

(1956) 01 P&H CK 0020
In the Punjab And Haryana At Chandigarh
Case No : F.A.F.O. No. 89 of 1955

Delhi and Finance Housing and Construction Ltd.	APPELLANT
Vs	
Brij Mohan Shah and Another	RESPONDENT

Date of Decision : 31-01-1956

Acts Referred:

Arbitration Act, 1940 — Section 2, 33
Contract Act, 1872 — Section 29

Citation : AIR 1956 P&H 205

Hon'ble Judges : Falshaw, J

Bench : Single Bench

Advocate : A.N. Grover, for the Appellant; A.R. Whig, for the Respondent

Final Decision : Dismissed

Judgement

Falshaw, J.—This is an appeal by a Company the Delhi and Financing Housing and Construction Limited, against the order of the lower Court dismissing the Company's application u/s 34, Arbitration Act and refusing to stay proceedings in a suit instituted by Brij Mohan Shah respondent.

2. The plaintiff's case was that he and Nand Kishore defendant 2 as partners under the name of Messrs S. P. Kishore and Company entered into a contract with the appellant Company for carrying out the electrification scheme in the Company's colony known as Rajauri Gardens on the Najafgarh Road and deposited Rs. 12,000/-with the Company as security. The contract was terminated by the Company in November 1952 and the plaintiff filed this suit for the recovery of Rs. 31,000/- on account of the return of his security deposit and also the price of goods supplied and work done.

3. The Company applied u/s 34, Arbitration Act for stay of the proceedings on the ground that the contract between the parties contained a clause for reference of any disputes to arbitration. The application was opposed on several grounds by the plaintiff, all of which were decided in favour of the defendant company

except one, namely that the arbitration clause in the contract was invalid as being vague and uncertain.

4. The clause in question, which is No. 68 in the contract, reads-

"All disputes between the parties to the contract, arising out of or relating to the contract shall, after written notice by either party to the the contrast to the other of them, be referred to the sole arbitration of the Managing Agents/Technical Director, DLF Housing and Construction Ltd., New Delhi."

5. Since the words "sole arbitration" are used, it must be assumed that the "/" which occurs between the names of the two arbitrators means "or" and that one or the other of them was to be appointed as arbitrator, and the question which arises is whether in the absence of any provisions as to how the choice was to be made between the two arbitrators, the clause is invalid as being vague and uncertain.

6. On behalf of the Company it was argued that the clause either means that the Managing Agents should be appointed as arbitrators or, failing them, the Technical Director, or else that it means that either of the arbitrators named was to be selected by agreement between the parties, and that in either event the clause was good. It seems to me, however, that the very fact that even the learned counsel for the Company could find at least two alternative meanings which could naturally be ascribed to the word clearly shows that some vagueness exists.

6a. Indeed he more or less chose to concentrate on the second of his suggested interpretations, namely that one or either of the arbitrators named was to be chosen by agreement between the parties and he contended that some such words were implied in the clause.

In this connection he relied on the decision in " India Hosiery Works Vs. Bharat Woollen Mills Ltd., There the relevant words of the clauses Were -- "Shall be referred to arbitration at Calcutta"; and it was held by Chakravatti C.J. and Sarkar J. that an arbitration agreement, neither specifying the number of arbitrators nor specifying the mode of appointment, is perfectly effective and valid and the incidents of such an agreement are that it is to take effect as an agreement for reference to a sole abitrator, to be appointed by consent of the parties or, where the parties do not concur in making an appointment, to be appointed by the Court.

7. It will, however, be seen that that case was totally different and the meaning ascribed to the words in the clause by the learned Judges is the perfectly natural meaning, but the case is different where, as in the present case, two arbitrators are named with an indication that one of them is to be selected, but without any provision as to how the selection is to be made, and I do not find it possible to imply the words in such a clause that one or either was to be selected by agreement between the parties.

8. The two cases most in point are those cited on behalf of the respondent, "Ganpatrai Gupta v. Moody Bros. Ltd." 85 GLJ 136 (B), and Luxmi Chand Baijnath Vs. Kishanlal Sohoni, In the first of these cases the contract contained a clause to the effect that "all disputes whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Tribunal of Arbitration, Bengal Chamber of Commerce or Indian Chamber of Commerce applicable for the time being for decision." These words were held by Sinha J. to be vague and uncertain and the arbitration clause was in consequence held to be invalid.

9. In the other case the arbitration clause read -

"If there arise any dispute or trouble regarding this contract then the same shall be decided by the Arbitration Board of the Blanket and Shawl Traders" Association or by the arbitrators appointed by the buyer and by the seller, one by each."

Bachawat J. held that this could be interpreted in three ways-

"(a) The word "or" is substitutional and appends a secondary alternative after a primary alternative, and the expression means "by the Arbitration Board of the Blanket and Shawl Traders" Association and failing them by two Arbitrators one to be appointed by each party".

(b) The expression provides for a panel of Arbitration Tribunals, and the reference is to a Tribunal to be selected out of the panel by the consent of the parties.

(c) The word "or" provides for alternatives and the expression means "either the Arbitration Board of the Blanket and Shawl Traders" Association or the Arbitration Tribunal consisting of the Arbitrators appointed by the buyer and by the seller one by each".

He went on-

"Mr. Meyer, therefore, bases his client's case entirely on the footing that the third construction is the correct construction and he argues that the Arbitration clause provides for reference of the disputes to either the Arbitration Board of the Blanket and Shawl Traders" Association which I will call Tribunal "X" or by the Arbitration Tribunal consisting of two Arbitrators one to be appointed by each party which I will call Tribunal "Y".

If this construction is accepted, the Arbitration agreements do not say under what circumstances the reference is to be made to "X" Tribunal and under what circumstances the reference is to be made to the "Y" Tribunal, and it cannot be said with certainty whether "X" Tribunal or "Y" Tribunal is the appointed Arbitrator. Under this argument *prima facie* the Arbitration agreements are uncertain. Mr. Meyer contends that the uncertainty is curable by election.

I agree that uncertainty in certain cases may be cured by election, e.g., in the case of a grant by giving a right of election to the party who is to do the first act

towards completion of the grant --Halsbury, Vol. X, Articles 349-50, pages 281-82, and in the case of alternative promises by giving right of election to the party who is to perform the promise -- Halsbury, (Vol. VII. Article 461, page 331, and Article 267. pp. 189-190.

It has also been held that where there are several legatees to whom the opinion is given -- e.g., where there, is a bequest of one house each to the nephews and neices of the Testator in the event of disagreement between them -- the choice may be determined by lot, -- In re, "Knapton, Knapton v. Kindle" (1941) 1 Ch 428 (D).

Reference may also be made to Stroud's Judicial Dictionary, 3rd Ed., page 2008, Norton on Deeds, 2nd Ed., pp. 109-118, Jarman on Wills, 8th Ed., Vol. I, p. 477, and British Empire Digest, Vol. XVII, pp. 359-61.

An uncertainty is not curable by election in all cases. It is not curable by election where there is nothing to indicate who is to have the option. Thus a gift either to A or B is uncertain where the gift is not substitutional : Jarman on wills, 8th Ed., pp. 493-95. And a contract of sale for either Rs. 500/- or Rs. 1,000/- also is uncertain. Illustration (1) to Section 29, Indian Contract Act.

An Arbitration agreement between A and B to refer disputes to the Arbitration of "X" or at the option of A to "Y" is certain because the agreement itself shows who is to have the option: " Bhowanidas Ramgobind Vs. Harasukhdas Balkishendas, and " Sundermull Poreshram Vs. Tribhuban Hirachand and Co., The Arbitration agreements in this case do not indicate who is to have the option.

Mr. Meyer contends that he who is to make the reference first is to have the option. I am unable to agree with the contention. Either party may "commence the arbitration and may require that the dispute be referred and settled by arbitration. The Arbitration agreements do not require that one of the parties rather than the other is to commence the arbitration or to do the first act in making the reference.

There is nothing to indicate in the Arbitration agreement that one of the parties has the option of determining the Arbitration Tribunal to-whom the reference is to be made.

Mr. Meyer contends that the disputes may be referred to either Tribunal "X" or Tribunal "Y" just as a suit may some times be instituted in either Court "X" or Court "Y". This analogy is fallacious, Where two Courts have concurrent jurisdiction, the plaintiff has a choice of forum and may institute his suit in either Court. But there is no election in the sense that the choice of Courts is finally determined and the other Court is deprived of its jurisdiction.

Either party may still institute a suit in the other Court which retains its concurrent jurisdiction. Under an Arbitration agreement two Arbitration Tribunals cannot have concurrent jurisdiction over the identical subject-matter at the same time. An Arbitration agreement is an agreement that the disputes

shall be settled by an Arbitrator named or designated in the agreement or by an Arbitrator appointed in accordance with the Arbitration agreement.

An Agreement to refer either to "X" or to "Y" is not an agreement by a named Arbitrator because it is not certain who the Arbitrator is. "X" does not become the appointed Arbitrator because one of the parties makes the reference to him first. The agreement does not authorise one of the parties to appoint either "X" or "Y" as arbitrator by making a reference to him."

10. In these circumstances the arbitration agreement in question was held to be invalid and an award was set aside. In my opinion these remarks are applicable in the present case and I thus agree with the finding of the lower Court that the arbitration clause was bad as being vague and uncertain. I accordingly dismiss the appeal with costs. Counsel's fee Rs. 50/-.