The inherent power has its roots in necessity and its breadth is coextensive with the necessity". (Theoretical Basis of Inherent Powers

Doctrine-Text material prepared by Jim R. Carrigan-Publication of National College of The State Judiciary, USA)-noted with approval by the

Supreme Court in The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others, . No doubt this power can be

exercised only in the absence of any express or implied prohibition contained in the enactment regulating the jurisdiction of the Courts. [See Jaipur

Mineral Development Syndicate, Jaipur Vs. The Commissioner of Income Tax, New Delhi, Courts which are seized of applications instituted

under the Arbitration Act, therefore, in exercise of inherent jurisdiction, can pass appropriate orders consistent with the procedural rules of the

CPC as may be necessary for the ends of justice. A reference in this connection to the following passage from Russell on Arbitration is profitable:

Quite apart from these express powers (i.e. statutory powers similar to the powers recognised under the Arbitration Act), the Court has always

been willing to assist in this way in proper cases.

The Court, in order to preserve the status quo, in a case where one of the parties to a contract had given a notice purporting to dismiss the

contractor, restrained the party from acting on the notice until judgment or further order, or until a reference to arbitration provided for by the

contract had been held: Foster v. Hastings Corporation (1903) 87 L.T. 736.

8. The question here is: Do the facts of the case warrant the issuance of the order of the nature under challenge. Facts requisite and relevant in the

context can briefly be stated thus:- As per the agreement dated 28th May 1987 (it is this agreement that is said to contain the arbitration clause) the

Respondent had agreed to purchase 13 varieties of trees in Brahmagiri "B" Estate and paid an advance of Rs. 25 lakhs. When felling operations

commenced in September 1987, the Assistant Collector, Mananthody issued directions seizing the felled timber and also prohibiting the

Respondent from continuing the cutting operation. According to the Respondent, the Assistant Collector initiated these proceedings at the instance

of the revision Petitioner. The Respondent therefore contended that he was entitled to specific performance of the contract and also for a sum of

Rs. 85 lakhs as damages. In view of the arbitration clause contained in the agreement, the Respondent in the Original Petition from out of which

this revision arises, has prayed for the appointment of an arbitrator to settle the dispute. Along with the Original Petition, the Respondent filed the

two I.As., one for a temporary injunction restraining the Petitioner herein from selling the property ignoring the agreement and the other for

attaching the schedule property. The revision Petitioner opposed these petitions on the ground that the agreement has become unenforceable in

view of the proceedings of the Assistant Collector and therefore the Petitioner was constrained to cancel the same invoking Clause 19 of the

agreement.

9. The main dispute sought to be referred to arbitration is: Is the Respondent entitled to get the agreement enforced specifically. If the answer is in

the affirmative, the property must be available to be handed over to the Respondent. To put it differently the facts of the case warrant an interim

order preserving the status quo atleast until the disposal of the proceedings initiated u/s 8 if not till the final disposal of the dispute.

10. The Court below in the light of the principles enunciated supra has rightly granted the interim relief prayed for in the I.A.S.

In the light of what is stated above C.R.Ps. are liable to be dismissed. Accordingly they are dismissed.