BOMBAY HIGH COURT

Ramdas Khatau and Co

Vs.

Atlas Mills Co. Ltd

(Beaumont, C.J.)

25.09.1930

JUDGMENT

Beaumont, C.J.

1. This is an appeal from a decision of Rangnekar, J. in which he granted an injunction to restrain the defendants from proceeding with a certain arbitration.

2. The point arises in this way. The plaintiffs and the defendants entered into an agreement which contained a clause referring matters in dispute to arbitration. Disputes arose between the parties, and the defendants alleged that the plaintiffs had been guilty of misrepresentations which had induced them to enter into the contract, and that they were not bound by the contract, and ultimately, in a letter dated 27th April 1929, the defendants required the plaintiffs to refer the disputes to arbitration, and they set out in that letter five points of difference to be submitted to the arbitrator. The third of those points was "whether in the circumstances the defendants are not entitled to avoid the contract dated 14th February 1928, "and the fourth was" whether the defendants should not be paid back the amount of deposit of rupees one lakh with interest thereon and the shares of the value of rupees one lakh." The one lakh of rupees and the shares had been deposited by the defendants under the contract, and those two claims certainly seem to suggest that defendants desired to impeach the contract and to say that it was not binding upon them. The plaintiffs very properly took the view that it was not open to the defendants both to approbate and reprobate. They could not at one and the same time ask to have the disputes referred to arbitration under the clause in the agreement, and also allege that the agreement was not binding. The defendants in the correspondence refused to recede from their position, and therefore the plaintiffs commenced this action asking that the defendants might be restrained from proceeding with the arbitration. I think perhaps the plaintiffs were somewhat premature. If they had gone before the arbitrator and raised the point that the defendants clearly could not impeach the contract and at the same time ask the arbitrator to act under it, it is very probable that the arbitrator would have seen the justice of the case. It is extremely probable also that the defendants when they came to be advised by counsel would have receded from the position that they had taken up and would not have impeached the contract; and that they would in fact have done that appears clear from the affidavit sworn on 9th July 1929, in which they say that they do not propose to impeach the contract. The Advocate General, who appears for the defendants, has stated in Court that in fact his clients do not propose to impeach the contract, and that they will

not take any objection to the plaintiffs appointing their own arbitrator, although the time for making such appointment has elapsed, and therefore if the arbitration proceeds, the plaintiffs will not in fact be prejudiced.

3. However we have to decide strictly whether the plaintiffs are entitled to the injunction which Rangnekar, J., granted, because we have to deal with the question strictly on the matter of costs.

4. Now the way the learned Advocate General puts the case is this. He says:

> Assume that my arbitration proceedings are entirely futile and entirely unnecessary, nevertheless the Court has no jurisdiction to restrain such proceedings.

5. He put his case first of all on the Specific Relief Act, and he said that the injunction asked for in this case is not justified by Section 54. He further says that the Specific Relief Act is exhaustive, and for that he relies on the decision of the Court of appeal in Calcutta in *Ram Kissen Joydoyal v. Pooran Mull*[1] I am not prepared to accept the view that the Specific Relief Act, is exhaustive. I rely on the nature of the Act and on the preamble which is in very similar terms to the preamble of the Contract Act, which Act the Privy Council has held is not exhaustive. I should be to sorry to hold that the power of this Court, which is derived from the old Court of Chancery, to grant injunctions wherever just and convenient, as those words have been construed in England, has been taken away by an Act of Parliament. I think therefore that we are bound to look outside the Act, and to consider the English leases on the subject.

6. In my opinion, the general principle is clear that a plaintiff is not entitled to come to this Court and to ask for an injunction against the commission of an act which inflicts no legal wrong upon him. There are a great many acts which may inflict annoyance and occasion coat and expense, which, in the popular sense of the word, are a nuisance to another person but which do not amount to a nuisance in the legal sense of the word, and give rise to no cause of action, are, in fact, damnum sine injuria. In order that a plaintiff may be entitled to relief, he must show that he has suffered some legal wrong; and in my opinion the cases in England to which we have been referred and particularly two decisions of the Court of appeal, *North London Railway Co. v. Great Northern Railway Co*[2]. and *Steamship Den of Airlie Co. Ltd. v. Mitsui & Co., Ltd*[3]. have, laid it down that the commencement and prosecution of futile proceedings for arbitration are among those annoying acts which do not amount to a legal wrong, and which cannot be restrained by injunction. I think that the ratio decidendi of the cases really is that obtaining an entirely wrong award from an arbitrator does not inflict a legal wrong upon the person against whom the award is made and would not entitle such person to recover damages, and if the doing of the act would not give rise to a claim for damages, the Court has no jurisdiction to restrain the committal of the act by injunction. But it does not follow from that that in no circumstances can the Court restrain arbitration proceedings by injunction.

7. In several cases, of which the leading case is *Kitts v. Moore*[4] a decision of the English Court of appeal, the Court has laid it down that where an action

[1][1920] 47 Cal. 733
[2][1883] 11 Q.B.D. 30
[3][1912] 106 L.T. 451
[4][1895] 1 Q.B. 253

has been brought impeaching the agreement on equitable grounds, the Court could restrain the defendant from proceeding to arbitration pending the determination of the question in suit. In the

case of *Sardarmull Jessraj v. Agar Chand Mehata & Co*[5]. Rankin, J., had to consider all these cases, and he came to the conclusion that the jurisdiction of the Court to restrain arbitration proceedings in an action was strictly limited to actions of the nature of *Kitts v. Moore*[6] that is to say, to actions in which the agreement is impeached on equitable grounds, and that the jurisdiction did not extend to the case before him in which it was alleged that there was no agreement at all. Speaking for myself, I think that that is taking too narrow a view. It seems to me anomalous to say that if an agreement is attacked on the ground that the parties were not ad idem, which is a ground recognized by the common law, the Court cannot restrain arbitration proceedings, whereas if the agreement is attacked on the ground that it was induced by misrepresentation, an equitable ground, the arbitration proceedings can be stayed. I am disposed to think that where in an action the validity or existence of the contract is challenged on any ground, the Court has jurisdiction to restrain arbitration proceedings under the agreement until that question has been determined. Unless the Court has such jurisdiction it seems to me that difficulties may arise. The Court can always restrain conduct which is calculated to result in multiplicity of actions or in the abuse of its own process; and a position might arise in which the validity or existence of an agreement is being tried by one Judge on oral evidence in the action, and in another case exactly the same question is being tied by another Judge in an application to set aside an award on affidavit evidence. I think that the Court would have jurisdiction to look ahead and to prevent that state of affairs from arising by restraining arbitration proceedings. But the jurisdiction can only be exercised, in my opinion, where you have got an action proceeding in the Court in which the validity of the contract is in issue and the parties are before the Court; and the Court in such a case can only grant an injunction restraining the arbitration proceedings until the question in the action has been determined. That position does not arise here because there are no proceedings before the Court in which the validity of the agreement is in any way in question. The plaintiffs do not dispute the validity of the agreement. The defendants disputed it in the correspondence, but have since receded from that position in their affidavit, and they have not taken and do not propose to take any proceedings for impeaching the contract, and that being so cases like *Kitts v. Moore*[7] have no application here.

8. Mr. Engineer for the plaintiffs pressed us with this point. He says that in India the position with regard to the en force ability of an award is different from the position in England. He points out that when an award is made the arbitrators are bound to file it, and when it is once filed it can be enforced unless somebody takes steps to have it set aside; and therefore, it is not like the position, contemplated in the English cases in which it is said that, if futile proceedings for arbitration are taken, the party against whom they are taken is entitled to sit with folded hands and do nothing, and he will suffer no loss. In India he has got to take proceedings to prevent the award becoming enforceable. There is, no doubt, some force in that contention. But it does not, in my opinion, really affect the principle on which the English cases were decided, the principle, as 1 have said, being that the commencement of futile arbitration proceedings gives you no cause of action any more then does the commencement of litigation which appears likely to fail.

[5][1919] 52 I.C. 588 [7][1895] 1 Q.B. 253

[6][1895] 1 Q.B. 253

9. So far as I know there is no case either in England or in India, at any rate, since the decision of the English Court of appeal in *North London Railway Co. v. Great Northern Railway Co*[8]. in which a perpetual injunction has been granted to restrain arbitration proceedings, and no other relief given, with the possible exception of the case to which the learned trial Judge referred, namely *Sessions v. Oates*[9] That was a decision of a Divisional Court; the report is extremely

short, and the question of jurisdiction was not considered. The Court treated the matter as being entirely one of discretion. I think that we cannot take that case as being an authority for the injunction which is asked for in this case. In my opinion we have no jurisdiction to grant the injunction, and I therefore think that this appeal must be allowed with costs and the suit be dismissed with costs.

Blackwell, J.

10. In this case the appellants, the defendants to the suit, called upon the plaintiffs to submit certain disputes which had arisen between the parties to arbitration under the arbitration Clause 34 of the contract between them dated 14th February 1928. As appears from para. 10 of the plaint, the appellants had included in the matters which they desired to refer to arbitration the question whether they were entitled to avoid that contract. It also appears from para. 11 of the plaint that the plaintiffs' case is that the defendants sought to impeach the validity of the contract by reason of certain misrepresentations which were outside the terms of the contract. The plaintiffs accordingly refused to go to arbitration. The appellants appointed their arbitrator and called upon the plaintiffs to appoint their arbitrator within seven days. Correspondence then took place between the plaintiffs' attorneys and the arbitrator in which the plaintiffs' attorneys objected to the arbitrator entering upon the reference upon the questions which had been submitted by the appellants. Notwithstanding that protest both the parties at that time being advised by their solicitors the arbitrator refused to accede to the contention of the plaintiffs that he was not entitled to proceed with the arbitration while the validity of the contract wag being called in question by the appellants, and the arbitrator informed the plaintiffs that, unless they obtained an injunction to restrain the arbitration proceedings, he would continue arbitration. At no time until after the commencement of the suit did the appellants give any indication whatever that they were not going to challenge the contract upon the ground of misrepresentation. It was in those circumstances, that the plaintiffs brought their suit for an injunction. The suit having been brought, the appellants then for the first time, by their affidavit dated 9th July 1929, stated that they did not intend to rely upon the ground of misrepresentation as a ground for avoiding the contract. The Advocate General has repeated that statement and has informed the Court that if the arbitration proceeds, the appellants will not rely upon that ground and will not object to the plaintiffs appointing an arbitrator, although the time has elapsed. Rangnekar, J., granted a perpetual injunction restraining the defendants from proceeding with the arbitration, and this is an appeal from his decision.

11. The plaintiffs, the respondents to this appeal, have sought to bring themselves within the terms of the Specific Relief Act. Whether they can do so or not depends upon the provisions of Section 54 which provides that a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly

[8][1883] 11 Q.B.D. 30

[9][1894] 10 T.L.R. 392

or by implication. The Advocate General has contended that the appellants were under no obligation and owed no duty to the plaintiff's in the present circumstances, and that accordingly the respondents did not fall within that part of Section 54. In my opinion, he is right. The only other ground upon which the respondents have sought to bring themselves within Section 51 is that the defendants to this suit are invading or threatening to invade the plaintiffs' right to, or enjoyment of, property. I am quite unable to accede to this contention. It appears to me that there

has been no threat to or invasion of any property of the plaintiffs at all in this case. Accordingly, in my view, the plaintiffs entirely fail to bring themselves within any of the provisions of Section 54, and cannot, therefore, bring their themselves within the Specific Relief Act.

12. The Advocate General has contended that the Specific Relief Act is exhaustive. In support of that contention, he relied upon some observations of the Privy Council in *Tituram Mukerji v. Cohen*[10] Sir Arthur Wilson, who delivered the judgment of the Board, said that the right to an injunction depends in India upon statute and is governed by the provisions of the Specific Relief Act.

13. The Advocate General however conceded that the question whether there was any other jurisdiction in the Courts in India to grant an injunction does not appear to have been discussed at all in that case. The Advocate General also relied upon *Ram Kissen Joydoyal v. Pooran Mull*[11] where the Court referred to the observations of Sir Arthur Wilson in the Privy Council case above referred to. Here also the question, whether there was any other jurisdiction in the Court to grant an injunction, was not raised. In my opinion, these cases are of no assistance in determining the question whether the Court has any jurisdiction to grant an injunction apart from the Specific Relief Act, because the matter does not appear to have been discussed in either of them.

14. In my opinion, the Specific Relief Act is not exhaustive. The preamble to that Act is in precisely the same form as the preamble to the Contract Act, and it has been said by the Privy Council with regard to the Contract Act, that that Act is not exhaustive, in *Jwaladutt Pillani v. Bansilal Motilal*[12] By parity of reasoning it seems to me clear that the true view is that the Specific Relief Act is not exhaustive. I think, therefore, that a Court in India is en pitied to look at the English cases dealing with the right of the Court to restrain arbitration proceedings, in as much as the Courts in India have inherited from the Supreme Court the equity jurisdiction which was conferred upon it in any case where that jurisdiction had not been taken away by subsequent legislation.

15. There appear to be throe classes of cases in which the English Courts have dealt with the question whether they would restrain arbitration proceedings by injunction. The first is the class of cases in which corruption or misconduct disqualifying an arbitrator from acting was proved, and the Courts have restrained the arbitrator from proceeding with the arbitration. Instances are to be found in *Beddow v. Beddow*[13] and *Malmesbury Railway Co. v. Budd*[14] With that class of cases we are not here concerned.

16. Next, the English Courts have held that they have no jurisdiction to restrain arbitration proceedings in respect of a matter outside the agreement to refer, even though the

[10][1905] 33 Cal. 908 [12] A.I.R. 1929 P.C. 132 [14][1876] 2 Ch. D. 113
[11][1920] 47 Cal. 733 [13][1878] 9 Ch. D. 89 : 47 L.J. Ch. 588

proceedings may be futile and vexatious, because no legal injury is caused to the party who seeks to restrain the arbitration proceedings by reason of their continuing. An instance of that class of case is to found in the decision of the Court of appeal in *North London Railway Co. v. Great Northern Railway Co*[15]. There appears to be no English case, so far as I can find, where the question has arisen whether the Court has jurisdiction to restrain arbitration proceedings where the existence of the contract is denied. That question came before Rankin, J., as he then was, in *Sardarmull Jessaraj v. Agar Chand Mehata & Co*[16]. In that case the plaintiff

asked for an interlocutory injunction to restrain further proceedings before an arbitration tribunal under a commercial contract. It is not clear from the report what the nature of the suit was. It would seem, however, from para. 1 of the judgment that the plaintiffs had brought the suit to have it determined whether they had entered into the alleged contract and were asking for an interlocutory injunction. Rankin, J., referred to the English decision and in particular to that class of cases of which *North London Railway Co. v. Great Northern Railway Co.* (2) above mentioned, is an example. He also referred to *Kitts v. Moore* (4), where the Court of appeal pointed out that equity Courts had always granted an injunction to restrain a reference to arbitration under an agreement which is impeached until the right to impeach it has been determined. But it is important to observe that in all those cases, an interim injunction only was granted, in a suit in which the question as to the right to impeach the contract on some equitable ground, such as, fraud, mistake, or surprise, was directly raised. Rankin, J., went on to consider the question whether, if a eon tract was not impeached upon an equitable ground, but its existence was denied it could be said that the case then fell within the principle indicated in *Kitts v. Moore*[17] He said (p. 813):

> The words "impeach the contract" were use by the Lord Justices in *Kitts v. Moore [1895] 1 Q.B. 253(Supra)*, but I think, meant to impeach the contract on equitable grounds such as fraud, mistake or surprise. To impeach the contract on a ground of equity is quite different from denying the existence of any contract as a matter of fact. In my view the latter case is exactly the same as where the submission is admitted but the allegation is that the matters to be referred are outside it. I think there is no legal injury and no embarrassment in equity if a person who has not made a contract is put into the position of having an arbitration held against him.

17. Speaking for myself I respectfully agree with that view of Rankin, J., and I think he was right. Having regard to Section 42, Specific Relief Act, I think it extremely doubtful whether a suit asking for a declaration that a contract did not exist would lie. In my opinion, even if a suit was brought, and assuming without admitting that such a suit would lie, challenging the existence of the contract on the ground that it had never been made, the Court having regard to the principles laid down in *North London Railway Co. v. Great Northern Railway Co. [1883] 11 Q.B.D. 30(Supra)* would have no jurisdiction to restrain arbitration proceedings under the alleged contract upon the ground that no legal injury [would be caused by the award, if in fact it turned out that no contract was made inasmuch as the award would be a nullity and could be challenged as such. I can sea no difference between that case and a case in which it is alleged that the matter sought to be referred is outside the contract. These cases appear to me to be on all fours, as regards the jurisdiction of the Courts to restrain arbitration proceedings.

[15] [1883] 11 Q.B.D. 30 [17][1895] 1 Q.B. 253

[16][1919] 52 I.C. 588

18. Upon the footing that the Court is prepared to grant an interim injunction in cases where actions have been brought impeaching the contract, the question arises whether the present case can be brought within the principle of *Kitts v. Moore [1895] 1 Q.B. 253(Supra)*. Mr. Engineer has contend fed with considerable force that it appears to be very illogical that party A to a contract should be entitled to impeach it upon an equitable ground and bring an action challenging the validity of the contract upon that ground and obtain an interim injunction, whereas A should not be entitled to obtain an injunction in a suit brought only for that purpose if the other party to the

contract B, challenges its validity upon an equitable ground. I realize the force of that contention, and at one stage of the argument I must confess it appealed to me very strongly. On further consideration, however, it is, in my opinion, not well founded. The plaintiffs in this case might, if they had chosen, themselves have brought an action to enforce their rights under the contract upon the footing that it was in fact valid and binding, and have had litigated and determined in that action the question whether the defendants were or were not entitled to impeach the contract on the ground of misrepresentation de hors the contract. If they had launched such a suit, in my opinion, they would have been entitled in that suit to an interim injunction restraining the arbitration proceedings until that question had been determined. They did not adopt that course. They asked for a perpetual injunction to restrain the arbitration proceedings, no provision whatever being made for the determination of the question whether the contract could properly be impeached on the ground of misrepresentation de hors the contract. Mr. Engineer was unable to cite to us any case in which the Courts have granted a perpetual injunction in such circumstances. In my opinion, it would not be just or convenient to grant a perpetual injunction in such circumstances, even if the Court had jurisdiction to do so. I think with respect that Rangnekar, J., was wrong in granting a perpetual injunction in this suit, and that this appeal should therefore be allowed with costs.

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