
(1984) 03 BOM CK 0052
In the Bombay High Court
Case No : C.R.A. No. 55 of 1984

Indian Oil Corporation Ltd. and another	APPELLANT
Vs	
Kesarsingh Mohan Singh	RESPONDENT

Date of Decision : 16-03-1984

Acts Referred:

Arbitration Act, 1940 — Section 33, 34, 9(b)

Citation : (1984) MhLj 903

Hon'ble Judges : M.S. Deshpande, J

Bench : Single Bench

Advocate : R.K. Thakur, for the Appellant; N. Kamlakar, for the Respondent

Final Decision : Allowed

Judgement

M.S. Deshpande, J.—This revision application by the original defendants is directed against the orders passed by the two courts below refusing to stay the suit u/s 34 of the Indian Arbitration Act.

2. The respondent Kesarsingh, who claims to be an ex-serviceman, was given a dealership by the Indian Oil Corporation on the basis of the discharge certificate from the Army authorities to the effect that he was discharged owing to his illness and his character was good. Later the Indian Oil Corporation found that the Discharge certificate had been tampered with because Kesarsingh had changed in the column of character on discharge, the remark from "fair" to "good" and the Cause of discharge from "inefficiency" to "Sickness". A termination letter was issued on March, 26, 1983, referring to the changes made in the discharge certificate and also to the position that he could not claim to be an ex-serviceman because his discharge was on the ground of inefficiency. Thereafter Kesarsingh filed a writ petition in this Court and also obtained an ex parte stay on 8-4-1983. Later after the original record was produced by the Army authorities in this Court on 15-7-1983, the ex parte stay granted was vacated and the writ petition was withdrawn on July 22, 1983. Kesarsingh thereafter brought Regular Civil Suit No. 557 of 1983 in the Court of the Civil Judge, Junior

Division, Akola for a declaration that his right under the dealership agreement subsisted and the notice of termination issued by the Indian Oil Corporation was illegal and inoperative and for an injunction restraining the Indian Oil Corporation from terminating the agreement on the ground mentioned in the notice. The Indian Oil Corporation put in an appearance before the Trial Court and filed an application u/s 34, Indian Arbitration Act contending that in view of the Arbitration clause contained in the dealership agreement, the matter should be referred for arbitration.

3. The learned Trial Judge after considering the arguments advanced by the parties was of the view that the dispute which has been raised by the Indian Oil Corporation was not covered by the Arbitration agreement. He found that the allegation of bias which was made by Kesarsingh would not help him in view of the legal position, which was placed before him. He also found that it was necessary to consider the vital question about legality and scope of the word "Ex-serviceman" and though the defendants were ready and willing to go for arbitration under the Arbitration Clause, in view of his other findings, stay could not be granted. The learned Joint Judge did not affirm the finding of the Trial court that the dispute was not covered by the arbitration agreement but expressed no opinion on that point. In the view of the learned Joint Judge, the suit in question involved determination of complicated questions and, therefore, that was a matter which ought not to be referred to arbitration. He did not record any finding on the contention regarding bias which had been raised on behalf of Kesarsingh and dismissed the appeal.

4. Feeling aggrieved by the order passed by the two courts below, the defendants Indian Oil Corporation have challenged those orders by this revision application.

5. The first point which was raised on behalf of the respondent was that since the dealership agreement which contains the arbitration clause, was itself sought to be terminated by the defendants, the arbitration clause would not survive. Clause 21 of the Dealership agreement provided as follows:-

This agreement may be terminated without assigning any reason whatsoever by either party upon giving to the other not less than thirty days notice in writing to expire at any time of the intention to terminate it and upon the expiration of any such notice the agreement shall stand automatically cancelled and revoked but without prejudice to the rights of either party against the other in respect of any matter or thing antecedent to such termination.

Clause 28, which is the Arbitration clause, reads as follows:

Any dispute or difference of any nature whatsoever or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration of the Managing Director of the Corporation or of some Officer of the Corporation, who maybe nominated by the Managing Director. The Dealer will not be entitled to

raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the Corporation or that he has to deal with the matters to which the contract relates or that in the course of his duties as an officer of the Corporation he had expressed views on all or any other matters in dispute or difference. In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Managing Director as aforesaid at the time of such transfer, vacation of office or inability to act, shall designate another person to act as arbitrator in accordance with the terms of the agreement. Such persons shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this contract that no person other than the Managing Director or a person nominated by such Managing Director of the Corporation as aforesaid shall act as arbitrator hereunder. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the agreement, subject to the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder for the time being in force shall apply to the arbitration proceeding under this clause.

6. The submission that the arbitration clause did not survive upon the termination of the agreement cannot be countenanced in view of the observations in the *The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*, that in cases of frustration, it is the performance of the contract which comes to an end but the contract would still be in existence for purposes such as the resolution of disputes arising under or in connection with it. The question as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes.

7. In *Damodar Valley Corporation Vs. K.K. Kar*, , the respondent entered in a contract with the appellant to supply coal but as he failed to do so in accordance with the terms of the contract, the appellant unilaterally repudiated the contract and ultimately paid the respondent for the supply of coal. It was the case of the appellant that these payments, including the return of the deposit amount, finally settled the claims of the respondent. After receiving those payments the respondent claimed from the appellant damages for repudiation of the contract. When the appellant did not agree the respondent served a notice of his intention to refer the matter to the arbitration under the arbitration clause contained in the contract. The arbitration clause provided for reference to the adjudication of the arbitrators after notice, any question, dispute or difference arising between the parties upon or in relation to or in connection with the contract. The question arose whether the court on an application under sections 9(b) and 33 of the Arbitration Act was entitled to enquire into the truth and validity of the averment as to whether there was or was not a final settlement on the ground that if that was proved, it would bar a reference to the arbitration in as much as the arbitration clause itself would perish. It was further held that the question whether there had been a full and final settlement of a claim under the contract

was itself a dispute arising "upon" or "in relation to" or "in connection with" the contract. A claim for damages was a dispute or difference which arose between the respondent and the appellant and was "upon" or "in relation to" or "in connection with" the contract, and the reference to the arbitrator by the respondent was not barred. It was also observed there that the question whether the termination was valid or not and whether damages were recoverable for such wrongful termination did not affect the arbitration clause, or the right of the respondent to invoke it for appointment of an arbitrator. The contention of the respondent that the repudiation by the petitioner terminated the contract cannot be accepted. The contract will subsist for the determination of the rights and obligations of the parties and the arbitration clause would also survive. The expression used in the Arbitration clause 28 of the Dealership agreement would include resolution of the dispute by arbitration even after the termination of the contract. It was observed in the *The Union of India Vs. Kishorilal Gupta and Bros.,* that when an arbitration clause is couched in widest terms, the dispute, whether there is frustration or repudiation of the contract, will be covered by it. It is so because, though such repudiation ends the liability of the parties to perform the contract, it does not put an end to their liability to pay damages for any breach of the contract. The contract is still in existence for certain purposes. There is, therefore, no substance in the contention raised by the respondent that there could be no reference to the arbitration because of the unilateral termination of the agreement by the petitioner.

8. The respondent's contention in his reply to the application for stay u/s 34 Arbitration Act, was that the dispute was not covered by the Arbitration agreement and this submission found favour with the learned trial Judge. The main contention in the plaint was that the respondent has started business after making a considerable investment and when he was agitating that the distribution of kerosene to the village dealers should be equitable, the applicant instead of increasing the respondent's quota, sent a notice terminating the agreement, though the Discharge certificate, on the basis of which the dealership was granted to the respondent was proper and valid. Clause 21 of the Dealership Agreement requires a notice of 30 days to be given for bringing about termination. Apparently a notice of that duration was not given in the present case and, therefore, it was one of the submissions on behalf of the respondent that there was no valid termination. It would be apparent from clause 28 which has been extracted above that any dispute or difference of any nature whatsoever or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration. This clause would take within its sweep the determination of all questions relating to the agreement and would include not only the questions whether the notice of termination was valid or not and whether there was valid termination but also the circumstances in which the dealership agreement was brought to an end and what would be its effect. The learned trial Judge was not, therefore, right in observing that the dispute in this case was not covered by the

arbitration clause. It is noteworthy that the appeal court refused to express any opinion on this observation of the learned trial Judge. The only circumstance which weighed with the learned Joint Judge was that the dispute raised complicated questions which it would not be proper to refer for arbitration. Since the trial court was not right and took an entirely untenable view of the effect of clause 28, it was obvious that the refusal to stay the suit u/s 34 by the trial court was vitiated by a material irregularity.

9. The learned trial Judge held that the applicant was ready and willing to get the dispute referred to arbitration. The Judgment of the appeal court is silent on this point. The learned trial Judge has observed that there was nothing on record to show that the applicant was reluctant to refer the proceeding to arbitration. It may be noted that soon after the termination letter dated 26-3-1983, the respondent filed the writ petition. The petition was withdrawn on 22-7-1983. The present suit was brought by the respondent in July 1983. It was urged on behalf of the respondent that the applicant should have shown his readiness and willingness to go for arbitration during the pendency of the writ petition. I have already referred to the position as pointed out by the learned trial Judge that there is nothing on record to show how the parties conducted themselves during the pendency of the writ petition. The learned Trial Judge has observed that the application for stay u/s 34, Arbitration Act, was made by the applicant at the first possible opportunity. No exception can, therefore, be taken to the learned Trial Judge's finding that the applicant had shown his readiness and willingness to get the matter referred to the arbitration.

10. The learned Joint Judge observed that the dispute in this case should not go to arbitration because it raises complicated questions. He has pointedly referred to the need for examining witnesses from the Defence Ministry, Home Ministry and other Ministry and observed that these officers will have to be summoned for giving evidence and it may be necessary to examine the question regarding the alleged forgery in the Discharge certificate obtained by the respondent. This plea, however, was not raised by the respondent in reply to the application u/s 34, Arbitration Act filed on 7-9-1983 and this was not one of the grounds which weighed with the learned Trial Judge. In *Mary Manharlal Ratanlal Vakil Vs. Wadhwa Sales Corporation, Nagpur and Others*, , it was held that in the absence of such a plea, only because the complicated questions of law were involved, the stay should not be refused. It was also observed there that language of section 34, Arbitration Act is so general as to include legal proceeding in respect of any matter and was never intended to exclude question of law. The view taken by the learned Joint Judge that complicated questions should not go to arbitrator cannot be supported. In fact since such a plea had not been raised by the respondent in the present case, the learned Joint Judge should not have allowed himself to be swayed by these considerations.

11. It was lastly urged that the arbitration under clause 28 of the Arbitration agreement was to be either of the Managing Director of the Corporation or of

some officer of the Corporation who may be nominated by the Managing Director and that the agreement stipulated that dealer would not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an officer of the Corporation or that he has to deal with the matters to which the contract relates or that in the course of his duties as an officer of the Corporation he had expressed a view on all or any other matters in dispute or difference. The learned Trial Judge did not accept this contention relying on the observations in *President of India Vs. Kesarsing* AIR 1966 J & K 113, *Srivenkateswara Constructions and Others Vs. The Union of India*, and *Shivlal Prasad Vs. Union of India (UOI)*, . In all these cases the arbitrators were to be nominees of one of the parties to the agreement. In *Srivenkateswara Construction's* case (Supra) it was held that there was no scope for apprehension of bias on the part of succeeding General Manager or his nominee though he may be a subordinate, and hence the contractor could not get rid of arbitration agreement. There, a reference was also made to the observations in *Uttar Pradesh Cooperative Federation Ltd Vs. Sunder Bros Delhi* AIR 1967 SC 149 on which reliance was also placed here on behalf of the respondent. On the facts of the case before it the Supreme Court held that the particular arbitrator who was a Registrar of the Co-operative Societies, had sufficient interest in the transaction and that, therefore, the matter could not be referred to him. It was emphasised on behalf of the respondent that the Supreme Court held in the aforesaid case that a party may be released from the bargain if he can show that the selected arbitrator is likely to show bias or sufficient reason to suspect that he will act unfairly or that he has been guilty of continued unreasonable conduct and consequently an order of stay of suit u/s 34 will not be granted if it can be shown that there is good ground for apprehending the arbitrator will not act fairly in the matter or that it is for some reason improper that he should arbitrate in the dispute between the parties. It may be noted that the Supreme Court observed there that it is the normal duty of the Court to hold the parties to the contract and to make them present their disputes to the forum of their choice. However, an order to stay legal proceedings in a court of law will not be granted if it is shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter or that it is for some reason improper that he should arbitrate in the dispute. Their Lordships noted the fact that it was alleged by the respondent that the Registrar of the Co-operative Societies is ex-officio President of the Society and it was with his approval that the agreement in dispute was terminated. Further there the Registrar was the Chief Controlling and Supervising Officer of the Society and its bye-laws. It was, therefore, held that the Registrar may not act fairly in the matter and it was improper that he should be an arbitrator in the dispute between the parties. Such is not the position here. The notice of termination to the respondent was issued on behalf of the Indian Oil Corporation by Indu Vira, General Manager, while under the arbitration clause, it is the Managing Director of the Corporation or his nominee who is to be the sole arbitrator. Thus here the officer giving the notice and the officer who was to be the arbitrator were different persons and the observations of their Lordships of the Supreme Court

on the basis of the facts before them cannot be applied to the facts of the present case. Here there is nothing on record besides a vague suggestion that an official of the Indian Oil Corporation would not be fair and just to the respondent. There should be a reasonable basis for such an apprehension and a mere vague suspicion would not enable the respondent to contract out of the arbitration clause to which he was a party.

12. On behalf of the respondent a reference was made to the observations in *Abdul Latiff Vs. Dost Mohammad and Co., Ltd.*, . There the sole arbitrator was a share holder of the company and had an interest in the result of the arbitration. All that is what served in the *The Union of India (UOI) and Others Vs. Narayan Cold Storage Ltd., Amritsar*, was that the importance of judicial impartiality on the part of the arbitrator cannot be overstated and therefore any order to stay the legal proceedings in a Court of law will not be granted if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter or that it is for some reason improper that he should arbitrate on the dispute. According to Shri Kamalakar, the learned advocate for the respondent, in the notice dated March 26, 1983, there was a definite assertion by the General Manager that the respondent's act of tampering a Government document was a serious offence of forgery punishable under the Indian Penal Code. What is important, however, is not that such an allegation was made but whether the person who made the allegation was to be the arbitrator and it is apparent that it was the Managing Director and/or his nominee and not the General Manager who was to be the Sole arbitrator. The observations in *M/s Narayan Cold Storage's* case (*Supra*) would not apply to the facts brought out here. In *Bhagwan Industries Ltd. Vs. Union of India*, it was observed that though in the matter of arbitration persons who command mutual confidence of both sides should act as arbitrators. However, when a hardy agrees to the acting of an employee of the other party as arbitrator it has to be taken that the former fully understanding the implication thereof displayed confidence in such arbitrator. It cannot later turn round and seek setting at naught such mutually agreed arbitration clause. In that case, the arbitrator was to be an officer of the Law Ministry of the Union of India in pursuance of the arbitration clause in the contract for supply of goods entered into with the company by the Director General of Supplies and Disposals on behalf of the Union of India conferring unilateral power on the D.G.S.D. to appoint any officer of the Law Ministry as the sole arbitrator. Though the facts were different, it is apparent that what has to be shown is a possibility of a real bias and not merely a suspicion that the arbitrator may not act fairly. The learned Joint-Judge has observed that a clause such as clause 28 in the Dealership agreement would run across the principle of natural justice as an officer who had expressed an opinion in the matter or who had dealt with it, should not work as an arbitrator and the agreement in question allowed this. The learned Joint Judge lost sight of the fact that the arbitrator was to be different from the General Manager who had dealt with this affair. There is nothing on record to indicate, nor was there even an allegation that the Managing Director who was concerned

with the agreement in question, had dealt with the matter in dispute personally. It is, therefore, obvious that there was an error apparent on the face of the record in the finding recorded by the learned Joint Judge on this point.

13. Considering all the facts, I find that there are no real grounds on which the stay should have been refused. The learned advocate for the respondent urged that this Court ought not to interfere in the exercise of its revisional jurisdiction with the discretion exercised by the two courts below as no jurisdictional error was pointed out. Reliance was placed on the observations in the *The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway*, to the effect that the High Court should not interfere even if the order is right or wrong or in accordance with law or not, unless it has exercised its jurisdiction illegally or with material irregularity. That was a case of an interim ex-parte order issued by the Trial Judge which was revoked by him later. Reliance was also placed in *Maitreyee Banerjee Vs. Prabir Kumar Mukherjee*, where the High Court had interfered in revision and set aside the order of the District Judge allowing amendment of the plaint and it was observed that the High Court in exercise of its power of revision ought not to have interfered in a case like this as no jurisdictional error was involved. In the present case, however, both the courts below, as already pointed out above, have taken into consideration the circumstances which did not arise either from the Dealership agreement or the other material on record for using that discretion in not granting the stay. The trial court acted with material irregularity in holding that the dispute was not covered by the arbitration clause in the agreement, when such a view could not have been taken and the result was that in spite of its finding that the respondent was ready and willing for arbitration and in commercial matters the discretion should normally be exercised in favour of the defendant, it rejected the prayer only on its misconstruction of the Dealership agreement. The appeal court took into consideration the question of bias. It could not on the material on record, have inferred, as it did, that the case involved complicated questions which should not go to the arbitrator for decision. This view also cannot be supported in view of the wide sweep of the arbitration agreement in the present case. There can, therefore, be no doubt that this is a case which calls for interference by this court in the exercise of its revisional jurisdiction as both the courts below have acted with material irregularity in the exercise of their jurisdiction.

14. In the result, the revision application is allowed. The order passed by the lower court is set aside and the suit is stayed u/s 34 of the Arbitration Act.

In view of the circumstances of the case there will be no order as to costs throughout.