
(1993) 06 GUJ CK 0001
In the Gujarat High Court
Case No : First Appeal No. 1186 of 1980

Himmatlal Chaturdas Choksi	Vs	APPELLANT
Keshavlal Chaturdas Choksi		RESPONDENT

Date of Decision : 21-06-1993

Acts Referred:

Arbitration Act, 1940 — Section 34, 39, 8, 8(2)

Citation : (1993) 2 GLR 1346

Hon'ble Judges : A.N. Divecha, J

Bench : Single Bench

Advocate : M.G. Nagarkar, for the Appellant; N.R. Oza, for the Respondent

Judgement

A.N. Divecha, J.—The judgment and order passed by the learned Civil Judge (S.D.) at Vadodara on 8th August, 1980 below the application at Ext. 5 in Special Suit No. 304 of 1979 is under challenged in this First Appeal u/s 39 of the Arbitration Act, 1940 ("the Act" for brief) at the instance of the original plaintiff. Thereby the learned Trial Judge accepted the original defendant's application u/s 34 of the Act and stayed the further proceedings of the suit instituted by the original appellant.

2. It may be mentioned that during the pendency of this Appeal before this court the original appellant has left for his heavenly abode and is survived by his heirs and legal representatives substituted in his place by the order passed by this court on 23rd December, 1992 in Civil Application No. 5145 of 1992. For the sake of convenience I shall refer to the parties as they were arraigned in the suit proceedings, this is, the original appellant as the plaintiff and the respondent herein as the defendant.

3. The plaintiff and the defendant were brothers. It appears that they had the ancestral business of goldsmith in Vadodara. They appear to have got along well for some time in their joint business. They acquired some property also in Vadodara. After some time they appeared to have agreed to have separate

business and a separate residence also for each brother. Thereupon they executed one agreement on 9th August, 1970 and agree to partition their joint business assets and to have a separate residence for each brother in the self-acquired property and to have separate shops on the ground floor portion of the property. It was agreed that the defendant was to have his shop on the front side of the property and the plaintiff on the rear side thereof. It was further agreed that the matter should be resolved through the joint arbitration of Soni Khimchand Mulchand and Soni Natwarlal Ratilal in the case of disputes between the parties with respect to the manner in which they were residing in the property or the manner in which they were carrying on their respective business therein. It appears that out of the two named arbitrators in the aforesaid agreement on Soni Khimchand Mulchand dies some time before the dispute between the two brothers, that is, the plaintiff and defendant, was brought to the doorsteps of the Civil Court (S.D.) at Vadodara. The plaintiff filed one suit in the court of the Civil Judge (S.D.) at Vadodara, Baroda against the defendant for partition of the property ("the suit property" for convenience) referred to in the aforesaid agreement of 9th August, 1970 ("the suit agreement" for convenience). It came to be registered as Special Civil Suit No. 304 of 1979. On service of its summons to the defendant, he applied to the court for stay of the suit proceedings u/s 34 of the Act. His application came to be taken on record at Ext. 5. The plaintiff appears to have filed his reply at Ext. 9 on the record of the case and to have resisted the application at Ext. 5 on the record of the case on various grounds. After hearing the parties, by his judgment and order passed on 5th August, 1980 below the application at Ext. 5 in Special Civil Suit No. 304 of 1979, the learned Civil Judge (S.D.) at Vadodara accepted the said application and ordered stay of the suit proceedings. The aggrieved plaintiff has thereupon invoked the appellate jurisdiction of this court u/s 39 of the Act by means of this Appeal.

4. It is not necessary to deal with the submission urged before me by Sri Nagarkar to the effect that the dispute between the parties would not fall within the purview of the matters sought to be referred to arbitration of the two named arbitrators in the suit agreement. The reason therefore is quite simple. For the purpose of applicability of Section 34 of the Act. what is required to be seen is existence of a valid arbitration agreement. It would, therefore, be necessary to see whether or not there was between the two brothers any valid arbitration agreement in existence.

5. As aforesaid, the suit agreement named two specific persons to act as arbitrators for resolution of certain disputes named therein arising between the two brothers, that is, the plaintiff and the defendant. It is an admitted position on record that one of them, named, Khimchand Mulchand Soni breathed his before institution of the suit in question. Only one person out of the two named arbitrators is alive. It has clearly been stipulated in the suit agreement that the dispute or disputes between the two brothers has or have to be resolved by the two specifically named person to act as arbitrators. It has specifically been

mentioned in the agreement that the decision would be binding to the two brothers. It is also made clear in the suit agreement that the two specifically named arbitrators had to take their decision jointly. The suit agreement nowhere states which person was named as an arbitrator by which brothers. It thus appears that both the brothers have jointly selected both specifically named persons as their arbitrators for resolution of their disputes mentioned therein. The intention between the parties as reflected in the suit agreement thus was to seek the resolution of their inter se family disputes between the two brothers through arbitration of their chosen arbitrators and through the arbitration of no other person or persons. Besides, as pointed out hereinabove both the specifically named persons were required jointly to decide the dispute or disputes. It thus becomes clear that both the brothers clearly intended that their inter se disputes were to be resolved by their chosen arbitrators jointly and by no arbitrator individually or in the company of any other person.

6. As rightly submitted by Sri Oza for the respondent it is true there is no provision made in the suit agreement regarding the supply of the vacancy of an arbitrator arising on account of some eventuality. Ordinarily, in absence of mention about supply of a vacancy of an arbitration in an arbitration agreement, a presumption would raise that the parties did not intend not to supply such vacancy. The position of law in that regard is well settled by the ruling of the Supreme Court in the case of Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc., . It has been held therein :

The language of the provision is not that the parties intended to supply the vacancy but on the other hand it is that "the parties did not intend to supply the vacancy". In other words if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of Section 8(1)(b) what it is required is not intention of the parties to supply the vacancy but their intention not to supply the vacancy.

However, as pointed out by me hereinabove, under the suit agreement, the two brothers, that is, the plaintiff and defendant, intended not to supply any vacancy of an arbitrator arising on account of any eventuality. In that view of the matter the presumption sought to be raised by Sri Oza for the respondent on the basis of the aforesaid ruling of the Supreme Court in the case of P.G. Agencies (supra) will not arise.

To the same effect is the ruling of the Supreme Court in the case of Mahadeo and Others Vs. State of Maharashtra, . It is not necessary elaborately to deal with it in view of the peculiar factual position pointed out hereinabove. It is distinguishable on its own facts.

7. Even otherwise Section 8 of the Act enable party to take recourse to a Court of Law for getting a vacancy of an arbitrator filled in if the other party to the agreement does not concur in appointment of an arbitrator to fill up a vacancy arising on account of refusal, inability or death of a nominated arbitrator. It

would be quite proper to look at Section 8 of the Act in order to know what powers the court enjoy for filling up a vacancy of an arbitrator arising on account of the aforesaid reasons and certain other reasons mentioned therein. It reads :

Power at court to appoint arbitrator or umpire :

(1) In any of the following cases -

(a) where an arbitration agreement provide that the reference shall be to one or more arbitrators to be appointed by consent of the parties and all the parties, do not after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or to act, or is incapable of acting, or dies and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy;

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him; any party may serve the other parties of the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

A bare perusal of the provisions of Section 8 of the Act would go to show that the party seeking the help of the court has to perform certain acts specified therein. If a vacancy of an arbitrator arises, the person desirous of keeping the arbitration agreement alive has to call upon the other party to concur in the former's nomination of a person to act as an arbitrator by issuing a written notice in that regard. If the addressee of the notice does not respond to that notice or does not comply with it within the prescribed time-limit, the author of the notice can invoke the jurisdiction of the court u/s 8(2) of the Act for getting an arbitrator appointed to keep the arbitration agreement alive. If nothing of that sort is done, the arbitration agreement would lapse.

8. In this connection a reference deserves to be made to the Division Bench ruling of the Sindh High Court in the case of Hariram Khaiaram v. Govindram Rattan Chand (AIR 1949 Sindh 24). In that case two persons were nominated as arbitrators to resolve inter se disputes between the parties to the agreement. One of arbitrators refused to act as an arbitrator when the dispute between the parties to the Agreement was referred to arbitration for resolution. It appears that a suit came to be filed and Section 34 of the Act was pressed into service for stay of the suit proceedings and in that connection Section 8 of the Act was resorted to in support of the application for stay for the purposes of filling up the

vacancy of an arbitrator. In that context it has been held :

Where in the case of arbitration agreement in which provision is made for reference to two appointed arbitrators, one of the appointed arbitrators refuses to act or is incapable of acting or dies the procedure to be followed is the one that is held down in Section 8 and not one laid Section 9. Section 9 has no application to an arbitration agreement which provides for a reference to appointed arbitrators as distinguished from arbitrators to be appointed. Thus on the refusal of the appointed arbitrator to act, and on the failure of a party to serve the other party with a notice as contemplated by Section 8(1), to concur in the appointment in supplying the vacancy, the procedure to be followed is one laid down in Section 8(2). And where no application is made to the court, as required by Section 8(2), the reference lapses and parties are free to resort to Civil Court for settlement of their disputes. The procedure laid down by Section 9, is in applicable.

I am in respectful agreement with the principle of law enunciated by the Division Bench of the Sindh High Court in its aforesaid ruling in the case of Hariram Khiaram (supra). It is on all fours applicable in the present case. It provides a complete answer to the submission urged before me by Sri Oza for the respondent to the effect that the vacancy of an arbitration in the instant case could have been filled in by resorting to Section 8 of the Act.

9. In view of my aforesaid discussion I am of the opinion that on the death of Soni Khimchand Mulchand the suit agreement lapsed and there remained in existence valid arbitration agreement between the parties. Section 34 of the Act could not have been pressed into service for enforcement of such lapsed arbitration agreement. In that view of the matter, I am of the opinion that impugned judgment and order of the trial court cannot be upheld. It deserves to be quashed and set aside.

10. In the result, this First Appeal is accepted. The judgment and order passed by the learned Civil Judge (S.D.) at Vadodara on 8th August, 1980 below the application at Ext. 5 in Special Civil Suit No. 304 of 1979 is quashed and set aside. Since the suit is of 1979 and since the stay of further proceedings thereof is lifted by this judgment of mine, the learned Trial Judge is directed to accord to topmost priority to its disposal preferably by 31st December, 1993. The Registry is directed to send the writ together with the records and proceedings of the case as expeditiously as possible preferably by 8th July, 1993. There shall be no order as to costs on the facts and in the circumstances of the case.

11. The operation of this judgment is ordered to be stayed for a period of six weeks from today to enable the aggrieved party to challenge this judgment of mine in appeal before an appropriate forum.

12. The Civil Application is made in this First Appeal on behalf of the appellant for additional evidence. I do not think it needs to be directed in view of my decision in the First Appeal itself. It accordingly stands disposed of. Rule is accordingly

discharged however with no order as to costs on the facts and in the circumstances of the case.

13. Rule made absolute.