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Court : Mumbai

Decided On : Oct-12-1972

Reported in : (1974)76BOMLR8

Judge : Nain, J.

Appeal No. : O.C.J. Suit No. 910 of 1971

Appellant : The Union of India (Uoi)

Respondent : The ScIndia Steam Navigation Co. Ltd.

Disposition : Appeal dismissed

Judgement :

Nain, J.

1. Defendants No. 1 have taken out this Motion for stay of the suit under Section 34 of the Arbitration Act, 1940 (hereinafter referred to as 'the Arbitration Act'), to compel the plaintiffs to refer the suit disputes to arbitration as between the plaintiffs and defendants No. 1 pursuant to Clause 17 of the Charter Party dated November 6, 1970. Defendants No. 2 are not parties to the said Charter Party.

2. Plaintiffs No. 1 are the Union of India. Plaintiffs No. 2 are The Food Corporation of India and are a Government of India undertaking. Defendants No. 1 are the owners of a steam ship called s.s. Jal-jawahar. Defendants No. 2 are the Bombay

Port Trust.

3. On November 6, 1970 a Charter Party was entered into between plaintiffs No. 1 and defendants No. 1 whereby defendants No. 1 agreed to carry on board s.s. Jal-jawahar between November 15, 1970 and November 30, 1970, 3000 metric tonnes of Urea in bags from United States to ports in India. The said Charter Party contains the following arbitration clause:

17. Any dispute arising under this Charter Party shall be settled in accordance with the provisions of the Arbitration Act, 1940 in India, each party appointing an Arbitrator, and the two Arbitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto. The Arbitrators shall be commercial men.

4. Pursuant to the said Charter Party, plaintiffs No. 1 put on board s.s. Jal-jawahar 8350.06 metric tonnes of Urea in 167012 bags at New Orleans in United States on or about December 2, 1970. Out of the said quantity, a quantity of 162799 bags of Urea in sound condition was delivered to the plaintiffs. The plaintiffs also received 1623 bags of Urea in slack and torn condition, making an aggregate receipt of 164422 bags. There was a short delivery of 2590 bags.

5. On January 23, 1971 plaintiffs No. 2 registered their provisional claim for shortage with defendants No. 1 as well as with defendants No. 2. On January 27, 1971 they specified the shortage to be 2590 bags and notified both the defendants accordingly. The plaintiffs thereafter got the goods surveyed and ultimately on April 1, 1971 they sent a claim bill for Rs. 70,084.95 to defendants No. 1 and on May 14, 1971 to defendants No. 2. By the letter of July 13, 1971 defendants No. 2 repudiated their liability. Thereafter on September 4, 1971 the plaintiffs served the statutory notice under Section 87 of the Bombay Port Trust Act, 1879 on defendants No. 2. Ultimately on November 22, 1971 the plaintiffs filed the present suit against both the defendants for recovery of the said claim of Rs. 70,084.95.

6. In the plaint the plaintiffs have contended that according to the terms of the Charter Party and the Bill of Lading defendants No. 1 are bound and liable to pay to them for the short delivery of goods the said sum of Rs. 70,084.95, being the

value of the said goods which defendants No. 1 have failed and neglected to deliver on account of their negligence or in any event have wrongfully converted the said goods to their own use. Without prejudice to the said claim against defendants No. 1, the plaintiffs say that defendants No. 2 are statutory bailees of the said goods and are liable to pay for the said goods to the plaintiffs on account of their negligence in not taking proper care of the said goods as statutory bailees. The plaintiffs further say that defendants No. 2 are guilty of mal-feasance, misfeasance and non-feasance and are liable. In the alternative the plaintiffs say that defendants No. 2 have wrongfully converted the said goods to their own use and are liable to pay to the plaintiffs the said claim. It might be mentioned here that the claim in the suit is jointly against both the defendants and it is not against either of the defendants in the first instance and against the other in the alternative. It would, therefore, be for the Court to pass a decree if any either against both the defendants jointly or against one of them whom the Court holds to be liable for the plaintiffs' claim. Defendants No. 2 are not a party to the Charter Party and are, therefore, not a party to Clause 17 thereof which contains the arbitration agreement between plaintiffs No. 1 and defendants No. 1.

7. Plaintiffs No. 1 oppose the motion for stay and one K.S. Manjrekar, Deputy Director in the office of the Regional Director (Food), Bombay, has made an affidavit dated September 20, 1972 in reply to the Notice of Motion for stay of the suit under Section 34 of the Arbitration Act. In the said affidavit it is contended that the cause of action against defendants No. 1 is closely linked with the cause of action against defendants No. 2. The plaintiffs further contend that they would have to lead a substantial part of the same evidence both in the arbitration proceedings as well as in the suit if the suit is stayed against defendants No. 1. They further contend that either defendants No. 1 failed to deliver the entire cargo to defendants; No. 2 as statutory bailees or if defendants No. 1 did deliver the entire cargo to defendants No. 2, defendants No. 2 would be liable as statutory bailees and the evidence of the plaintiffs would be the same. The plaintiffs also contend that there would be a multiplicity of proceedings, viz., arbitration proceedings against defendants No. 1 and the suit which would have to proceed in any case against defendants No. 2.

8. Section 34 of the Arbitration Act provides that the Court 'may make an order staying the proceedings'. The making of an order of stay is undoubtedly in the discretion of the Court. This discretion must nonetheless be judicially exercised. Where parties have agreed to refer their disputes to arbitration and one of them notwithstanding that agreement files a suit to have the disputes determined by the Court, the prima facie leaning of the Court is to stay the suit and to leave the plaintiff to the tribunal to which he has agreed. If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, a prima facie duty is cast upon the Courts to act upon such an agreement. Once the party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the burden of showing why effect should not be given to the agreement to submit, is upon the party opposing the application for stay. In this case a complication is created by the fact that defendants No. 2 are not a party to the Charter Party containing the arbitration agreement. They do not agree to refer the disputes between the parties to arbitration in so far as they are concerned. They however submit to the orders of the Court with regard to the stay of the suit against defendants No. 1. In these circumstances, I must determine whether in this case I must hold the plaintiffs to the arbitration agreement with regard to one of the parties and allow them to proceed against the other party in the Court.

9. My attention has been invited on behalf of the plaintiffs to the case of *Sheodatt v. Prakash Distributors* AIR[1954] Nag. 289, decided by Hidayatullah J. (as he then was) and Kaushalendra Rao J. In that case the suit was filed by the plaintiff for recovery of Rs. 2 lacs for refund and for Rs. 36,000 as damages. Defendant No. 1 was a party to the agreement which contained arbitration clause. The other defendants were not. Defendant No. 2 was an employee of defendant No. 1. The Court observed that to stay the suit and permit arbitration would in that case result in splitting up of the action which may be a ground for refusing stay. The Court also observed that granting of the stay would result in allowing of the case of the plaintiff against some of the defendants to be determined by the arbitration, leaving the case of the rest of the defendants to be decided by the Court and the portion of the claim that could not be dealt with in arbitration was by no means small or insignificant. On the allegations that the defendants, who were not parties

to the arbitration agreement, were benamidars and were not persons of substance, the Court thought that there was sufficient reason for refusing stay. Accordingly the decision of the lower Court refusing to grant a stay was confirmed and the appeal was dismissed. The said judgment of the Nagpur High Court was followed in the case of C.H.O. & C.S. Co. v. Brijnathsinghji AIR[1956] Nag. 61 decided by Sinha C.J. and Hidayatullah J. (as he then was). My attention was also drawn to a Division Bench judgment of the Calcutta High Court in the case of Asiatic Shipping Co. v. P.N.D. Lloyd : AIR1969 Cal374 , in appeal against the decision of a single Judge of the said High Court refusing to stay the suit under the provisions of Section 34 of the Arbitration Act. The suit was filed by the owner of a vessel on a Charter Party between the plaintiffs and defendant No. 1. Defendant No. 2 was a guarantor. The Charter Party contained an arbitration clause. Defendant No. 2 was however not a party thereto. The Calcutta High Court held that where on failure of the principal debtor to pay the consideration for the contract the plaintiff creditor files a suit against both the principal debtor and his guarantor, the Court is justified in refusing to stay the suit when there is an arbitration agreement between the plaintiff and the principal debtor, the guarantor not being a party to it. It was observed that the decision upon the liability of a guarantor necessarily involves the determination of the question as to whether the principal debtor was liable, for, if the principal debtor was not liable no liability could be attributed to the guarantor. And as the same issue as regards the liability of the principal debtor will have to be gone into both in the suit and in the arbitration proceedings, there is every likelihood of conflicting findings and hence the suit could not be stayed. The appeal was accordingly dismissed.

10. On behalf of defendants No. 1 my attention was drawn to the case of W. Bruce Ltd. v. J. Strong. [1951] 2 K.B. 447. In that case there was a chain of contracts for sale of dried fruit. There was arbitration clause only between the last purchaser and his vendor. In a suit for recovery of damages for shortage filed by the last purchaser against his vendor, the defendant took out a third party notice against his vendor, who in turn took out a third party notice against his vendor. It was only the last contract between the plaintiff and the defendant which contained an arbitration clause. The learned trial Judge refused to stay the suit, but on appeal the Court of Appeal allowed the appeal and compelled the plaintiff to refer his

disputes with the defendant to the arbitration notwithstanding the fact that the suit would have to proceed in Court so far as the determination of rights between the plaintiff and the third party, and between the third party and his vendor. This judgment is in direct conflict with the decisions of the Nagpur and Calcutta High Courts referred to hereinabove. I am afraid, I prefer to follow the Indian decisions. I must add that the ease before me for refusal of stay is even stronger than it was in the Nagpur and Calcutta cases.

11. Defendants No. 1 have also invited my attention to the judgment in *Prakash Cotton Mills Pvt. Ltd, v. The Punjab Cotton Co., (Exp. & Imp.) Pvt. Ltd.* (1969) Appeal No. 112 of 1969 (in Suit No. 57 of 1969), decided by K.K. Desai and Vaidya JJ., on October 13/14, 1969 (Unrep.) of a Division Bench of this Court consisting of K.K. Desai J. (as he then was) and Vaidya J. in appeal against the decision of Kantawala J. who directed the stay of the plaintiffs' suit, under Section 34 of the Arbitration Act. In this case also the contract between the plaintiffs and defendants No. 1 contained an arbitration agreement whereas defendants No. 2 who were financiers of the plaintiffs and were joined by the plaintiffs in the suit, were not a party to the arbitration agreement. On appeal the Division Bench affirmed the decision of the learned single Judge and dismissed the appeal. In the judgment of the Division Bench it is observed that where a certain party who is a stranger to the arbitration agreement is joined as co-defendant and the Court finds that the said party was made a co-defendant in the suit only for the purpose of escaping from the arbitration agreement, the Court would hold that the suit as against the co-defendant was frivolous and vexatious and that the Court would not reject the application for stay. It is further observed in the said judgment that in that case defendants No. 2 had been joined mala fide for the purpose of escaping from the arbitration agreement and further that there was no possibility of conflicting decisions in the arbitration proceedings and in the Court.

12. From the facts of this case, it appeals to me that it cannot be said that defendants No. 2 have been joined mala fide with a view to escape or resile from the arbitration agreement. The plaintiffs have a bona fide claim against defendants No. 2 either jointly with defendants No. 1 or in the alternative. At the hearing of the suit, the real controversy may come to be between defendants No. 1 and

defendants No. 2. Defendants No. 1 allege that they have delivered the entire consignment to defendants No. 2 as bailees and the shortage in the goods had occurred while the goods were in the possession of defendants No. 2, Defendants No. 2 allege that defendants No. 1 had short delivered the goods to them and were therefore liable. In these circumstances, it may be that the defendants may have to fight out each other in the suit. The decree may be against both or either of them. The evidence so far as the plaintiffs are concerned would be the same against both the defendants, viz, the delivery of goods under the Bill of Lading at New Orleans and short delivery to them in India. If the suit is stayed as against defendants No. 1 and decided by arbitration and proceeded with against defendants No. 2 in Court, in my opinion, there is every likelihood of conflicting findings in the award and the judgment of the Court. This must be avoided. For all these reasons, I am of the view that the discretion of the Court must be exercised against the stay of the suit against defendants No. 1.

13. An argument was made on behalf of defendants No. 1 that in cases where a part of the claim in the suit against the same defendant was covered by the arbitration agreement and another part of the claim was outside the agreement, the Courts have stayed the suit with regard to that part of the claim which fell within the arbitration agreement and have allowed that part of the claim which is not covered by the arbitration agreement to proceed before the Court. In my opinion, there can be cases where it may be desirable to stay proceedings as to part only, if that part is the (subject-matter of an arbitration agreement and can appropriately be decided by arbitration. In such cases, the Court's exercise of its discretion will depend on whether it is convenient to try the different parts of the dispute separately. A stay would possibly be entirely refused where only a subordinate and trifling part of the dispute is agreed to be referred or where the claim falling within the arbitration agreement and the one falling without it would turn upon substantially the same facts. I am however not concerned with this line of cases because in this case the entire claim in the suit is against both the defendants. This is not a case where a part of the claim is agreed to be referred to arbitration and the other part is not. I, therefore, consider it unnecessary to refer to this line of cases.

14. In the result, I dismiss the Notice of Motion. Costs of the Motion will be costs in the cause.

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