

CALCUTTA HIGH COURT

State of Bombay

Vs.

Adamjee Hajee Dawood and Co

A.F.O.D. No. 142 of 1950

(Harries, C.J. and Banerjee, J.)

01.03.1951

JUDGMENT

Banerjee, J.

1. This is an appeal from a decree made by Sarkar J. on 22-8-1950, dismissing a suit on a preliminary issue. That issue is as to whether the suit is maintainable in view of Section 32, Arbitration Act, 1940. Section 32 is as follows:

"Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

2. The facts are as follows. The Plaintiff it appears from the plaint, claims a declaration that a certain contract was not made between the parties and is not binding on it. The Plaintiff claims a further declaration that the deft. is not entitled to make any claim in respect of the said contract and asks that the contract be adjudged void and delivered up to be cancelled. There is a prayer for an injunction to restrain the deft., its servants and agents from making any claim or demand on the contract. There is a prayer also for damages, etc.

3. By a telegram sent to the Plaintiff by one Mr. Kennedy, the deft. offered to supply to the Plaintiff certain quantity of gunny bags. This offer was accepted by a letter of the Plaintiff to the deft. There was confirmation of the plff's. acceptance.

4. According to the Plaintiff this correspondence constitutes the contract between the parties. It is alleged in the plaint that subsequently it was agreed between the parties that the goods would be shipped free on board the steamer, Calcutta. All the goods except 63 bales were duly delivered. The Plaintiff makes no claim in respect of the non delivery of the 63 bales.

5. The deft. made a claim against the Plaintiff in respect of the 63 bales alleging that Mr. Kennedy

was the plff's. agent and that he had bought the goods for the Plaintiff from the deft. through a firm of the name of Moran and Co. It further said that the purchase was made by Moran and Co's. bought and sold notes referred to as Contract No. 94452. This contract contains an arbitration clause. It is not necessary to set out the other terms of this alleged contract.

6. It is alleged that the Plaintiff having refused to pay, the deft. purporting to act under the arbitration clause contained in the contract (94452) referred the dispute to the arbitration of the Bengal Chamber of Commerce. The Plaintiff objected to the arbitration on the ground that there was no alid submission as the contract was not binding on the Plaintiff, the reasons given being (a) that Kennedy had no authority to enter into the contract on behalf of the Plaintiff, and (b) that the contract was not in terms of the provisions of Section 175 Govt. of India Act, which requires that the contract must be signed on behalf of the Govt.

7. The Plaintiff on these facts filed the suit, claiming the reliefs I have mentioned above.

8. Sarkar J. construed the plaint as one for a declaration that the arbitration agreement contained in the contract is invalid and on that view he held in view of Sections 32 and 33, Arbitration Act, that the suit was not maintainable. With great respect to the learned Judge, we are unable to construe the plaint in that way. In the plaint, the Plaintiff states the circumstances under which, according to it, the alleged contract was entered into and claims a declaration that the contract is act binding on the Plaintiff This is not a suit merely for a declaration that the arbitration agreement is invalid. It is a suit claiming something more, namely, claiming that the contract containing the arbitration clause is void.

9. Every person has a right to bring a suit which is of a civil nature and the Court has jurisdiction to try all suits of a civil nature (see Section 9, Civil Procedure Code) If this right has got to be taken away, that must be taken away by express terms or by necessary implication. The Plaintiff has a right to sue for having a contract adjudged void under Section 39, Specific Relief Act. Schedule 3 of the Arbitration Act, 1940, sets out the enactments which are expressly repealed. There is no mention there of Section 9, Civil Procedure Code, or of Section 39, Specific Relief Act. Therefore, it is quite clear that Arbitration Act does not expressly repeal either Section 9, Civil Procedure Code or Section 39, Specific Relief Act. Apart from Sections 32 and 33, Arbitration Act, there is no section in the Act which can be said to repeal by implication Section 9, Civil Procedure Code and Section 39, Specific Relief Act. Do Sections 32 and 33 by necessary implication repeal Section 9. Civil P. C, and Section 39, Specific Relief Act?

10. Mr. Bijan Mitter appearing on behalf of the respondent urges that Sections 32 and 33, Arbitration Act, in effect bar all suits in which a declaration is claimed that a contract, which contains an arbitration clause, is void. That argument overlooks the nature of an arbitration clause which is contained in a contract. In '*Heyman v. Darwins, Ltd.*¹,' at p. 347, Lord Macmillan observes as follows:

"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other

¹(1942) 1 All. E. R. 337

clauses. The other clauses set out the obligations which the parties undertake towards

each other 'nine inde;' but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in any ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement. Moreover, there is the further significant difference that the courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts."

11. To the same effect are the observations in the speeches of Viscount Simon, Lord Wright and Lord Porter. It is clear from the observations in this case that a contract may come to an end, e.g., by frustration; but the 'arbitration agreement' may yet remain operative. The arbitration agreement may be declared void without the contract being declared invalid. They are two separate things.

12. Whether the arbitration agreement falls with the contract depends upon a particular test L that test is laid down in '*De La Garde v. Workshop and Co*².,

"The test is said to be whether the contract is determined by something outside itself, in which case the arbitration clause is determined with it, or by something arising out of the contract, in which case the arbitration clause remains effective and can be enforced."
(Russel on Arbitration Edn. 14 p. 75)

13. The arbitration agreement does not come into operation until a dispute arises under or out of the contract. If there is no dispute, there is no operation of the arbitration clause. Therefore it is quite clear that the arbitration clause, though it is written in the same document as the other terms of the contract, is not in a sense an integral part of the contract. It is, as has been said in one of the decisions of our Court, an agreement which is rolled up in a contract with the other terms of the contract. The difference between a contract and an arbitration clause contained in it can also be seen by a consideration of Section 34, Arbitration Act. Under that section a suit may be stayed or may not be stayed according to the discretion of the Court. In other words, as Lord Macmillan has pointed out, the Courts

"have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts."

14. It does not follow, therefore, that a suit asking for a declaration that the 'arbitration' agreement is void is necessarily tantamount to a suit that the contract (containing the arbitration clause) is void.

15. The word used in the sections is 'agreement' in the expression 'arbitration agreement', and not 'contract'. Yet where necessary the Act uses the word 'contract', e.g., in Section 7 (1) of the Act,

"where it is provided by a term in a contract"

In Section 7 (2) the Act uses the words 'arbitration agreement'. The legislature, though it uses the word 'contract' in Section 7 has purposely refrained from using the word 'contract', in Section 32 and Section 33. Therefore, we have no doubt that the legislature has advisedly used the words 'arbitration agreement' in these sections. I cannot take the view that Section 32 contemplates the case of suits challenging the validity of a contract because it contains an arbitration clause. If the intention of the legislature were that all contracts containing an arbitration clause should come within the purview of Sections 32 and 33, the legislature would have said so in appropriate words. In my view, Sections 32 and 33 have a very limited application, namely, where the existence or validity of an 'arbitration agreement' (and not the contract containing the 'arbitration agreement'), is challenged. Assume for a moment that Sections 32 and 33, Arbitration Act, have repealed Section 39, Specific Relief Act. Which section of the Specific Relief Act will apply in such cases to contracts which do not contain an arbitration clause? We cannot take the view either that Section 39, Specific Relief Act, has been partially repealed, that is to say, repealed so far as it relates to contracts containing an arbitration clause. To hold that Section 39, Specific Relief Act has been wholly or partially repealed will lead to absurd result.

16. Sarkar, J. has referred to three cases of this Court: *'Manick Lal v. Shiva Jute Bailing Ltd.'*³, decided by Das J., *'Bajinath Narseria v. Chhotulal Sethia'*⁴, judgment of Clough J., which has taken the view of Das J.; *'Chaturbhuj Mohanlal v. Bhicam Chand Chororia and Sons'*⁵, a judgment of Sinha J., in which the learned Judge takes a different view from the other two learned Judges as to the meaning of the word "existence" in Section 32 of the Act. We, in this case, having regard to the view we have taken, are not called upon to express our opinion as to the meaning of the word "existence" in Section 32, namely, whether it means 'factual existence' or 'legal existence'. It may be mentioned here that Mr. Sen, counsel for the appellant, took the point before the learned trial Judge; but having regard to the view we have taken in the appeal, he has not thought it fit to put forward any argument on it before us, though he has by no means abandoned it and if the case goes to a higher tribunal he will be at liberty to make use of this point if he is so advised.

17. Having regard to the view we have taken of the plaint, we are unable to hold that the suit is one for challenging the validity of the arbitration agreement merely.

18. On these considerations we think the learned Judge's judgment was wrong and the decree must be set aside. The plaint, as we have read it, is a plaint which attacks the entire contract. The suit, therefore, does not come within the purview of Section 32 or Section 33, Arbitration Act.

19. Mr. Sen has drawn our attention to several Allahabad cases which show that if for the

³52 C. W. N. 389

⁵53 C. W.N.. 410

⁴52 C. W. N. 397

determination of a matter, special jurisdiction is conferred on a Court, then an ordinary civil court is not deprived of its jurisdiction to try the matter because it has got to decide a point which comes within the purview of the special jurisdiction. I do not think that those cases have a direct bearing on the point under consideration. The Arbitration Act lays down a definite procedure for

challenging the arbitration agreement and on a plain reading of the sections, I am of opinion that Section 32 does not hit a suit which challenges the validity of a contract though it contains an arbitration clause.

20. We allow this appeal and set aside the decree made by the learned Judge. The suit will go back to the learned Judge for disposal in accordance with law.

21. The appellants are entitled to their costs here and in the Court below. Certified for two counsel.

Harries, C.J.

22. I agree. But as we are differing from the learned Judge I desire to make a few observations.

23. Section 33, Arbitration Act, is confined to applications challenging the existence or validity of an arbitration agreement or award. There is nothing in the section which would entitle a Court to hold that a contract was never entered into, or that an alleged contract had no existence or that it was void 'ab initio' or had become void. The section is confined to arbitration agreements and awards.

24. There can be no doubt that no suit would lie by reason of Section 32 for a declaration that an arbitration clause did not exist or that it was invalid because the relief claimed in such a suit is the relief expressly mentioned in Section 33. Section 33 read with Section 32 therefore would bar all suits which fall within the purview of Section 33.

25. Section 9, Civil Procedure Code provides:

"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

26. It seems to me clear that there is nothing in Section 32 or Section 33 barring a civil Court from taking cognizance of a suit claiming that a contract alleged by the deft. had never been entered into, or claiming that the contract was void ab initio or had become void for some reason or another.

27. It is however argued that such a suit is impliedly barred by Section 32 and Section 33, Arbitration Act, because it may be that the ground of attack on the arbitration clause could be used as a ground of attack on the whole contract. The existence or validity of an arbitration clause may or may not be attacked on grounds upon which the whole contract could be attacked. I can imagine a number of cases where the ground of attack on the arbitration clause would offer no ground for attacking the whole contract, whereas in other cases the ground for attacking the arbitration clause might well be a good ground for attacking the whole contract. However, I do not think that that is any reason for coming to the conclusion that a suit such as the present one is impliedly barred by Sections 32 and 33, Arbitration Act. If the legislature had intended that a suit such as the present should be barred, the matter could have been easily put beyond doubt by

framing Section 33 in somewhat different words. If the words were: "Any party to a contract containing an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of the contract or arbitration agreement or to have the effect of either determined shall apply to the Court, etc.", that would have given the Court under the section jurisdiction to deal both with the contract as a whole or with the part of it relating to reference to arbitration. However, the section was drafted giving the Court power only to deal with the arbitration agreement or an award made thereafter.

28. If the contention for the respondent be accepted a somewhat startling consequence would follow. For example, if 'A' puts forward a forged and bogus lease containing an arbitration clause and threatens to refer a purely bogus dispute with the owner 'B' to arbitration, 'B' would have no remedy whatsoever by suit because a suit brought for a declaration that the lease was bogus and a forgery and for its cancellation would be met by Section 33, Arbitration Act. It would be suggested that as the bogus lease contained an arbitration clause no Court could adjudge the lease to be bogus and order its cancellation and that the only method which could be employed to attack the lease would be an application to the Court under Section 33 for a declaration that the arbitration clause in the lease was bogus. It would follow that if the respondents' contention be correct then 'B' could not get relief by cancellation of the document because Section 33 does not provide for the granting of such relief.

29. The right given to citizens to protect their interests by suits cannot be too readily taken away. The legislature can of course do so, But it must do so by clear terms or by necessary implication. The Court should not infer that a right of suit has been taken away because such an inference is possible from some subsequent legislation. The inference that a right to suit has been taken away must I think be inevitable before it can be held that the right of suit has been taken away by necessary implication by some legislative enactment.

30. I entirely agree with my brother Banerjee that Sections 32 and 33 on their true construction do not purport to deal with suits for declarations that there never was a contract or that a contract is void. The sections must be confined to attacks on arbitration agreements and awards and the fact that an arbitration agreement may fall with the contract does not prevent the Court declaring in a properly constituted suit that there never was a contract at all or that the contract is void and of no effect.

Appeal allowed.