J.S. Sood Vs. Saawan Kumar

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SooperKanoon Citation : sooperkanoon.com/684205

Court : Delhi

Decided On : Dec-21-1982

Reported in : AIR1983Delhi273; 23(1983)DLT326; 1983(4)DRJ345; 1983RLR318

Judge : D.K. Kapur and; S. Ranganathan, JJ.

Acts : Arbitration Act, 1940 - Sections 20

Appeal No. : First Appeal No. 23 of 1982

Appellant : J.S. Sood

Respondent : Saawan Kumar

Advocate for Pet/Ap. : K.K. Mehra,; Yogeshwar Prasad and; Vishaljit, Advs

Judgement :

S. Ranganathan, J.

(1) A very short question arises for consideratiom in this appeal. The appeal is from an order of the learned Judge on the original side by which he dismissed an application filed by the appellant under Section 20 of the Arbitration Act.

(2) On 21-8-1979 the appellant entered into a financing agreement with the respondent. This agreement contained an arbitration clause in respect of disputes arising under the agreement. Clauses 10 and 18 of the agreement provided, inter

alia, that all disputes arising out of the agreement shall be referred to, and decided by, Sri Manohar Singh Bist, sole arbitrator. The clauses clearly state that Sri Bist was an employee of the appellant but purported to declare that the respondent had absolute confidence in his integrity and that it was, indeed, at the respondent's insistence that Sri Bist was being named sole arbitrator to resolve disputes arising under the agreement between the parties.

(3) It may be mentioned that, under the above agreement, the appellant Was to advance a Sum of Rs. 5 lakhs to the respondent to enable the latter to complete the picture named 'Sajjan ki Saheli'. The appellant, however, could advance only Rs. 2 lakhs and so the parties entered into a revised agreement on 19-2-1981. This agreement restricted the limit of the advances to be made by the appellant to Rs. 2.75 lakhs but it also cut down a part of the distribution rights in respect of the film which were available to the appellant under the original agreement.

(4) Disputes having arisen between the parties, the appellant filed an application under Section 20 of the Arbitration Act. He prayed that, in terms of the agreement dated 21-8-1979, Sri Ms. Bist be appointed the sole arbitrator to decide the above disputes.

(5) The respondent in reply, opposed the reference to Sri M.S. Bist on two, among other, grounds-: (1) As the agreement of 21-8-1979 stood superseded by the agreement of 19-2-1981, and the latter agreement contained no arbitration. clause there could be no reference at all to arbitration; and (2) There could be no appointment of, or reference to, the arbitrator named in the agreement of 21-8-79 who was an employee of the appellant and who, the respondent apprehended, may not act fairly or impartially. During the hearing before the learned Judge, the respondent was willing to agree to a reference to some other independent arbitrator. The appellant, however, submitted that the respondent having with full knowledge of the fact that Sri M.S. Bist Was the appellant's employee, agreed to his nomination as' arbitrator could not go back upon the terms of the agreement. It was submitted that the parties having agreed to a named arbitrator, the Court should refer the matter to him only and none else.

(6) The learned Judge agreed with the respondent that there was good ground for apprehending that the arbitrator will not act fairly in the matter and that, in any case, it Was not proper that Sri Bist should arbitrate in the disputes. In his opinion, the decision in Uttar Pradesh Cooperative Federation Ltd. v. Sunder Bros., : AIR 1967 SC249 directly governed the situation. Since the named arbitrator could not be appointed and the parties could not agree upon the appointment of any other arbitrator, he found 'no way out except to dismiss the petition and leave the parties to have their disputes settled by a civil court.'

(7) The appellant is aggrieved by this order. Accordingly to learned counsel for the petitioner, the dispute should have been referred for arbitration by Sri Bist, the person appointed by agreement between the two parties with full awareness of the fact that he was an employee of the appellant. Section 20 of the Arbitration Act, on the basis of which this contention is raised, reads as follows :

'20.Application to file in Court arbitration agreement. (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respest to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies they or any of them, instead of proceeding under Chapter Ii, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court. (2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested an plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants. (3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than, the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed. (4) Where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. (5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made

applicable.'

(8) A reading of Sub-section (4) above extracted shows that, where the parties have agreed upon a named arbitrator to adjudicate upon the disputes between them the Court must made an order of reference to be named person and cannot appoint someone else as arbitrator : vide, Kishan Chand v. Union : 1974RLR553 . It is also not the contention before us that the Court should have appointed someone else as an arbitrator and referred the disputes to him for determination.

(9) The question, then, arises whether it is open to the Court to refuse to refer the matter to arbitration and leave the parties to have their respective rights to be adjucated in a court of law instead. The opening words of Section 20(4) quite clearly give a discretion to the Court in the matter to refuse to have the agreement filed in Court and referred for arbitration. Converted into positive language, Sub-sections (3) and (4) read together empower the Court to refuse arbitration if the opposite party is able to show that 'sufficient cause, ..'exists for holding that the agreement should not be filed or a reference to arbitration made. These words obviously give a very wide discretion to the court and the decided cases show a variety of circumstances in which the courts have refused an order of reference.

(10) But does the mere fact that the arbitrator, named in the agreement, is an employee of one of the parties furnish sufficient cause for refusing a reference We think not. Russel has two interesting passages on this topic. At page 116 (Nineteenth Edition), after referring to the paramount importance of the rule universally accepted that 'Judicial tribunals should be; honest, impartial and disinterested', the author says :

'THISrule applies in full force to arbitral tribunals, subject only to this exception, that parties who are free to choose their own tribunal may, provided they act with full knowledge, choose dishonest, partial or interested arbitrators.'

(11) It is also pointed out that this exception is in its turn subject to a statutory exception, contained in Section 24 of the Arbitration Act, 1950, which gives parties who have so choosen a focus penitential in certain circumstances. That section, in so far as is. relevant for our present purposes, reads as follows:

'24(1)Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in, the agreement, and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the authority of the arbitrator or for an injunction to restrain any other party or the arbitrator from. proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when. he made the agreement knew, or ought to have known, that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality.'

(12) The same topic is again dealt with at pages 153-A (ibid) in the following words :

'DISQUALIFICATIONby known interest if the parties to a dispute, with full knowledge of the facts, select an arbitrator who is not an impartial person, or who has to perform other duties which will not permit of his being an impartial person, the will not in general release them from the bargain Upon which they have agreed ; and if a party to a contract submits- to the jurisdiction of a tribunal which has an interest of its own in the decision, the court will not in general on that account release him from the bargain (however improvident it may be) so long as the court is satisfied that he is aware or ought to have been aware of the terms of the bargain he has entered into. To disqualify an arbitrator so appointed, it is insufficient to show that he might be suspected of partiality : it must be shown, if not that he actually is biased, at least that there is a strong probability that he will be biased, and to such an extent as to be incapable of fairly and honestly giving a decision, 'Every person must use his own discretion in the choice of his judges ; and being at liberty to choose whom he likes best, cannot afterwards object the want of honesty or understanding to them, or that they have not done him justice.'

This rule is, however, subject to a statutory exception of great importance. Where an agreement provides for future disputes to be submitted to a named arbitrator, and a dispute duly arises, and a party applies for an injunction to restrain the arbitrator named, or another party, from proceeding with arbitration, or applies for

leave to revoke the authority of the arbitrator, then it is not a ground for refusing the application that the party applying knew of the arbitrator's interest when the agreement concerned was made. Even so, it may be presumed that the court will not lightly interfere with an appointment deliberately agreed upon by the parties. Thus the provision common in building contracts, by which certain possible disputes between building contractor and building owner are determined by the architect or engineer, will still be enforceable'. These passages clearly apply to the facts of the present case. The terms of clause in arbitration agreement in the present case appear somewhat implausible when they say that Sri Bist was being named arbitrator only at the respondent's request but this over-emphasis cannot obliterate the fact that the respondent was fully aware that Sri Bist was the appellant's employee and it was with this full knowledge that he entered into this agreement. Even before this court the respondent has urged nothing against Sri Bist except that he was the appellant's employee and an apprehension that he may be biased or interested. There is no specific allegation of bias or grounds of partiality. There is, it seems to us, no satisfactory reason put forward for being allowed to go back upon the agreement which the respondent entered into with open eyes. There is no specific provision in India, as in Section 24 of the English Act, that would enable him to do so.

(13) To enforce the agreement specifically will not, as it might at first blush appear to do, deprive the respondent of his remedies for the redress of any genuine grievances he may have. He can, if the agreement including that on the name of the arbitrator has been brought about by fraud, mistake coercion or undue influence, challenge the validity of the agreement and, thereforee, of the arbitration clause under Section 33. He can, where there are claims which he wants to enforce, seek redress in proceedings before a civil court and, as we shall presently see, in an appropriate case, persuade the Court to refuse stay of the suit merely because there is an arbitration agreement. He can, again, proceed ahead with the arbitration and if there is misconduct on the part of the arbitrator, which includes his biased conduct of the proceedings, either seek the revocation of his authority or have his award set aside on that ground. But. having entered into the agreement with full knowledge of the relevant facts, he may not be premitted to say that the reference to arbitration should not be made only because the named

arbitrator is an employee of the other side.

(14) Learned counsel for the respondent has referred to the decision of the Supreme Court in U.P. Cooperative Federation v. Sunder Bros. : AIR 1967 SC249 which has also been strongly relied upon by the learned single Judge. That was a case of a dispute between the U.P. Cooperative Federation and the respondent firm appointed as Managing Agents for carrying on the business of public carriers in which the Federation was engaged. By the terms of the Managing Agency agreement disputes relating thereto were to be decided by arbitration as provided in the Cooperative Societies' Act (II of 1912) by the provisions of which statute the respondent agreed to be bound. The Federation terminated this agreement prematurely where upon the respondents brought a suit for a declaration that the termination was illegal and other reliefs. The Federation sought a stay of the suit under Section 34 of the Arbitration Act in view of the provisions for adjudication contained in Section 51 of the Cooperative Societies Act or that for arbitration contained in the agreement. The trial court stayed the suit but the appellate court and, in revision, the High Court refused stay. On appeal before the Supreme Court, the only question in debate was whether the lower courts rightly exercised their jurisdiction under Section 34 of the Arbitration Act in not granting stay of the proceedings of the suit.

(15) The Supreme Court answered this question in the affirmative for a number of reasons. Only one of them is relevant here. The Court observed :

'(7)There is also another ground whey the proceedings in the suit should not be stayed in the present case If Rules 1 15 and 1 16 of the Co-operetive Societies Rules are applicable then reference of the dispute has to be made to the Registrar of the Co-operative Societies who may either decide the dispute himself or refer the dispute to an arbitrator or two joint arbitrators appointed by him or three arbitrators, of whom one shall be nominated by each of the parties to the dispute and the third by the Registrar who shall also appoint one of the arbitrators to act as chairman. It is alleged by the respondent that the Registrar of co-operative Societies is ex officio President of the Society and it was with his. approval that the agreement in dispute was terminated. It was also pointed out that the Registrar

was the Chief controlling and supervising officer of the Society under its bye-laws. It was submitted for the respondent that the Registrar may not, thereforee, act fairly in the matter and it is. improper that he should be an arbitrator in the dispute between the parties. In our opinion, there is much validity in this argument. The legal position is that in order of stay of suit under S. 34 of the Indian Arbitration Act will not be granted if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter or that it is for some reason improper that he should arbitrate in the dispute between the parties. It is, of course, the normal duty of the court to hold the parties to the contract and to make them present their disputes to the forum of their choice but an order to stay the legal proceedings in a Court of law will not be granted if it is shown that there rs good ground for apprehending that the arbitrator will not act fairly in the matter or that it is for some reason improper that he should arbitrate in the dispute'.

Quoting passages from the speeches in the House of Lords in Bristol Corporation v. Johan Aird and Co., (1913 Ac 241), the learned Judge concluded : 'It is manifest that the strict principle of sanctity of contract is subject to the discretion of the Court under S. 34 of the Indian Arbitration Act, for there must be read in every such agreement an implied term or condition that it would he enforceable only if the Court, having due regard to the other surrounding circumstances) thinks fit in its discretion to enforce it. It is obvious that a party may be released from the bargain if he can show that the selected arbitrator is likely to show bias or by sufficient reason to suspect that he will not unfairly or that he has been guilty of continued unreasonable conduct. As we have already stated, the respondent has alleged in the present case that the Registrar) Co-operative Societies has approved the termination of the contract of Managing Agency with the plaintiff and the Registrar was the chairman of the defendant Society. We are accordingly of the opinion that the High Court properly exercised its discretion under S. 34 of the Indian Arbitration Act in not granting a stay of the proceedings in the suit.'

(16) A first look does not doubt suggest that the principle laid down by the Supreme Court in the above case may govern the present case as well, particularly as both Sections 20 and 34 postulate the same condition (viz. absence of sufficient cause or reason) for passing the relevant order. The Calcutta High

Court in C.D. & Co. v. Union Carbide : AIR1962 Cal360 has taken the view that the discretion of the Court is the same under the two provisions. We think, however, that there is a material difference between the two situations, the one covered by Section 20 and the other by Section 34. Under Section 20, the parties seek the assistance of the court for enforcing an agreement entered into between them and the court should come to their help if the person, who resists arbitration, does not show sufficient cause for his resistance. In most cases such cause may arise on account of subsequent discovery about the arbirator's conduct of relationship as happened in the cases cited before us Gulam Mohamed v. Gopaldas . The onus is on such a person to give cogent reasons and satisfy the court with facts and details that a reference to arbitration would be inequitable. It is not sufficient for him to merely say that the arbitrator may not act fairly for a reason which he was fully aware of at the time of signing the agreement. He should make out a clear and cogent case of bias or other facts which he Was not aware of at the time of the agreement. In this context reference may be made to Yusuf v. Akbar AIR 1976 Mad. 3 and Govindan v. Secretary, Home Department. In the former case, an objection that the named arbitrator was the husband of the partners (in the firm which was one of the parties) was not considered sufficient to decline a reference. In the latter, there was an allegation against the impartiality of the name arbitrator and the Court remitted the matter to the trial court for a retrial of the issue whether the named arbitrator had, as alleged, surrendered his judgment to the Government and thus disqualified himself. The court observed :

'IT is by now clear that if the parties to a contract voluntarily incorporated as one of its terms a clause which obliges one or the other of them to refer such disputes, arising under it or to seek for an interpretation of the terms of such a contract to or from an arbitrator specified or named by thems then the mandate imposed upon themselves by the parties is inescapable and has to be given effect to. To this general principle there is an exception. It it is satisfactorily proved and established that the person named or specified as the arbitrator under the contract is biased towards one of the parties or the arbitrator overtly or covertly involved himself in the subject-matter of the contract from the time of its inception and during the course of its working so as to give an impression to a reasonable person that a reference to him of the disputes that have arisen between the parties in relation to

the contract would be futile and in the ultimate analysis would not be a means to secure justice to the complaining party, then the Courts have covered out an exception to the General application of the Mandate as above and has allowed parties to court to court to seek for the appointment of an arbitrator other than the named arbitrator before whom the difference between the parties could be laid for final adjudication. In U.P. Co-operative Federation v. Sunder Bros., Delhi, : AIR 1967 SC249 , this principle has been recongnised...'

There is no such material in the present case or any issue framed on this aspect. What has been raised is a broad objection based on the solitary fact that the named arbitrator is an employee of the appellant. This, in our opinion, is not sufficient to decline a reference.

(17) Section 34, however, deals with the converse situation. It comes into play where a suit or legal proceeding has been commenced in the normal course and one of the parties seeks a stay of such proceedings. For obvious reasons the normal rule here is and should be that the suit or other legal proceedings should be allowed to proceed. Though the status confers a discretion in the court to stay them in appropriate cases, Power to stay is hedged in by a number of restrictions. Apart from other conditions, the section lays down that discretion may be exercised if the court is satisfied that there is no sufficient reason why the matter should not be referred for arbitration. In this approach, if the party seeking stay could put forward some tenable reason or justification for suggesting that the arbitration will be unsatisfactory or unjust the court will refuse the stay. Thus, the discretion to refuse stay under Section 34 must be construed to be much wider and more readily exercisable than the discretion to refuse a reference to arbitration can rightly say if it has the slightest of reasons to apprehend that the reference to arbitration may not result in a fair adjudication but that a reference to arbitration under section 20 will be refused only if cogent and satisfactory grounds are made out to show that the proceedings will be futile.

(18) There is also an important factual distinction between this case and the case before the Supreme Court. In the Supreme Court case the agreement no doubt envisaged that disputes between the parties should be resolved by the Registrar

or his nominees but it could not be known or anticipated at the time of the agreement that the dispute will arise as a result of an order approved or passed by the Registrar himself. It was only when the disputes arose that the respondent realised that the Registrar himself will decide or have a nominee of his to decide the validity of the order of termination that he had himself approved. This discovery was sufficient to entitle the respondents even to resist reference to arbitration ; a stay of the legal proceedings already initiated could naturally be resisted with greater case.

(19) We are fortified in our conclusion that there should be a difference in approach between Section 20 on the one hand and Section 34 on the other by certain other considerations as well. Firstly, we have already pointed out that although in England also, a stay of proceedings under Section 4 corresponding to Section 34 is granted liberally and readily, an objection to a reference to arbitration on the ground taken in the present case is available only under a specific statutory provision ; but for the said provision, such an object could not be taken except where a discovery of partiality or bias has been made subsequently. In the absence of a specific statutory provision in India, the general principle enunciated by Russel and referred to earlier should apply. Secondly, where a reference under Section 20 is refused for the reason alleged and the order of refusal is passed (or becomes final) after a large number of years, the passage of time may in many cases, result in the expiry of the period of limitation for the initiation of a suit or other appropriate legal proceedings for the enforcement of the rights of the applicant for arbitration. There can, however, be no such prejudice under Section 34 in asmuch as in cases covered by that section appropriate proceedings have already been commenced and no party will be faced by problems of limitation by the mere stay of the suit. Thirdly, we think that while in an appropriate case where the bias or partiality of the nominated arbitrator is ex facie clear or proved cogently, a reference should be refused it may be too far-reaching and sweeping a conclusion to hold that an order of reference to arbitration should be declined merely because the named arbitrator has some connection with one of the parties Such a proposition may render illegal a vast array of arbitration matters that come up before the courts in India where invariably an arbitrator is agreed upon who is connected with one of the parties who may even, in a broad sense, be in a

dominating position so as to be able to dictate the terms of the agreement. Thus financing the hire-purchase agreements are known to provide for arbitration by an employee or legal adviser of the financier ; contracts entered into by Central Public Works Department of the Government, Railway or Municipality provide for arbitration at the hands of a Government, Railway or Municipal employee ; and contracts by certain departments of the Government name a high Government official as the arbitrator. Where reluctant to arrive at a conclusion that may create such a situation.

(20) For the reasons discussed above, we have come to clear conclusion, though after some initial hesitation caused by the decision of the Supreme Court, that an order of reference to the arbitrator named in the agreement should not have been declined in the present case. We, thereforee, set aside the order of the learned Single Judge, order the agreements of 21-8-1979 and 17-8-1981 to be filed and order a reference of the disputes raised in the petition to Sri Manohar Singh Bist, the sole arbitrator agreed upon between the parties. We need hardly say that this order will be without prejudice to such rights as may be available to the respondent to challenge, if so advised, the agreement, the appointment or the award under the other provisions of the Arbitration Act.

(21) The appeal is allowed but we make no order as to Costs.