(1922) 05 CAL CK 0003

Calcutta High Court

Case No: None

Sarat Chandra Sen		APPELLANT
	Vs	
Rajkumar Mookerjee		RESPONDENT

Date of Decision: May 1, 1922

Acts Referred:

- Arbitration Act, 1899 - Section 19

Citation: AIR 1923 Cal 135(1) : 69 Ind. Cas. 863

Hon'ble Judges: Chotzner, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an appeal by the defendant in a suit for recovery of possession of land upon establishment of title. The plaintiff and the defendant are owners of adjoining parcels and the controversy between them constitutes a boundary dispute. On the 19th May 1915, they executed a deed of agreement and referred the matter in dispute to three arbitrators. The arbitrators held an enquiry, and on the 4th November 1917, one of them announced a decision which was signed only by himself and was unfavourable to the plaintiff. On the 8th March 1918, the plaintiff commenced the present litigation to establish his title and to enforce hie claim. The arbitrators were not apprised of the institution of the suit, and on the 30th March 1918 they published their joint award. The defendant, who did not receive notice of the suit till the 4th April, entered appearance on the 11th April and filed his written statement on the 25th April. Amongst other defences, he urged that the award was a bar So the maintenance of the suit. Thereupon the following issues were raised:

1. Has the plaintiff any title to the land in suit?

2. Does the disputed land appertain to holding No. 161?

3. Is the suit barred by law of limitation?

4. Is the plaintiff''s suit barred by the laws of estoppel and acquiescence?

5. Is the suit maintainable under the law?

6. Is the award made by the arbitrators with reference to land in sail void and inoperative?

7. To what relief, if any, is the plaintiff entitled?

2. The Trial Court held, on the authority of the decision in Ram Chandra Pal v. Krishna Lal 17 Ind. Cas. 600 : 17 C.W.N. 351 that the plaintiff was not competent to resile from the agreement to refer to arbitration and that the award was not void and inoperative. The Court also investigated the case on the merits and finally dismissed the claim. Upon appeal, the Subordinate Judge held that as soon as the suit was instituted, the arbitrators became functi officio and the award was consequently in valid. On the merits, he held that the plaintiff had established his title as found by the Commissioner, and in this view he decreed the claim in part. On the present appeal, the defendant has eon-tended that the award was not void and must be deemed operative, till at any rate the plaintiff should establish that the proceedings of the arbitrators had been vitiated by corruption or misconduct. The plaintiff has argued, on the other hand, that paragraph 18 of the Second Schedule to the CPC of 1908 shows that the only remedy of the defendant, if any, was to apply to the Court to stay the suit, and that as he did not take recourse to the procedure prescribed, the suit could be deemed barred by the award.

3. The true effect of paragraph 18 has been considered by this Court in three recent cases. In Dinabandhu Jana v. Durga Prasad Jana 51 Ind. Cas. 80 : 46 C. 1041 : 29 C.L.J. 399 : 23 C.W.N. 716 it was pointed out that where, for the determination of the controversy between the parties, two competent tribunals are available, the Court and the arbitrators, and the plaintiff chooses the latter but in fast has recourse to the former, it is not open to the defendant to enforce specific performance of the contrast or to plead the contract as a conclusive bar to the suit, but the defendant may apply to the Court to stay the suit, in the exercise of its judicial discretion, so as to enable either of the parties to obtain a decision from the arbitrators. When the Court is apprised that the suit has been instituted in contravention of an arbitration agreement, the Court has thus a discretion to stay the suit. The burden lies upon the plaintiff to show that some sufficient reason exists why the matter should not be left to be decided by the arbitrators, and not on the defendant to show that no such reason exists; it is the prima facie duty of the Court to act upon the agreement between the parties. It may be added that in the case then before the Court, the suit bad been instituted two days after the agreement, to refer the matters in controversy to arbitration.

4. The question presented itself for consideration again in the case of Ram Prosad Surajmull v. Mohan Lal Lachminarain 60 Ind. Cas. 895 : 47 C. 752 in connection with Section 19 of the Indian Arbitration Act, 1899, which furnished the model for paragraph 22 of the Second Schedule to the Civil Procedure Code, There, a

reference to arbitration was made by a buyer of goods on the 3rd May 1919. On the 21st May 1919, the sellers instituted a suit for damages for breach of contrast. On the 20th June 1919, the award was made, and on the 9th July following, it was filed in Court. On the 22nd July the sellers applied to set aside the award. Mr. Justice Greaves granted the application on the ground that though the reference to arbitration had been made before the suit in terms of the contract between the parties, the award was of no effect, as the suit had not been stayed pending the arbitration. This conclusion was approved by the Court of Appeal, as supported by the decisions in Doleman & Sons v. Ossett Corporation (1912) 3 K.B. 257 : 81 L.J.K.B. 1092 : 107 L.T. 581 : 76 J.P. 457 : 10 L.G.R. 915; Appavu Rowther v. Seeni Rowther 42 Ind. Cas. 514 : 41 M. 115 : 33 M.L.J. 177 : 6 L.W. 243 and Dinabandhu Jana v. Durga Prasad Jana 51 Ind. Cas. 80 : 46 C. 1041 : 29 C.L.J. 399 : 23 C.W.N. 716. It cannot thus be disputed that if the Court has refused to stay the action, or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute and it is by its decision and by its decision alone that the rights of the parties are settled, We need not consider whether a plaintiff who has instituted a suit in contravention of the agreement to refer to arbitration may not deprive himself of his right to prosecute the suit if, at the, same time, he goes on with the arbitration and obtains an award. The facts of the present case do not raise such a question; if it did require examination, it might be difficult to reconcile the views of Fletcher Moulton, L.J. and Farwell, L. J., as expounded in Doleman & Sons v. Ossett Corporation (1912) 3 K.B. 257 : 81 L.J.K.B. 1092 : 107 L.T. 581 : 76 J.P. 457 : 10 L.G.R. 915.

5. The point arose again in Jokiram Kaya v. Ghaneshamdas Kedarnath 61 Ind. Cas. 380 : 47 C. 849 : 25 C.W.N. 62. In that case a seller of goods referred a dispute between him and his buyer 60 arbitration on the 24th April 1919, in accordance with an arbitration clause contained in the contract. On the 14th August 1919 the buyer, with full knowledge of the arbitration, instituted a suit for recovery of damages from the sailer on the allegation that the seller was in default. The seller received intimation of the suit on the 24th August 1919 but the writ was not served on him till the 26th September 1919. On the 16th October 1919 the arbitrators made an award in favour of the seller. On the 17th November 1919 the buyer made an application to the Court to set aside the award on the ground that by reason of the institution of the suit the arbitrators were functi officio and their award was consequently void for want of jurisdiction. This application was granted and the award was set aside on the 28th November 1919, On the 1st December 1919 the seller applied for stay of the suit u/s 19 of the Indian Arbitration Act. This application was refused by the Trial Court but was granted by the Court of Appeal. The arbitrators were thus left free to proceed with the arbitration. It was pointed out that though as the result of the institution of the suit the arbitrators became functi officio from that very moment and their authority to deal further with the matter referred became extinguished, the validity of the reference itself, which, when made, was in exact conformity with the agreement of the parties, was not affected.

6. The true position consequently is that as soon as the suit is instituted, the arbitrators lose their authority. If the defendant still desires that the contoversy should be decided by arbitration, he must endeavour to obtain a stay of the suit by an appropriate application under paragraph 18 of the Second Schedule to the Civil Procedure Code. If the application in refused by the Court in the exercise of its discretion, the remedy by arbitration ceases to be available. If the suit is stayed, two possible contingencies may require consideration. If the arbitrators have not yet made an award, they are free to bring their proceedings to a termination and make an award in accordance with law. If, on the other hand, the arbitrators have made an award after the institution of the suit, as happened in Ramchand v. Gobindram 56 Ind. Cas. 150 : 13 S.L.R. 193 the award cannot be pleaded as an effective bar to the suit. The award so made should be brought up before the Court under paragraph 20 of the Second Schedule to the Civil Procedure Code; the Court will refuse to enforce it under paragraph 21 read with paragraph 14 (c); and as the award will thus stand cancelled because made without jurisdiction, the arbitrators will be left free thereafter to resume their proceedings on the basis of the original reference. If this view were not adopted, the result would follow that a party to a submission, who had appeared through-out and bad taken his chance before the arbitrators, might, at the very last moment when the award, possibly an adverse award, was about to be made and when there would be no time left for his opponent to obtain a stay order, institute a suit, Mad thereby render infructuous the entire proceedings.

7. In the case before us, the defendant did not take resourse to the proper procedure, namely, apply for stay of the suit, cancellation of the award as made without jurisdiction, and thereafter remission of the matter to the arbitrators. His failure was possibly attributable to ignorance of the law which was explained in the case of Dinabandhu Jana v. Durga Prasad Jana 51 Ind. Cas. 80 : 46 C. 1041 : 29 C.L.J. 399 : 23 C.W.N. 716 long after the institution of this suit. We have accordingly considered whether the defendant should at this late stage be given an opportunity to comply with the requirements of the law, as was done in the case just mentioned. In our opinion, the answer must be in the negative, for the death of one of the arbitrators renders a re consideration by the original arbitrators impossible. Unlike the case of Jokiram, Kaya v. Ghaneshamdas Kedarnath 61 Ind. Cas. 380 : 47 C. 849 : 25 C.W.N. 62 the agreement to refer to arbitration here does not provide for re constitution of the committee of arbitrators if one of them should die, Consequently, even if we were inclined to concede to the defendant the same advantage as was given to the appellant in Dinabandhu Jana v. Durga Prasad Jana 51 Ind. Cas. 80 : 46 C. 1041 : 29 C.L.J. 399 : 23 C.W.N. 716 he would not be benefited thereby. There is thus no escape from the position that in the present case the award has been rightly rejected as made without jurisdiction and the suit tried on the merits by the Court. The appeal consequently fails and is dismissed with costs.