SUPREME COURT OF INDIA

Baldota Brothers

Vs.

Libra Mining Works

C.A.No.102 of 1959

(S. K. Das, A. K. Sarkar And K. Subba Rao, JJ.)

14.05.1959

JUDGEMENT

SUBBA RAO, J. :

This is an appeal by special leave against the order of Mody J., sitting on the Original Side of the Bombay High Court, passed on the notice of motion taken out by the appellants to restrain the respondents from proceeding with the suit filed by them in the Court of the Subordinate Judge, Kakinada in the State of Andhra Pradesh, hereinafter called the Kakinada suit. The material facts relevant to the question raised are as follows : The appellants agreed to purchase from the respondents iron ore under four contracts. They also entered into three contracts with the respondents to act as their selling agents, and one of these contracts was dated August 10, 1956, and the other two were of August 30, 1956. All the said contracts expressly provided that all suits and legal proceedings in respect of disputes arising out of or in relation to the said contracts were to be instituted in Courts in Bombay City only. On January 23, 1957, the respondents filed a suit O. S. No. 16 of 1957, in the Kakinada Court against the appellants for the recovery of a sum of Rs. 5,150 alleged to be balance due under the contract dated August 10, 1956, along with interest thereon, and sum of Rs. 46,562 alleged to be balance due for goods supplied under the contract dated October 17, 1956. It may be mentioned at this stage that there is a controversy between the parties as regards the contract dated October 17, 1956, the respondents alleging that the parties entered into a new contract on the said date in cancellation of that dated August 30, 1956, and the appellants stating that the alleged contract was not in cancellation of the earlier contract of August 30, 1956 but was only to confirm the terms of the earlier contract with a concession shown to the respondents enabling them to supply only 3,000 tons of iron ore instead of 7,000 tons. The said suit was filed on January 23, 1957. To that suit, the appellants, their partners and the Manager of their firm were made parties. Notices were served on them on August 8, 1957. At first there was an order for ex parte hearing , but later on the ex parte order was set aside. The appellants (defendants in the Kakinada Court) filed their written-statement on September 17, 1957, denying inter alia, the existence of the contract dated October 17, 1957, and also pleading that the Kakinada Court had not jurisdiction to entertain the suit. On November 25, 1957, issues were framed, and one of them was whether the Kakinada Court had jurisdiction to entertain the suit. On January 21, 1958 i.e., one year after the institution of the suit in the Kakinda Court, the appellants filed a suit, Suit No. 62 of 1958, on the Original Side of the Bombay High Court claiming to recover a sum of Rs. 74,346-9-0 from the respondents. In that suit, the appellants claimed the following four items, totalling a sum of Rs, 74,346-9-0 :

1. Amount due the agreement recorded in letter dated 28th October 1956. Rs. 15,861-4-0.

2. Amount which the plaintiffs are obliged to pay Messrs. Metailmex Praha as described in para 10 of the plaint. Rs. 7,046-7-0.

3. Amount which the plaintiffs are obliged to pay Messrs. Toscho Co. Ltd., as described in para, 11 of the plaint. Rs. 30,462-4-0.

4. Amount paid by plaintiffs for and on behalf of the defendants to Messrs. T. S. R. and Co. as described in para, 12 of the plaint. Rs. 20,976-10-0.

Total. ... Rs. 74,346-9-0.

The first item is alleged to represent the amount settled as payable by the respondents to the appellants on the settlement of the disputes between them in regard to the aforesaid contracts. Items 2 and 3 are the amounts alleged to have been paid by the appellants for and one behalf of the respondents to the persons who purchased goods of the respondents towards destinational shortage. The last item is said to be the amount paid by the appellants to the clearing agents of the respondents firm by honouring a hundi drawn on the respondents by the clearing agents. The Kakinda suit was posted for hearing on September 12, 1958; but the appellants took out a notice of motion in the Bombay High Court on September 2, 1958 and obtained interim injunction restraining the respondents from proceeding with the Kakinada suit pending the disposal of the suit in the Bombay High Court. In the affidavit filed in support of the notice of motion the appellants alleged that the whole cause of action arose in Bombay, that the Kakinda Court had no jurisdiction to entertain and try the suit as it was agreed to between the parties that disputes under the contracts should be decided only in Courts in the Bombay City and that the whole object of the respondents was to drag the appellants to the Kakinda Court and thereby defeat and delay the payment of the dues to the appellants. They also alleged therein that the proceedings adopted by the respondents were vexations, oppressive and were in abuse of the process of the Court. The respondents filed a counter stating that the subject-matter of the suit in the Bombay High Court and that in the Kakinada Court were totally different, that the conduct of the appellants in obtaining interim injunction after the date of hearing was fixed in the Kakinada Court at their request was dishonest and that the respondents were "trying all sorts of device" to prevent the disposal of the Kakinada suit. In support of their allegation that the Kakinada Court had jurisdiction to try the suit, they relied upon a letter dated October 17, 1956, whereunder, it was said, a new contract was entered into between the appellants and the respondents in respect of 3000 tons of iron ore, and they further alleged that the Bombay Court had no jurisdiction in respect of the said goods as the entire cause of action arose only within the jurisdiction of the Kakinada Court. Mody J., who heard the application, by an order dated October 25, 1958, dismissed it without recording any reasons for doing so. We are informed by the learned Solicitor-General that the well established practice of the Bombay High Court on the Original Side has been ordinarily not to give any reasons for the dismissal of such applications, presumably because it was held by the Bombay High Court that no appeal lay against

an order dismissing a petition for injunction on the ground that such orders did not come within the meaning of the word "judgment" used in the Letters Patent. As no appeal lay under the Letters Patent, the appellants directly approached this Court and obtained special leave under Art. 136 of the Constitution.

2. The first question that arises at the outset is whether it is a fit case for invoking the jurisdiction of this Court under Art. 136 of the Constitution. The learned Solicitor-General contended that once special leave had been granted by this Court, the appeal should be disposed of on merits, unless it was brought to the notice of the Court that there were new facts, which, if they had been disclosed earlier, would have entailed its dismissal in limine. He would go further and contend that if it was open to this Court to question the propriety of the leave granted at the time of the hearing of the appeal, one division bench of this Court would be sitting in judgment over another division bench. This argument was directly raised and negatived in a recent case in Bengal Chemical and Pharmaceutical Works Ltd. v. Their Employees, Civil Appeals Nos. 125 and 164 of 1958 : (AIR 1959 SC 633). When a similar argument was raised in that case, this Court rejecting the said argument observed.

"Learned counsel for the Company, however, says that, though the said principles might be applied at the time of granting leave, once leave is given no such restrictions could be imposed or applied at the time of the final disposal of the appeal. The limits of the exercise of the power under Art. 136 cannot be made to depend upon the appellant obtaining the special leave of this Court, for two reasons, viz., (i) at that stage the Court may not be in full possession of all material circumstances to make up its mind and (ii) the order is only an ex parte one made in the absence of the respondent. The same principle should, therefore, be applied in exercising the power of interference with the awards of tribunals irrespective of the fact that the question arises at the time of granting special leave or at the time the appeal is disposed of. It would be illogical to apply two different standards at two different stages of the same case. The same view was expressed by this Court in Pritam Singh v. State of Madras, 1950 SCR 453 : (AIR 1950 SC 169), Hem Raj v. State of Ajmer, 1954 SCR 1133 : (AIR 1954 SC 462) and Sadhu Singh v. State of Pepsu, AIR 1954 SC 271. There is therefore no distinction in the scope of the exercise of the power under Art 136 of the Constitution at the stage of application for special leave and at the stage when the appeal is finally disposed of.

3. The learned Solicitor-General contends that if the aforesaid view be correct, the Court by giving special leave would put the appellants on the wrong scent, induce the parties to incur heavy expenditure, make them prepare and study their cases, and after all the travail dismiss the appeal without hearing them on merits and such a procedure is unjust to the parties. No respondent will be aggrieved by such procedure; the appellant also cannot complain as he adopted the procedure with open eyes and therefore must take such consequences as follow from invoking the special jurisdiction of this Court under Art. 136. Nor the argument that one division bench of this Court would be sitting in judgment over another has any foundation, for, at the time of granting of special leave, this Court only hears the appellants ex parte, does not purport to decide any question, takes a prima facie view of the case and gives leave. It is an implied condition of the leave that at the stage of final hearing the point raised should stand the test laid down by this Court for the exercise of its discretionary jurisdiction, and from this point of view the decision at the final stage is really a decision that no case has been made out for the exercise of this Court's jurisdiction under Art. 136 of the Constitution. There is no question of one division bench sitting in judgment over another; the same Court hears the same matters at different stages, one for the limited purpose of granting special leave, when only the test of prima facie arguable point is applied, and the other for the final disposal when the question raised is considered in the presence of both the parties and when, it is in

possession of all the relevant material. We therefore, hold that unless this Court is satisfied that the appeal raises a question that justifies the exercise of its discretionary jurisdiction under Art. 136 of the Constitution, the appeal is liable to be dismissed without further investigation into the merits of the case.

4. The learned Solicitor-General then contends that the appeal raises the question of the appellants' right to hold the other party to the bargain, and on the basis of that right to obtain an order of injunction with their suit in the Kakinada Court, and restraining the respondents from proceeding by that means to have his suit tried in Bombay, and that question is of sufficient importance to attract the jurisdiction of this Court under Art. 136 of the Constitution. There is an underlying fallacy in this argument. This appeal is not against the final decree in the suit, but only against the interlocutory order in an application for injunction pending the disposal of the suit. The Bombay High Court did not decide, either expressly or by necessary implication, that the Kakinada Court had jurisdiction to decide the suit. That plea was taken in the Kakinada suit and a specific issue was raised thereon, and the said issue falls to be decided on oral and documentary evidence. If the Kakinda Court holds that it has no jurisdiction, that suit will be dismissed. If, on the other hand, it comes to the conclusions that it has jurisdiction and decides the case on merits, it will have done so only on its finding that the suit contract is that entered into between the parties on October 17, 1956, and that the said contract does not contain a clause conferring sole jurisdiction on the Bombay Courts.

The decision of the Kakinda Court, or the final decision made by the highest appellate Court against that decree, would not preclude the Bombay Court from proceeding with its suit, though the finding both on the question of jurisdiction and on the merits of the subject-matter which are common to the two suits might operate as res judicata. We cannot, therefore, appreciate the argument that the Bombay Court, by refusing to issue an injunction, has decided on the rights of parties, though, if the contention of the appellants is ultimately upheld by the Kakinada Court, they may be put to some inconvenience. The only point, therefore, that arises in this appeal is a simple one namely, whether the Bombay High Court has rightly exercised its discretion in refusing to issue an injunction against the respondents from proceeding with their Kakinda suit.

5. Mody, J. assumed that he had jurisdiction to issue an order of injunction in suitable cases. Whether the power of the Bombay High Court to issue an injunction dehors the provisions of Rr. 1 and 2 O. XXXIX of the Code of Civil Procedure rests on S. 151 of the Code as held by the Bombay High Court in Ram Bahadur Thakur and Co. v. Devidayal (Sales) Ltd., ILR (1954) Bom 334 : (AIR 1954 Bom 176), or in exercise of power under its general equity jurisdiction independent of the Code of Civil Procedure as held by the High Courts of Calcutta and Madras in Rash Behary Dev v. Bhowani Churn Bhose, ILR 34 Cal 97, Mungle Chand v. Gopal Ram, ILR 34 Cal 101, Govindarajulu Nayudu v. Imperial Bank of India, Vellore, 35 Mad LW 168 : (AIR 1932 Mad 180) and Karuppayya v. Ponnusami, ILR 56 Mad 563 : (AIR 1933 Mad 500 (2)), it is not, and cannot be, disputed that the power is a discretionary one vested in a Court to be exercised for the ends of justice, having regard to the circumstances of each case. In the present case, though the learned Judge has not given any reason for his order, the affidavits filed by the parties disclose that a substantial question of fact falls to be decided for sustaining the plea of exclusive jurisdiction of the Bombay High Court, and that the application was filed at a belated stage after the Kakinada suit was ripe for hearing. The appellants may have a good case on merits, on which we do not, and cannot, express any opinion, for the question falls to be decided on evidence, and it may be also that they have good reason to account for the long delay in filing their application. But the learned Judge must have taken into consideration all the relevant circumstances, and, in exercise of his discretion,

refused to give an injunction. It is not possible to say that under such circumstances, the question raised in one that attracts the discretionary jurisdiction of this Court. We understand from our brother, Sarkar, J., who was one of the members of the bench which granted leave, that special leave was granted in this case as the order of Mody J., assumed the correctness of the proposition that a chartered High Court can issue an injunction restraining the disposal of a suit filed earlier in another Court in or outside its territorial jurisdiction, notwithstanding the fact that the subsequent suit attracts the provisions of S. 10 of the Code of Civil Procedure and the said point is of sufficient importance. That point does not arise now, as we have held that even on the assumption that the Bombay High Court has jurisdiction to issue an injunction, the order made in exercise of its jurisdiction is purely a discretionary one.

6. In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

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