
(1951) 05 CAL CK 0030
In the Calcutta High Court
Case No : Arbitration No. 244 of 1950

Probodh K. Sarkar

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 23-05-1951

Acts Referred:

Arbitration Act, 1940 — Section 8
Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : AIR 1953 Cal 385 : 56 CWN 437 : 56 CWN 436

Hon'ble Judges : Bachawat, J

Bench : Single Bench

Advocate : Ranadeb Chaudhuri, for the Appellant; A.K. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Bachawat, J.—This is an application by Mr. B.K. Ghose, Receiver, appointed in Suit No. 420 of 1950 for the appointment of an umpire in place and stead of the late Sri Sarat Chandra Bose and for other reliefs.

2. There were three contracts between Probodh Kumar Sarkar and the respondent Union of India. Each contract contains an arbitration clause providing for reference to two arbitrators one to be appointed by each and in the event of disagreement between them to an umpire appointed by them.

3. Sarkar claimed that large sums of money were due to him from the Union of India under the contracts. The disputes were referred to the arbitration of two arbitrators, one arbitrator being nominated by each party. Both arbitrators were unable or unwilling to act and on 9-3-1949 there was an order referring the disputes to the arbitration of Bakshi Shib Charan Singh and Sri S.C. Mitter and in case of difference of opinion between them, to an umpire to be nominated by the joint arbitrators. On 21-3-1949 the arbitrators appointed Sri Sarat Chandra Bose as umpire. There was disagreement between the arbitrators. Sri S.C. Mitter was in favour of awarding a sum much larger than what Bakshi Shib Charan Singh

was prepared to award. Eventually there was a reference to the umpirage of Sri Sarat Chandra Bose.

4. It appears that Das Bank Ltd. advanced large sums of money to Probodh Kumar Sarkar. To secure the repayment of such loans & advances there was an equitable assignment of the moneys payable under the contracts by Sarkar in favour of Das Bank Ltd.

5. On 20-1-1950 Das Bank Ltd. instituted a suit against Sarkar claiming over Rs. 94000 and a declaration of charge over the moneys due under the contracts.

6. On 21-1-1950, Messrs. A. P. Roy & Co., forwarded to Sri Sarat Chandra Bose an application by Probodh Kumar Sarkar for withdrawal of the pending reference and a request by him to confirm the report by Bakshi Shib Charan Singh. On the same day Mr. P.K. Bose, attorney for Das Bank Ltd., informed A.P. Roy & Co. of the institution of the suit and requested them not to take any steps prejudicial to Das Bank. On 25-1-1950 there was an injunction restraining Sarkar from withdrawing the arbitration proceedings. On 30-1-1950 the applicant Mr. B. K. Ghose was appointed receiver of the claim of Sarkar in respect of the contracts with power to collect the outstandings and with full power under Order 40, Rule 1(d), Civil P.C. and the power of bringing and defending suits in his own name and with the further power that the receiver was at liberty to prosecute in place of the defendant the pending reference before the umpire. This appointment of receiver was made in the suit instituted by Das Bank against Sarkar. On 20-2-1950 Sri Sarat Chandra Bose died. On 1-4-1950, Mr. P.K. Bose the attorney for Messrs. Das Bank Ltd. sent a notice for appointment of an umpire to the arbitrators and also to Mr. S.K. Mondal, solicitor for the respondent. In reply the arbitrators stated that they were "functus officio" and could not appoint an umpire. Mr. S.K. Mondal stated that the reference could not proceed at the instance of a third party and also because the decision of Bakshi Shib Charan Singh had been accepted. The present notice of motion was taken out on 11-8-1950.

7. If there is disagreement between the arbitrators there is no award and the jurisdiction of the umpire is attracted. In the absence of a contrary provision in the arbitration agreement the umpire must adjudicate upon the whole case even if the arbitrators disagree on one point. -- "Wicks v. Cox", 11 Jurist, 542 (A). -- "Winteringham v. Robertson" (1858) 27 L.J. Ex. 301 (B).

8. It is said that the reference has stood withdrawn and also that the offer of withdrawal has been accepted by the Union of India and therefore there is a compromise and the report of Bakshi Shib Charan Singh has stood confirmed. It is really for the umpire to decide if there is a compromise or a withdrawal which cannot be retracted and whether he should make an award confirming the report of Bakshi Shib Charan Singh. He has the power to allow the party applying for withdrawal to abandon his application and to proceed with the reference. See -- "James Lamont & Co. v. Hyland" (1950) 1 AllER 341 (C); -- "Lakshmana Pillai v.

Appalwar Alwar" AIR 1923 Mad. 246 . The umpire made no award and when the umpire died the reference was pending before him,

9. Even if there is a compromise the umpire may make an award in accordance with the compromise; -- "Gobordone Das v. Jai Kissen" 22 All 224 (E). In fact the umpire ought to embody the admitted claim or compromise in the award unless the parties invite him not to do so. Russel on Arbitration, 14th Edition, page 64 -- "Hutchinson v. Shepperton" (1849) 13 Q. B. 955. -- "Hari Kunwar v. Lakshmi Ram" AIR 1916 All 113 . -- Harakh Ram Jani and Another Vs. Lakshmi Ram Jani and Others, (H). It cannot, therefore, be said that it is unnecessary to appoint an umpire. There has been as yet no award which is final and binding upon the parties.

10. It is next contended on behalf of the respondent Union of India that the applicant is not a party and that, therefore, this application is not maintainable.

11. This application is made u/s 8, Arbitration Act, 1940. The conditions, mentioned in the section must exist before the Court can bind an umpire. The notice of appointment must be served by and the application must be made by "a. party".

12. Section 8, Indian Arbitration Act, 1940, corresponds to Section 5, English Arbitration Act, 1889-Referring to the section in the English Act, Maugham, J. -- "In Re Franklin and Swathling's, Arbitration" (1929) 1 Ch. 238 at pp. 240--41 (I) observed as follows:

"An application u/s 5, Arbitration Act, 1889, is one which can only be made by a party to the submission. * * * The Arbitration Act, 1889, is, in my view, a technical statute; it is a statute which provides for the ousting of the jurisdiction of the Court; the language of it. has to be carefully observed, and it is not open to me to give it any meaning except that which. is expressly provided for in the various clauses".

13. In that case certain articles of partnership, entitled a partner to nominate a qualified person as partner and the admission of the nominee to. the partnership was subject to the consent of the: other partners which was not to be unreasonably withheld. The articles gave the nominee the right to require reference to arbitration if he was of the opinion that the consent was unreasonably withheld. The articles further provided for reference to a single arbitrator of differences arising during the continuance of the partnership or afterwards between the partners or their representatives. The consent to the admission of a nominee to a partnership being withheld the nominee applied for appointment of a sole arbitrator u/s 5, English Arbitration Act, 1889. It was held that he had no right to make the application. He was not a party to the original partnership deed. Until it was decided that the consent was unreasonably withheld it could not also be said that there was a trust in his favour with reference to the partnership assets. The question whether a person in whose favour there was such a trust could apply u/s 5 was left open. I think Maugham,

J., recognised that persons other than the original contracting party may in certain cases. have the right to apply u/s 5, Indian Arbitration Act, 1889.

14. Section 8 Indian Arbitration Act, 1940, empowers the Court to appoint an arbitrator or an umpire in certain cases so that the arbitration agreement may not become abortive. It provides a machinery for effectively working out and enforcing the arbitration agreement. The umpire appointed under this section has the like power to act on the reference and to make an award as if he were appointed by consent of the parties. The scheme and object of the section shows that the application under the section can be made by persons by and against whom the arbitration agreement is mutually enforceable.

15. A submission is a mutual promise to perform the award. -- "Purslow v. Bailey" (1694) 2 Ray 1039 ; -- "Sharpe v. Hancock" (1844) 1 M; G 354 (K) --"Winter v. White" (1819) 3 Moore 674 . The party who invokes Section 8 must not only be entitled to enforce the award but must also be bound to perform it. The award must be mutually binding.

16. Now the applicant in this case is the receiver of a claim for a sum of money due to Sarkar from the Union of India under contracts containing arbitration clauses. He has invoked Section 8 by serving the notice and applying in his own name. The suggestion that this application is substantially by and on behalf of Sarkar is unsound. The receiver may institute legal proceedings in his own name for the recovery of the claim if he is empowered to do so in a suit in which the ownership is completely represented. -- "Pink v. Maharaj Bahadur" 25 Cal. 642 (M); -- "Jagattarini v. Naba" 34 Cal. 305 -- Gogineni Ankayya Vs. Official Receiver, Masulipatam and Others, , -- "Cassim Mamooji v. K.B. Dutta" AIR 1916 Cal 51 . This power of a receiver to institute proceedings in his own name is an exceptional power necessitated by the exigencies of convenience. He is said to be a quasi assignee of the claim -- "Jagattarini v. Naba" 34 Cal. 305 . In such proceedings he has a capacity apart and distinct from the owner. The owner is not the person who has instituted the proceedings. -- Jyotirmoy Nag Chowdhury Vs. Biswanath Boss and Another where it was held that the proceedings instituted by the receiver in his own name did not abate on the death of the owner. This application, therefore, cannot be said to be an application by Sarkar who is the owner of the claim and who as party to the arbitration agreement could invoke the machinery of Section 8.

17. The receiver himself also cannot be said to be a party within the meaning of Section 8. He is entitled to enforce the claim arising out of the contracts containing the arbitration clauses, but he is not bound to carry out the obligations under the contract. He is in no better position than a mere assignee of a debt arising out of a contract who cannot enforce the arbitration clause contained in the contract. Russel on Arbitration, 14th Edn. page 73. The arbitration clause is not mutually enforceable by and against the receiver. If an application were made by the Union of India u/s 8 Sarkar would be the necessary respondent; The receiver as respondent to such application would not effectively

represent Sarkar. See -- "Md. Kader Ali v. Gobindabandhu" AIR 1946 Cal 127 . The mutuality which is the very essence of arbitration is non-existent.

18. The application, therefore, is not maintainable. In saying this I do not want it to be supposed that the receiver having the requisite power and invoking Section 8 in the name of the party to the arbitration agreement cannot do so. I am dealing with a case in which the machinery of Section 8 is invoked by the receiver in his own name.

19. Mr. A.K. Sen, counsel for the respondent Union of India also contended that the application is not maintainable because (a) no proper notice was served on the Union of India in the manner provided in Section 42 of the Act; and (b) the Court appointing the receiver has not even purported to confer the requisite power upon the applicant so as to enable him to invoke the machinery of Section 8. Having regard to my finding it is not necessary to express any opinion on this point.

20. The application must, therefore, be dismissed with costs.