(1920) 03 CAL CK 0022

Calcutta High Court

Case No: None

Jokiram Kaya		APPELLANT
	Vs	
Ghaneshamdas Kedarnath		RESPONDENT

Date of Decision: March 9, 1920

Acts Referred:

- Arbitration Act, 1940 - Section 19

Citation: 61 Ind. Cas. 380

Hon'ble Judges: Ernest Fletcher, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

Asutosh Mookerjee, J.
We are invited in this appeal to consider the propriety of an order of dismissal made by Mr. Justice Greaves on an application for stay of a suit u/s 19 of the Indian Arbitration Act. The material fact which led up So the order are not in dispute and may be briefly narrated for our present purpose.

2. On the 14th August 1918 the appellant sold to the respondent 150000 yards of delivered in three equal in January, February and March, was not carried out: the Seller contends that the breach was due to default on the part of the buyer; on the other hand, that the default Was on the part of the seller. The contract contained an arbitration clause in the following terms:

Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the Rules of the Bengal Chamber of commerce, application for the time being, for decision, Shall be accept as final binding on both parties to this is The award may at the instance of either party and witheut any notice to the other of them, be made a rule of the High Court of Judicature at Fort William.

3. On the 24th April 1919 the seller referred the dispute to the arbitration of the Bengal Chair of commerce terms of the just to our, and his letter gave a detailed

account of what, according to his version, had taken place between the parties, The statement of the Heifer was forwarded by the Registrar of the Chamber to the buyer for his remarks. The buyer sent a reply in due course; this was transmitted by the Registrar to the seller, who submitted his final reply on the 17th July 1919. On the 14th August 1919 the instituted a suit on the Original Side of this Court for recovery of damages from She seller, on the allegation that the seller was in default. The seller received intimation of this suit on the 24th August 1919, but the writ of summons was not actually served on him till the 26th September 1919. On the 18th October 1919, the Arbitration Tribunal of the Chamber made an award in favour of the seller. On the 17th November 1919 the buyer made an application to this Court to Set aside the sward, on the ground that, by reason of the institution of the suit, the arbitrator were junction officio and that, consequently, the award wag void for want of jurisdiction. This application was granted, and the award was sot aside by Mr. Justice Ghose on they 28th November 1919. On the 11th December 1919 the seller applied for stay of the suit u/s 19 of the Indian Arbitration Act. On the 11th December 1919 Mr. Justice Greaves dismissed the application. We have now to examine whether the order of dismissal was, in all the concomitances of the case, appropriately made.

4. Section 19 of the Indian Arbitration Act provides as follows :

Where any party to a submission to which this Act appeal, or any person claiming under him, commences any time proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred, any party to such proceeding may, at any time appeal and before filing a written statement or tiny other steps in the proceeding, as ply to the Const to stay the pre the Court, if satisfied that; is no the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and willing remains ready and willing to do ell things, may make an order staying the proceedings,

5. This section corresponds to Section 4 of the English Arbitration Act, 1899, which was interpreted in the judgment of the Court of Appeal in Doleman and Sons v. Ossett Corporation (1921) 3 K.B. 257 : 107 L.T. 581 : 76 J.P. 457 : 10 L.G.R. 915 : 81 L.J.K.B.1092. The principle enunciated in this decision was held applicable to a case under paragraph 18 of the Second Schedule of the Civil Procedure Code, by this Court in Dinahandhu Jana v. Durga Prasad Jana 51 Ind. Cas. 80 : 46 C. 1041 : 29 C.L.J. 399 : 23 C.W.N. 716 end is of fundamental importance in this class of cases. Where, for the determination of the controversy between the parties, two competent Tribunals are available, the Court and the arbitrators, and one of them chooses the latter, but in fast has recourse to the former, it is not open to his opponent to enforce specific performance of the contract or to plead the contract as a conclusive bar to the suit; but he may apply to the Court to stay the suit in the exercise of its judicial discretion, so as to dove the plaintiff in the suit no other remedy than to

proceed by arbitration. It is, consequently, plain that a Court invited to exercise its judicial discretion to deprive a party of the remedy by suit, must be satisfied that the remedy to proceed by arbitration is really available,

6. Now, in the case before as, there was a valid reference to arbitration on the 24th April 1919. What then was the effect of the institution of the suit on the 14th August I9119 The Position is best expressed in the would of Multon, L.J. in Doleman and Sons v. Ossett Corporation (1912) 3 K.B. 257 : 107 L.T. 581 : 7 J.P. 457 : 10 L.G.R. 915 : 81 L.J.K.B. 1092

The law will not enforce the specific performance of such agreements (that it, agreements to refer to private Tribunals), but if duly appealed to, it has the power in its discretion to refuse to a party the alternative of having the dispute settled by a Court of Law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action, or if the defendant has abstained force it to do so, the Court has since of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows, therefore, that in the latter case the private Tribunal, if it has ever come into existence, is functions officio, unless the parties agree de novo that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred,

7. Consequently, when a reference to arbitration has been made and the private Tribunal has come into existence, the effect of the institution of the suit is that, from that very moment, the arbitrators become function officio, that is, their authority to deal further with the matter becomes extinguished. The institution of the suit cannot, however, retrospectively affect the validity of the reference which, when it was made, was in exact conformity with the agreement of the parties, If this view were not adopted, the result would follow that a party to a submission, who had appeared throughout and had 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 and thereby render infructuous the entire proceedings. Such a conclusion cannot, in our opinion, be defended, either on principle or on the authorities. We are not concerned here with a ease where, after the institution of a suit by one of the parties, his opponent makes a reference to arbitration and obtain an award with cut stay of the suit. There it might possibly be contended, with some approach to plausibility, that the arbitration proceedings were void from their very inception. It might also be a question of nicety in a case of that description, whether, when an award so made had been set aside, a fresh reference to arbitration was permissible, on the hypothesis that the agreement to refer was not exhausted by a reference which had proved ultimately in fructuous because initially incompetent. In the case before us, on the other hand, the arbitration proceedings were properly instituted and carried on till up to the moment of the institution of the suit; that suit

could not, on any conceivable principle of law, relate back to the date of reference and affect the validity of the proceedings which had followed thereon, We must hold, accordingly, that the effect of the cancellation of the award on the 28th November 1919 did not affect that portion of the arbitration proceedings which had taken place before the 14th August 1919, when the suit was instituted.

8. The question next arises, whether, if the suit were now stayed, the bar to the continuance of the arbitration proceedings would be so effectually removed as to allow their termination in a valid award. In our opinion, the answer must be in the affirmative, in view of rule VIII of the Rules of the Tribunal of Arbitration, adopted by resolution of the Bengal Chamber of Commerce on the 16th January 1912, and confirmed on the 27th February 1912;

If any arbitrator or umpire decline or fail to act, or if he die or became incapable of acting, the Registrar may substitute and appoint a new arbitrator or umpire in manner aforesaid (that is, in the manner stated in Rule V) and the Court so re constituted shall proceed with the arbitration, with liberty to act on the record of the proceedings as then existing, and on the evidence, if any, then taken in the arbitration, or to commence the arbitration de novo,

9. In the present case, we may hold, without unduly stretching the language of the rule, that the arbitrators became incapable of acting," when the suit was instituted, and their authority lost all life and power. No doubt, they themselves did not at the time release this, and proceeded to discharge their duties as if they were still capable of Acting under an authority yet unimpaired and in full operation. That cannot, however, affect or alter the true legal position. Consequently, if the suit is stayed, it would be competent to the Chamber to substitute and appoint new arbitrators and the Court so reconstituted will then be able to proceed with the arbitration.

10. This view furnishes a satisfactory solution of the difficulty apprehended by the respondent that if the matter were remitted for arbitration to the same arbitrators as had acted before, he might not have a fair chance. We desire to add, however, that the respondent has not laid the foundation for a real grievance in this respect; he had, so far as may be gathered from the materials on the record, ample opportunity to place his case before the arbitrators, and there is no shadow of a suggestion that they had acted unfairly or improperly. But we need not elaborate that aspect of the matter, for, if the suit is stayed, the arbitration proceedings will be revived and carried on to a conclusion before a Tribunal reconstituted under rule VIII. We hold, accordingly, that if the application for stay of the suit u/s 19 of the Indian Arbitration Act is granted, the ugh the respondent will thereby be deprived of his remedy by suit, the remedy to proceed by arbitration will be still available. In this view of the matter, we must next consider whether, in the circumstances of this case, the discretionary power vested in the court u/s 19, should be exercised in favour of the appellant.

11. On behalf of the respondent, it has been forcibly argued that a court of Appeal should not readily interfere with the decision of the primary court on a question of this description. The appellant has not disputed this position, which is, indeed, supported by high authority: Freeman v. Chester Rural District Council (1911) 1 K.B. 783 : 80 L.J.K.B. 695 : 104 L.T. 368 : 75 J.P. 132, Vawdrey v. Simpson (1896) 1 Ch. 166 : 65 L.J. Ch. 369 : 44 W.R. 123 and Barnes v. Youngs (1898) 1 Ch. 414 : L.J. Ch. 263 : 63 W.R. 332. It is clear, however, that the discretion must be judicially exercised, and an erroneous exercise of the discretionary power is capable of correction by a Court of Appeal; otherwise, a statutory provision would have been made that the order was final and not liable to be challenged by way of appeal. We must, consequently, examine the circumstances of the case and form our own conclusion, attaching due weight to the view adopted by the court below. Now, it is firmly settled that, where parties have agreed to refer a dispute to arbitration, and one of them, notwithstanding that agreement, commercial an action to have the dispute determined by the court, the prima facie leaning of the Court is to stay the action and leave the plaintiff to the Tribunal to which he has agreed. As Lord Sal borne, L.C, observed in Willesford v. Watmor (1873) 8 Ch. 473 : 42 L.J. Ch. 447 : 28 L.T. 428 : 21 W.R. 350, if parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then a prima facie duty is cast upon the Courts to act upon such an agreement. This expression of opinion was adopted with approval in Law v. Garrett (1878) 8 Ch. D. 26 : 38 L.T. 3 : 26 W.R. 426 Lyon v. Johnson (1889) 40 Ch. D. 579 : 58 L.J. Ch. 626 : 60 L.T. 223 : 37 W.R. 427 and clog v. clegg (1890) 44 Ch. D. 200 : 59 L.J. Ch. 520 : 62 L.T. 821 : 38 W.R. 638 Lord Hatherley, L.C., emphasized the same point of view, when, in Kitchen v. Turn hull (1872) 20 W.R. (Eng) 253, he said that the parties having some to an agreement to refer, such agreement must be considered binding between them and ought not lightly to be overturned. Hence it has been ruled that the burden of showing cause, why the agreement to submit should not be given effect to, is upon the party opposing the application for stay, and it is for him to induce the Court to exercise its discretion in his favor with a view to allow the Action to proceed: Mason v. Haddan (1859) 6 C.B. (N.S.) 526 : 120 R.R. 256 : 33 L.T. (O.S.) 163 : 141 E.R. 562 Railway Passenger''s Assurance Co. (1882) 9 Q.B.D. 505 188, fox v. Railway Passenger''s Assurance Co. (1885) 54 L.J.Q.B. 505 : 52 L.T. 672, Denton v. Legge (1895) 72 L.T. 626 : 13 R. 388 Dentony v. Simpson (1896) 1 Ch. 166 : 65 L.J. Ch. 369 : 44 W.R. 123, Doleman and Sons v. Ossett Corporation (1912) 3 K.B. 257 : 107 L.T. 581 : 76 J.P. 457 : 10 L.G.R. 915 : 81 L.J.K.B. 1092 and clough v. County Live Stock Insurance Association (1916) 85 L.J.K.B. 1185 : (1916) W.C & I Rep. 373 : 60 S.J. 642 : 32 T.L.R. 526 This view has been followed in this Court in the case of Dinabandhu Jana v. Durga Prasad Jana 51 Ind. Cas. 80 : 46 C. 104 : 29 C.L.J. 399 23 C.W.N. 716.

12. Tested in the light of these principles, how do the parties stand? The burden lies on the respondent to show that some sufficient reason exists, why the matter should not be referred to arbitration, and not on the appellant to show that no such

reason exists. The respondent has not brought forward any substantial reason why the agreement between him and the appellant, to refer matters in dispute to arbitration, should not be Acted upon, It has not been suggested that the arbitrators are likely to be biased or interested persons; nor has it been said that the matters in dispute involve solely or chiefly, such questions of law as must ultimately be decided by the Court. On the other hand, the main question in controversy is, whether the breech of contract was due to the default of one party or the other, a matter which this arbitrators would presumably be well qualified to investigate. A doubt, however, was expressed on behalf of the respondent, whether, even if the unit wore stayed, the arbitration proceedings could be legally revived and curried on so as to terminate in a valid award. This was a perfectly legitimate question to raise and we have already decided that; the proceedings an be revived and carried on before a re constituted Tribunal. The only other objection which has teen taken by the respondent is, that the application for away should have been made earlier, that is, immediately after the appellant was served with the writ of summons, if not shortly after he had notice of the suit. The appellant, however, has explained that at that time the law on the subject, as expounded in Dinabandhu Jana v. Durga Prasad Jana 51 Ind. Cas. 80 : 46 C. 104 : 29 C.L.J. 399 : 23 C.W.N. 716 was not very clearly appreciated, and that, as the summons was served during the long vacation, it was not easy to make the requisite application for tray and to obtain an order before the award could actually be made. The appellant has further urged that the conduct of the respondent has by no means been such as would entitle him to sympathy or indulgence from the Court. The respondent had full notice of the arbitration proceedings and submitted his case to the Tribunal; it was only after the arbitration proceeding had contemned for nearly four months that ho tideway changed his front and instituted she, No reason has been assigned, no explanation has been attempted, to suavity this time of the respondent. We must take this along with the fast that the respondent has made no endeavor to discharge the harden which lay upon him to satisfy the Coast fact the matter in dispute should not be added by arbitration, The cumulative iffiest of all this leads to the conclusion that the respondent has failed to establish grounds for the exercise of oar in his favour so allow his proceed. The inference is thus inevitable that the application for stay cannot rightly be refused.

13. The result is, that the appeal is allowed with costs both here and in the Court below. The order of the lower court is not and the suit is stayed will be at liberty to proceed with the arbitration in the Chamber of commerce with the Tribunal re constituted under rule VIII, in the manner indicated above.

Fletcher, J.

14. I agree.