The Printers (Mysore) Private Ltd.

Vs

Pothan Joseph

Civil Appeal No. 107 of 1960

(P. B. Gajendragadkar, K. N. Wanchoo, K. C. Das Gupta JJ)

27.04.1960

JUDGMENT

GAJENDRAGADKAR, J. -

The respondent, Pothan Joseph, who was working as the Editor of the Deccan Herald owned and published by the appellant, The Printers (Mysore) Private Ltd., in Bangalore has filed a suit against the appellant on two contracts executed between the parties on April 1, 1948, and February 20, 1953, respectively, and has claimed accounts of the working of the Deccan Herald newspaper from April 1, 1948, to March 31, 1958, as well as payment of the amount that may be found due to him from the appellant under the provisions of cls. 2(d) and 1(d) of the said contracts. The services of the respondent were terminated by the appellant by its letter dated September 28, 1957, in which the respondent was told that the termination would take effect from March 31, 1958. However, by a subsequent letter written by the appellant to the respondent on March 17, 1958, the respondent was told that his services had been terminated with immediate effect and he was asked to hand over charge to his successor, Mr. T. S. Ramachandra Rao. Thereafter on July 14, 1958, the respondent filed the present suit against the appellant.

The appellant contended that the two contracts on which the respondent's claim was based were subject to an arbitration agreement, and so it was not open to the respondent to file the present suit against the appellant. The appellant, therefore, requested the Court under s. 34 of the Indian Arbitration Act, 1940, (hereinafter called the Act), to stay the proceedings initiated by the respondent and refer the dispute to arbitration in accordance with the arbitration agreement between the parties.

The learned trial judge who heard the appellant's application, however, exercised his discretion against it and refused to stay the proceedings in the respondent's suit. Thereupon the appellant preferred an appeal in the Mysore High Court but his appeal failed and the High Court confirmed the order passed by the trial court though for different reasons. The High Court, however, thought that the learned trial judge, in dealing with the appellant's application "had gone much further than he should have done, and hence it was desirable that the case should be tried by some other judge". The respondent did not object, and so the High Court directed that the suit may be transferred to the file of the Additional Civil Judge, Bangalore. The appellant then applied to the High Court for a certificate. His application was, however, rejected on the ground that the decision under appeal could not be considered as a judgment, decree or final order under Art. 133(1) of the Constitution; on that view it was thought unnecessary to decide whether on the merits the case was fit to be taken in appeal to this Court. Then the appellant applied for and obtained special leave from this Court. That is how this appeal has come before us; and the substantial point which arises for our decision is

whether the courts below were in error in refusing to stay the suit filed by the respondent against the appellant in view of the arbitration agreement between them.

Before we deal with the merits of the contentions raised by the parties in this appeal it is necessary to set out briefly the relevant facts leading to the present litigation. The appellant is a printing company and it owns and publishes the Deccan Herald in English and Prajavani in Kannada at Bangalore. By a contract dated April 1, 1948, the appellant engaged the respondent as Editor of the Deccan Herald for a period of five years on terms and conditions specified in the said contract. As provided by cl. (5) of the said contract the period of the respondent's employment was extended by another five years by a subsequent contract entered into between the parties on February 20, 1953. As we have already mentioned the services of the respondent came to be terminated abruptly on March 17, 1958. It appears that by his letter dated October 16, 1957, the respondent made certain claims against the appellant under the provisions of the Working Journalists Act. Besides, he demanded 1/10th of the profits made by the Deccan Herald from 1948 up to the date of the termination of his service under the two respective contracts. This claim was denied by the appellant. Correspondence then ensued between the parties but since no common ground was discovered between them the respondent filed the present suit. His case is that the two contracts entitled him to claim 1/10th of the profits made by the Deccan Herald during the period of his employment, and so he claims an account of the said profits and his due share in them.

The learned trial judge found that the respective contentions raised by the parties before him showed that there was no dispute as such between them which could attract the arbitration agreement. He also held that an attempt was made by the parties to settle their differences amicably through the mediation of Mr. Behram Doctor but the said attempt failed because the appellant was not serious about it and was just trying "to protract, defeat and delay the plaintiff's moves". According to the learned trial judge a plea of limitation would fall to be considered in the present suit and it was desirable that the said plea should be tried by a competent court rather than by arbitrators. He was, however, not impressed by the respondent's contention that his character had been impeached by the appellant and so he should be allowed to vindicate his character in a trial before a court rather than before the arbitrators. In dismissing the appellant's claim for stay of the suit the learned judge observed that if the accounts of the Deccan Herald had not been separately maintained it would be competent for a qualified accountant to allocate expenses and capital expenses among the different activities of the appellant and then very little would be left for arbitrators to decide. He had no doubt that the contract by which the respondent was entitled to claim 1/10th share in the profits of the Deccan Herald necessarily postulated that the accounts of the Deccan Herald would be separately maintained. On these considerations the trial judge refused to stay the suit.

When the matter went in appeal the High Court held that the dispute between the parties did not fall within the arbitration agreement. The High Court also considered the other points decided by the trial court; it held that Mr. Behram Doctor had not been appointed as an arbitrator between the parties and that the proceedings before him merely showed that the parties were exploring the possibility of having an arbitration. It observed that the appellant company was a big concern and referred to the respondent's apprehension that it was in a position to dodge the respondent's claim. However, the High Court was not impressed by these apprehensions, and it was not inclined to find fault with the conduct of the appellant in the trial court. It was also not satisfied that the question of limitation which would arise in the suit as well as the question of interpreting the contracts could not be properly tried by arbitration. It recognised that there had been a complete change of front on the part of the appellant in regard to the pleas raised by the appellant under the arbitration agreement when the matter was discussed before Mr. Behram Doctor, and when it reached the court in the form

of the present suit. The High Court then considered other facts which it thought were relevant. It stated that there was great deal of bad blood between the parties and there was no meeting ground between them. The appellant's plea that recourse to arbitration may help an early disposal of the dispute did not appeal to the High Court as sound, and so, on the whole, the High Court thought that the order passed by the trial court refusing to stay the proceedings in suit should be confirmed. The appellant contends that the reasons given by the High Court in refusing to stay the suit are not convincing and that the discretion vesting in the High Court in that behalf has not been properly or judiciously exercised.

Section 34 of the Act confers power on the court to stay legal proceedings where there is an arbitration agreement subject to the conditions specified in the section. The conditions thus specified are satisfied in the present case, but the section clearly contemplates that, even though there is an arbitration agreement and the requisite conditions specified by it are satisfied, the court may nevertheless refuse to grant stay if it is satisfied that there are sufficient reasons why the matter should not be referred in accordance with the arbitration agreement. In other words, the power to stay legal proceedings is discretionary, and so a party to an arbitration agreement against whom legal proceedings have been commenced cannot by relying on the arbitration agreement claim the stay of legal proceedings instituted in a court as a matter of right. It is, however, clear that the discretion vested in the court must be properly and judicially exercised. Ordinarily where a dispute between the parties has by agreement between them to be referred to the decision of a domestic tribunal the court would direct the parties to go before the tribunal of their choice and stay the legal proceedings instituted before it by one of them. As in other matters of judicial discretion, so in the case of the discretion conferred on the court by s. 34 it would be difficult, and it is indeed inexpedient, to lay down any inflexible rules which should govern the exercise of the said discretion. No test can indeed be laid down the automatic application of which will help the solution of the problem of the exercise of judicial discretion. As was observed by Bowen, L.J., in Gardner v. Jay ((1885) 29 Ch. D. 50, 58) "that discretion, like other judicial discretion, must be exercised according to common sense and according to justice."

In exercising its discretion under s. 34 the court should not refuse to stay the legal proceedings merely because one of the parties to the arbitration agreement is unwilling to go before an arbitrator and in effect wants to resile from the said agreement, nor can stay be refused merely on the ground that the relations between the parties to the dispute have been embittered or that the proceedings before the arbitrator may cause unnecessary delay as a result of the said relations. It may not always be reasonable or proper to refuse to stay legal proceedings merely because some questions of law would arise in resolving the dispute between the parties. On the other hand, if fraud or dishonesty is alleged against a party it may be open to the party whose character is impeached to claim that it should be given an opportunity to vindicate its character in an open trial before the court rather than before the domestic tribunal, and in a proper case the court may consider that fact as relevant for deciding whether stay should be granted or not. If there has been a long delay in making an application for stay and the said delay may reasonably be attributed to the fact that the parties may have abandoned the arbitration agreement the court may consider the delay as a relevant fact in deciding whether stay should be granted or not. Similarly, if complicated questions of law or constitutional issues arise in the decision of the dispute and the court is satisfied that it would be inexpedient to leave the decision of such complex issues to the arbitrator, it may, in a proper case, refuse to grant stay on that ground; indeed, in such cases the arbitrator can and may state a special case for the opinion of the court under s. 13(b) of the Act. Thus, the question as to whether legal proceedings should be stayed under s. 34 must always be decided by the court in a judicial manner having regard to the relevant facts and circumstances of each case.

Where the discretion vested in the court under s. 34 has been exercised by the trial court the appellate court should be slow to interfere with the exercise of the said discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach then it would certainly be open to the appellate court - and in many cases it may be its duty - to interfere with the trial court's exercise of discretion. In cases falling under this class the exercise of discretion by the trial court is in law wrongful and improper and that would certainly justify and call for interference from the appellate court. These principles are well established; but, as has been observed by Viscount Simon, L.C., in Charles Osenton & Co. v. Johnston ((1942) A.C. 130, 138) "the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case".

In the present case there is one more fact which has to be borne in mind in dealing with the merits of the controversy before us. The appellant has come to this Court by special leave under Art. 136; in other words, the appellant is not entitled to challenge the correctness of the decision of the High Court as a matter of right. It is only in the discretion of this Court that it can be permitted to dispute the correctness or the propriety of the decision of the High Court, and so in deciding whether or not this Court should interfere with the order under appeal it would be relevant for us to take into account the fact that the remedy sought for by the appellant is by an appeal which is a discretionary matter so far as this Court is concerned. It is in the light of these principles that we must consider whether or not the appellant's complaint against the High Court's order can be upheld.

The first point which calls for a decision relates to the construction of the contracts between the parties. As we have already stated two contracts were executed between them but their terms are substantially the same and so we may deal with the subsequent contract which was executed on February 20, 1953 (P. 2). Under this contract the respondent was engaged as the Editor of the Deccan Herald and his salary was fixed at Rs. 1,500 per mensem under paragraph 1(a). Paragraph 1(b) and (c) deal with the other amenities to which the respondent was entitled. Clause (d) of paragraph 1 provides that when the newspaper shows a profit in the annual accounts the Editor shall be entitled to 1/10th share of it; it is on this clause that the respondent's claim in the present proceedings is based. The terms on which the respondent had to remain in the service of the appellant are specified in paragraph 2(a) and (b). Paragraph 3 provides for the renewal of the contract for a further period of five years if it is found that such renewal is for the mutual advantage of the parties. This paragraph also provides that during the continuance of his employment the respondent shall not directly or indirectly be interested in any other newspaper business than that of the appellant or any other journalistic activities in competition with that of the appellant. It also stipulates that if the contract is determined the respondent shall not for a period of three years thereafter be directly or indirectly interested in any newspaper business of the same kind as is carried on by the appellant within the Mysore State. It would thus be seen that this paragraph shows the liability imposed on the respondent as a consideration for the benefit conferred on him by paragraph 1 in general and cl. (d) of the said paragraph in particular. Paragraph 4 contains an

arbitration agreement. It provides that if in the interpretation or application of the contract any difference of opinion arises between the parties the same shall be referred to arbitration. The arbitrator can be named by both the parties but if they failed to choose the same person each side will choose an arbitrator and the two will elect another person to complete the panel. Their award shall be final and binding on both the parties.

The High Court has held that the present suit is outside the arbitration agreement because neither party disputes the applicability of the terms of the contract in the decision of the dispute. The High Court thought that in the context the words 'application of the contract' meant a dispute as to the applicability of the contract, and since the applicability of the contract was not in question and no dispute as to the interpretation of the contract arose, the High Court held that paragraph 4 was inapplicable to the present suit. Mr. Purshottam, for the appellant, contends that the construction placed by the High Court on the word "application" is erroneous. According to him, any difference of opinion in regard to the application of the contract must in the context mean the working out of the contract or giving effect to its terms. In our opinion, this contention is well founded. The words 'interpretation or application of the contract' are frequently used in arbitration agreements and they generally cover disputes between the parties in regard to the construction of the relevant terms of the contract as well as their effect, and unless the context compels a contrary construction, a dispute in regard to the working of the contract would generally fall within the clause in question. It is not easy to appreciate what kind of dispute according to the High Court would have attracted paragraph 4 when it refers to a difference of opinion in the application of the contract. Since both the parties have signed the contract the question about its applicability in that form can hardly arise. Differences may, however, arise and in fact have arisen as to the manner in which the contract has to be worked out and given effect to, and it is precisely such differences that are covered by the arbitration agreement. We would accordingly hold that the High Court was in error in coming to the conclusion that the present dispute between the parties was outside the scope of paragraph 4 of the contract.

If the High Court had refused to stay the present proceedings only on this ground the appellant would no doubt have succeeded; but the High Court has based its decision not only, nor even mainly, on the construction of the contract. The tenor of the judgment suggests that the High Court considered the other relevant facts to which its attention was invited and the material findings recorded by the trial judge, and though it differed from some of the findings of the trial judge, on the whole it felt no difficulty in coming to the conclusion that there was no reason to interfere with the trial court's exercise of discretion under s. 34. That is why, even though the appellant has succeeded before us on the question of the construction of the arbitration agreement, having regard to the limits which we generally impose on the exercise of the jurisdiction under Art. 136, he must still satisfy us that we would be justified in interfering with the concurrent exercise of discretion by the two courts below, and that would inevitably depend upon the other relevant facts to which both the courts have referred, and on which both of them have relied though in different ways.

What then are the broad features of the case on which the trial judge and the High Court have respectively relied ? It is clear that the present dispute is not the result of an ordinary commercial transaction containing an arbitration clause. The contract in question is between a journalist and his employer by which the remuneration of the journalist has been fixed in a somewhat unusual manner by giving him a specified percentage in the profit which the Deccan Herald would make from year to year. According to the respondent he was surprised when the General Manager of the paper informed him that 75% of the overall expenditure incurred in the several activities of the appellant was being charged to the Deccan Herald, and that the capital liabilities were charged in the same

proportion; he thought that this system of accounting adopted by the appellant was repugnant to the material provisions in his contract. Indeed his case is that after he came to know about this system he protested to the Director, Mr. Venkataswamy, who has been taking active part in the affairs of the appellant, and Mr. Venkataswamy assured him that as from the beginning of 1955 the accounts were being separately maintained. It would appear that the information received by the respondent from the General Manager disillusioned him and that appears to be the beginning of the present dispute, according to the respondent's letter of May 24, 1955, (D. 1). On February 18, 1956, the respondent invoked the arbitration agreement and told Mr. Venkataswamy that Mr. Behram Doctor had agreed to work as arbitrator and give his award (D. 2). Mr. Venkataswamy who was addressed by the respondent as the Managing Director told him by his reply of March 5, 1956, that he was not the Managing Director and added that in his view it was not open to the respondent to invoke cl. 4 of the contract because he was award that no monies were payable to the respondent under cl. 1(d). It would thus be seen that Mr. Venkataswamy's immediate response to the respondent's request for arbitration was that the respondent could not invoke the arbitration clause (D. 3). It is true that on April 23, 1956, Mr. Venkataswamy attempted to explain this statement by saying that all that he intended to suggest was that no occasion for invoking the arbitration agreement had arisen. That, however, appears to be an unsatisfactory explanation (D. 10). Even so, Mr. Venkataswamy agreed to meet Mr. Behram Doctor and so on March 9, 1956, the respondent gave to Mr. Venkataswamy the address of Mr. Behram Doctor and asked him to see him (D. 5). He informed Mr. Behram Doctor accordingly (D. 6). It appears that subsequently Mr. Behram Doctor met both the respondent and Mr. Venkataswamy on May 9, 1956. The proceedings of this meeting which have been kept by Mr. Behram Doctor and copies of which have been supplied by him to both the parties indicate that Mr. Behram Doctor attempted to mediate between the parties and presumably the parties were agreeable to secure the mediation of Mr. Behram Doctor to resolve the dispute. We ought to add that the copy of the said proceedings produced by the appellant contains a statement that Mr. Venkataswamy at the outset told Mr. Behram Doctor that he had come on an unofficial visit and was speaking without the consent of the other directors. This statement is, however, not to be found in the copy supplied by Mr. Behram Doctor to the respondent. Prima facie it is not easy to understand why Mr. Behram Doctor should have omitted this material statement in the copy supplied by him to the respondent. That, however, is a matter which we do not propose to pursue in the present appeal. It is thus clear that though Mr. Behram Doctor was not appointed an arbitrator and no reference in writing was made to him an attempt was made by the parties to settle the dispute with the assistance of Mr. Behram Doctor, and that attempt failed. Having regard to the facts which have come on the record it may not be unreasonable to infer that the appellant was not too keen to pursue the matter on the lines originally adopted by both the parties before Mr. Behram Doctor.

It also appears that for some years the accounts of the Deccan Herald had not been separately kept as they should have been according to the respondent's case. The respondent alleges that they have not been kept separately throughout the ten years; but that is a matter which is yet to be investigated. If the accounts are not separately kept the question of allocating expenditure would inevitably arise and that can be decided after adopting some ad hoc principle in that behalf. A plea of limitation has also been indicated by the appellant and it has been suggested that the first contract having merged in the second it is only under the latter contract that the respondent may have a cause of action. Thus the effect of the two contracts considered together may have to be adjudged in dealing with the question of limitation. It has also been suggested that the respondent knew how the accounts were kept from year to year and in substance he may be deemed to have agreed with the method adopted in keeping the accounts. If this point is raised by the appellant it may involve the decision of the question about the effect of the respondent's conduct on his present claim. The appellant has also

suggested that the respondent has adopted an attitude of blackmailing the appellant and the respondent treats that as an aspersion on his character. The relations between the parties have been very much embittered and the respondent apprehends that the appellant, being a powerful company, may delay and seek to defeat the respondent's claim by protracting the proceedings before the arbitrators. It now looks impossible that the parties would agree to appoint one arbitrator, and so if the matter goes before the domestic tribunal the two arbitrators appointed by the two parties respectively may have to nominate a third one to complete the constitution of the domestic tribunal, and that it is said may easily lead to a deadlock. In the trial court attempts were made to settle this unfortunate dispute but they failed and the respondent's grievance is that the appellant adopted an unhelpful and non-co-operative attitude. It appears fairly clear that when the parties entered into the present contract and agreed that differences between them in regard to the interpretation and application of the contract should be referred to arbitration they did not anticipate the complications which have subsequently arisen. That is why an arbitration agreement may have been introduced in the contract in question. All these facts have been considered by both the courts, and though it is true that in their approach and final decisions in respect of these facts the two courts have differed in material particulars, they have in the result agreed with the conclusion that the discretion vested in them should be exercised in not granting stay as claimed by the appellant. Under these circumstances we do not think we would be justified in substituting our discretion for that of the courts below. It may be that if we were trying the appellant's application under s. 34 we might have come to a different conclusion; and also that we may have hesitated to confirm the order of the trial court if we had been dealing with the matter as a court of first appeal; but the matter has now come to us under Art. 136, and so we can justly interfere with the concurrent exercise of the discretion by the courts below only if we feel that the said exercise of discretion is patently and manifestly unreasonable, capricious or perverse and that it may defeat the ends of justice. Having regard to all the circumstances and facts of this case we are not disposed to hold that a case for our interference has been made out by the appellant. That is why we dismiss this appeal but make no order as to costs throughout.

Appeal dismissed.

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