

Koshy Vs. K.S.E. Board

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Court : Kerala

Decided On : Jul-08-1983

Reported in : AIR1984Ker23

Judge : K.K. Narendran, J.

Acts : [Arbitration Act, 1940](#) - Sections 5 and 8

Appeal No. : C.R.P. No. 2111 of 1981

Appellant : Koshy

Respondent : K.S.E. Board

Advocate for Def. : G. Janardhana Kurup, Adv.

Advocate for Pet/Ap. : P.A. Cyrus and; John Koshy, Adv.

Disposition : Petition allowed

Judgement :

ORDER

K.K. Narendran, J.

1. The scope of the power of the Court under Section 5 of the [Arbitration Act, 1940](#) to grant leave to revoke the authority of an appointed arbitrator arises for consideration in this Civil Revision. The point is whether leave will be granted only

if actual bias of the arbitrator is established or the existence of a circumstance which is likely to bias the arbitrator is enough.

2. The petitioner was a contractor of the respondent. Kerala State Electricity Board. As his claims were not settled he invoked the arbitration clause in the contract and moved the Sub Court, Trivandrum, for the appointment of an arbitrator. By order dt. 22-7-1980, the court appointed the respondent as arbitrator. After the above order, the petitioner came to know that the respondent-Board has issued a letter dt. 21-4-1979 to their Chief Engineer deciding most of the issues to be settled by arbitration against the petitioner. This fact was not brought to the notice of the court when the appointment of the arbitrator was made. So, the petitioner moved the court under Sections 5 and 8 of the [Arbitration Act, 1940](#), for leave to revoke the authority of the arbitrator appointed and to appoint another arbitrator. By the order impugned, the court rejected the petitioner's request holding that the petitioner ought to have raised his objection at the time of the appointment of the arbitrator.

3. Section 5 of the [Arbitration Act, 1940](#) reads:--

'5. Authority of appointed arbitrator or umpire irrevocable except by leave of court:--
The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.'

No doubt, a party to a contract should not be permitted to wriggle out of the contract easily. But at the same time, a contract for arbitration is a contract uberrima fides. To put it in other words, there must be absolute and perfect candor or openness and honesty in such a contract. A concealment or deception, however slight, will vitiate the contract. The arbitrator need not be actually biased. It is enough that there is a reasonable prospect that he will be biased and that he will not be able to decide the matter fairly and the party who entered into the contract has such a reasonable apprehension. This is because, a perfectly even and unbiased mind is essential for the validity of the arbitration proceeding just like any other judicial or quasi-judicial proceeding. So, if there is some circumstance which the party was not aware of at the time when the contract was entered into or when

the arbitrator was appointed by the court and which will go to show that there is a reasonable prospect of bias and the court is satisfied that the arbitrator is not likely to give an impartial decision, the Court has to interfere under Section 5. This is to prevent a miscarriage of justice. In this case, the respondent-Board had already decided against the petitioner some of the points referred for arbitration. The petitioner came to know of this only after the respondent was appointed arbitrator by the court. The court was also not aware of this. In the normal course, the respondent ought to have brought it to the notice of the court. That was not done. As the respondent has already taken a decision on some of the points involved in the arbitration it cannot be said that the petitioner cannot have a reasonable apprehension that the respondent-Board will be biased. The learned Sub Judge has refused leave without even adverting to the legal aspects of the matter simply blaming the petitioner for not objecting to the appointment of the respondent as arbitrator when the order was made. The respondent has no case that the petitioner was aware of the decision it had already taken in the matter. By refusing leave the court below has failed to exercise a jurisdiction vested in it

4. In *Amarchand v. Sree Ambica Jute Mills* (AIR 1966 SC 1036) it has been held :--

'It is true that on an application under Section 5 it is not necessary to show that the arbitrator is in fact biased and it is enough to show that there is a reasonable ground for apprehension that the arbitrator will be biased. But the reasonable ground must be established to the satisfaction of the Court to which an application for leave to revoke the authority of an appointed arbitrator is made.' (Para 12).

In the above case it has been further held :--

'Before the Court exercises its discretion to give leave to revoke an arbitrator's authority, it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. In considering the exercise by the Court of the power of revocation it must not be forgotten that arbitration is a particular method for the settlement of disputes. Parties not wishing the law's delays know, or ought to know, that in referring a dispute to arbitration they take arbitrator for better or worse, and that his decision is final both as to fact and law. In many cases the

parties prefer arbitration for these reasons. In exercising its discretion cautiously and sparingly, the Court has no doubt these circumstances in view, and considers that the parties should not, be relieved from a tribunal they have chosen because they fear that the arbitrator's decision may go against them.' (Para 13). In *Bhuwalka Brothers v. Fatechand* (AIR 1952 Cal 294) the allegation in the petition filed under Section 5 of the Arbitration Act was that almost all the members of the Bengal Chamber of Commerce who would be called upon to arbitrate are members of one or the other association and that the members are committed to a particular view of the matter stated in the circulars issued by the Chamber and hence leave is to be granted to revoke the authority of the Chamber to arbitrate the dispute. Granting leave, the court held:--

'I venture to put two limits within which the discretion is to be exercised; one the court should not lightly release the parties from their bargain; that follows from the sanctity the Court attaches to contracts: the other, that the Court should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal to grant the leave. The discretion has to be exercised within these limits.' (Para 11). In *Bhuwalka Brother's case*, Banerjee J. has referred to *Bristol Corporation v. John Aird & Co.* (1913 AC 241) wherein Lord Atkinson has observed:--

'But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those preformed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shown in fact that there is any reasonable prospect that he will be so biased as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of Law and they are entitled to say in answer to an application to the Court to exercise the discretion which the 4th section of the Arbitration Act vests in them.' In the above case, Banerjee J. has also referred to *Eckersley v. Mersey*

Docks & Harbour Board (1894) 2 QB 667) wherein Lord Esher M. R. has observed: 'In this case it is said on behalf of the plaintiffs that there is sufficient reason for the Court to say that the disputes in the action should not be referred to the engineer of the Board, because he might be biased. It, is not a sufficient reason to say that he might be biased, if the Court should be of opinion that there is no ground for supposing that he would be biased. When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer because he might be suspected of being biased, although in truth he would not be biased. It is an attempt to apply the doctrine which is applied to Judges, not merely of the Superior Courts, but to all Judges that not only must they be not biased, but that, even though it be demonstrated that they would not be biased, they ought not to act as Judges in a matter where the circumstances are such that people -- not necessarily reasonable people, but many people--would suspect them of being biased'

In Bhuwarka Brother's case (AIR 1952 Cal 294') Banerjee J. has laid down the law as follows :--

'An arbitrator who has an interest dependent upon his decision is disqualified if either party at the time of his appointment was ignorant of the fact that this would be so and the interest is of such a nature that it ought to have been disclosed. But if the parties, with full knowledge of the facts, selected an arbitrator who was not an impartial person, or who had to perform other duties which would not permit of his being an impartial person, the Court would not release them from the bargain upon which they had agreed; and if a party to a contract submitted to the jurisdiction of a tribunal which had an interest of its own in the decision the Court would not on that account release him from the bargain, however improvident it was considered to be, so long as the Court was satisfied that he was aware or ought to have been aware of the terms of the bargain he had entered into.'

In Kemp v. Rose ((1858) 1 Giff 258) again a case referred to by Banerjee J. in his judgment, a builder by his contract bound himself to abide by the decision and certificates of Mr. Lamb an architect as to the amounts to be paid for the work, not knowing that the architect had given an assurance to the opposite party that the

cost of the building should not exceed a specified amount even though he refused to give such a guarantee. Sir John Stuart V. C. in his judgment held :-

'According to the language of the written contract the plaintiff bound himself in the strongest way to abide by the decision of Mr. Lamb in an absolute confidence that his decision would be that of a wholly unbiased man.

A perfectly even and unbiased mind is essential to the validity of every judicial proceeding.

Therefore, where it turns out that, unknown to one or both of the persons who submit to be bound by the decision of another, there was some circumstance in the situation of him to whom the decision was entrusted which tended to reduce a bias in his mind, the existence of that circumstance will justify the interference of this Court.

Whether in fact the circumstance had any operation in the mind of the arbitrator must, for the most part, be incapable of evidence, and may remain unknown to every human being, perhaps even unknown to himself. It is enough that such a circumstance did exist.....

Suppose a guarantee had been given by Mr. Lamb, and that he had bound himself by contract that all the expenses beyond the sum of 2500 . should be paid by himself, would it be possible to contend successfully that the plaintiff entering into the contract in ignorance of the interest on the part of the arbitrator, is to be bound by those terms of the contract which left in such a large way all questions as to the amount of remuneration to the decision of Mr. Lamb? Although an assurance is much less strong than a guarantee, and may not in fact, have biased the judgment of Mr. Lamb, yet it was calculated to have that effect. Without imputing corruption to Mr. Lamb, it is enough if there was a circumstance tending to bias his judgment which was unknown to the plaintiff. The power of Mr. Lamb as the architect and engineer, to whose judgment almost everything, both as to quantity and price, was left, was in this contract, as in most others of the same kind, nearly unbounded; and that being so, if there was the smallest speck or circumstance which might unfairly bias his judgment, his decision cannot be absolutely binding upon the

contracting party. Therefore the plaintiff is entitled to have the decisions of Mr. Lamb reviewed by this Court.'

5. In the result, the order impugned is set aside. The petitioner is granted leave under Section 5 of the [Arbitration Act, 1940](#) to revoke the authority of the respondent-Board appointed as arbitrator. It is made clear that after revocation, the petitioner can move the court for appointment of an arbitrator as per the provisions of the [Arbitration Act, 1940](#). The Civil Revision Petition is allowed. No costs.

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