

(1984) 04 CAL CK 0021

Calcutta High Court

Case No: Matter No. 1765 of 1983

Indrajit Sinha

APPELLANT

Vs

B.L. Rathi

RESPONDENT

Date of Decision: April 23, 1984

Acts Referred:

- Arbitration Act, 1940 - Section 10, 31, 32, 33, 41(a)
- Civil Procedure Code, 1908 (CPC) - Section 10, 151
- Constitution of India, 1950 - Article 134A

Citation: 88 CWN 823

Hon'ble Judges: M.M. Dutt, J; A.K. Sengupta, J

Bench: Division Bench

Advocate: R.C. Deb and S. Gupta, for the Appellant; A.C. Bhabra and Protap Chatterjee, for the Respondent

Final Decision: Dismissed

Judgement

M.M. Dutt, J.

This is an application praying for an interim order of injunction restraining the respondent from taking any steps in the pending proceedings u/s 33 of the Arbitration Act, 1940 being Matter No. 1765 of 1983. The application has been filed by one Indrajit Sinha in the appeal preferred by him against the judgment and order dated February 3, 1984 passed by Pratibha Bonnerjea J. in the said proceeding u/s 33 of the Arbitration Act. dismissing the application of the appellant praying for stay of the said proceeding u/s 10 and section 151 of the Code of Civil Procedure. It is not disputed that the appellant Indrajit Sinha is the owner of premises No. 7/1, Lord Sinha Road, Calcutta. It is also not in dispute that the respondent B.L. Rathi has been in occupation of a portion of the said premises. On November 19, 1983, the appellant filed a suit being suit No. 124 of 1983 in the City Civil Court Calcutta against the respondent praying, inter alia, for a declaration that the respondent has

no right to change the nature and character of a room and the bath room in the second floor of the said premises and to dispossess the appellant's representative and for a permanent injunction restraining the respondent from changing the nature and character of the said room and the bath room and from dispossessing the appellant's representative. It has been alleged by the appellant in the said suit that the respondent is a licensee of the appellant in respect of one room in the second floor of the said premises. In the said suit, the appellant has placed reliance upon the letter dated March 31, 1978 purported to have been written by the respondent to the appellant. The letter shows that the respondent has been in occupation of a portion of the said premises as a licensee under the appellant. The letter also contains an arbitration clause. It is the case of the appellant that disputes and differences having arisen between the parties, the appellant duly referred the same to the arbitration of one Mr. R.L. Gaggar, Advocate in terms of the arbitration clause in the agreement as contained in the said letter dated March 31, 1978.

2. By a letter dated 28th November, 1983 the said Mr. R.L. Gaggar informed the Respondent that the disputes were agreed to be referred to his arbitration, that he had entered into the reference, and that he would held the first meeting on 3rd December, 1983 at 9 a.m. at his residence. Along with the said letter, he forwarded a xerox copy of the said letter dated 31st March, 1978 containing the arbitration Clause. It may incidentally be mentioned that on 2nd December, 1983 the said Mr. R.L. Gaggar who was appointed the Arbitrator filed a Caveat in this Court on behalf of the appellant.

3. Immediately thereafter, the respondent filed an application u/s 33 of the Arbitration Act on December 2, 1983 in this Court. In the said application, it has been alleged by the respondent that he has been in occupation of a portion of the said premises No. 7/1, Lord Sinha Road as a tenant of the appellant and not as his licensee. Further, it has been alleged that the first page of the said letter dated March 31, 1978, which has been relied on by the appellant in the suit filed by him in the City Civil Court, Calcutta and a xerox copy of which has been forwarded to the respondent by the said Mr. R.L. Gaggar, Advocate by his letter dated November 28, 1983, is forged and fabricated inasmuch as the respondent is not a licensee under the appellant. Further, there is no existence of any arbitration agreement between the parties which has been included in the first page of the said letter. The respondent has also annexed a true copy of the letter dated March 31, 1978 to the application u/s 33 of the Arbitration Act. The said letter shows that the respondent is a tenant under the appellant, and that there is no arbitration clause. Accordingly, it has been prayed by the respondent as follows :

(a) That the existence and/or validity of the said alleged arbitration agreement be determined and the said arbitration agreement is declared as not in existence, void and/or delivered up or cancelled.

(b) That the first page of the xerox copy of the letter dated March 31, 1978 annexed to the letter dated November 28, 1983 containing the Arbitration clause, is forged and void.

4. In the said proceeding the appellant made an application under sections 10 and 151 of the CPC praying for the stay of the proceeding pending the disposal of the suit filed by the appellant in the City Civil Court. The learned Judge by the impugned judgment and order dated February 3, 1984 dismissed the said application. Hence this appeal.

5. The only question that is involved in the application as also in the connected appeal is whether the learned Judge was justified in not staying the proceeding u/s 33 of the Arbitration Act pending the disposal of the suit filed by the appellant in the City Civil Court, Calcutta. Elaborate submissions have been made by both the parties.

6. It has been urged by Mr. R.C. Deb, learned Counsel, appearing on behalf of the appellant that the subject-matter in both the proceedings, namely, in the suit and in the proceeding u/s 33, is the same. It is submitted that in both the proceedings, the principal question is whether the letter dated March 31, 1978 containing the terms and conditions of licence and also the arbitration clause as relied on by the appellant in the suit, is a genuine document or not. The decision in the suit will be final and conclusive and binding on the parties and will also operate as res judicata in the proceeding u/s 33. Counsel submits that section 10 of the CPC is applicable to all proceedings and appeals under the Arbitration Act by virtue of section 41(a) of the Act. Section 41(a) -provides that subject to the provisions of the Act and the rules made thereunder, the provisions of the Code of Civil Procedure, 1908 shall apply to all proceedings before the Court, and to all appeals, under the Act. It is submitted on behalf of the appellant that in view of section 41(a) of the Act, section 10 of the CPC will apply notwithstanding the fact that both the proceedings are not suits, but one is a suit filed in the City Civil Court and the other is a proceeding u/s 33 of the Arbitration Act filed by the respondent before a learned single Judge of this Court.

7. In support of the said contention, the learned Counsel for the appellant has placed reliance on a number of decisions in order to show the applicability of section 10 of the CPC even though both the proceedings are not suits. It is not necessary for us to consider the said decisions, for we would like to proceed on the assumption that section 10 will not be inapplicable on that ground, namely, both the proceedings are not suits, but one is a suit and the other is a proceeding. But the proper test to the applicability of section 10 is the test of res judicata. In other words, although the applicability of section 10 has been assumed in spite of the fact that the proceedings are not suits, yet before granting stay u/s 10, the Court has to see whether the decision in the City Civil Court suit would operate as resjudicata in the proceeding u/s 33 of the Arbitration Act.

8. It is urged by Mr. Bhabra, learned Counsel appearing on behalf of the respondent that the decision that may be given in the suit will not operate as res judicate in the proceeding u/s 33 of the Arbitration Act inasmuch as the City Civil Court has no jurisdiction to decide the said proceeding. In this connection, we may refer to section 31 of the Arbitration Act which provides as follows :

(1) Subject to the provisions of this Act an award may be filed in any Court having jurisdiction in the matter to which reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be filed and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceeding shall be made to the Court where the award has been, or may, be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, wherein any reference or any application under this Act shall be made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceeding and all subsequent application arising out of that reference and the arbitration proceeding shall be made in that Court and in no other Court.

9. It is not disputed that an award may be filed in this Court. Therefore, there can be no doubt that this Court has the exclusive jurisdiction to decide the questions as mentioned in subsection (2) of section 31 including the question regarding the existence of the arbitration agreement. The City Civil Court in which the appellant has filed the suit has no jurisdiction to give any decision on the question as to the existence of the arbitration agreement. Indeed, we have already noticed the prayer made in the plaint of the City Civil Court suit, namely, for a declaration and for injunction relating to the nature and character of the suit property. There is no whisper in the plaint of the suit as to the existence or otherwise of the arbitration agreement, nor is there any prayer in that regard. We are unable to accept the contention of the appellant that the subject-matter of both the proceedings is the same. Even assuming that the subject-matter in both the proceedings is the same, still the City Civil Court has no jurisdiction to try any issue as to the existence or otherwise of the arbitration agreement.

10. Section 32 of the Arbitration Act is very significant. It provides that notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be enforced, set aside, amended, modified or in any way affected otherwise than as provided in the

Act. Therefore, it is manifestly clear that no suit can be filed regarding the question as to the existence or otherwise of an arbitration agreement. So the City Civil Court will have no jurisdiction to give any decision on the question as to the existence of the arbitration agreement which is the subject-matter of the proceeding u/s 33 of the Arbitration Act.

11. It is a well established principle of law that a Court which no jurisdiction to try any matter its decision on that matter cannot operate as res judicata in any proceeding before a Court which is alone competent to decide such matter. The City Civil Court not having jurisdiction to decide the issue as to the existence or otherwise of the arbitration agreement between the parties its decision will not be res judicata in the proceeding u/s 33 of the Arbitration Act.

12. For the reasons aforesaid, we are of the view that the learned Judge was justified in not staying the proceeding u/s 33 of the Arbitration Act.

13. This order virtually disposes of the appeal. The appeal is, accordingly, treated as on day's list and both the appeal and the application are dismissed. There will, however, be no order as to costs. The settlement of index of papers and the filing of the paper books are dispensed with. The undertaking is discharged.

14. All interim orders are vacated. Parties will be at liberty to take appropriate directions from the learned trial Judge.

15. Mrs. Mukherjee, learned counsel appearing on behalf of the appellant has prayed for a Certificate for appeal to the Supreme Court under Art. 134A of the Constitution of India. In our opinion, this case does not involve any substantial question of law of general importance nor do we think that there is any question of law that needs to be decided by the Supreme Court. The prayer for a certificate is, accordingly, disallowed. Further, the prayer for stay of the operation of this judgment is also disallowed.

A.K. Sengupta, J.

I agree.