C.V. Krishna Vs. State of Madras

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SooperKanoon Citation : sooperkanoon.com/791908

Court : Chennai

Decided On : Mar-15-1976

Reported in : AIR1977Mad30

Judge : Ramaprasada Rao and ;Ratnavel Pandian, JJ.

Acts : Indian Arbitration Act, 1940 - Sections 34

Appeal No. : Appeal No. 370 of 1972, against decree of Sub-J., Chingleput in O.S. No. 41 of 1968

Appellant : C.V. Krishna

Respondent : State of Madras

Advocate for Pet/Ap. : Mr. Srinivasa Varadachari

Judgement :

Ramaprasada Rao, J.

1. The plaintiff is the appellant. He filed a suit (it is called a suit because of convenience) for a direction to the defendant to file the arbitration agreement contained in a contract entered into between himself and the defendant in connection with the supply of an insulated milk tanker made of stainless steel. He also prayed for a reference to an arbitrator other than the arbitrator named in the arbitration agreement, who was to be appointed by the court in this suit so as to

decide the disputed matters as between the contracting parties. The suit arose this way. On 26-6-1964, the defendant invited tenders under Ex. A-1, for the supply of the milk tanker and such an invitation made it clear that the price was to be exclusive of sales tax. Under Ex. B-1, dated 29-7-1964, the plaintiff tendered and quoted a price of Rs. 35,000. This was accepted under Ex. B-2 dated 25-8-1964, and the plaintiff was directed to supply the tanker within 60 days from 24-10-1964 and he was also directed to pay a security deposit of Rs. 4,500. The plaintiff initially committed default in the matter of the supply of the tanker within the prescribed time. It appears, therefore, that under Ex. A-2 dated 28-12-1965 the order placed by the plaintiff and later accepted by the defendant, was cancelled. But is also appears from record and the supervening events, which are not disputed before us, that the plaintiff was given yet another opportunity to supply the tanker, though in point of time, earlier to such a decision the security deposit of Rs. 4,500 was also forfeited by the defendant. Finally, revoking the earlier order of cancellation of the order the plaintiff was given an opportunity under Ex. A-3, dated 10-3-1966 to supply the tanker by 30-4-1966, but the records disclose that such supply was not made even within that time. Now it transpires that the plaintiff finally delivered the tanker in or about December 1966, which is said to have been accepted by the defendant on 10-12-1966. The plaintiff raised a bill Ex. B-3, for such supply and claimed a sum of Rupees 38,500 which included a sum of Rs. 3850 as and towards the sales tax. Curiously enough the plaintiff received a cheque enough the plaintiff received a cheque for Rs. 15,000 on 10-5-1965, with a note appended to it to the effect that the said amount was in full settlement of his bill Ex. B-3. The plaintiff accepted the said cheque under protest and called upon the defendant to submit the disputes, which have arisen by then to arbitration. We may here mention that it is not disputed that under clause 19 of Ex. A-1 or B-1 any difference or dispute arising out of the interpretation or application of the terms of the contract, as entered into between the plaintiff and the defendant shall be referred to the Milk Commissioner for an award and such reference shall be deemed to be a submission to the arbitration within the meaning of the provisions of the Indian Arbitration Act, 1940, and the parties agreed that the award of the Milk Commissioner shall be final and binding on the parties. The plaintiff apparently foreseeing and having felt that differences have arisen not only in the

matter of the interpretation but also the applicability of the clauses in the contract either under Ex. A-1 or Ex. B-1, wanted such disputes to be referred to arbitration. He sought for such a reference by issuing notices Exs. B-4, B-5 and B-6. The plaintiff was confronted with a reply under Ex. A-4 which reads as follows-

'Madras Dairy and Milk Project.

From ToThe Commissioner of Milk Thiru M. R. Krishna Iyer,Production & Livestock Advocate, 12-A Aziz NagarDevelopment, Milk Colony, 1st St., Kodambakkam,Madhavaram, Madras 51. Madras 24.ROC. No. 28638/E1/64 dated 21-10-1967.

Sir,

Sub: Supply of stainless steel milk tank-settlement of bill-Delay-regarding.

Ref: Your letter dated 5-10-1967.

With reference to your letter cited, I am to inform you that orders of the Government in the matter have since been received and further action is being pursued to settle your client's affairs, at a very early date.'

The plaintiff became apprehensive and he, therefore, filed the present action seeking for the reliefs, already mentioned. The defendant in his written statement after traversing the merits and complaining that the tank was defective, stated thus in paragraph 6 of the written statement-

'6. The following three matters had to be considered and a decision arrived: (i) forfeiture clauses; (ii) liquidated damages for delay in supply and (iii) the difference in value.

All these arose because of the delay of plaintiff not completing the terms of contract as per agreement. It was finally decided by the Government that 1 and 2 above have to be enforced and this was pending correspondence between both the parties. The plaintiff is not entitled for any interest, as such delay are incidental and inherent in the contract and was pending consideration and correspondence between parties. The plaintiff has been paid in full the amount due to him and no

amount is payable by the defendant.'

He particularly objects to the plaintiff's request for appointment of an arbitrator other than the one named in the arbitration agreement and would ultimately claim that the claim made by the plaintiff in this action is excessive and that the suit has to be dismissed. The following issues were framed by the learned Subordinate Judge of Chingleput:--

1. Has the defendant shown any sufficient reason why he should not be required to file the arbitration agreement?

2. Is not the applicant entitled to get an order for appointment of an independent arbitrator; and

3. To what relief, is the plaintiff entitled?

No oral evidence was adduced by the parties. After referring to the documentary evidence, the learned trial Judge dismissed the suit with costs. It is as against this, the present appeal has been filed.

2. Mr. Srinivasa Varadachari, learned counsel for the appellant, says that the suit ought not to have been dismissed and the court had no option left except to refer the subject-matter to an arbitration whether to the named arbitrator or to an independent arbitrator as the case may be, but the dismissal of the suit with costs is against law. What is urged by the learned Government Pleader is that there is sufficient hypothesis in the pleadings to infer that the plaintiff was not inclined to submit the matters in dispute to the named arbitrator and as the plaintiff cannot avoid such an arbitrator having agreed to do so when the contract was formed, the dismissal of the suit was right.

3. We are unable to agree with the conclusion of the learned Subordinate Judge. There was no argument before us as was attempted in the written statement that the suit has not been properly framed. 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 them, then the mandate imposed upon themselves by the parties is inescapable and has to be given effect to. To this general principal there is an exception. If 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 it the ultimate analysis would not be a means to secure justice to the complaining party, then the courts have carved out an exception to the general application of the mandate as above and has allowed parties to come to court to seek for the appointment of an arbitrator other than the named arbitrator before whom the differences 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 recognised. The Supreme Court said that the strict principle of sanctity of contract is subject to the discretion of the court under Sec. 34 of the Indian Arbitration Act, for there must be read with every such agreement on an implied terms or conditions that it would be enforceable only if the court having due regard to the other surrounding circumstances thinks fit in its discretion to enforce it and that 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 act unfairly or that he has been guilty of continued unreasonable conduct. In a recent judgment of a Division Bench of our court, the above decision was referred to in K. Yusuf Sheriff v. Akbar Sheriff, AIR 1976 Mad 3. In the latter case, the named arbitrator was the husband of one of the partners. Veeraswami C. J., speaking for the Bench said that it cannot be assumed from mere relationship that the arbitrator would act otherwise than impartially. Obviously that was a case where there was no iota of evidence to found a suspicion as against the neutrality of the arbitrator.

4. With the above background we shall look into the facts of this case. When a cheque for Rs. 15,000 was sent on 10-5-1967 in full settlement of a bill Ex. B-3, raised by the plaintiff demanding a sum of Rs. 38,850, certainly a dispute has arisen. The plaintiff was pursuing the demand and was anxious to know how a

sum of Rs. 15,000 could be an equation for Rs. 38,850. This he did when he sent the notices Exs. B-4, B-5 and B-6. He gets a reply which has already been excerpted whereunder the Milk Commissioner, who is the named arbitrator under the agreement Ex. A-1 or Ex. B-1 states that orders of the Government have since been received and further action is being pursued to settle the plaintiff's affairs. Pursuant to this, a cheque for Rs. 17,575 is sent once again in full settlement but without any explanation. When the plaintiff came to court the defendant in paragraph 6 of the written statement which was also excerpted above has categorically pleaded that it was finally decided by the Government that the forfeiture clause and the clauses relating to the liquidated damages for delay in supply and the difference in value have to be enforced. Obviously, the plaintiff's apprehension that the arbitrator who is to settle disputes has abdicated his power and has surrendered himself to the opinion of a third party is not without foundation. Therefore, it is clear that this apprehension in the mind of the plaintiff was responsible for the second relief asked for by him in the suit.

5. In the above circumstances, when the contract is not in dispute, when the terms of the contract are not equally disputed and when, under clause 19 of the agreement an aggrieved party can refer the current disputes under it to the arbitrator named or otherwise, then the defendant cannot under the terms of the contract itself or otherwise, refuse to accede to the request of the plaintiff to bring the arbitration agreement into court for judicial scrutiny.

6. The next question is whether the second relief asked for by the plaintiff, namely to appoint an arbitrator other than the named arbitrator (Milk Commissioner) is well-founded. No doubt the pleading is rather expressive in this case and even so Ex. A-4 dated 21-10-1967. These two circumstances provoked the plaintiff, rightly in our view, to contend that the Milk Commissioner who is the named arbitrator, under the contract, ought not to function as such, as he has surrendered his judgment to the Government and made it appear that he was merely an automation to implement the same. But the question is whether the Government did decide at all as pleaded in para. 6 of the written statement and if so what was the nature of the decision and what was the occasion for the decision. These facts and records relating to them were not placed before the trial court. Even the trial

Judge would say that there is nothing on record to show that the Government have issued any instruction to the Milk Commissioner to act in a particular manner. At the appellate stage, the learned Government Pleader before us is unable to improve matters. In this state of affairs, we are unable to apply the exception to the general rule referred to above and straightway disturb the named arbitrator and impose another instead, on the parties. As already stated, the courts are too slow to disturb the named arbitrator. But at the same time, the courts have the right to decide in their judicial discretion whether all such terms contained in an arbitration agreement are to be enforced or not. There may be circumstances in a given case wherein as stated by the Supreme Court a party may be released from the bargain, if circumstances do exist to justify such a conclusion. As there is not enough material before us, nay even before the trial court for it to conclude that the named arbitrator ought not to function in the particular case, we are unable to, at present, grant the second relief asked for by the plaintiff. We have already stated that the apprehension of the plaintiff is not without any foundation. Be that as it may, the matter has to be looked into by the trial court and for this purpose, the finding of the court below that the plaintiff is not entitled to the second relief has to be set aside.

7. We have already expressed that the plaintiff is as of right entitled to call the defendant to file the arbitration agreement into court. We have also stated that the question whether the arbitrator named under Ex. A-1 or B-1 should be the Tribunal who should decide the disputes that have arisen between the parties under the contract or not, is a matter to be decided by the trial court after hearing the parties and after giving an opportunity to the parties to call for such records as are necessary to decide the issue.

8. In the circumstances, the dismissal of the suit is wrong, the judgment and decree of the trial court are reversed and while decreeing the suit in so far as the first relief is concerned, the subject-matter is remitted to the trial court for a decision on the second relief asked for by the plaintiff.

9. Having regard to the delay with which the plaintiff is also confronted with, the trial court shall dispose of the matter within one month after the reopening of the

courts and see that the parties produce all such necessary records in time so as to enable it to complete the trial. Costs, costs in the course.

10. Order accordingly.