

CALCUTTA HIGH COURT

Arbitration: Priyabrata Bose

Vs.

Phani Bhusan Ghose

(Ameer Ali, J.)

11.01.1937

ORDER

Ameer Ali, J.

1. This matter arises out of certain partnership. I have already ruled that partnership in Bengal is a relationship based upon mutual mistrust, and when the business is in musical instruments as here, one can be certain that there is going to be long and lucrative discord. That has happened. The partnership deed is dated 10th March 1933. C1. 15 of the deed is a submission to two named arbitrators Mr. H.K. Mitra and Mr. H.N. Bose, Mr. Mitra being a barrister, Mr. Bose being an attorney. Mr. Bose was in fact the attorney for Mr. Ghose, and that is one of the points taken, the question being, whether that relationship was known to the parties at the time. There was a dissolution in December 1933 and this dispute relates to a sum of L 7,000 which Mr. Bose claims that Mr. Ghose agreed to pay him in addition to taking over the liabilities of the partnership on Mr. Bose's retirement. The arbitration commenced in May 1936 the first meeting being on 22nd May 1936 and the last on 26th June 1936. It was, as may be seen from the papers put before me what I might call an arbitration deluxe. Both the arbitrators are legal gentlemen. Counsel of standing appeared for both parties and the preliminary point of jurisdiction was argued with much tenacity and skill during the six sittings. The arbitrators realizing that this arbitration was one of those designed, at any rate, not to put a speedy end to the strife became anxious about their fees, not an unnatural anxiety, and this matter weighed upon their minds, so far as I can see from the minutes considerably. The arbitrators therefore first directed the parties to pay the fees in advance on alternate days.

2. This having broken down by Mr. Ghose not providing the money, they optimistically directed the defendant to pay for the first three days, the respondent for the next three days, etc. The claimant did pay for the first three days; the respondent did not pay for the next three and when it came to the sixth day the arbitrators were still more anxious about their position and the arbitrator Mr. H.N. Bose took up the position at this meeting that as the parties could not make arrangements for payment of fees in advance he would act no further. The precise effect of what he said or did on that day whether or not amounts to a refusal to act within Section 8, Arbitration Act, is the second point to be considered on this application. It is to be remembered that this arbitrator Mr. Bose was most anxious that the parties should not prolong the matter, and on the preliminary point of jurisdiction to state a case for the opinion of the Court, a course which

neither party seemed anxious to pursue. There is therefore no criticism to be made in any way on the conduct of either arbitrator in the matter. In point of fact after Mr. Bose had expressed his intention, the terms of which I shall refer in greater detail, the other arbitrator Mr. Mitra feeling there having been six sittings, the preliminary point of law having been discussed, they should at least come to a finding on that point and in view of that opinion the matter was adjourned sine die to see whether the parties could agree to some method and there the matter was left. The notice of motion was taken out so long ago as 6th August last and is for a fresh arbitrator to be appointed in the place of Mr. H.N. Bose, or in the alternative, that Mr. Mitra be directed to act as the sole arbitrator.

3. The two grounds either for the removal of Mr. Bose, or for the appointment of a fresh arbitrator in his place are (1) Interest of the arbitrator, and (2) Refusal to act. Before expressing my findings on those matters and upon the additional point of law argued by Mr. N.N. Bose for the respondent to the effect that Section 8 does not apply to a case of this kind, I must refer to the view I originally took, namely, that this was one of those cases in which the Court should interfere by way of revoking the arbitration. The impression I received from the materials before me was confirmed by what I heard from the arbitrators in person when I think on a subsequent date I asked them whether they were prepared to continue and under what conditions. They both stated to me that they were prepared to continue but that they would like their fees to be paid, at any rate, before the award was given and they would also like to be invested or infused with some power to shorten the proceedings before them. The precise nature of that power they were unable to explain, nor do I think there is any. When I had to all intents and purposes made up my mind to exercise the power I have referred to, Mr. B.C. Ghose for the applicant raised the question of possible bar to his client's claim by limitation. The question I have to decide is whether the risk of that claim being barred should outweigh the considerations I have referred to. The point has been argued before me and Mr. Bose has referred me to *Sassoon's Case in Ram Dutt Ram Kissen v. E.D. Sassoon and Co*¹. for a decision that even where the period sought to be deducted is time taken in an arbitration and the proceeding in question is a suit, the period during which the arbitration took place does come within the terms of Section 14. I myself take that view. On the other hand the fact remains that in that case it was arbitration and the whole contents of the Act was applied by analogy. There is therefore some element of doubt in the matter and I have come to the conclusion that I should not be justified in putting that risk upon the claimant. It may be that he has other reasons for wishing to continue with the arbitration rather than go to suit. It may be the respondent had other reasons for wishing to avoid it, but as things are the parties having chosen their course and being desirous of running themselves and the fact that the order which suggested itself to me might deprive the plaintiff of his claim, I think I should be wrong of my own motion in revoking the arbitration. There remain the questions raised in the application itself. The first question is one quite impossible to decide on affidavit and almost impossible to decide even upon evidence, the question of the knowledge of interest. Interest is admitted. My conclusion for the very little it is worth is that the interest was known at the time, but possibly in cases like this when disputes arise, it assumes an importance which does not occur to the parties at the time the submission is entered into. On the first point, therefore, I rule against the applicant.

4. The second point again is not an easy one although the minutes of the arbitration are

¹ AIR 1929 P C 103

before me. It is largely a question of impression. I have read the minutes through and the letter of

Messrs Leslie & Hinds, and on this point I have come to the conclusion that there was a refusal. It seems to me, as I have said before, rather hard that arbitrators who are in a difficulty such as this cannot with impunity make one or two refusals without which it seems to me they can never get the parties to agree to anything, and I think Mr. Bose at the moment in question felt that the matter was hopeless, the parties could not agree and it was no use hoping for an arrangement without which he has not prepared to continue, always remembering that the parties were not prepared on the technical point of jurisdiction to have a case stated for the opinion of the Court. There remains the question of Section 8. On this point Mr. Bose has suggested to me that I should follow the view which is implied in the English authorities. On the other hand this Court has taken the view, although the matter did not arise for decision, that under Section 8 this Court could exercise the power which the applicant claims to have exercised, and I think that I must follow that authority. I appoint a new arbitrator in place of Mr. Bose. Arrangements must be made by the party who wishes the arbitration to continue for payment of the retiring arbitrator's fees. I appoint Mr. Guha, a member of the Bar of considerable standing and reputation. His name has been suggested to me. He has been in Court and although not briefed was assisting Mr. N.N. Bose. In the circumstances I appoint him.

5. Whether the parties will even now be able to make the matter effective I do not know, but I have no doubt that the arbitrators will do their best. The fees due to Mr. H.N. Bose must be paid by the claimant in the first instance. The costs of this application as also the question of ultimate liability will abide the result of the arbitration. The arbitrators will have liberty to proceed with the arbitration before the drawing up of the order.

¹ AIR 1929 P C 103