

(2000) 05 CAL CK 0029

In the Calcutta High Court

Case No : Civil Appellate Jurisdiction A.P.O. No. 620 of 1999, A.P.O.T. No. 945 of 1998, G.A. No. 4802 of 1998 and A.P. No. 53 of 1998

Narayan Prasad Lohia

APPELLANT

Vs

Nikunj Kumar Lohia and Others

RESPONDENT

Date of Decision : 18-05-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11(3), 2, 30, 30(3)

Citation : (2000) 3 CALLT 177 : (2000) 2 CHN 250 : 104 CWN 884

Hon'ble Judges : Vinod Kumar Gupta, J; Malay Kumar Basu, J

Bench : Division Bench

Advocate : Mr. S. Pal and Ms. N. Pathora, for the Appellant; Mr. Anindya Mitra, Mr. Jayanta Mitra and Mr. Soumen Sen, for the Respondent

Judgement

V.K. Gupta. J.

1. This appeal is directed against the Judgment and Order dated 17th November 1998 passed by the learned single Judge of this Court in A.P. No.53 of 1998 whereby the application filed by the Respondents for setting aside the award was allowed and the award was set aside by the learned single Judge. The Respondents in the application for setting aside the Award had sought a declaration that the arbitral award made and published by the two Arbitrators was void and invalid, unenforceable and not binding on the parties and had accordingly sought the relief of setting aside of the said award and for passing of the consequential orders. The award in question appears to have been passed by the Arbitrators, Sri S. S. Jain and Sri P. K. Khaitan. It appears to have been passed on 6th October, 1996. How did the Arbitrators come to be appointed in the very first place, whether there was in existence any arbitration agreement providing for their appointment, and whether any reference had been made to the Arbitrators of the disputes and differences between the parties are all matters which themselves are not free from controversies, doubts, disputes and differences. Since we propose to dispose of this appeal on two pure questions of

law, we need not dilate on these disputed questions except to briefly refer the circumstances under which the aforesaid two persons ultimately came to pass the aforesaid Award dated 6th October, 1996.

2. It appears that a Memorandum of understanding was executed between the Parties on 24th June, 1996 whereby Sri S. S. Jain was nominated as the person to resolve the disputes and differences between the parties for his mediation and settlement by way of arrangement, not being an award of an Arbitrator, but having binding effect as such morally or otherwise on all parties. This part of the agreement is reproduced as under :

"AND WHEREAS parties being desirous of having the disputes and differences resolved, agreed to refer the matter for my mediation and settlement by way of an arrangement, not being an Award of an Arbitrator, but having binding effect as such morally or otherwise on all parties."

3. In the same agreement the parties are supposed to have agreed that in case of any dispute or difference relating to any term etc. the same would be referred to Sri S. S. Jain whose decision shall be binding and final on all concerned. This is contained in the following part of the agreement which reads thus :

"In case of any difference or disputes relating to any term, meaning, scope, extent, Interpretation or otherwise of this MOU or any part hereof, the same would be referred to the undersigned whose decision shall be final and binding on all concerned."

4. It appears that on 29th September, 1996 the parties sent a communication to both Sri S. S. Jain and Sri P. Khaitan asking them to become Arbitrators and enter upon the Reference with respect to disputes and differences between the parties. This communication is reproduced as under :

Dated : 29 September, 1996

"Sri S S Jain, P. Khaitan

Dear Sir(s)

A memorandum of understanding was arrived at between all of us and signed by all before you Sri P.K. Khaitan and was witnessed by you Sri S. S. Jain.

The same was signed with condition by all concerned and as such could not be implemented.

We have now tabulated our points of differences arising out of and/or concerning and/or in extension of the said MOU and shall handover our respective papers in this regard within one hour of handing over this letter to you. Save as what appears in the said respective sheets, the said MOU is final, binding, agreeable and shall be Implemented by us after your Award In respect of the differences now referred, which we hereby do to you. The said MOU will be implemented in accordance and/ or coupled with your award as aforesaid.

We hereby agree to abide by your Award which shall be final and binding on all of us. You shall have summary powers. We request you to make an Award irrespective of your being able to receive our consent or not on all or any of the points referred to you. We are writing this so as to avoid any embarrassment on your part.

Thanking you,

Yours faithfully.

Sd/-

1. Nikunj Kumar Lohia

2. N. P. Lohia,

3. B. G. Lohia,

4. Mukund Lohia."

5. Two points arise for our consideration in this appeal. Firstly, whether the reference, if at all made to two Arbitrators was valid in law, and secondly, whether the fact that the Arbitrators did not give reasons in support of their Award would make the award bad in the eyes of Law.

6. Mr. Pal, learned senior advocate appearing for the Appellant contended that there is nothing in the Arbitration and Conciliation Act, 1996 whereby it can be said that an Arbitration Agreement cannot provide for reference of disputes to two Arbitrators and that in the absence of any such stipulation in the 1996 Act, the reference to two Arbitrators cannot be bad, illegal or unwarranted. His further submission is that in any case the parties chose these two Arbitrators for settlement of their disputes through mediation in terms of section 30 of the Act and strictly speaking, mediation u/s 30 not being an arbitration award, struck rules regarding the composition and constitution of an arbitral Tribunal comprising of an odd number of Arbitrators cannot be applicable in the case like the present one.

7. In so far as the contention regarding the Arbitrators not assigning any reasons in support of the award, being contrary to section 31(3) of the Act. Mr. Pal submitted that since the award was on agreed terms, as per section 30(3) read with section 31(3)(b) of the Act, the Arbitrators were not required to give reasons in support of the award and that the parties having accepted the award, in terms of section 4 of the Act they waived any such objection with regard to such legal requirement. In fact Mr. Pal's submission was that the composition of the arbitral Tribunal being even in number also cannot be considered to be a legal infirmity because again, in terms of section 4 of the Act the parties by participating in the arbitration proceedings had waived the right to object to the composition of the arbitral Tribunal, even if it was required to be of odd number.

8. We have given our most serious consideration to the aforesaid contention of

Mr. Pal but do not feel inclined to agree with him.

9. An arbitration agreement is defined in section 2(b) to mean an agreement referred to in section 7 of the Act. Section 7 of the Act in so far as it is material for our purposes reads as under :--

"Section 7. Arbitration agreement.--(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

10. A combined reading of section 2(b) and section 7(1) thus clearly suggests that where the parties agree to submit to arbitration certain disputes which have arisen between them, or which may arise in respect of a defined legal relationship, such agreement shall be deemed and considered to be an arbitration agreement between the parties. The thrust is on the agreement "to submit to arbitration" all or certain disputes. Section 7 does not at all contain any stipulation or requirement of law as to the number of Arbitrators. Whether it should be one or more, and if more whether the number should be odd or even does not find any mention in section 7 of the Act.

11. Arbitral Tribunals find place in the 1996 Act, mainly starting from Chapter-IV of the Act which deals with the jurisdiction of Arbitral Tribunals and includes provisions for competence of such Tribunals to rule on their jurisdiction, the interim measures that these Arbitral Tribunals may take considering the necessity in respect of subject matter of the disputes, and the conduct of arbitral proceedings as mentioned in Chapter-V, and so on and so forth. This Chapter also deals with the Arbitral Tribunals determining their rules of procedure, conduct, place of arbitration and commencement of arbitral proceedings and so on and so forth. In so far as the composition of an arbitral Tribunal is concerned, section 2(d) of the Act defines an "Arbitral Tribunal" to mean either a sole Arbitrator or a panel of Arbitrators. The expression "Panel of Arbitrators" even though has not specifically been defined anywhere in the Act, one has to turn to section 10 of the Act which deals with the question of number of Arbitrators that an Arbitral Tribunal may have and suggests that even though, the parties are free to determine the number of Arbitrators, such number shall not be an even number, and that failing such determination with respect to the fixation of the number of Arbitrators, the Arbitral Tribunal shall consist of a sole Arbitrator. For ready reference we reproduce section 10 of the Act which reads thus :

"Section 10 Number of arbitrators.--(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1). the arbitral tribunal shall consist of a sole arbitrator."

12. If there was any doubt with respect to the Arbitral Tribunal consisting of only

odd number of Arbitrators, sub-section (3) of section 11 of the Act puts all such doubts to rest by providing that in an arbitration agreement providing for three Arbitrators, each party shall appoint one Arbitrator and the two appointed Arbitrators thus shall appoint the third Arbitrator who shall set as the presiding Arbitrator. Sub-section (3) of section 11 reads thus :

".....Sec
tion 11(3) Falling any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator."

13. What we therefore gather from a bare look at the aforesaid provisions contained in the Act is that even though the definition of arbitration agreement as would be discernible by a combined reading of section 2(b) and section 7 of the Act does not say so in the specific terms as to what number an Arbitral Tribunal is to be composed of, keeping in view the clear language employed in section 10 read with sub-section of section 11 of the Act. we have no hesitation in holding that an Arbitration Agreement, to be in conformity with the requirement of Law as per 1996 Act, when dealing with the composition of an Arbitral Tribunal, either has to provide for a sole Arbitrator, or when the number required is more than one, it has to provide for an odd number of Arbitrators to constitute an Arbitral Tribunal. In an Arbitration Agreement therefore, which provides for an even number of Arbitrators to constitute an Arbitral Tribunal would not be in conformity with either section 10, or sub-section (3) of section 11 of the Act and therefore, on a combined reading of section 2(b) and section 7 of the Act, such an Arbitration Agreement would be bad in law. We are saying so because the mandate as contained and prescribed in section 10 of the Act clearly suggests that Arbitration proceedings have to be conducted by a multi member Arbitral Tribunal only if such Tribunal consists of odd number of Arbitrators, If therefore Arbitration Proceedings per se cannot be conducted by an Arbitral Tribunal fixing of even number of Arbitrators there is no purpose whatsoever in the Arbitration Agreement providing for an even number of Arbitrators for constituting an Arbitral Tribunal.

14. This now takes us to the second question regarding the Arbitrators not giving reasons in support of the award. As already noticed, section 31 of the Act enjoins upon the Arbitrators to state the reasons upon which an arbitral award is based unless either the parties have agreed that no such reasons are to be given or that the award is an arbitral award on agreed terms u/s 30 of the Act. Sub-section 3 of section 31 which deals with the question of the Arbitrators stating the reasons reads thus :

"Section 31(3) The arbitral award shall slate the reasons upon which it is based, unless-

(a) the parties have agreed that no reasons are to be given, or

(b) the award Is an arbitral award on agreed terms u/s 30."

15. Mr. Pal's contention that the Arbitrators were not required to give reasons in this award because the award was based on a settlement through mediation in terms of section 30(2) and (3) is without any force because a bare perusal of the award clearly and without any manner of doubt suggests that it is an award on contest and is actually an arbitral award in terms of section 31 of the Act and cannot, by any process of reasoning or by any stretch of imagination, be termed as an award under sub-section (2) or sub-section(3) of section 30 of the Act. While one goes through the text of the award one sees that rather than stating that it was passed on agreement between the parties or was by way of a settlement through mediation, it clearly suggests and says that the parties contested with each other and as a result of the contest the Arbitrators have given their own award.

16. On both the counts therefore, we find that the arbitration award suffered from the aforesaid legal infirmities and was liable to be set aside.

17. Reliance placed by Mr. Pal on section 4 of the Act in support of his contention that the aforesaid two legal infirmities could be considered and deemed to have been waived is misplaced because section 4 only talks of the waiver of the right to object if a party knowingly waives that right. Section 4 of the Act reads thus :

"Section 4. Waiver of right to object.--A party who knows that-

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

18. A bare look at section 4 (supra) clearly suggests that, first of all the waiver of the right has to be deliberate, purposeful and knowingly made, and that waiver should be in respect of a provision of the Act as contained in Part-1, from which the parties may derogate, or it should be in addition to a requirement under the Arbitration Agreement which may not have been complied with and yet the parties proceed with the arbitration without slating their objection. We therefore do not find ourselves in agreement with the aforesaid submission of Mr. Pal and hold that section 4 of the Act in the present case cannot be attracted and therefore it cannot be said that the aforesaid two legal infirmities from which the Award suffered would be deemed to have been waived by any party.

In the result therefore the appeal Is dismissed but without any order as to costs.

M.K. Basu, J.

19. I agree.

Later :

Let a xerox copy of this Judgment, duly countersigned by the Assistant Registrar of this Court, be given to the parties upon their undertaking to apply for and obtain certified copy of the same upon usual undertaking.

20. Appeal dismissed.