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Court : Allahabad

Decided On : Apr-26-1910

Reported in : 6Ind.Cas.420

Judge : Richards and ;Tudball, JJ.

Appellant : Ram Kumar Singh

Respondent : Jagmohan Singh

Judgement :

Richards, J.

1. This appeal arises out of a suit brought by the plaintiff for a declaration of his title to a certain house or part of the house. The plaintiff is the son of one Ram Autar Singh deceased. The defendant married a daughter of the said Ram Autar Singh and undoubtedly lived in the premises in dispute for a long time. The plaintiff claims that the defendant lived in the house during the life-time of Ram Autar Singh by the latter's permission and that on his father's death, he (the plaintiff) was a minor. The defendant set up a title that the premises in dispute were a gift to himself and his first wife, the daughter of Ram Autar Singh. The Court below has decided on the merits of the case in favour of the plaintiff, but nevertheless dismissed the suit on the ground next herein after mentioned. The defendant pleaded that the parties by agreement dated the 28th November 1902, referred certain disputes (including the dispute as to the title of the house) to arbitration,

that the plaintiff, refused to perform his contract and that, therefore, the suit is barred by Section 21 of the Specific Relief Act.

2. There is no doubt that the contract was entered into and the agreement signed by the parties. The arbitrators were ready and willing to go on with the arbitration. Both parties at first attended before the arbitrators and produced their witnesses. The defendant says (at page 7 B.) ' The arbitrators gave Ram Koomar and myself a notice that on such and such a date there will be a meeting of the arbitrators and that we should attend. I attended the meeting regularly; but Ram Koomar did not attend. I asked the arbitrators to make an award. They said that they would not make an award until both parties attended. Ram Koomar gave notice to the arbitrators not to make an award.' This evidence is not contradicted and there can be no doubt that the award was not made because of the conduct of the plaintiff and the notice sent by him. The defendant suggests that the plaintiff sent the notice and refused to attend the proceedings because the arbitrators has intimated their opinion on one of the matters referred to them against the plaintiff; however this may be, the plaintiff has given no evidence of any kind that the arbitrators were guilty of misconduct.

3. It is argued for the plaintiff that -when' he signed the agreement, ho had altogether performed the contract and that accordingly it cannot be said that he refused to perform the contract" within the meaning of the section. It seems to me that such a construction cannot he given to the, section. In my opinion a contract to refer disputes to arbitration implies a contract to do all things necessary to the making of a valid award so far as the parties are concerned. If the contract was not rescinded I would hold on the evidence that the plaintiff refused to perform his contract within the meaning of the section.

4. It seems to me that it lay on the plaintiff, to show that he had a just cause for revoking the authority of the arbitrators. If the notice had any effect at all, it was to revoke the authority of the arbitrators, and was itself a refusal to perform the contract. A contract once made can only be rescinded by mutual agreement. Of course, if after a contract to refer is entered into, nothing is done for a long time, the Court might infer from conduct of the parties that they had rescinded it by

mutual consent. But this is not a necessary inference. In the present case the defendant was clearly anxious to have the award. The only circumstances for which it could be implied that he agreed to rescind was the fact that he never attempted to put in force the provisions of the Code of Civil Procedure to force on the proceedings. As against the drawing of this inference, it must be remembered that defendant was in possession and might well be content to rely on the strength of this position. I find it impossible to hold on the evidence that the defendant ever intended to rescind or did rescind the contract. It is lastly said that the contract to refer was not 'in existence' when the suit was instituted within the meaning of the section. It seems to me that if the contract was never rescinded it must be still in existence and the mere fact that there might have been difficulty in applying the Sections of the Civil Procedure Code, does not render the contract non-existent. It is said that this means that the plaintiff may now be unable to have the question decided either by the Court or by arbitration. The answer is that he had his remedy until he contracted to refer and he had his remedy by arbitration until he refused to go on with , the arbitration. In other words it is his own fault. I would dismiss the appeal.

Tudball, J.

5. The sole question which has been argued before us is whether the plaintiff's suit is barred by the provision of the last clause of Section 21, Specific Relief Act. The lower Court on the merits has held in favour of the plaintiff-appellant but 'has held that the suit is barred by the existence of a binding and subsisting contract to refer the dispute to arbitration. The suit was brought to obtain a declaration of the plaintiff's title to and possession of a portion of a house. The defendant-respondent is the husband of plaintiff's sister and is what is known in this country as a khana damad, i.e., a son-in-law who resides in the house of his father-in-law. The plaintiff's father died when the plaintiff was a minor.

6. When the latter had attained his majority, a dispute arose between the parties under three different heads.

7. In respect to one, a Civil suit was brought and during the pendency thereof, the parties on 28th November 1902, executed an agreement in writing to refer the three matters to the arbitration of three persons. No period was fixed within which the arbitrators were to come to a decision.

8. In regard to the matter then under litigation, they passed a decision and the Civil suit was decided in accordance with their award It was in favour of the defendant.

9. The plaintiff after that, i.e., in 1903 sent a notice to the arbitrators revoking the submission to arbitration.

10. Whether this was done with good cause has not been established in evidence and for the purposes of this decision it may be assumed that the revocation was without good cause.

11. The arbitrators then dropped the proceedings. It appears from the defendant's evidence that he attended the meetings of the arbitrators but they refused to go on unless the plaintiff also attended; and then the latter wrote to say that he did not wish them to go to a decision.

12. The defendant took no further action under the provisions of Civil Procedure Code to enforce a decision of the two remaining questions in dispute, one of which was the question raised in this very suit, i.e., the title to the house in dispute which the plaintiff claims as being his ancestral property and which the defendant claims as having been gifted by the plaintiff's father to his (defendant's) wife.

13. The period of limitation for an application under Section 523 (three years under Article 178, Limitation Act) passed by and neither party made any attempt to enforce a decision by the arbitrators. Then the plaintiff in the defendant's absence took possession of the house. Upon this the defendant brought a suit (November 1907) under Section 9, Specific Belief Act, and obtained a decree on 27th March 1908.

14. On 31st March 1908, the plaintiff brought the present suit.

15. Three pleas have been raised on this appeal:

(i) That an actual submission to arbitration having been made by the parties, the plaintiff has fulfilled his contract to refer and, therefore, there is no such contract in existence as would bar this suit under Section 21, Specific Relief Act.

(2) That the defendant not having proved that the revocation of the agreement was made without sufficient cause, the contract no longer exists.

(3) That the contract to refer to arbitration has been broken up by the conduct of the parties and the bar of Section 21 has ceased to be applicable.

16. On the first plea, I agree with my learned brother that an agreement to refer to arbitration implies an agreement to do every thing necessary to enable the arbitrators to arrive at a decision on the question submitted to them. To hold that the plaintiff ' had fulfilled his contract to refer merely by signing the document of 20th November 1902, is, I think, impossible. It is true that an agreement to refer may in this country be revoked for good cause, but until such, revocation be made, it is the plaintiff's duty under the contract to do all that is necessary to enable the arbitrators to come to a decision.

17. It cannot be said that he has fulfilled his contract to refer until he has to the best of his power placed before the arbitrators the materials necessary for a decision.

18. As to the second point, the burden of proving revocation for good cause was upon the plaintiff and he has failed to put forward any evidence on the point. It was not for the defendant to prove the negative, i.e., the absence of good cause.

19. On the third point, however, I think the plaintiff is entitled to a decision in his favour. In my opinion the conduct of the parties has broken up the contract to refer and there was, therefore, no such contract in existence when the present suit was brought.

20. When the plaintiff refused to go on with the arbitration one of two courses was open to the defendant.

21. It was open to him to take action within the period of limitation, under the provisions of the law as contained in the Civil Procedure Code to enforce a decision by the arbitrators if the latter were still willing to act. If they were unwilling to act, then the arbitration was at an end, unless the Court were able to appoint other persons in their places.

22. The other alternative open to the defendant was to drop his right to enforce a decision by the arbitrators and to leave the matter in status quo, and suing, if he thought fit, for damages for breach of contract. The defendant has not elected to take the first of these two courses, nor has he sued for damages for breach of contract.

23. As matters now stand, neither party can enforce in a Court of law the contract to refer.

24. If, therefore, we hold that the jurisdiction of the ordinary Courts is barred by the last clause of Section 21, Specific Relief Act, we shall hold that there is a cause of action which cannot be litigated between the parties either in the Courts of Justice or any where else unless and until one of the arbitrators dies or is unable to act.

25. The plaintiff has a cause of action, he has suffered a wrong and is entitled to a remedy. In the circumstances as they now are, he cannot under the agreement of 20th November 1902 enforce a decision by the arbitrators; nor can the defendant do so either. Unless the parties make a fresh contract to refer, the plaintiff cannot possibly obtain in any forum, the relief to which he is entitled, if Section 21 in the present circumstance is. a bar.

26. That the arbitration proceedings came to nothing, is partly due to the plaintiff's action no doubt, but it is also partly due to the inaction of the defendant who has not taken any steps to enforce his rights under the Civil Procedure Code. A contract which could otherwise be specifically enforced but which by reason of the lapse of time can no longer be enforced in a Court of law cannot be said to be in existence in the eye of the law. If in the present case the contract to refer were in existence, the plaintiff would be entitled to enforce even now a decision by the arbitrators under the agreement of 20th November 1902. This he clearly is not now

entitled to do nor is the defendant so entitled. The law cannot contemplate with equanimity a state of affairs in which a party cannot resort to any forum, to recover, within limitation, the relief to which he is entitled.

27. The meaning of the last clause of Section 21, Specific Relief Act, I take it, is that the law says to a party ' To a have selected a forum of your own which is fully empowered to decide the issue between you and your opponent, therefore, as long as that forum exists and is capable and willing to act and you can enforce a decision therein, the ordinary Courts are closed to you.' But where by the action of both parties that other forum is now closed to both of them, the law surely does not mean that the parties are not entitled to enter the ordinary forum established by it.

28. In my opinion it is the action of both parties in the present case which has placed it beyond the power of the arbitrators to decide the issue between them. There is, therefore, no longer in existence a contract to refer and the suit is not barred. I would, therefore, accede to the appellant's contention and hear the case on the merits. As my learned colleague's opinion must prevail, this is not necessary.

29. The order of the Court will be that the appeal be dismissed and as the Court is not unanimous each party will abide his own costs of the appeal.

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