CALCUTTA HIGH COURT

Teamco Private Ltd

Vs.

T.M.S. Mani

A.F.O.O. No. 213 of 1965

(P. Chatterjee and A.N. Sen, JJ.)

18.02.1966

JUDGMENT

A.N. Sen, J.

1. This appeal has been preferred against the judgment and decree of the Subordinate Judge, 10th Court, Alipore, whereby the learned Judge has directed the filing of the arbitration agreement in court.

2. The facts of the case have been fully set out in the judgment of the court below and it is not necessary to repeat the same. It may only be noted that there is not much of dispute with regard to the facts.

3. The facts relevant for the purpose of this appeal may, however, be briefly stated,. T. M. S. Mani, the plaintiff in the action and the respondent in this appeal was appointed a selling agent and sales organizer by Messrs Teamco Private Ltd., the defendant in the action and the appellant herein under an agreement in writing dated 1-4-61. There is an arbitration clause contained in clause 11 of the said agreement. Clause 11 of the said agreement provides as follows :

> 'In case of any dispute arising between the parties, the matter should be referred to the arbitrators, elected by the parties and their decision on the subject will be final".

T. M. S. Mani filed an action under section 20 of the Arbitration Act in the 10th Court of the Subordinate Judge, 24 Parganas, Alipore praying that the agreement be filed in court. The said action was registered as Title suit No. 40 of 1963 in the 10th Court of the Subordinate Judge, 24 Parganas, Alipore with T. M. S. Mani as the plaintiff in the suit and Messrs Teamco Private Ltd. as the defendant therein. The suit was contested by the defendant. Two principal points were urged on behalf of the defendant in the trial court. The first point was that the suit was not maintainable in law, as it was not open to the plaintiff to proceed under Section 20 of Chapter III of the Arbitration Act, the plaintiff having previously taken steps under Section 8 of Chap. II of the said Act. The second point argued was that the arbitration agreement in question was vague and uncertain and the same, therefore, could not be enforced in law. The learned subordinate

Judge held against the defendant on both the points and decreed the suit in favor of the plaintiff. Hence this appeal has been filed by the defendant.

4. Mr. Bhabra, the learned counsel appearing on behalf of the defendant-appellant, has raised before us the very same points and has submitted that the decision of the learned Subordinate Judge is erroneous and wrong.

5. The main contention of Mr. Bhabra, the learned counsel for the appellant, has been that the arbitration agreement in question is vague and uncertain and is not enforceable in law.

6. The arbitration clause in the agreement has already been set out. Mr. Bhabra argues that the arbitration agreement is vague and uncertain for two reasons; firstly, it is vague and uncertain with regard to number of arbitrators to be appointed and secondly it is vague and uncertain with regard to the manner or mode of appointment of the arbitrators. Mr. Bhabra lubmits that the arbitration clause provides that disputes should be referred to "The Arbitrators" and he contends that there may be any number of arbitrators provided the number is more than one. According to Mr. Bhabra, the expression. "The Arbitrators" used in the said clause is absolutely vague and does not indicate how many arbitrators will be there except that the said expression clearly indicates that the number of arbitrators must be more than one. Mr. Bhabra contends that, as there is no certainty to the number of arbitrators to be appointed except that such number must be more than one, the said clause becomes vague and uncertain and there can be no valid arbitration agreement, enforceable in law. Mr. Bhabra has also drawn our attention to the judgment of the Court below wherein the learned Subordinate Judge has himself held "No doubt the number of arbitrators has not been mentioned and there is some vagueness in this respect". Mr. Bhabra further contends that the Arbitration Act provides for reference to one, two, three or more arbitrators and no limitation or restriction is imposed by the said Act with regard to such number of arbitrators. Mr. Bhabra refers to sections 4, 8, 9 and 10 of the Arbitration Act in support of this argument. According to Mr. Bhabra on a true construction of the said arbitration clause it is not possible to ascertain the number of arbitrators to whom the parties intended to refer their disputes excepting that the parties had clearly intended that such reference must be to more than one arbitrator.

7. Mr. Bhabra further contends that the provision in the arbitration clause of reference of such disputes to the arbitrators "elected by the parties" is equally vague and uncertain. Mr. Bhabra argues that on a construction of the said clause it is not possible to find out how such arbitrators are to be elected. Mr. Bhabra submits that the word 'elect' means according to Shorter Oxford English Dictionary "To pick out, choose; to choose in preference to an alternative; to choose by vote for any office or position". Mr. Bhabra contends that the said clause is clearly vague as the same does not give any indication as to how the election or the choosing of such arbitrators is to be made by the parties. According to Mr. Bhabra on a reading of the said clause it cannot be inferred how the arbitrators are to be elected or chosen, whether they are to be chosen by common consent of both the parties or whether any party can choose its own arbitrators without the consent of the other party. Mr. Bhabra has argued that an arbitration agreement should be strictly construed and should be construed with regard to the language used and Mr. Bhabra submits that on such construction the court should hold that the arbitration clause contained in the said agreement is absolutely vague and uncertain and does not in law amount to an arbitration agreement.

8. Mr. Bhabra has referred to certain decisions in support of his contention that a vague and uncertain arbitration agreement cannot be enforced in a court of law. It is not necessary to refer to the decisions cited by Mr. Bhabra, as the legal position to my mind, is well settled. If the agreement is vague and uncertain and is not capable of being made certain, there is really no agreement in law and as such the question of enforcing any such agreement cannot arise. Section 29 of the Indian Contract Act declares all agreements, the meaning of which is not certain or capable of being made certain to be void.

9. Mr. Bhabra has next contended that the suit was not maintainable and the agreement could not be filed under section 20 of the Arbitration Act, as the plaintiff-respondent had previously elected to proceed under chapter II of the Arbitration Act by issuing a notice under section 8 of the said Act. Admittedly, before the institution of the present action, the plaintiff respondent on the 27th of April 1963 addressed a letter to the managing director of the defendant-appellant and in paragraphs 8, 9, 10 and 11 of the said letter the plaintiff-respondent had written as follows –

> "8. Under section 8 of the Indian Arbitration Act (Act 10 of 1940) whereas difference and disputes have arisen between us and in pursuance of paragraph 11 of the agreement dated 1-4-61, I hereby demand of you to refer the entire dispute to arbitration.
>
> 9. Please take notice that in terms of paragraph 11 of the agreement dated 1-4-61 I elect Sri T. A. Menon, A. M., Dip. Econ., LLB. I. C. R., Advocate, High Court and Supreme Court as the arbitrator named by me and he has consented to act as an arbitrator in the dispute.
>
> 10. I am now to call upon you to name the arbitrator appointed by you whose consent you should obtain in advance, within 7 days of receipt thereof, to act along with Sri. T. A. Menon in adjudicating and making an award in this dispute.
>
> 11. Please take notice that in the event of your failure to comply with the above appointment I will have no alternative except to take recourse to Court".

10. Relying on this letter Mr. Bhabra contends that the plaintiff respondent having elected to proceed under Chapter II of the Arbitration Act, has precluded himself from bringing the action under Section 20 which is in Chapter III of the said Act. In support of this contention Mr. Bhabra has referred to us Clause (i) of Section 20 of the Arbitration Act which reads as follows :-

> "Section 20(i). Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it and where a difference has arisen to which the agreement applies, they or any of them instead of proceeding under Chapter II may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court."

11. Mr. Bhabra has also cited a decision reported in *Venkata Surya Rao v. Venkata Rao*[1], Kumarayya, J. in delivering judgment in that case has held:

> "Thus, in order to attract the provisions of Section 20, three conditions are necessary; (i)

> that the arbitration agreement must have been entered into before the institution of any suit with respect to the subject matter of any agreement or any part of it; (ii) there must have arisen a difference to which the agreement applies; and (iii) the proceedings under Chapter II must not have been started. The conditions prescribed are cumulative and not mutually exclusive. Unless these conditions are satisfied, there can be no occasion for making an application under Section 20 with the request that the agreement be filed in Court. Nor could the Court entertain and proceed with the case as prescribed in that provision. It follows this section has no application at all to agreements to refer to arbitration, disputes in pending suits as it has intended to cover only those cases where the parties without having recourse to litigation have agreed to refer their differences to arbitration. It is equally clear that in case of difference to which the agreement applies, the party can apply to the Court under this provision if he has not yet proceeded under Chapter II. The words "instead of proceedings under Chapter II" used in Section 20 mean and necessarily imply that the application to the Court for filing the award is only an alternative step and not a simultaneous or a supplemental step."

12. Mr. Mukherjee, learned Advocate appearing on behalf of the plaintiff respondent, has submitted before us that the arbitration clause in the agreement is valid and enforceable. Mr. Mukherjee contends that the arbitration clause is not vague and uncertain and the arbitration clause clearly contemplates that disputes between the parties will be referred to arbitration and there is no vagueness with regard to such intention. According to Mr. Mukherjee the arbitration clause in the agreement postulates that any disputes between the parties will be referred to arbitration and that the number of arbitrators to be appointed and the manner or mode of their appointment will be agreed upon in future by the parties. In other words, it is Mr. Mukherjee's contention that the arbitration clause implies that disputes will be referred to arbitration but the same leaves it open to the parties to agree at a future date as to the number of arbitrators to be appointed and as to how such arbitrators are to be appointed; if the parties so agree they can appoint arbitrators by common consent, or each party may appoint its own arbitrator or arbitrators. Mr. Mukherjee admits that the language used in the arbitration clause, "the matter should be referred to the trbitrators elected by the parties", does not efinitely convey any idea as to the number of arbitrators to be appointed and as to how they should be appointed and that those matters are left to be agreed upon between the parties at a future date. Mr. Mukherjee argues that such an arbitration clause is not, however, vague and uncertain because the parties by agreement can agree to the number of arbitrators to be appointed and to the manner of their appointment and in the event of the parties failing to agree, the arbitration will proceed in accordance with the provisions of the Arbitration Act. According to him Rule 1 of the First Schedule to the Arbitration Act which provides for reference to a sole arbitrator will then apply. In support of his contention Mr. Mukherjee has relied on a decision of the Division Bench of this Court reported in AIR 1953 Calcutta 488. The arbitration clause in the said agreement which was the subject-matter of construction in

[1] AIR 1963 And Pra 286

that case was worded as follows:

> "All disputes whatsoever arising in or out of or in connection with the said contract or arising in any way whatsoever in connection with any other contract for the supply of

> goods by the company to the buyers shall be referred to arbitration at Calcutta. The decision of its Tribunal of Arbitration shall be final and binding on both the parties either of whom may make the same Rule of Court."

The validity of the said arbitration clause was challenged on the ground of vagueness and uncertainty, as no arbitrator had been named in the agreement and the appointment of arbitrator or arbitrators had also not been specified. Chief Justice Chakraborty who delivered the judgment held on a construction of the said clause that the arbitration agreement contained therein was not vague and uncertain although no arbitrator had been named in the agreement and the mode of appointment had not been specified inasmuch as Rule 1 of the First Schedule to the Arbitration Act was applicable. In my view the said decision is not of any assistance to the plaintiff-respondent in view of the language used in the arbitration clause in the agreement in question.

13. Section 3 of the Arbitration Act provides as follows :-

> "An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

Rule 1 of the First Schedule to the Arbitration Act reads- "unless otherwise expressly provided, the reference shall be to a sole arbitrator." I have already quoted the arbitration clause which was the subject-matter of construction in the case reported in AIR 1953 Calcutta 488. From the clause contained in the said arbitration agreement no different intention could be gathered and as such by virtue of the provisions contained in Section 3 of the Arbitration Act, Rule 1 of the First Schedule to the said Act could be made applicable; and in view thereof it was held in mat case that the arbitration clause was not vague and uncertain.

14. The language used in the arbitration clause in the agreement in question is completely different. Every agreement will have to be construed with reference to the language used therein. Rule 1 of the First Schedule to the Arbitration Act shall have no application if a different intention is expressed in the arbitration agreement, as clearly provided in Section 3 of the Arbitration Act. The question that arises for consideration is whether in view of the language used in the arbitration clause in the agreement in question a different intention has been expressed therein. The language used in the arbitration clause in question is, "The matter should be referred to the arbitrators elected by the parties." It is to be noted that the arbitration clause in the agreement in question uses the expression arbitrators" and the use of the expression "arbitrators" clearly expresses in my view an intention that the reference will not be to a single arbitrator and therefore expresses a different intention ana rules out the applicability of Rule 1 of the First Schedule to the Arbitration Act which provides for reference to a sole arbitrator. In the case reported in AIR 1953 Calcutta 488 cited by Mr. Mukherjee I find that at p. 490 Chief Justice Chakraborty has observed as follows :-

> "The Rule contemplates an agreement which is silent as to the number of arbitrators. If the agreement attempts to say that the appointment will be otherwise than by consent of all the parties it cannot possibly do so without making some reference to the number. It will have to say that the arbitrator or arbitrators will be appointed by one or some of the

> parties or by a third party and as soon as it does so, it will go outside the rule. If it speaks of the appointment of "the arbitrator", there will be no scope for the application of the Rule because a single arbitrator will be indicated by the agreement itself. If it speaks of the appointment of "arbitrators", then also will the Rule be excluded, because it will be "otherwise expressly provided" that there will not be a sole arbitrator. The only type of agreement which can come under the Rule is, therefore, an agreement which speaks expressly of arbitration by consent of the parties in which case there is no reference to the number of arbitrators or an agreement which says nothing about the mode of appointment in which consent of all the parties will be a necessary implied condition."

15. I respectfully agree with the observations made by Chief Justice Chakraborty and I have no hesitation in holding that Rule 1 of the First Schedule to the Arbitration Act cannot have any application in the instant case in view of the language used in the arbitration clause in the agreement in question.

16. Mr. Mukherjee has also referred to Halsbury's Laws of England, 3rd Edition, Vol. II, Article 27 which reads as follows :-

> "27. Reference to single arbitrator. Unless a contrary intention is expressed and if no other mode is provided, every arbitration agreement provides that the reference shall be to a single arbitrator".

This passage is also of no assistance as I have already held that a contrary intention is expressed in the arbitration clause in the agreement in question.

17. No other construction of the said arbitration clause in the agreement has been suggested by Mr. Mukherjee and no other arguments have been advanced by him.

18. My first impression on reading the arbitration clause was that it intended to mean that disputes should be referred to two arbirators, one to be appointed by each of the parties, Mr. Mukherjee has submitted that this cannot be meaning of the arbitration clause. According to his reading of the arbitration clause, whatever may be the number of arbirators, they must be appointed by common consent of both the parties and in the event of failure of agreement between the parties, Rule 1 of the First Schedule to the Arbitration Act will apply. Mr. Bhabra also does not accept the said meaning and he eontends that such meaning is not expressed by the language used in the arbitration clause and eannot be gathered on a proper construction thereof and words which are not there in the said clause will have to be imported to give any such meaning.

19. In the case of *Ganpatrai Gupta v. Moody Brothers Ltd. reported in*[2] S. B. Sinha, J. observes at p. 143

[2](1950) 85 Cal LJ 136

> "Arbitration agreements should be strictly construed. Clear language should be introduced into any contract which is to have the effect of ousting the jurisdiction of the Courts and compelling the parties to have recourse to arbitration for decision of disputes".

It will be helpful in this connection to refer to the observations of Viscount Maugham in the case of *G. Scammel and Nephew Ltd. v. H. C. and J. G. Ouston*[3] His Lordship observed as follows :

> "In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done, it would be impossible to hold that the contracting parties had the same intention; in other words, the consensus ad idem would be a matter of mere conjecture."

In the same case Lord Wright in his speech has observed that "The object of the Court is to do justice between the parties and the Court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not at mere form.....But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the Court can safely act, the Court has no choice but to say that there is no contract". These observations of Lord Wright have been quoted with approval by the Supreme Court in the case of *Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd. reported in*[4]

20. On a true construction of the arbitration clause in the agreement in question I am not satisfied having regard to the language used therein, that the language has the effect of carrying out the intention of the parties to enter into any valid arbitration agreement. In the words of Viscount Maugham quoted earlier,

> "it is impossible to hold that the contracting parties had the same intention; in other words, the consensus ad idem would be a matter of mere conjecture".

The arbitration clause in the agreement in question is clearly vague and uncertain and the meaning thereof cannot be determined with any reasonable degree of certainty. The language used fails to evince any definite meaning on which the Court can safely act. My reason for thinking that the clause is vague is not only based on the actual vagueness and unintelligibility of the words used but is also confirmed by the diversity of the explanations which appear and are sought to be tendered with regard to the meaning thereof. If the parties have failed to express their intention of having their disputes settled by arbitration by using clear, meaningful and unambiguous language and have failed to enter into a valid arbitration agreement, the Court has no choice but to say that there is no contract and it is not open to the Court to create a contract for the parties, I agree with Mr. Bhabra's contention that the arbitration clause is unenforceable and that there is no valid arbitration agreement between the parties. If there be no valid arbitration agreement between the parties there can be no question of filing the same in Court under Section 20

[3] 1941 AC 251
[4] AIR 1958 SC 512

of the Arbitration Act.

21. Having regard to my conclusion that there is no valid arbitration agreement between the parties, I do not consider it necessary to deal with the other point argued by Mr. Bhabra as to the

maintainability of the action under Section 20 of the Arbitration Act in view of the plaintiff-respondent having previously issued a notice under Section 8 of Chapter II of the Arbitration Act.

22. I, therefore, allow the appeal. The order of the trial Court is set aside and the suit is hereby dismissed. In the facts of this case I direct that the parties will pay and bear their own costs of the appeal as also of the proceedings in the Court below.

Chatterjee, J.

23. I agree.
Appeal allowed.