

SUPREME COURT OF INDIA

Sunder Kukreja

Vs.

Mohan Lal Kukreja

C.A.No.1910 of 2009

(Markandey Katju and V.S. Sirpurkar JJ.)

26.03.2009

JUDGEMENT

Markandey Katju, J.

1. Leave granted.
2. This appeal by special leave has been filed against the impugned judgment dated 30.11.2007 of the Delhi High Court FAO (OS) No.469 of 2006.
3. Heard Shri Arun Jaitley learned counsel for the appellants and Ms. Nita Gokhale learned counsel for the respondents.
4. The dispute in this case is between brothers. The appellant Sunder Kukreja filed a petition under Section 20 of the *Arbitration Act, 1940* praying for an appointment of an Arbitrator. The parties are real brothers and were carrying on business with each other in the name and style of M/s. D.R. Kukreja and Company. Their mutual rights and obligations were governed by partnership deeds, the last of which was executed on 10.7.1984. In terms of Clause 11 of the said deed, disputes arising between the parties had to be resolved by way of arbitration before a sole arbitrator to be nominated by the parties. Clause 11 reads as follows:

“11. In the event of any dispute or disputes arising between the parties in the running of the partnership business or any matter relating to partnership it shall be referred to a sole arbitrator, agreed to in writing by the parties and the award given by the sole arbitrator shall be binding on all the parties. In case, the parties cannot agree to a sole arbitrator, the matter will be decided in accordance with the Indian Arbitration Act, 1940.”
5. It was contended by the respondent true that the partnership was dissolved by the parties with mutual consent in terms of the retirement deed dated 16.8.1990 alleged to have been executed by the appellant. However, the appellant denied executing any such retirement deed.

6. Subsequently the petition under Section 20 of the Arbitration Act was filed by the appellants seeking a direction for filing the arbitration agreement dated 10.7.1984 in the Court and for reference of the dispute between the parties to arbitration in terms of Clause 11 thereof. It was alleged in the petition under Section 20 that disputes relating to payment of profits earned by the partnership firm and the interest on the said amount had arisen between the parties which called for adjudication by the arbitrator under Clause 11. The petitioner further alleged that the respondent had been mismanaging the affairs of the partnership by employing undesirable elements and other dubious means, thereby disintitling himself to remain in control of the partnership.

7. The said petition under Section 20 was opposed by the respondent herein who filed a written statement contending that the petitioner has misrepresented the true facts and that there was no subsisting arbitration agreement between the parties in the light of the retirement deed dated 16.8.1990 allegedly executed by the petitioners by which the partnership between the parties stood dissolved and all claims stood completely satisfied. It was also alleged that the petitioners had not come to the Court with clean hands and had deliberately omitted to mention the fact of their retirement from the business under the retirement deed.

8. The genuineness of the retirement deed was, however, challenged by the appellants herein (the petitioners in the petition under Section 20) who asserted that no retirement deed has been executed by them. According to the petitioners, the alleged retirement deed was a forged and fabricated document which was never executed by the petitioners, and which was prepared to somehow usurp the share belonging to the other partners in the firm without settling the accounts.

9. By an order dated 1.5.1996, the learned Single Judge hearing the arbitration petition referred the disputed deed of retirement for examination and opinion to the Central Forensic Science Laboratory (CFSL). The document in question was accordingly examined by the CFSL who reported that the alleged signatures of the petitioners on the alleged retirement deed were not genuine.

10. The learned Single Judge held that the plea that there was no dispute because of the alleged retirement deed and receipts can be easily gone into by the arbitrator, and in view of the report of the forensic expert between the parties it cannot be prima facie said that the dispute does not subsist. The report of the forensic expert creates a substantial doubt in the stand taken by the respondent of the alleged retirement of the appellant from the partnership.

11. The learned Single Judge relied on the decision of this Court in *Erach F.D. Mehta vs. Minoo F.D. Mehta*¹ and held that the arbitration clause in the present case is wide enough to include all the disputes sought to be referred. Hence the learned single Judge allowed the petition under Section 20.

12. In appeal, however, the Division Bench of the High Court was of the view that in case there is a dispute as to the very existence of an arbitration clause by reason of supersession of the agreement in which the same is contained by another subsequent agreement arrived at

between the parties, the said dispute cannot be referred to arbitration. The Division Bench hence set aside the judgment of the learned Single Judge and remanded the matter to learned Single Judge for a fresh consideration of the question whether the alleged retirement deed was never executed between the parties.

13. In our opinion the judgment of the Division Bench cannot be sustained. It is true that as held by the seven Judge Full Bench decision of this Court in *M/s. S.B.P. & Co. vs. M/s. Patel Engineering Ltd. and Anr.*² (vide para 46) the Chief Justice or the designated Judge has the right to decide the question of the existence of a valid agreement and the existence or otherwise of a live claim. However, as pointed out by this Court in *M/s. Shree Ram Mills Ltd. vs. M/s. Utility Premises (P) Ltd.*³ (vide para 27) the Chief Justice or his designate Judge has to examine the claim as to whether the dispute is a dead one in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations, or whether it is still alive. In the same judgment in *M/s. Shree Ram Mills Ltd. vs. M/s. Utility Premises (P) Ltd.* (supra) this Court observed:

“.....”It is in this sense that the Chief Justice has to examine as to whether their remains anything to be decided between the parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that their remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal.....”

(emphasis supplied)

14. It may be mentioned that the decision of this Court in *M/s. Patel Engineering case* (supra) and *M/s. Shree Ram Mills Ltd. case* (supra) pertained to the Arbitration and Conciliation Act, 1996 and not to the Arbitration Act of 1940. The present case is governed by the Arbitration Act of 1940, but in our opinion even if it is governed by the 1940 Act that will not make any difference in the present case. We are only adopting the logic in those decisions. The decision of this Court in *Damodar Valley Corporation vs. K.K. Kar* AIR 1974 SC 158 (vide para 7) is in our opinion distinguishable on facts because in that case there was no report of an expert that the subsequent deed was fake, as is in the present case.

15. In the present case the learned Single Judge had referred the matter to a forensic expert who gave a report that the alleged retirement deed dated 16.8.1990 was not genuine and had

not been executed by the appellant. On the basis of this report of the forensic expert, the learned Single Judge recorded a prima facie satisfaction that the dispute is still alive and deserved to be referred to the arbitrator.

16. There is no dispute in this case about the validity or existence of the partnership deed or the arbitration clause therein.

17. In our opinion the learned Division Bench was not correct in holding that the dispute should not have been referred to the arbitrator in view of the alleged retirement deed dated 16.8.1990. The very genuineness of the said retirement deed was challenged and in fact the forensic expert gave a report that it was not genuine. The learned Single Judge has recorded prima facie satisfaction that the dispute had not become dead. Hence, in view of the decision of this Court in *M/s. Shree Ram Mills Ltd. vs. M/s. Utility Premises (P) Ltd.* (supra) it would have been appropriate to have left the question regarding the genuineness of the alleged retirement deed to be decided by the arbitrator.

18. In view of the above discussion, we set aside the decision of the Division Bench and we appoint Mr. Justice D.P. Wadhwa, retired Judge of the Supreme Court as the sole Arbitrator to decide the dispute between the parties, including the dispute whether the alleged retirement deed was genuine or not. Hon'ble Mr. Justice D.P. Wadhwa can fix his own terms of emoluments and other requirements.

19. The appeal is allowed. No order as to costs. Copy of this judgment shall be sent forthwith by the Registry of this Court to Hon'ble Mr. Justice Wadhwa.

¹*AIR 1971 SC 1653*

²*JT 2005(9) SC 219*

³*JT 2007(4) SC 501*