

(1981) 01 CAL CK 0016
In the Calcutta High Court
Case No : Spl. Suit No. 88 of 1980

Kalipada Das

APPELLANT

Vs

North Bihar Sugar Mills Ltd.

RESPONDENT

Date of Decision : 05-01-1981

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : AIR 1982 Cal 48

Hon'ble Judges : Salil Kumar Roy Chowdhury, J

Bench : Single Bench

Advocate : Sunrhit Deb, for the Appellant; Bimal Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Salil Kumar Roy Chowdhury, J.—This is the second application u/s 20 of the Arbitration Act for filing the arbitration agreement dated 24th August, 1977.

2. Shortly the facts are that pursuant to an invitation of tender made by the respondent/defendant for construction of a paper plant building at Bagaha, District West Champaran in the State of Bihar the petitioning creditor submitted its tender and work order was placed by the respondent/defendant dated 16th August, 1977 and formal contract was entered into being dated 24th August 1977, a copy of which is annexed to the petition. The said contract contained an arbitration clause in the following terms :

"In the case of any dispute/differences arise during the course of execution of this contract and/or thereafter relating to this contract, the matter/dispute/difference shall be referred to arbitration Of the Architect, namely, Messrs. Kothary & Co., Calcutta, whose decision shall be final and binding on both the parties."

It appears that certain disputes arose between the parties in respect of the said contract and the petitioner-plaintiff alleged breach on the part of the Architect M/s. Kothari & Co., the named arbitrator in the said arbitration clause and the

petitioner-plaintiff claimed certain amount and thereafter on or about 11th January, 1979 the petitioner-plaintiff instituted a suit being Title Suit No. 79 of 1979 (Messrs. Kalipada Das v. Messrs. North Bihar Sugar Mills Ltd.) in the City Civil Court inter alia praying for a decree for declaration that the said contract dated 24th August 1977 was still subsisting and also for injunction and other reliefs. In the said suit the plaintiff made an interlocutory application for temporary injunction against the respondent/defendant from obstructing the petitioner plaintiff from carrying out the work under the said contract which was rejected and from the said order the petitioner plaintiff preferred an appeal on 23rd January 1977 which was also dismissed on 25th February, 1980. On 23rd August, 1980 the petitioner plaintiff made the first application u/s 20 of the Arbitration Act before this court which was dismissed by S. C. Deb, J. on the 12th September, 1980 inter alia on the ground that there is a likelihood of conflicting decisions between the two forums, one being the said suit pending before the City Civil Court and another by the arbitrator if appointed u/s 20 of the Arbitration Act. It appears to me that in the said short judgment of Deb, J. dated 12th September 1980 his lordship held that there was sufficient cause not to make an order u/s 20 of the Arbitration Act. Subsequently the petitioner plaintiff made an application u/s 23(1)(3) of the CPC before the City Civil Court for withdrawing the said title suit unconditionally and for an order granting the petitioner leave and/or permission to institute fresh suit in respect of the subject-matter of the title suit No. 79 of 1979 in the appropriate court. The City Civil Court, 12th Bench by an order dt. 26th Sept. 80 made an order under Sec. 23, Rule 1, sub-rule (3) after contest and the petitioner plaintiff was permitted to sue afresh on the said subject-matter or cause of action if not otherwise barred and payment of Rs. 200/- was made a condition precedent to be made by the petitioner plaintiff to the respondent defendant. Thereafter the present application u/s 20 was presented on the 1st October, 1980 and after directions were given for filing affidavits the matter came up for hearing.

3. Mr. Sunrhit Deb, appearing for the plaintiff-petitioner submitted that all the conditions u/s (20?) subsection (1) are satisfied and the respondent/defendant has failed to show sufficient cause why the arbitration agreement should not be filed and order of reference should be made as prayed for in the present petition. He also submitted that the previous Section 20 application was dismissed by Deb, J. only on the ground of possibility of conflicting decisions between City Civil Court and the arbitrator to be appointed under the Arbitration Act and such a situation should not be allowed to happen and, therefore, the application was dismissed. Mr. Deb submitted that thereafter the suit having been withdrawn under Order 23. R. 3, sub-rule (3) of the CPC the said suit is no longer pending and liberty was given to file a fresh suit on the same subject-matter and. therefore, the petitioner has instituted the present application u/s 20 which is to be treated as a suit u/s 20, sub-section (2) of the Arbitration Act. Therefore, all the conditions being satisfied an order should be made as prayed for.

4. Mr. Bimal Chatterjee. appearing for the respondent/defendant, submitted that

the petitioner-plaintiff having instituted a suit before the City Civil Court has indicated its intention to abandon the arbitration agreement and take recourse to ordinary course of law by filing the said suit. Therefore, that constituted a sufficient cause why the arbitration agreement should not be filed. He drew my attention to the order of the City Civil Court, a certified copy of which was produced in court being Order No. 39 dated 26th September. 1980 in the said Title Suit No. 79 of 1979 (M/s. Kalipada Das v. North Bihar Sugar Mills Ltd.) and submitted that leave was granted only for the purpose of filing a fresh suit on the same subject-matter and not for reference to arbitration by making an application u/s 20 of the Arbitration Act. Therefore, the petitioner-plaintiff is estopped from making this application u/s 20 and that constitutes sufficient cause for not granting the order as prayed for. He referred to the well known principle that the court is to exercise its discretion in making an order u/s 20 and the principle under Sections 20 and 34 of the Arbitration Act as to the exercise of court's discretion is same. Reference may be made to the decision of Gannon Dunkerley and Co. Vs. Union Carbide (India) Ltd., . Mr. Chatterjee also referred to the principle on which the discretion of the court is to be exercised and what is meant by sufficient cause u/s 20, subsection (4) of the Arbitration Act as laid down in the Supreme Court decision in Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, . Therefore. Mr. Chatterjee submitted that the present application should be dismissed as sufficient cause has been shown by the respondent/defendant as to why the order should not be made for filing the arbitration agreement. Mr. Chatterjee also pointed out that in the arbitration agreement the reference is made to named arbitrator being Kothari & Co., which is a firm of architect and well known engineers and not a tribunal of arbitration or a person who can be appointed as arbitrator. The said contention is not absolutely without substance as it may be contended that a firm of architect cannot be appointed as an arbitrator as it is not a tribunal of arbitration which generally takes institutional arbitrations. For the purpose of the present application it is not necessary for me to make any comment on the said submission and express any final opinion on this aspect of the matter.

5. Considering the matter very carefully it appears to me that the petitioner-plaintiff after filing the said Title Suit No. 79 of 1979 in the City Civil Court, in which he made successive interlocutory application for injunction and preferred an appeal therefrom and also failed in the appeal then came up before this court in a previous Section 20 application filed the very same arbitration agreement and order of reference which was dismissed by S. C. Deb, J. on the ground of the pendency of the suit before the City Civil Court and possibility of conflicting decisions between the court and the arbitrator. In the present petition it appears that the petitioner-plaintiff has made specific allegations against the said appointed arbitrator M/s. Kothari & Co. being biased and unsuitable for being appointed as arbitrator. The said averments are in paragraphs 25 and 26 of the petition. That perhaps, in my view, constitute sufficient cause why the arbitration agreement should not be filed as the petitioner-plaintiff is really asking to amend

the arbitration agreement by replacing the arbitrator by another, other than the appointed arbitrator. Prayer (c) of the petition itself shows that the petitioner is asking for appointment of another arbitrator in place of Kothari & Co., the appointed arbitrator in the said agreement. In my view the said contention of the petitioner-plaintiff and the prayer in the petition make it quite clear that the petitioner-plaintiff is asking for varying the arbitration agreement between the parties by a sole arbitrator to be appointed by the court. In my view that will amount to substitution of the original arbitration agreement by the court. Section 20 is a machinery section by which the arbitration agreement is filed and reference is made to the appointed arbitrator in terms of the arbitration agreement. It is an admitted position that there is a named arbitrator, whether a firm of engineers and architect can be appointed as arbitrator is a different question but assuming such an appointment can be made then the petitioner-plaintiff is asking for appointment of another arbitrator than the appointed arbitrator which amounts to varying the original arbitration agreement which is sought to be filed by the petitioner-plaintiff in this application. Therefore, on the well-settled principle that u/s 20 of the Arbitration Act the court has no power to substitute one agreement by another agreement at the request of one of the parties. It appears to me that this also constitutes a sufficient cause why the arbitration agreement should not be filed u/s 20 of the Arbitration Act. The petitioner himself has made specific allegations of bias and unsuitability against the arbitrator and, therefore, the question of filing the arbitration agreement as such cannot arise unless it is amended by replacing the appointed arbitrator by the parties under the arbitration agreement by another arbitrator, Mr. Deb appearing for the petitioner-plaintiff submitted that on instruction from his client he is withdrawing the allegations against the arbitrator made in the petition so that the order can be made for filing the arbitration agreement as such and order of reference may be made to the arbitrator appointed under the arbitration agreement. In my view, it is too late and cannot be encouraged by court as from the conduct of the petitioner-plaintiff all through first instituting a suit before the City Civil Court in respect of the said contract, making interlocutory applications and after the same failed, preferring an appeal which also became unsuccessful then made an application u/s 20 which was also dismissed due to the pendency of the City Civil Court suit at that time, as hereinbefore stated; thereafter withdrawing the City Civil Court suit with liberty to file a fresh suit on the same subject-matter and is now coming forward with another application u/s 20 is something which the court should not encourage and it amounts to estoppel by the procedure and, in my view, Mr. Chatterjee is right in his submission that by the conduct of the petitioner-plaintiff it has demonstrated its intention to abandon the arbitration agreement and take recourse to suit and that constitute a sufficient cause.

6. After carefully considering the facts of this case and the petitioners' own averments in paragraphs 23, 24, 25 and 26 I am satisfied that there is sufficient cause why the arbitration agreement should not be filed and prayer asked for

substituting the appointed arbitrator by another arbitrator at the instance of the petitioner-plaintiff in this application is not permissible under. Section 20 of the Arbitration Act and court has no such power. Therefore in my view, in the peculiar facts of this case, which constitute sufficient cause being shown by the respondent/defendant why an order u/s 20 should not be made. I have already referred to the Supreme Court decision in Abdul Kader's case reported in Abdul Kadir Shamsuddin Bhubere Vs. Madhav Prabhakar Oak, where the Supreme Court has observed that the power of the court to make an order u/s 20 is a matter of discretion (at p. 410) :

"The words of this sub-section leave a wide discretion in the court to consider whether an order for filing the agreement should be made and a reference made accordingly. It is neither necessary nor desirable to lay down in general terms what would be sufficient cause which would entitle the court to refuse to make an order of reference, The court will have to decide on the facts of each case whether sufficient cause has been made out for not ordering the agreement to be filed and not making the order of reference."

Therefore, it is quite clear that the court has to exercise its discretion in making an order u/s 20 taking into consideration all the facts and circumstances of & particular case in its proper perspective and come to a conclusion whether an order u/s 20 should be made in the facts of a particular case. As I have analysed the facts of this case, from the conduct of the petitioners it has been demonstrated clearly that it has no intention to go to arbitration but filed a suit before the ordinary court of law. as he has done in this case, and withdraw the suit with liberty to file a fresh suit on the same subject-matter. Apart from the said fact the petitioner himself has alleged bias and unsuitability of the arbitrator appointed under the arbitration agreement and, therefore, asking for variation of the arbitration agreement u/s 20 of the Arbitration Act and his prayer (c) in the petition makes the said intention of the petitioner to vary the arbitration agreement by changing the arbitrator unilaterally by this court which the court has no power. Therefore, in my view, this "is a fit case where the court should not "exercise its discretion in favour of making an order for filing the arbitration agreement as the arbitration agreement, as it stands now, is not asked for by the petitioner to be filed but he is asking for a different arbitration agreement by changing the name of the arbitrator to be filed which the court has no power to do. As a result there is some force in the contention of Mr. Chatterjee that a firm of architect and engineers being Kothari & Co. cannot be appointed as an arbitrator as it is not a person or an institutional arbitrator what is known as tribunal of arbitration and as such there is some force in that contention and constitute a sufficient cause for not making an order u/s 20 of the Arbitration Act.

7. In the result, there will not be an order u/s 20 of the Arbitration Act and the application is dismissed with costs.

8. This order will not prejudice the rights of the petitioner-plaintiff to proceed according to law, if so advised.