(1970) 03 CAL CK 0039

In the Calcutta High Court

Case No : Award Case No. 3 of 1967

Bankelal Singh APPELLANT

Vs

Ganesh Narain Brijlal Pvt. Ltd. RESPONDENT

Date of Decision : 05-03-1970

Acts Referred:
Arbitration Act, 1940 — Section 15, 16, 21, 24, 34

Citation : (1972) 2 ILR (Cal) 265

Hon'ble Judges : S.A. Masud, J

Bench : Single Bench

Advocate : A.C. Bhabhra, for the Appellant;B.K. Bachawat, for the Respondent

Judgement

S.A. Masud, J.—This is an application for setting aside an award dated March 7, 1968, made by Mr. S. Tibrewalla, Barrister-at-law.

2. The circumstances under which this application has been made arc stated as follows:

On October 6, 1964, the Petitioner approached Ganesh Narayan Brijlal Pvt. Ltd., the Respondent No. 1, to secure a new lorry chassis and also for financing the Petitioner in purchasing the said lorry. Thereafter an agreement was made to the said effect on terms mentioned in para. 1 of the petition. Sitablal Singh, the Respondent No. 2, agreed to be the guarantor of the Petitioner. Several payments were made by the Petitioner to the Respondent company but disputes and differences arose in respect of such payments and also in respect of the title to the said lorry. The Petitioner filed a suit No. 2591A of 1966 against Ganesh Narayan Brijlal Pvt. Ltd. and Sitablal for, inter alia, declaration that Bankelal is the owner of lorry No. WGH 5369, for confirmation of possession of the lorry by him, for accounts and for other relief?s. In the said suit the Respondent made an application for stay of the said suit u/s 34 of the Indian Arbitration Act on January 2, 1967. On May 23, 1967, the said application was dismissed. An appeal was preferred by the Respondent company on June 7, 1967,-against the said order dismissing the application for stay. Before the appeal Court Bankelal and the Respondent company made an application for reference of all their disputes and differences in the suit and the appeal to arbitration. The appeal Court by its order dated December "19, 1967, allowed the said petition and referred all the disputes and differences between the parties in the suit to the sole arbitration of the said Mr. Tibewalla. Thereafter, the Arbitrator gave direction to the parties to file statements of facts and on June 4, 1968, the Respondent company filed a statement of claim. The Petitioner also filed statements of facts reiterating the prayers in his said suit. On January 6, 1968, and on January 13, 1968, the arbitration meetings were held and Mr. D. Bagaria appeared for the Petitioner. On March 7, 1968, the Arbitrator made and signed his award. The award was duly filed and the present application was made on February 25, 1969.

3. Mr. Bhabhra, on behalf of the Petitioner, has submitted that the application should be dismissed on two grounds. According to him, the application was made by the Petitioner and the Respondent company before the appeal Court u/s 21 of the Indian Arbitration Act, 1940. The Respondent Sitablal was not a party to the said application and, as such, the reference to arbitration is invalid in law. Further, he has argued that assuming the said application was made u/s 24 of the Act the Arbitrator in holding the Petitioner, and the Respondent Sitablal jointly liable for payment of Rs. 9,000 has acted in breach of Section 24 inasmuch as the award is not severable. Relying on Narsingh Das v. Firm Gogan Ram AIR 1955 Punj. 31 he has argued that although the Court has power to modify or correct the award, in the facts of this case the Arbitrator in making the said Sitablal liable jointly with the Petitioner has made the award one compact whole and in severable. In the premises the award should be set aside.

4. In my view this contention of Mr. Bhabhra cannot be accepted. Mr. Bachawat on behalf of the Respondent company has conceded that the award, as it stands, should be modified or corrected by this Court u/s 15 of the Act. The mistake of the Arbitrator took place because he thought, not without reason, that the application u/s 21 of the Act before the appeal Court was made by all the parties including Sitablal inasmuch as the latter appeared before the Arbitrator and gave evidence. The Respondent company did not get opportunity to correct the Arbitrator''s mistake as it was only after the award was passed, the company came to know that Sitablal also was made liable along with the Petitioner. Admittedly, Sitablal was not a party to the said application before the appeal Court and Sitablal Singh did not give his consent to the said application for reference. Accordingly, the Arbitrator had no jurisdiction to affix joint, and several liability on the Petitioner and Sitablal. The application before the appeal Court, however, may be construed as an application u/s 24 of the Act which reads as follows:

Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by Section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall continue so far as it relates to the parties, who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

Under the said section the reference would be binding on those parties who want to have the disputes and differences between them referred to arbitration. But the pending suit in which such application is made will continue against the party, in the preset case Sitablal who has not joined in the said application. This section makes it clear that the award made by the Arbitrator shall be binding only on the parties who have joined in the application. In the premises, Mr. Bhabhra is right that the Arbitrator has committed an error in making Sitablal liable to the Respondent company. But, I cannot accept the contention that the award should be set- aside on that ground. Section 15 of the Act empowers the Court to modify or correct an award. Section 15 reads as follows:

The Court may by order modify or correct an award?

(a) Where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) Where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(c) Where the award contains a clerical mistake or an error - arising from an accidental slip or omission.

5. In the facts of the present case, I hold that the award should be corrected by me u/s 15(a) or 15(b). The reasons why I hold the said view may now be stated. The Respondent company is described as financier in respect of the transaction of a sale of a lorry. The Petitioner is stated to be the hirer and Sitablal, the guarantor. It is the financier''s case that the Petitioner has committed a breach of the terms of agreement and, as such, the Petitioner will be liable to pay certain sums of money to it. Further, the company also has contended that they are entitled to have the ownership and possession of the said lorry which is in the possession of the Petitioner. Sitablal as a guarantor is also liable to the financier along with the Petitioner in terms of the said agreement. But the guarantor''s liability ordinarily arises on the failure of the primary debtor to pay to the financier. The financier''s cause of action fails or succeeds on breach of the terms of the agreement on the part of the company or the Petitioner. Sitablal has not appeared in the application before the trial Court or before the appeal Court. Sitablal who happens to be brother of the Petitioner perhaps thought that his liability would depend upon the Petitioner''s failure or success in the proceeding. The Petitioner and the Respondent company accepted the position and wanted their disputes to be settled by arbitration. The said disputes were duly referred to

Mr. Tibrewalla and Sitablal, gave evidence in support of the Petitioner. The award thereafter was made after hearing the parties. Substantially the award has been made to the effect that on payment of Rs. 9,000 to the Respondent company the Petitioner will become the sole and absolute owner of the said lorry. The Arbitrator, however, under a mistake, as set out above, made Bankelal and Sitablal jointly liable to pay to the Respondent company the said sum of Rs. 9,000. It is true that under the award, until the said sum of Rs. 9,000 is paid to the Respondent company, the Respondent company remains the owner of the said lorry. But ''the fact remains that the Arbitrator has decided the title to the lorry in favour of Bankelal and has also arrived at the actual amount which Bankelal is to pay to the company for getting the said lorry. It is true that the award in several paragraphs has imposed a joint and several liability on the Petitioner and the said Sitablal. Mr. Bhabhra relying cm Owen v. Wilkenson 141 E.R. 123 and Ananda Kishore Choudhury v. Panchu Kapali and Ors. 59 C.L.J. 423 has argued that jointness of a liability as a legal concept gives rise to certain legal consequences which cannot permit severability of the liability so as to make one person liable excluding others. But, in my view, the jointness can be separated in the facts of this case without substantially affecting the decision of the Arbitrator. Further, the fact that two out of those three parties have referred the dispute to arbitration u/s 24 shows that the order was made on the basis that the disputes were severable. Further, the award has imposed not only joint liability but joint and several liability. In that view of the matter, I hold that the award should be given effect to excluding the portions where Sitablal has been made jointly and severally liable along with the Petitioner. Mr. Bachawat has also argued that, in any event if the Court holds that the award is in severable, the award should be remitted to the Arbitrator u/s 16(l)(a) & (c) of the Act. Reliance has been placed by him on Jagrup Ram Kasaundhan Vs. Kashi Prasad Gupta and Others and Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others, in support of his contention. But, in view of my finding that the award is severable, it is not necessary for me to decide that point.

6. The only other contention of Mr. Bhabhra is that it was the Petitioner who filed the said suit No. 2591A of]966 for a declaration that he was the owner of the said lorry. The Respondent company has not filed any suit against the Petitioner for a declaration that the company was the owner, and yet the Arbitrator in his award has declared the Respondent company as the owner of the said lorry. According to him, Bankelal''s claims should have been either dismissed or allowed. The Arbitrator in declaring the Respondent company as the owner of the said lorry has exceeded his jurisdiction and, as such, there is an error on the face of the award. Relying on Probodh Kumar Goswami v. Eichtoh Trading Company ILR (1947) Cal. 572 he has argued that the '' award must relate to the disputes and differences in the suit itself and the Arbitrator cannot give a declaration in favour of the Respondent company when the Petitioner has not asked for the same in his plaint. In my view, this contention of Mr. Bhabhra must also be rejected. It is true that the Petitioner filed the suit for declaration claiming the

ownership of the lorry. But, it appears from the records that the Respondent company described himself as the claimant in his statement of claim before the Arbitrator. Further, as stated above, the substance of the disputes between the parties is the determination of title to the said lorry and determination of Petitioner''s liability to pay sums of money to the Respondent company in terms of their agreement. It is true that the disputes between Sitablal and the company have not been referred to the arbitration, and to that extent the liability fixed on Sitablal has been made wrongly. But the disputes between Bankelal and the company, which the Arbitrator has decided, have been validly referred to arbitration and, as such, the award so far as Bankelal is concerned cannot be set aside. The liability of Sitablal has not been referred to the Arbitrator and, as such, the award in making Sitablal liable must be corrected for reasons stated above. Further, the Arbitrator has not granted any relief not asked for, as suggested by Mr. Bhabhra, inasmuch as the Arbitrator has held that the Petitioner is liable to pay to the Respondent company a sum of Rs. 9,000 to be paid in five monthly installments.. Until the said sums of money are paid the Respondent company would remain the owner of the said lorry. If Bankelal pays the said sum of Rs. 9,000 in terms of the said award he will be the sole owner of the said lorry. Thus the Arbitrator has duly exercised his jurisdiction in deciding the disputes and differences between the Petitioner and the company.

7. In any event, Mr. Bachawat is right when he has urged that the Petitioner would not be allowed to raise the technical objection inasmuch as it is Sitablal who has been prejudiced by the award and not the Petitioner. Sitablal Singh was not a party to the application u/s 24 of the Arbitration Act and yet the award has been made binding on Sitablal. But the Petitioner at all material times was a consenting party to the reference and the Arbitrator in deciding the disputes between him and the company cannot be said to have illegally affected the Petitioner''s right. The Arbitrator has arrived at a finding of fact to the effect that a sum of Rs. 9,000 is payable by the Petitioner to the Respondent company and the Petitioner is bound by the said award. There is no vagueness in the award in which the Petitioner has been declared as the owner of the said lorry on payment of the said sum of Rs. 9,000. In this connection reference may be made to the decision in Narsingh Narayan v. Ajodhya Prasad 16 C.W.N. 256, 258. Relying on J. Agarwalla and Sons Ltd. v. Kanoria General Dealers Ltd. 59 C.W.N. 7J5. 722 I hold that no? substantial injustice? has been done to the Petitioner and the award cannot be set aside on this ground also. Further, the award at best may be said to be imperfect in form or contains an obvious error and, as such, u/s 15(b) also I hold that the award should be corrected.

8. In the premises, I modify or correct the award as follows: The award is valid and effective save and except the following portions which would stand deleted from the award.

(a) In the Cause Title, ''2. Sitablal Singh'' and ''both'' will be deleted; ''opposite party'' will be substituted for ''opposite parties''.

(b) In the first paragraph, ''and Sitablal Singh'' will be deleted.

(c) In Clause 2 of the award, ''and Sitablal Singh jointly and severally'' will be omitted and instead of ''are'' the word ''is'' to be substituted.

(d) In Clause 4 ''opposite party'' will be substituted for ''opposite parties''.

(e) In Clause 5 of the award, ''the opposite parties or either of them'' will be deleted and in its place ''Bankelal Singh'' is to be substituted.

(f) In Clause 7, ''opposite party'' should be substituted for ''opposite parties''.

9. It is made clear that this order is made without prejudice to the Petitioner''s right to continue the pending suit against Sitablal Singh. The award as modified is to be given effect to and there will be no order as to costs.