

(1997) 10 KL CK 0006
In the High Court Of Kerala
Case No : M.F.A. No. 820 of 1990

Union of India (UOI) and Others

APPELLANT

Vs

P.M. Imbichibi and Another

RESPONDENT

Date of Decision : 01-10-1997

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 20, 5, 8

Citation : AIR 1998 Ker 72 : (1998) 1 ILR (Ker) 349

Hon'ble Judges : N. Dhinakar, J;K.K. Usha, J

Bench : Division Bench

Advocate : T.P.M. Ibrahim Khan, for the Appellant; U.K. Ramakrishnan, for the Respondent

Final Decision : Dismissed

Judgement

Usha, J.—O.S. No. 281/86 was filed by the respondents herein under the provisions of the Arbitration Act, 1940 before the Court of the Subordinate Judge, Kozhikode seeking leave to revoke the authority of an appointed arbitrator, to direct the respondents therein to file the agreement before the Court and also for an order to refer the dispute between the parties for arbitration of an arbitrator appointed by the Court. The Court below allowed the prayer for revoking the authority of the appointed arbitrator and it also appointed an arbitrator to adjudicate the dispute between the parties. Aggrieved by the above judgment and decree, the respondents in O.S, 281/86 have come up in appeal.

2. Petitioner in O.S. No. 281/86 was in possession of certain area belonging to the respondents. His father, Khan Sahib Koonhammedkoya, was originally in occupation of land measuring 4265.75 square feet, as per an entrustment from the 2nd respondent under an agreement dated 2-8-1929. On his death in 1943 the petitioner came into possession of the land, on 30-5-1960 a portion of the land was surrendered by the respondents and a fresh agreement was executed on 21-1-1971 in respect of 2025.75 square feet of land, which was in the

possession of the petitioner. He was made liable to pay ground rent of Rs. 104.64, shed rent of Rs. 120/- and the Municipal tax of Rs. 16/- p.m. The rent was revised from time to time and on 5-12-1977 it was fixed at Rs. 1,252.25. Thereafter under communication dated 30-9-1981 the petitioner was informed that he was liable to pay the enhanced amount of Rs. 17,345.58 towards licence fee, shed rent and Municipal tax. The petitioner protested against the revision of rent. On receipt of a communication terminating his licence with effect from 5-12-1982 the petitioner moved this Court by filing O.P. No. 9267/82. The original petition was disposed of by this Court on 29-8-1986. While denying relief to the petitioner this Court observed that the dismissal of the original petition was without prejudice to his seeking remedy by way of arbitration.

3. The petitioner thereupon sent a registered notice dated 24-9-1986 to the 2nd respondent requesting to appoint a retired Judge of High Court of Kerala as the arbitrator to adjudicate the dispute specified in that notice. No favourable reply was received. Clause 19 of Ext. B-1 agreement between the parties provided that in case of any dispute between the parties the difference or dispute shall be referred to the General Manager of Southern Railway and his decision thereon shall be final, binding and conclusive. Thus as per the provisions in the agreement the General Manager of Southern Railway has to be appointed as the arbitrator for resolving the dispute between the parties. The petitioner felt that he will not get any justice at the hands of designated arbitrator in view of the fact that he had already expressed his view as to the result of the proceedings by filing a counter-affidavit before this Court in O.P. No. 9267/82. It was alleged that the General Manager of Southern Railway had already expressed his view in the counter-affidavit that the enhancement of licence fee by communication dated 30-9-81 was valid, proper and justified. Contending that the 2nd respondent was clearly biased in favour of the Railway administration and against the petitioner he sought an order u/s 5 of the Arbitration Act, 1940 for revoking the authority of the appointed arbitrator. As mentioned earlier, there was also a prayer for appointment of an arbitrator by the Court to adjudicate the dispute and the petitioner suggested the name of a retired Judge of the High Court of Kerala. During the pendency of the suit the petitioner died and his legal representatives are impleaded as supplemental petitioners 2 to 9. They put forward the same contentions as in the original petition.

4. It was contended by the respondents that the suit was not maintainable, that as per the binding agreement between the parties the licence fee was revised from 21-1-1971, the Government shall have the right to revise the licence fee, if it considered necessary, and therefore, the enhancement in the year 1981 should have been accepted by the licensee unconditionally. The petitioner has no right to bargain for any reduction and the enhancement of licence fee made is justifiable and reasonable. Since the original petition filed by the licensee was dismissed by this Court, the present suit is not maintainable. The Court has no jurisdiction to invoke Sections 20 and 5 of the Arbitration Act.

5. The trial Court found in favour of the petitioner but it did not accept the name suggested by the petitioner for appointment as arbitrator, on the other hand, it appointed a retired District Judge as arbitrator to adjudicate the dispute between the parties. The Court did not go into the merits of the case because the issues are the subject-matter for adjudication in the arbitration proceedings.

6. The main contentions raised before us by the learned counsel for the appellants are twofold. Firstly it was submitted that the petitioner was not entitled to seek relief simultaneously under Sections 5, 8, 11, 12 and 20 of the Arbitration Act and on that ground alone the petition should have been dismissed. In support of the above contention the learned counsel relied on a decision of this Court in *State v. Natesan*(1997) 1 Ker LT 888. Secondly, it was contended that this was not a case where the prayer u/s 5 should have been allowed by the Court below. According to the learned counsel, the tests laid down by the Supreme Court in *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, , and *Pioneer Shopping Complex (P) Ltd. v. Silpi Construction Contractors* (1989) 2 Ker LT 214, are not satisfied in the present case to invoke the power u/s 5. A mere apprehension of bias on the part of the arbitrator would not constitute a ground for removal of the arbitrator. It was also contended that having agreed to the terms of Clause 19, by which the General Manager of Southern Railway has been named as the arbitrator, the petitioner should be taken to have known the arbitrator's interest in the affairs of the Southern Railway and thereafter the petitioner cannot be permitted to contend that the General Manager is biased in favour of the Railway and against the petitioner.

7. On the other hand, according to the respondents before us viz., petitioners before the Court below, there is no merit in the contention that the petition was not maintainable. It is true that in the petition filed before the Subordinate Judge's Court reference is made to Sections 8, 11 and 12 along with Sections 20 and 5, but the learned counsel would point out that no relief was sought under Sections 8, 11 and 12. In a case where under the terms of the agreement a designated arbitrator has to be appointed, before seeking remedy u/s 20 it is necessary for the petitioner to seek orders u/s 5 for revoking the authority of the appointed arbitrator. It was also pointed out that no such objection was raised by the appellants before the Court below nor in the memorandum of appeal before this Court. Referring to the provisions contained under Rule 5 of the Kerala Arbitration Rules, 1977 the learned counsel would submit that the Court below has also treated the application only as one u/s 2-D(1) as it is seen registered as an original suit. Every other applications made under the Act are to be registered as Original Petition (Arbitration). Therefore, it is clear that all the parties proceeded on the basis that it was an application u/s 20 read with Section 5 of the Arbitration Act and there was no illegality or irregularity in maintaining the petition. It was further contended that a bias in the result of the proceeding had been made out against the arbitrator by the petitioner on the basis of the contentions raised by the General Manager, Southern Railway in the counter-affidavit filed in O.P. No. 9267/82. The facts in the case would satisfy all the tests

laid down by the Supreme Court as well as this Court in the decisions relied on by the learned counsel for the appellants. Reliance was placed on by the learned counsel on the decision of the Supreme Court in *Jiwan Kumar Lohia and another Vs. Durgadutt Lohia and others*, , in support of his contention.

8. We will first consider the question relating to maintainability of the petition before the Court below. It is true that in the title to the petition reference is made to Sections 8, 11 and 12 after referring to Sections 20 and 5 of the Arbitration Act, 1940, but we find no relief was sought in the petition under Sections 8, 11 and 12. The reliefs sought were only under Sections 5 and 20 i.e., for leave to revoke authority of the General Manager, Southern Railway as the arbitrator and then for an order to appoint an arbitrator and refer the dispute specified in the petition for arbitration. The fact that name of a retired Judge of this Court was suggested as an arbitrator would not make the petition any the less one u/s 20. Since there is a provision under the agreement by which a designated arbitrator has to be appointed, forgetting relief u/s 20, the petitioner has to seek leave to revoke the authority of the appointed arbitrator by filing an application u/s 5. We do not find any merit in the contention raised by the appellants that an application filed under Sections 5 and 20 simultaneously would not be maintainable. The decision of this Court in (1997) 1 Ker LT 888 (*supra*) relied on by the learned counsel for the appellants has no application in the facts of this case. What has been held therein is that a party cannot move both u/s 8 as well as Section 20 simultaneously in view of the difference in the nature of the jurisdiction of the Court under the abovementioned sections and also in view of the wording of Section 20. But in the present case we find that a part from referring to Sections 8, 11 and 12 in the title to the petition, no relief is sought by the petitioners under those provisions. The reliefs were limited to under Sections 5 and 20. A wrong reference to certain sections in the title of the petition would not vitiate the petition as such. As contended by the learned counsel for the respondents, registering the petition as a suit as per the provisions contained under Rule 5 of the Kerala Arbitration Rules, 1977 would also indicate that the application was understood by all concerned only as one u/s 20 and not u/s 8. Sub-section (2) of Section 20 also mandates that application filed u/s 20(1) shall be numbered and registered as a suit. We have, therefore, no hesitation to hold that the Court below has correctly entertained the application by the respondents herein treating the same u/s 20 read with Section 5.

9. It is not disputed before us that the General Manager has filed counter-affidavit in O.P. No. 9267/82 before this Court denying the claim of the petitioners and expressing the view that the revision of licence fee under communication dated 30-9-1981 was valid, proper and justified. The question to be considered is whether the above would be bias on the part of the General Manager, Southern Railway which would justify revocation of his appointment as arbitrator u/s 5 of the Arbitration Act, 1940. In *Jiwan Kumar Lohia and another Vs. Durgadutt Lohia and others*, the Apex Court had occasion to consider the test

to be applied for revocation of authority on the ground of bias. Quoting from the decision *Ranjit Thakur Vs. Union of India (UOI) and Others*, on the test of a bias attributable to a member of the Tribunal it was observed "the test of likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely" and whether the person concerned "was likely to be disposed of to decide the matter only in a particular way", it was observed that such test would also apply to an arbitrator. The power u/s 5 has to be applied cautiously and sparingly and only when the Court was satisfied that the substantial miscarriage of justice will take place in the event of its refusal to allow such an application.

10. In *Catalina (Owners) v. Norma (Owners)*, 61 U L Rep 360, the question that arose was whether the arbitrator exhibited bias which would amount to misconduct and his appointment as arbitrator is liable to be revoked. One of His Majesty's counsel was appointed as an arbitrator in a dispute between the owners of a steamship "Catalina" and the owners of a motor vessel "Norma" arose out of a collision between the vessels. Witnesses on behalf of Catalina, which was a Portuguese vessel, and Norma, which was a Norwegian vessel, were examined. Then it was posted for the evidence of Surveyors. In the course of proceedings and in the presence of the Managing Director of the owners of Catalina the arbitrator observed referring to two Norwegians who gave evidence that "They are not Italians, the Italians are all liars in these cases and will say anything to suit their book, the same would apply to the Portuguese, but not to the Norwegians who generally were truthful people." He then observed that he entirely accept the evidence of the master of the Norma. Objections were taken to his observation that Portuguese who had given evidence were people who were all liars in these types of cases and it was contended that he has committed misconduct as a result of his expressed bias. The above contention was accepted and a plea for revocation was allowed. In *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, Supreme Court considered the grounds on which leave to revoke may be granted and they were brought under five heads viz., (1) Excess or refusal of jurisdiction by arbitrator, (2) Misconduct of arbitrator, (3) Disqualification of arbitrator, (4) Charges of fraud, and (5) Exceptional cases.

11. But in the present case we do not think it is possible to hold that the arbitrator was guilty of misconduct, since he had not already entered the arbitration. But the fact that he has taken a definite stand in the counter-affidavit filed before this Court in O.P. No. 9267/82 that the revision of licence fee is perfectly justified and there is no merit in the complaint of the petitioner, would clearly show that he was biased in the result of the proceedings and he has disqualified himself to continue as an arbitrator. There is no merit in the contention raised by the appellants that after agreeing for appointment of a designated arbitrator as under Clause 19, the petitioner cannot be allowed to turn round and contend that he is biased in the result of the proceedings. Till the General Manager filed counter-affidavit in O.P. 9267/82 the petitioner had no occasion to doubt his capability to arbitrate a dispute between the petitioner and

the Southern Railway without bias. The application u/s 5 is filed not on the ground that the arbitrator is a General Manager of Southern Railway. The reason given was that the bias in the result of the proceeding was exhibited by the arbitrator when he filed a counter-affidavit before this Court taking a definite stand in favour of the enhancement of the licence fee and against the contention taken by the petitioner. In this context it is useful to refer to the following observations from Halsbury's Laws of England, Fourth Edition, Vol. 2, page 551 where the want of impartiality or bias of the arbitrator has been discussed:--

"Even under the general power, the Court will exercise its jurisdiction to revoke the authority of an arbitrator or umpire on the ground that he has actually misconducted himself, or failed to act impartially, or has a secret interest or bias in the result of the proceedings. The test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias."

"Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement, and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not of may not be impartial, for leave to revoke the arbitrator's authority or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it is not a ground for refusing the application that the applicant knew or ought to have known when he made the agreement that the arbitrator, by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be "capable of impartiality."

12. In the circumstances of the case we are of the view that the petitioner could have entertained a serious apprehension of the named arbitrator having a bias in the result of the proceeding. The Court below was, therefore, fully justified in allowing the prayer u/s 5 and appointing an arbitrator u/s 20 of the Arbitration Act, 1940. In the result, the appeal fails and it stands dismissed. There will be no order as to costs.