

Ramdas Dwarkadas Vs. the Orient Pictures

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Court : Mumbai

Decided On : Apr-01-1942

Reported in : AIR1942Bom332; (1942)44BOMLR739

Judge : Blackwell, J.

Appeal No. : O.C.J. Suit No. 412 of 1942

Appellant : Ramdas Dwarkadas

Respondent : The Orient Pictures

Disposition : Application dismissed

Judgement :

Blackwell, J.

1. This is a notice of motion taken out by the defendants for a stay of this suit upon the ground that the agreement out of which the suit is alleged to arise contains an arbitration clause.

2. By an agreement in writing made on May 12, 1941, between Shantiprasad Govindram Khandaria and Gopinath Mahadeo Tendulker described therein as financing and managing partners of the Orient Pictures, Bombay, and Mr. Ramdas Dwarkadas described in the agreement as the proprietor of Messrs. India Cine Laboratory, Bombay, Mr. Ramdas Dwarkadas who is the plaintiff in the suit agreed to supply raw films mentioned in the agreement to the other party to the agreement who are the defendants as and when required from time to time for a picture named 'Sidha-Rasta'. The plaintiff further agreed to process the picture in his laboratory, develop it and print it to the final finish. He was to charge the defendants a sum of Rs. 2,500 for complete developing and printing charges and supplying a Rush-print thereof as well as for giving facility of Moviola machine for editing purposes. This agreement is exhibit A to the plaint.

3. Clause 3 of the agreement provided that the defendants were to keep the negative of the film in the possession of the plaintiff in their laboratory. It was to be kept in connection with processing and a first charge was created upon the negative for arrears of bills in respect of raw films and processing charges. It is important to observe that by virtue of this agreement the plaintiff was given the right to retain only the negative of the film and had a first charge for arrears of bills in respect of that negative only.

4. Thereafter difficulties arose between the plaintiff and the defendants in regard to

the editing of the film in consequence of which a fresh arrangement of a tripartite character was come to between the plaintiff and the defendants and Messrs. Bombay Film Laboratories. This agreement is evidenced by the letters which are exhibit (B) to the plaint. The first letter dated June 26, 1941, was written by the plaintiff as the proprietor of the India Cine Laboratory to the Bombay Film Laboratories. It states that the India Cine Laboratory have learned from Mr. Tendulkar, one of the partners of the defendant firm, that they had arranged with the Bombay Film Laboratories for the editing of the picture and that the Bombay Film Laboratories had agreed to lender them services for the complete editing of the picture for a lump sum of Rs. 250 of which they had so far paid Rs. 100. The letter goes on to request the Bombay Film Laboratories to debit the balance of Rs. 150 to the account of the India Cine Laboratory. The letter then states as follows: --

We hereby also authorise you with a mutual consent of the said Messrs. The Orient Pictures to hold both Picture and sound negatives as well as positive print relating to the picture referred to above, in your custody on our behalf and account until such time, you receive further instructions on the subject from our end.

5. The letter requests the Bombay Film Laboratories to confirm the arrangement mentioned in the letter. There is an endorsement at the foot of the letter made by the Orient Pictures by Mr. G.M. Tendulkar as a partner therein confirming the arrangement set out in the letter. By a letter of July 16, 1941. written by the Bombay Film Laboratories to the India Cine Laboratory the Bombay Film Laboratories confirmed the arrangement set out in the letter of June 26, 1941.

6. Thereafter, as appears from correspondence set out in exhibit (C) to the plaint, the plaintiff sent his accounts to the defendants and made a demand for the payment of Rs. 7,309-13-0. The plaintiff wrote three letters to the defendants, of September 1, 12 and 19, 1941. By a letter dated September 25, 1941, from Messrs. Rajpal and Rajpal, advocates, written on behalf of the defendants the defendants denied that the sum of Rs. 7,309-13-0 claimed by the plaintiff was due by them and set out numerous alleged breaches by the plaintiff of the agreement dated May 12, 1941. Thereafter the plaintiff filed the present suit. In the plaint he sets out the material provisions of the agreement of May 12, 1941, and alleges that from time to time he supplied raw films and carried out the developing and printing of the picture as and when required and that from time to time he sent to the defendants debit notes in respect of the raw films supplied and charges for the work done by him, and in paragraph 7 he sets out the further agreement come to on, June 26, 1941, whereby among other things it was agreed that the Bombay Film Laboratories should hold both the picture and sound negatives as well as the positive prints relating to the picture on account and on behalf of the plaintiff. The correspondence is then referred to in the plaint, and in paragraph 10 the plaintiff alleges that he learnt from the correspondence that the defendants halve taken possession of two positive prints of the picture from the Bombay Film Laboratories. In paragraph 11 the plaintiff alleges that he is entitled to the possession of the negatives, sound negatives and positive prints, and he further alleges that he has a first charge thereon until the amount due and payable to him is paid by the defendants. In paragraph 12 he alleges that the defendants were not entitled to take possession of the positive prints and that they have wrongfully taken possession thereof. In the prayers he asks for a declaration that Rs. 7,309-13-0 are due and payable and for a declaration that he has a first charge on the picture negatives, the sound negatives and the positive prints, and he asks that in default of payment the said picture negatives, sound negatives and positive prints may be sold,

and the sale proceeds applied to the payment of the decretal amount.

7. This suit having been filed the defendants have applied to stay the suit upon the ground that the arbitration clause in the agreement of May 12, 1941, applies. That Clause 9 is in this form:--

If any dispute arises between the parties in respect of this agreement, the same shall be referred to arbitration, each arbitrator to be appointed by both the parties whose award will be final and binding upon both the parties.

8. The defendants have supported their application by an affidavit of Shanti prasad Govindram Khandaria sworn on March 23, 1942. In that affidavit the deponent alleges that as the plaintiff could not carry out his part of the contract by developing and editing the picture the defendants had to arrange for the same with the Bombay Film Laboratories, and the plaintiff on June 21, 1941, handed over to the defendants the picture negatives and the sound negatives of the said picture and the defendants handed over the same to the Bombay Film Laboratories. The deponent alleges that the plaintiff has released his lien or charge, if any, under the said agreement by his handing over the negatives and picture to the defendants. The deponent goes on to allege that there are disputes between the plaintiff and the defendants and that they should be referred to arbitration pursuant to Clause 9 of the agreement of May 12, 1941.

9. The plaintiff made an affidavit in reply sworn on March 31, 1942. He denied the allegation that he could not carry out his part of the contract. He alleged that the negative of the picture was handed over by him to the Bombay Film Laboratories on June 26, 1941, in pursuance of the agreement which is contained in exhibit B to the plaint, and that under that agreement the Bombay Film Laboratories with the consent of the defendants agreed to hold the picture and sound negative and positive prints of the film in their safe custody on his behalf. He denied that he had released his lien or charge. He alleged that disputes had arisen between him and the defendants not only with regard to the agreement dated May 12, 1941, but with regard to the agreement recorded in the correspondence exhibit B to the plaint. He Submitted that the subject-matter of the suit comprised the disputes between him and the defendants both with regard to the agreement dated May 12, 1941, and the agreement recorded in the correspondence exhibit B to the plaint. He contended that the subject-matter of the suit was therefore outside the scope of the submission contained in the agreement dated May 12, 1941. Further he alleged that he had come to know from Messrs. Sevaram Tricumdas on March 28, 1942, that the defendants had mortgaged the films to Messrs. Sewaram Tricumdas.

10. Mr. Shantiprasad G. Khandaria filed an affidavit in rejoinder sworn on March 31, 1942. In paragraph 9 he alleged that the suit was based only on the agreement dated May 12, 1941, and not on the arrangement which appears in exhibit B to the plaint. He alleged that the arrangement had never been accepted by the defendants and that it was not binding upon them. He therefore submitted that the alleged arrangement and disputes arising out of that alleged arrangement cannot affect the rights of the parties to the agreement. It is to be observed therefore that the validity of the agreement which is set out in exhibit B to the plaint is actually challenged by the defendants to this suit. He goes on in the affidavit to allege that in November, 1941, the defendants created a mortgage on the film in question inclusive of negative films and positive prints in favour of Tricumdas Sevaram and Ramchand Tricumdas, and he

alleges that the interests of third parties who are not parties to the suit are concerned, and that for that reason the defendants intend to oppose the plaintiff's application for a receiver and an injunction which is being made by another motion.

11. In support of the application for a stay Mr. Daphtary arguing upon the assumption that the second arrangement evidenced by exhibit B to the plaint was binding upon the defendants contrary to the contentions of Mr. S.G. Khandaria contended that it formed part and parcel of the original agreement and was merely a supplementary arrangement giving further security to the plaintiff in reference to the subject-matter of the first agreement. Consequently he contended that the arbitration clause would be equally applicable to the second agreement. He referred to and relied upon *Wide-Grey v. Morrison* (1877) 37 L.T. 270. In that case however there were two contemporaneous agreements, one of which contained, though the other did not, a reference to arbitration, and the learned Judge decided that those two agreements must be treated as together forming one agreement, and that the arbitration, clause consequently must be taken as applying to both. That case is in my opinion very different from the present.

12. Mr. J. H. Vakil in opposing the application for a stay relied upon *Turnock v. Sartoris* (1889) 43 Ch. D. 150. In that case a lease contained an arbitration clause. Some years after the date of the lease disputes having arisen between the parties a written agreement was entered into binding the lessor to take certain steps with a view to securing a better water supply and in some points varying the rights of the lessee as to the supply which the lessor had covenanted to give him under the lease. The lessee commenced an action alleging that the steps mentioned in the agreement had not been taken, and also alleging that the lessor had not supplied the stipulated quantity of water, and claiming an enquiry as to the damages sustained 'by reason of the matters aforesaid.' The defendant moved to stay the proceedings and refer the dispute to arbitration. The Court held that as the arbitration clause applied only to matters arising under the lease, it did not cover the whole subject-matter of the action. As Mr. Justice Cotton said in his judgment the subsequent agreement imposed upon the lessor certain fresh liabilities and to some extent modified the rights of the plaintiff.

13. In my opinion the case relied upon by Mr. Vakil is applicable to the facts of the present case. I think that the subsequent agreement evidenced by exhibit B conferred upon the plaintiff a right which he had not previously got, viz. to have possession of the positive prints retained on his behalf by a third party and imposed upon the defendants a liability which they had not previously undertaken, viz. to sanction the retention by third parties of the positive prints on behalf of the plaintiff. This new arrangement imposed liabilities upon the defendants and conferred rights upon the plaintiff which are not to be found in the original agreement at all. In my opinion the arbitration clause has no applicability whatever to these new rights and liabilities so imposed and conferred. In my opinion an arbitrator or arbitrators appointed under the original agreement would have no jurisdiction to entertain any dispute arising between the plaintiff and the defendants in respect of the new agreement. Moreover the validity of the fresh arrangement evidenced by exhibit B to the plaint is disputed by the defendants. The arbitrator or arbitrators appointed under the first agreement would certainly have no jurisdiction to determine whether the second alleged arrangement was or was not binding upon the plaintiff and the defendants, or what effect it had upon the provisions of the first agreement.

14. Mr. J. H. Vakil drew my attention to that part of the judgment in *Turnock v. Sartoris*, where the Court discussed the question whether it would be right to split up the action by referring to arbitration the matters arising under the lease and leaving the action to proceed as to the other matters, The Court took the view that even if the arbitration clause could be construed so widely as to cover all the matters in respect of which damages were claimed it would not be proper to refer them to an arbitrator as he would have no power to determine the construction of the agreement and its effect upon the provisions of the lease. I am of opinion that that argument applies to the present suit. I do not think that I ought to stay the suit to the extent to which it can be said to be a suit arising under the agreement of May 12, 1941, inasmuch as it is contended by the plaintiff that the rights under that agreement are materially affected and altered and modified by the second agreement, and an arbitrator or arbitrators appointed under the first agreement would have no power to entertain that question.

15. Mr. Vakil informed me that when this suit was instituted the plaintiff did not know that the defendants had mortgaged the film to third parties. If the plaintiff had been aware of that fact those third parties would no doubt have been made party defendants to the suit. Mr. Vakil said that the necessary steps would in due course be taken to add them as parties. It would, I think, be manifestly most inconvenient to stay this suit and to allow the arbitration to be held between the plaintiff and the defendants to which the mortgagees could not be made parties.

16. For the reasons above given and in the exercise of my discretion I have come to the conclusion that this application to stay fails and I accordingly dismiss it with costs. Having regard to the length of time which this motion has lasted Mr. Vakil asked me to allow the costs to be taxed. Mr. Daphtary on the other hand has asked me to fix the costs. I accordingly fix them at Rs 250.

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