

Moran and Co. Ltd. Vs. Anderson Wright Ltd.

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SooperKanoon Citation : sooperkanoon.com/871235

Court : Kolkata

Decided On : Feb-24-1953

Reported in : AIR1953Cal477,57CWN824

Judge : Chakravartti, C.J. and ;Sarkar, J.

Acts : [Arbitration Act, 1940](#) - Section 34

Appeal No. : A.F.O.O. No. 19 of 1952

Appellant : Moran and Co. Ltd.

Respondent : Anderson Wright Ltd.

Advocate for Def. : Sankar Das Banerjee, Adv.

Advocate for Pet/Ap. : H.N. Sanyal, Adv.

Disposition : Appeal allowed

Judgement :

Chakravartti, C.J.

1. This is an appeal from an order of S.R. Das Gupta J. dated 23-84951, by which the learned Judge stayed a suit brought by the appellant Moran & Co. Ltd., against the respondent, Anderson Wright Ltd., upon an application made by the latter under Section 34, Arbitration Act.

2. The facts are as follows: By two different contracts, both dated 7-7-1950, the respondent purchased 12,00,000 yards of Hessian Cloth, 6,00,000 yards under each of the contracts, delivery to be made at the rate of 1,00,000 yards per month from January 1951 and payment to be made in cash on delivery. Each delivery was to be treated as a separate and distinct contract. The Bought Notes, which were addressed to the respondent and signed by the appellant over the word 'Brokers', began with the sentence, 'Dear Sirs,

We have this day bought by your order and . on your account from our Principals,' and then it proceeded to set out the particulars of the goods and the terms and conditions of the contracts. Those terms included an arbitration clause in the standard form of Indian Jute Mills Association contracts and expressed as follows: 'All matters, questions disputes, differences and/ or claims arising out of and/or concerning and/or in connection with and/or in consequence of/or relating to this Contract, whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed, shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to-such rules the arbitration shall be conducted'.

3. In pursuance of the said two contracts, delivery was duly given in all the months from January to June, 1951 except March, but goods due to be delivered in that month were not delivered. By a letter dated 27-3-1951, the appellant intimated to the respondent that its sellers had informed it that, according to them, the contract had been 'ipso facto' terminated by reason of the failure of the respondent to give at least seven days' notice to place goods alongside, as required by the contracts. The respondent apparently did not accept the position that the appellant had any principal or that any default on its own part had been committed. Thereafter, on 11-6-1951, the appellant brought a suit on the Original Side of this Court for a declaration that it had merely acted as a broker in respect of the two contracts, a further declaration that it had no liability under them and an injunction restraining the respondent from enforcing the contracts against the appellant and claiming any damages from it thereunder. It was stated in the plaint that the appellant had

only 'brought about' the two contracts, acting as a broker, between the respondent and one Gowarchand Dhanchand and that the respondent was wrongfully alleging that the appellant was a party to the contracts and as such liable for their performance and consequently liable for damages for non-delivery of the goods due in March, 1951.

4. The Writ of Summons was served on the respondent on 23-6-1951, but it took no steps in the suit. Instead, on 19-7-1951, it filed an application under Section 34, Arbitration Act, for a stay of the suit, out of which the present appeal arises. It was stated in the application that the contracts were 'principal contracts' by which the respondent had bought from the appellant and that the appellant was liable under the contracts as a principal. In one part of the application it was also stated that 'even apart from any liability of any other person or persons', the appellant was liable under the contracts 'by reason of well-established practice and custom in the market as

well as in law'. It was alleged further that the appellant had failed to make the deliveries for March, 1951, then repudiated its liability to make such deliveries, next repudiated its liability to pay the damages suffered by the respondent and lastly brought the suit in order to prevent arbitration proceedings which the respondent was preparing to commence. The damages suffered were stated to be Rs. 1,13,042-3 as. The entire subject-matter of the suit, it was said, was covered by the arbitration agreement and accordingly it was prayed that the suit be stayed.

5. The application came to be heard by S.R. Das Gupta J. He held that the question raised in the suit was whether, in relation to the two contracts, the appellant had acted merely as a broker and that, his Lordship thought, must be held to be a question of the appellant's liability under the contract and so a question of construction, as held by the Supreme Court in the case of -- 'A.M. Mair & Co. v. Gordhandas Sagannull', : [1950]1SCR792 (A). The Supreme Court had also held that such a question came wholly within the arbitration agreement before it, which was in the same terms as the agreement in the present case. In the view of the learned Judge, the decision of the Supreme Court was undistinguishable and excluded the contention that such a question was a question as to whether

any contract had ever been entered into at all between the parties and therefore outside the jurisdiction of arbitrators. Accordingly, he made the order appealed from, staying further proceedings in the suit.

6. Before us, it was contended by Mr. Sanyal that the learned Judge had erred in holding that the decision of the supreme Court concluded the matter. The error, it was said, was of a two-fold character. In the first place, the case before the Supreme Court was a case in which an application had been made for an adjudgment of the award to be void after the award had been made and all that the Supreme Court said was that the dispute being one within the arbitration agreement, the arbitrators had not acted without jurisdiction in deciding it. The Court did not say that the decision itself, holding the respondent before it to be liable to the appellant, although he pleaded that the appellant had only acted as a broker, was correct. In the present case, the question had arisen at an earlier stage on an application under Section 34 of the Act and, on such an application, the Court had itself to decide whether there was an agreement between the parties. The objection of the party who had brought the suit to the effect that he was not liable under the contract, not being a party thereto, could not be disposed of by saying that the question was within the arbitration agreement and therefore one for the arbitrators and that the Supreme Court had so held. The Court itself had to decide it in a proceeding of the present character. In the second place, the dispute which the Supreme Court had held to be within the jurisdiction of the arbitrators was, it was contended, of a different character.

7. It cannot be disputed that on- an application under Section 34 of the Act, the Court must decide (i) whether the plaintiff in the suit sought to be stayed is a party to the agreement, (ii) whether the applicant under Section 34 is a party and (iii) whether the suit is 'in respect of any matter agreed to be referred'. Without deciding each of these questions and deciding it in the affirmative, the Court cannot make an order in the applicant's favour. Directly, the decision of the Supreme Court can therefore be conclusive only on the third point in the present case, if indeed the question which was held by that decision to be within the arbitration agreement was in fact or in substance the same question as that raised in the suit here. But, indirectly, the decision is conclusive on the other two points

as well, if it applies.

8. In my opinion, Mr. Sanyal was not right in contending, as he did, that the other two questions, would, in any event remain for the Court to decide for itself. A dispute can be held to be within an arbitration agreement, binding on certain parties, only if it is an agreement between them. Consequently, once it is held that the dispute raised in the suit is within the arbitration agreement and therefore a dispute in respect of a matter 'agreed to be referred', it is necessarily held that it was so agreed between the parties to the proceeding under Section 34. It will thus be seen that if the decision of the Supreme Court makes it obligatory to hold that the dispute in the suit in the present case is within the arbitration agreement, the question whether the appellant and the respondent are parties to that agreement, can no longer remain open for enquiry. If either of them was not, there could be no question of any dispute between them being referable to arbitration. Ordinarily, it is true, the enquiry under the third question will be regarding what the parties agreed to, whoever the parties were, and not regarding who agreed. In such a case, the first two questions may survive, even after the third has been answered in the affirmative, although, strictly speaking, they too will have been answered by implication. But if the dispute in the suit be as to whether the plaintiff or the defendant is a party to the contract and that dispute is held to be within an arbitration agreement contained in the contract itself, there will be a direct decision on the question of parties in respect of both the agreement and the contract. It may be that after such decision, nothing will be left of the dispute for the arbitrators to decide, but the fact that such a result will follow can only be an indication that a dispute of this character cannot be within an arbitration agreement : it cannot, if the decision is made, detract from its effect which will be to hold that the parties concerned are parties to the agreement and necessarily parties to the contract wherein it is contained. Thus, of the facts of the present case, the first two questions are not independent questions and they cannot survive after the third has been answered in the affirmative, if it is so answered.

9. For the above reason, it will be convenient to take the third question first. I am unable to agree with Mr. Banerjee, who appeared for the respondent, that besides relying on the decision of the Supreme Court, the learned trial Judge had found for

himself that the conditions precedent to his making an order for stay under Section 34 were satisfied. He, as I have already pointed out, has held that the dispute raised in the suit is not a dispute as to whether there was a contract between the parties at all, but a dispute as to whether the appellant was liable under the contract, as held by the Supreme Court and that since the Supreme Court had held such a dispute to be within the arbitration agreement, the suit was bound to be stayed. The decision of the Supreme Court must certainly be accepted and applied, but since 'prima facie' it might appear to be a decision which upsets all established notions as to the powers of arbitrators, it is necessary to examine it closely and see what exactly their Lordships held.

10. In the case before the Supreme Court, a firm of brokers addressed a Sold Note to the sellers which commenced with the words: 'we have this day sold by your order and for your account to the undersigned' and they signed the document themselves, adding the word 'brokers' below their signature. On the same day, they addressed a Bought Note to a third party which commenced with the words, 'we have this day bought by your order and for your account from the undersigned' and that document also they signed themselves in a similar manner. The Sold Note contained an arbitration clause expressed in the same terms as the clause in the present case. The sellers having failed to deliver a part of the goods, the firm of brokers made a demand on them for damages and on their denying liability to pay the sum, the firm referred the dispute to arbitration and obtained an award in their favour. Thereafter, the sellers made an application to this Court, for adjudging the award to be void and for setting it aside on the ground that the purchaser being the third party and the firm having merely acted as brokers, they were not parties to the contract and accordingly were not entitled to invoke the arbitration clause. Sinha, J. dismissed the application but Harries, C. J. and myself reversed him, since on our reading of the affidavits, the firm's own case was that they had acted in the transaction only as brokers, but were entitled to enforce the terms of the contract by reason of the usage or custom of the trade. The Supreme Court held that our reading of the affidavits was not correct and that the firm had denied that they were not parties to the arbitration agreement and asked the Court to construe the contract, although they had also stated that they were entitled to enforce the contract according to the custom or usage of the trade. That finding took away the

basis of the High Court's decision that on their own showing, the firm of brokers had not contracted as principals; and it was on that finding that the Supreme Court held, in a case where 'prima facie' the Sold Note was signed by the firm of brokers as purchasers, that the question whether they were 'parties to the contract in their own right as principals' or had entered into it on behalf of third party, was a question of the true construction of the contract and that such a question being one concerning the contract or arising out of it, it was within the arbitration clause.

As I read the decision of the Supreme Court, It only means that formal execution of the contract by the firm of brokers being admitted and apparent on the face of the contract and the question being one as to the effect or true intent of such execution, it was a question within the arbitration agreement and so a question for decision by the arbitrators. That such is the basis of the decision appears clearly from the manner in which their Lordships stated the dispute which, according to them, was 'that the brokers were not parties to the contract in their own right as principals but entered into the contract only, on behalf of the Bengal Jute Mill Company.' It will be noticed that the statement assumes that the brokers were parties to the contract and the only dispute it speaks of is a dispute as to the character in which they were parties. That such a dispute is not a dispute as to whether there had been any contract at all and is within an arbitration clause expressed as widely as the clause in the present case, must be taken as settled by the decision of the Supreme Court, but the decision ought not to be taken as comprising anything wider. I cannot imagine the Supreme Court having intended to hold that a dispute as to whether there was any contract between the parties at all or whether the person going or sought to be taken to arbitration was a party to the agreement was also a question within the jurisdiction of arbitrators. Even Lords Wright and Porter who, in the leading case of --'Heyman v. Darwins Ltd.', (1942) A. C. 356(B), expressed the view that a dispute as to whether there was a contract at all, could be within an arbitration agreement if it was severable and sufficiently wide, stated that rule only in relation to cases where the dispute was as to whether the contract had any legal existence and not in relation to cases where the dispute was as to whether one of the parties had at all entered into the contract.

11. In my opinion, the question raised in the appellant's suit in the present case is a question of the latter kind. The plaintiff says that it only brought about the two contracts between the respondent and a third party acting as a broker and was not itself a contracting party, there can be no question that as the purchaser, the principal is the respondent, as the Bought Note shows and as the respondent itself asserts. It is not the respondent's case that the goods were purchased by the appellant as the principal. The appellant's case is that neither were the goods sold by it as a principal, which means that the contracts of purchase and sale were not between the respondent and the appellant, between whom there was no contract at all, but they were contracts between the respondent and the third party and since the arbitration agreement was contained in the contracts, it was an agreement only between them, & in no way binding or affecting the appellant. The case made by the appellant is therefore not that although a party to the contracts, it was not a party in its own right as the principal taut only as a broker -- as the case before the Supreme Court was understood to be -- but the case is that the appellant was outside the contracts altogether. It is true that the Sold Note was not produced before the learned Judge and does not appear to have been disclosed or produced so far even in the suit and therefore we shall take no notice of it, although it was produced before us. But the absence of the Sold Note does not alter the character of the dispute. Even on the Bought Note alone, the dispute is as to whether the appellant and the respondent ever came together to contract at all and such a dispute, being a dispute as to the very existence of a contract and of an arbitration agreement between the parties, cannot be within the jurisdiction of the arbitrators and cannot be 'a matter agreed to be referred'. It cannot be within the jurisdiction of the arbitrators, because their jurisdiction to decide any matter at all is itself derived from the existence of an agreement and it cannot be a matter agreed to be referred, because to agree by an agreement to refer a question as to whether that very agreement, or the contract containing it, has taken place is in the nature of things impossible. I do not read the decision of the Supreme Court as throwing doubt on these fundamental propositions and I do not think the decision covers the dispute in the present case.

12. But it may be said that the Supreme Court adopted the test laid down by Lord Dune-din, as quoted in '(1942) A. C. 356 (B)'. and judged by that test, the dispute

in the present case would fall within the arbitration clause. The passage quoted from Lord Dunedin occurs in his speech in the case of --'Scott & Sons Ltd. v. Del Sel', (1923) S. C. (H.L.), 37(C), where he was dealing with a plea of frustration, advanced by the sellers under a certain jute contract, who were saying that by reason of prohibition by Government of further export of jute, the contract had come to an end. Lord Dunedin pointed out that in order to sustain that plea, the sellers would have to show that the contract contained an express term which would have the effect pleaded or that it contained an implied term and that, in either case, they would have to have recourse to the contract., 'And', he added, 'if they have got to have recourse to the contract, it seems to me that the dispute is a dispute under the contract'. The Supreme Court did not quote the words of Lord Dunedin verbatim, but there can be no doubt that this was the passage it purported to quote. But I should not like to think that the Supreme Court intended to attribute a general proposition to Lord Dunedin or was laying down a general proposition for itself in terms Of the quotation. In the case of a plea of frustration, it is obviously necessary to see if the contract was such that its performance or further performance could be said to have been excused by the circumstances which had supervened and the dispute being as to the effect of its terms, it is intelligible why it is said that it is a dispute under the contract. But it cannot possibly be said that a dispute must be a dispute under or concerning the contract and therefore within the arbitration clause in every case when the contract has at all to be referred to. If, for example, a person says that he has nothing whatever to do with a contract, not having signed it himself and no one having signed it on his behalf or in his interest, the contract will have to be referred to in order to see if the case made is true, but it can by no means be said that such a dispute is within the arbitration clause, because the person concerned, if he had nothing to do with the contract, had also nothing to do with the agreement.

13. Our attention was drawn to another decision of S.B. Das Gupta, J. in the case of --'Luxmi Jute Mills Ltd. v. Messrs. T. Thomas & Co. (Jute and Gunnies) Ltd.', (Special Suit No. 3 of 1950, D/- 28-2-1951, unreported) (D), where, on an application under Section 20(1), of the Act to file an agreement, the learned Judge held that a dispute as to whether one of the parties had entered into the contract, not as the principal but only as a broker and was therefore not a party to the

agreement was covered by the decision of the Supreme Court and was a dispute within the jurisdiction of arbitrators. That case is distinguishable and nearer to the case before the Supreme Court, because the Bought Note addressed to the purchasers commenced with the words, 'we have this day bought by your order and for your account from selves for principals' and it was signed by the writers over the word 'brokers'. As the immediate sellers were the brokers and the contract which said so was signed by them, it might legitimately be said that the dispute in the case was, the brokers being a party to the contract, in what character they were a party and therefore the dispute was one covered by the decision of the Supreme Court. I do not think that in order to hold that the dispute in the present case is not covered by the Supreme Court decision, it is necessary to dissent from the decision of S.B. Das Gupta J. in the case cited. That case was of the nature of --'Gubhoy v. Avetoom', 17 Cal 449(E), where the contract note bore the endorsement 'A. V. Avetoom for Principal'.

14. For all the reasons given above, I am of opinion that the third question in the present case stands clear of the decision of the Supreme Court and the dispute raised in the suit is not in respect of 'a matter agreed to be referred'. This is sufficient for a disposal of the appeal, but since the bulk of the argument addressed to us was on the first question, viz., whether the appellant is a party to the agreement, I may take that question by itself and examine the position. I have already pointed out that if the third question had to be answered in the sense that the dispute was within the jurisdiction of arbitrators, it would follow that the appellant was a party to the agreement. But if the first question survives, as it does on my finding on the third question, an answer to it in the negative will furnish an additional reason for not staying the suit. But I do not think we ought to proceed to search for an additional reason. The question whether the person who has initiated the legal proceeding is a party to the arbitration agreement is, under Section 34, undoubtedly a question for the Court to decide, for the section has not left it to arbitrators. But in proceeding to decide the question in a case of the present type, the Court will be faced with a difficulty, because although the question in the suit is whether the plaintiff is a party to the principal contract, while the question in the proceeding under Section 34 is whether he is a party to the arbitration agreement, the two questions are, when the agreement is contained in

the contract, the same. To decide one will be to decide the other. It will thus appear that where the dispute raised in the suit is a dispute as to whether the plaintiff is a party to the contract and the defendant makes an application under Section 34 on the basis of an arbitration agreement which the contract contains, the Court, if it decides the first question under the section, will be virtually deciding the main or perhaps the only issue in the suit. If it holds that the plaintiff is not a party to the agreement, which will involve its holding that he is also not a party to the principal contract, such decision will be a reason, not for staying the suit, but for not staying it. The suit will remain alive and in it the same issue will be tried again in the form of an issue relating to the principal contract. Even if it holds that the plaintiff is a party to the agreement, it will again decide the main issue raised in the suit but will be equally unable to stay it, because the dispute as to whether the plaintiff, is a party to the principal contract is not within the jurisdiction of arbitrators. In such circumstances, the inconvenience and un-desirability of the decision of the main issue in the suit being forestalled by a decision on the application, is plain. When such a position is likely to result, the Court may properly desire to refrain from creating it. It cannot be said that by following that course,, the Court may be helping a person who, desiring to avoid arbitration, resorts to the simple expedient of filing a suit and alleging therein that he is no party to the contract on which the defendant is seeking to make him liable. As I have already pointed out, a dispute as to whether the plaintiff is at all a party to the disowned contract can never be within an arbitration clause contained in it and since a stay must be refused and the suit allowed to proceed on that ground alone, the Court will provide no additional advantage to the plaintiff by not deciding on the application under Section 34 the question of his being a party to the agreement.

15. It must, however, be conceded that the Court has jurisdiction to decide on an application under Section 34 whether the plaintiff in the suit is a party to the arbitration agreement, even if it involves deciding whether he is a party to the principal contract. That question is one of the three questions under the section and in disposing of the application, it may always be decided. Indeed, it must be decided before the Court can make an order for stay. In the case of -- *Khusiram Benarsi Lal v. Hanutmal Bold'*, 53 Gal WN 505 (F), it was held by S.R. Das, that where an illusory and demonstrably frivolous plea regarding the formation,

existence or the validity of the contract was set up in the suit, the Court would act properly in deciding the matter on the application itself and if the decision went against the plaintiff and it prevented him from agitating the same issue in the suit on principles analogous to 'res judicata', he would have only himself to thank. The large question whether, when the contract is admitted but the question of its legal existence or validity is raised in some other form, the Court will or will not, in the exercise of its discretion, decide the question on the application under Section 34 by way of deciding it in relation to the agreement, does not arise in' the present case. Here, the dispute raised in the suit as to whether the plaintiff is at all a party to the principal contract is obviously not one for the arbitrators and the suit can, in no event, be stayed. In those circumstances, the question is whether the Court ought still to decide the issue by way of deciding the question of parties in relation to the agreement. In my opinion, it ought not to do so unnecessarily, particularly when there is no reason for saying that the dispute raised in the suit is a sham dispute.

16. Mr. Banerjee, who appeared for the respondent, did not contest the proposition that if the Court was to make an order for stay under Section 34, it had to decide whether the plaintiff was a party to the agreement. At the close of his argument he no longer contended that even that question was wholly concluded by the decision of the Supreme Court. But he argued that all that Section 34 required the Court to do was to see whether or not the plaintiff was 'prima facie' a party and not to decide finally whether he was in reality a party to a valid and subsisting agreement. Mr. Banerjee pointed' out that the expression 'any party to an arbitration agreement' which occurred in Section 34, occurred also in Section 33 where it could not possibly mean a party in fact and in law in all circumstances. Among the applications which Section 33 provides for, is an application challenging the existence or validity of an arbitration agreement and the person who can make such an application is described as 'any party to an arbitration agreement'. Mr. Banerjee contended that a person denying that any arbitration agreement with him existed or saying that the agreement was void, so that he was a party to nothing, could not be actually or legally a party to the agreement if his contention was correct and since even such a person could apply under Section 33 under the description 'any party to an arbitration agreement', the expression

could only mean formally and externally a party. The same meaning, Mr. Banerjee submitted, should be attached to the expression in Section 34.

17. As I am not deciding the question whether the appellant is a party to the arbitration agreement, it is not really necessary to deal with the contention of Mr. Banerjee, but as the matter was argued at great length, I may briefly express my views on it.

18. The question whether a person is a party to an arbitration agreement can arise in a proceeding under Section 34 in various forms. It can arise in relation to an agreement outside the contract asserted or challenged in the legal proceedings or it can arise in relation to an agreement contained in the contract. In the first case, the decision of the question on the application under Section 34 will not involve, at least ordinarily, a decision of any issue as to the contract, but in the second case it will. As to its nature, the question may simply be whether the plaintiff in the legal proceeding or the applicant under Section 34 is a signatory to the agreement at all; or it may be whether, being a signatory, he is a signatory in his own right and on his own account, or again, whether the agreement is not void, being contrary to law or founded on mistake or vitiated by fraud, so that although the person concerned is a signatory, there is no agreement in the eye of law to which he can be said to be a party.

19. We are concerned here only with a case where the arbitration agreement is contained in the contract which has been put into issue in the legal proceedings. We are also concerned only with a case where the question is whether the agreement and) the contract; containing it were between the plaintiff in the suit and the-applicant under Section 34 so that the plaintiff is a party to the agreement. As at present advised,. I am inclined to agree with 'Mr. Banerjee that if the person whose concern with the agreement is, in question is a signatory to the contract and formally a contracting party, that will be sufficient to enable the Court to hold, for the purposes of Section 34, that he is a party to the agreement. If a further question is involved as to whether the apparent contract, containing the agreement, is a valid contract having a legal existence, that may take out the case out of Section 34 on the ground that such a question can never be within the

jurisdiction of arbitrators & never a matter agreed to be referred, but the first requirement of the section as to the plaintiff in the suit being a party to the agreement will be satisfied.

20. Mr. Sanyal who urged strongly that we should decide the question as to whether the plaintiff is a party to the agreement, submitted that judged even by the narrow test I have mentioned, the plaintiff was not a party to the agreement as he was not a party to the contract. He referred us to the case of -- 'Patiram Banerjee v. Kanknarrah Co. Ltd.', AIR 1916 Cal 548: (G), where the Bought Note was in precisely the same terms and where it was held by Jenkins, C. J., Woodroffe, J. not dissenting, that such a note was only an intimation to the buyer that the writers had carried out their order by making a purchase on their account, not from themselves but from someone else. The Note did not, it was held, make the writers parties to the contract of purchase and sale to which it related, even as agents. In the course of the argument, I myself had occasion to refer to the decision in -- 'Miller, Gibb & Co. v. Smith & Tyrer Ltd.', (1916) 1 KB 419 (H), where the contract note was signed by the brokers on behalf of the sellers 'by the authority of our principals as agents' and it was held that the brokers could not be taken to arbitration under an agreement contained in the contract. I do not, however, think that we should decide in the present proceeding whether the plaintiff is a party to the agreement when it is not necessary to do so and by deciding that question, which is the only issue in the suit, create a bar of 'res judicata' against either the appellant or the respondent.

21. In the result, I hold that the dispute raised in the appellant's suit is not within the jurisdiction of arbitrators and consequently the suit cannot be stayed. As no question other than the question of the appellant not being a party to the contract has been raised in the suit, it is not necessary to consider whether there could be a partial stay or whether the present application ought to be kept pending till the preliminary issue is decided in the suit. The appeal is accordingly allowed, the judgment and order of S. R. Das Gupta J. set aside and the respondent's application under Section 34 dismissed with costs here and below.

22. Certified for two counsel.

Sarkar, J.

23. The question seems to me very simple.

24. Moran & Co. Ltd., the appellant before us, delivered to Anderson Wright Ltd., the respondent to this appeal, two bought notes which were substantially identical in form. The bought notes, so far as is relevant for the present purpose, are in these terms. Messrs. Anderson Wright Ltd. Dear Sirs, We have this day bought by your order, and on your account from our Principals, (Then follows the particulars of the goods, the price, the time of delivery and other terms of the purchase Yours faithfully, Per Pro Moran & Co. Ltd., Sd/- (Illegible)

Brokers.

Part of the goods covered by the bought notes were not delivered to the respondent. The respondent made a claim on the appellant for damages for breach of contract by reason of the failure to deliver. The appellant denied liability for the claim. The bought notes contained an arbitration clause which has been set out in the judgment delivered by my Lord the Chief Justice. The respondent was contemplating referring its claim to arbitration under this clause but before a reference was actually made the appellant filed a suit against the respondent. The relevant portions of the plaint are set out below: '1. On 7-7-1950 the plaintiff as brokers, brought about two principals contracts between the defendant and one Gewarchand Danchand being contract Numbers 98788 and 98789 whereby the said Gewar Chand Danchand sold and/or agreed to sell hessian cloth to the quantities and specifications mentioned in the said contracts on terms and conditions contained therein.

'X XX XX

4. The defendant is wrongfully alleging that the plaintiff is liable for damages for non-delivery of the said quantities under the said contracts for the month of March 1951 and that the plaintiff is a party to the said contracts and is liable for the performance thereof. The plaintiff does not admit that the defendant has suffered any damages or has been justified in not issuing shipping instructions in time.

5. The plaintiff states that it merely acted as brokers in respect of the said contracts of sale and purchase. The plaintiff denies that it is a party to the said contracts or that it has any liability thereunder.

The plaintiff claims:

(a) A declaration that the plaintiff merely acted as broker in respect of the said contracts numbered 98788 and 98789 dated 7th of July 1950 and is no a party to the said) contracts.

(b) A declaration that the plaintiff has no liability under the said contracts.

CO Injunction restraining the defendant its servants and agents from claiming, any damages from the plaintiff in respect of the said contracts and informing the same against the plaintiff,'

25. The respondent then applied for a stay of this suit under Section 34, Arbitration Act. S. R. Das Gupta J. allowed the application and ordered a stay. The question in this appeal is, should this order be maintained? The suit cannot be stayed unless it is in respect of matters agreed to be referred under the arbitration clause. This much is beyond question. The suit raises a dispute that the appellant is not a party to the contracts for sale which contracts contained the arbitration agreement as a term. Now, what is meant when a person says, 'I am not a party to the contract'? Plainly that, he never made the contract. In other words, that so far as he is concerned, the contract does not exist. It comes to this then that a dispute that a person is not a party to a contract is a dispute that the contract does not exist, that is to say, with him. Such a dispute cannot be within any arbitration clause contained in the contract denied. I like to read here, not because something new was said but because of the manner in which it was said, what Greene L. J. said in -- 'Toller v. Law Accident Insurance Society. Ltd.', (1936) 2 All ER 952 at pp. 955-6(1): 'If the arbitrator (assuming it was referred to him) found that there was no contract in existence at all he would be deciding that the very arbitration clause which founded his jurisdiction never existed and therefore he never could have had any jurisdiction to deal with that matter.'

Likewise, in this case if the dispute whether the appellant was a party to the contract containing the arbitration agreement, was within that agreement and this dispute was referred to an arbitrator under that agreement and the arbitrator found that the appellant was not a party to the contract and therefore to the arbitration agreement, he would have found that he had no jurisdiction to come to that finding. The other disputes raised in the suit, namely, the reliefs claimed under heads (b) and (c), are consequential to the dispute that the appellant is not a party to the contracts for it is claiming them on the basis that it was not such a party and not on any other basis. It only remains to state that even if it could be said that the dispute that the appellant was not a party to the contracts was idle and dishonest -- which I am quite clear cannot be said in this case -- that would have made no difference. It was said in -- 'Monro v. Bognor Urban Council', (1915) 3 KB 167 at p. 173 (G),

'The only point is whether the claim which is brought -- whether it is good, bad or indifferent -- comes within the submission to arbitration'.

See also -- 'Johurmull Parasram v. Louis Dreyfus & Co. Ltd.', AIR 1949 Cal 179 (K).

26. In my opinion therefore the suit is not in respect of matters agreed to be referred and on that ground alone the stay must be refused.

27. It was said that this case is governed by the judgment of the Supreme Court in ' : [1950]1SCR792 . This contention was accepted by S.R. Das Gupta J., who ordered a stay feeling himself bound by the judgment of the Supreme Court to do so. I am wholly unable to agree that the Supreme Court judgment covers the present case. What had happened in that case was that the appellants before the Supreme Court) had delivered to the respondents there, a document in these terms:

'We have this day sold by our order and for your account to the undersigned.'
(Then followed the particulars of the goods sold and the terms of the sale).'

The document was signed by the appellants and below the signature the word 'brokers' was written. The word 'undersigned' in the above quotation therefore meant the appellants. They also delivered a corresponding document to a firm called, Bengal Jute Mill Company stating: 'We have this day bought by your order and for your account from the undersigned.' This also was signed by the appellants in the same manner as the first document. Part of the goods covered' by the first mentioned document not being delivered by the respondents, the appellants preferred a claim against the respondents for damages for breach of contract which the respondents repudiated. The appellants then referred the dispute to arbitration under an arbitration agreement contained in that? document. An award was thereupon made in favour of the appellants. The respondents then applied to have the award set aside on the ground that the arbitrators had no jurisdiction to arbitrate as the Bengal Jute Mill Company and not the appellants were the real parties to the contract for sale. The dispute raised by the respondent was that the

'appellants were not parties to the contract in their own right as principals but entered into the contract on behalf of the Bengal Jute Mill Company':

See ' : [1950]1SCR792 . Their Lordships of the Supreme Court held (at p. 11) that, the question whether the appellants had made the contract in their own right or on behalf of others is a matter

'which turns upon the true interpretation of the contract, so that the respondents must have recourse to the contract to establish their claim that the appellants were not bound as principals while the latter say they were.' They added, (p. 128): 'If that is the position, such a dispute, the determination of which turns on a true construction of the contract, would also seem to be a dispute, under or arising out of or concerning the contract.'

In this view of the matter they refused to adjudge the award void and set aside the judgment of a bench of this Court from which the appeal had been taken. Their Lordships pointed out that,

'The error into which the learned Judges of the Appellate Bench of the High Court appear to have fallen was their regarding the dispute raised by the respondent in respect of the position of the appellant under the contract as having the same consequence as a dispute as to the contract ever having been entered into.'

It is therefore quite clear that the Supreme Court held that a 'dispute as to the contract ever having been entered into' was a question outside the arbitration agreement contained in the contract. I have already shown that the dispute raised in the suit sought to be stayed in the present case is a dispute of this kind. The Supreme Court judgment therefore supports the view that I have taken. If it is necessary to do so, I may point out that, in the case in the Supreme Court, the party challenging the award had admitted that the other side was a party to the contract and the only dispute was whether it was a party in its own right or on behalf of some other person. With a dispute of that kind we have nothing to do in the present case.

28. A point was made by Mr. Sanyal that before a Court can stay a suit under Section 34 it must find also that, the party whose suit is sought to be stayed is a party to the arbitration agreement. Mr. Banerjee accepted this contention. No doubt this is the correct position. Mr. Sanyal has invited us to hold that his client was not a party. I do not think it necessary to decide that question for the stay must in any event be refused, on the ground that the suit is not in respect of matters agreed to be referred. It is true that if I am wrong in my view that the suit is not in respect of matters agreed to be referred, it may be necessary to decide whether Moran & Co. Ltd. was a party to the arbitration agreement. But if I am so wrong, it would follow on the facts of this case that, Moran & Co. Ltd. was a party to the arbitration agreement. In this view of the matter, it is not necessary to go into the question raised by Mr. Banerji that all that Section 34 requires before a stay can be ordered under it, is a finding that, the petitioner for the stay and the respondent to the petition are prima facie parties to the arbitration agreement and it need not go further and decide whether they are the real parties. I wish, however, to say that I do not appreciate the distinction between a prima facie party to a contract and a real party to it. In my view the making of such a distinction will lead to confusion being created.

29. It was stated in the petition for stay that, '3. The said two contracts are principal contracts & the respondents in any event apart from any liability of any other person or persons are liable under the said two contracts, by reason of well established practice and custom in the market for the said goods as well as in law.' With regard to the liability under the custom thus alleged it is enough to say that, the suit does not raise any dispute about it. Even, therefore, if such a dispute is within the arbitration agreement, we have nothing to do with that in the present application for stay.

30. I, therefore, agree that the appeal should be allowed.

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