
(2001) 1 KarLJ 170

Karnataka High Court

Case No: Writ Petition No"s. 16710 and 16711 of 1999

R.K. Agrawal and
another

APPELLANT

Vs

B.P.K. Johri and others

RESPONDENT

Date of Decision: Oct. 7, 1999

Acts Referred:

Arbitration and Conciliation Act, 1996 " Section 12 (3) (a), 13 (4), 13 (5), 34#Constitution of India, 1950 " Article 14

Citation: (2001) 1 KarLJ 170

Hon'ble Judges: V.P. Mohan Kumar, J

Bench: Single Bench

Advocate: Dr. R.B. Krishnan, for M/s. Murthy and Kumar, for the Appellant; Sri Basavaprabhu S. Patil, Sri V. Lakshminarayana and Ms. R. Sarojini Muthanna, Additional Central Government Standing Counsel, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. These writ petitions raise a short point, which is urged by Dr. R.B. Krishnan, learned Counsel for the petitioner, largely inspired by the English

Legislation on the subject. The petitioner challenges the constitutional validity of Section 13(4) and Section 13(5) of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as "Act"). To assail the statutory provision, in essence, he relies on the principle nemo debet esse

judex in propria causa i.e., no man can be judge in his own cause. And he draws sustenance for the challenge from the Model Law on International

Commercial Arbitration. The relevant brief facts are as follows:

The petitioners and respondents 2 to 4 who belong to the very same family partitioned their family business under a Memorandum of Settlement

dated 30-3-1996, whereby while separating they agreed that the 1st respondent be the sole Arbitrator to arbitrate any dispute that might arise

amongst them in the event the dispute arising cannot be sorted out mutually. The disputes having arisen, the 1st respondent was called upon to

arbitrate the disputes. It is alleged that after the 1st respondent entered upon arbitration, the petitioners felt that circumstances existed that gave rise

to justifiable doubts in their minds as to the independency and impartiality of the 1st respondent. Thereupon, alleging that the grounds referred to in

Section 12(3)(a) of the Act existed the petitioners on 6-11-1997 made initially an application to the Court of the Civil Judge, Bangalore, u/s 34 of

the Act as AC No. 36 of 1997 seeking to change the Arbitrator. That application is pending and no interim orders have been made therein.

Subsequently an application was moved before 1st respondent himself expressing their apprehensions and misgivings, as contemplated u/s 13(2) of

the Act. Since the 1st respondent has not withdrawn from his office, nor has the contesting respondents agreed to the challenge and as the remedy

open to the petitioners in such circumstances is only availing an appeal u/s 34 of the Act by way of challenge as provided u/s 13(4) of the Act after

the making of the award by the Arbitrator, the petitioners contend that the absence of an appellate remedy renders the statute referred to above

arbitrary and opposed to Article 14 of the Constitution of India. This in brief is the gravamen of the challenge.

2. Dr. R.B. Krishnan, the learned Counsel in this behalf invites my attention to various provisions of the UNCITRAL Model on International

Commercial Arbitration. According to him the Arbitration and Conciliation Act, 1996 has been framed in terms of the provision therein. As such

he urges, that pari materia provisions should exist in the Indian Legislation. In this behalf he relies on Article 12(2) and Article 13(2) of the

UNCITRAL Model. Article 12(2) reads as under:

12(2) An Arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he

does not possess qualifications agreed to by the parties. A party may challenge an Arbitrator appointed by him, or in whose appointment he has

participated, only for reasons of which he becomes aware after the appointment has been made"".

The Article is pari materia with Section 12(4) of our Act read with Section 13(3) and (4) of the Act. Likewise Article 13(3) is also referred to by

the learned Counsel. It reads thus:

13(3) If a challenge under any procedure agreed upon by the parties or upon the procedure of paragraph (2) of this Article is not successful, the

challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the Court or other authority

specified in Article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the Arbitral Tribunal,

including the challenged Arbitrator, may continue the arbitral proceedings and make an award"".

3. The grievance of the petitioner is that there is no comparable provision in our statute which constitutes a different agency to consider the

allegation relating to partiality etc., and further confers a right of appeal against the decision of that authority. He also points out even when the

Arbitrator holds against bias etc., there is no forum provided to challenge such a finding. The Counsel points out that Section 13(5) engrafted in this

behalf does not completely provide for the redressal of the grievance of a party complaining of grievance contemplated in Section 12(3)(a) of the

Act. Section 13 does not confer a right to approach an independent agency for the adjudication of the allegations made against the Arbitrator but

he himself is called upon to sit in judgment over the allegation against himself. In other words, he judges his own cause. He further contends that

even after the said decision no appeal is provided directly to challenge the decision of the Arbitrator who declines to withdraw from the arbitration.

Section 13(4) and Section 13(5) reads as under:

13(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the Arbitral

Tribunal shall continue the arbitral proceedings and make an arbitral award.

13(5) Where an arbitral award is made under sub-section (4), the party challenging the Arbitrator may make an application for setting aside such

an arbitral award in accordance with Section 34"".

Article 13(3) of UNCITRAL Model Law referred to supra, provides that if the challenge in similar circumstances is not successful then the

aggrieved party may,--

Request the Court of other authority specified in Article 6 to decide the challenge.

The argument is that the English Legislation has kept this aspect in mind and has enacted Section 24 in the (English) Arbitration Act, 1966. That

section reads as under:

24. Power of Court to remove Arbitrator.-(1) A party to arbitral proceedings may (upon notice to the other parties, to the Arbitrator concerned

and to any other Arbitrator) apply to the Court to remove an Arbitrator on any of the following grounds:

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

(b) that he does not possess the qualifications required by the arbitration agreement;

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

(d) that he has refused or failed:

(i) properly to conduct the proceedings: or

(ii) to use all reasonable dispatch in conducting the proceedings or making an award,

and that substantial injustice has been or will be caused to the applicant.

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an Arbitrator, the Court shall not exercise its

power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) The Arbitral Tribunal may continue the arbitral proceedings and make an award while an application to the Court under this section is pending.

(4) Where the Court removes an Arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or

the repayment of any fees or expenses already paid.

(5) The Arbitrator concerned is entitled to appear and be heard by the Court before it makes any order under this section.

(6) The leave of the Court is required for any appeal from a decision of the Court under this section"".

4. The English Statute makes a third agency to decide the complaint against the Arbitrator and the said agency decides the issue. This provision

according to the learned Counsel safeguards the right of a fair hearing to the aggrieved party but this safeguard is absent in the Indian Law. The

learned Counsel submits that, this has caused arbitrariness in the matter of implementation of the Arbitration Act. According to him by conferring

the right to decide the question of bias on himself, the basic tenet of fair play is lost in that he is himself called upon to judge his own cause.

5. First blush, this argument of the Counsel is attractive. There certainly is an amount of unfairness in calling upon the Judge to decide as to whether

he is biased or not. Whatever the decision be, there would always be a ground to complain, that the decision is not fair. But this is not a singular

instance. In a contempt of Court proceedings, the Court itself decides whether there is contempt of its own Court. If the argument of the Counsel is

stretched, this can also be described as judging one's own cause. The Courts have recognised that the best judge to decide whether the judge is

guilty of impropriety alleged in a given case is, he himself. He cannot be condemned unheard. That is what, it might result, if a third party is called

upon to decide the allegation. It is recognised that he should have an active and objective role in that decision making process. This right of his is

recognised by the English Law itself. If he establishes that the allegations are unsustainable, then the attempt to change him fails. That is perhaps

why we find Section 24(5) in the (English) Arbitration Act.

6. If it is the function of the third party agency to read the mind of the Arbitrator and decide as to whether the Arbitrator is biased or not there is no

need to afford the Arbitrator an opportunity of being heard. Sub-section (3) of Section 24 also makes it clear that despite the above proceedings

against the Arbitrator initiated and continued the very same Arbitral Tribunal may proceed further with the proceedings and may make an award. It

is provided that the aggrieved person on the proceedings u/s 24(1) of the Act has, with leave, right of appeal against the said order deciding the

question on bias. What does all these indicate? It means in the decision making process on an application u/s 24(1) the Arbitrator himself is given

an effective right to participate. To put it in other words, the Judge himself is permitted to contest to hold that he is not biased. The difference in the

Indian Law in this behalf is that the Arbitrator himself is called upon to decide whether the allegations against him are true. He instead of figuring as

a party in the proceedings in this behalf before another authority as provided in English Law and attempting to dislodge the allegations against him,

is permitted to decide the issue. And his finding is not the last word on the issue. The aggrieved has a right of appeal with respect to the said finding

as well, as provided u/s 13(5) of the Act.

7. The learned Counsel complains that the non-providing of an independent forum to ventilate the grievances coming with the ambit of Section

12(3)(a) of the Act, renders the proceedings arbitrary. I am of the view that this argument has to be rejected. In the first place, it is wrong to urge

that no appeal is provided against the order. An appeal can be filed wherein the adverse order made u/s 13(4) of the Act can be challenged (vide

Section 12(5)). The only difference is that the stage of appeal is postponed. It is one thing to say that there is no right of appeal at all whereas it is

yet another thing to say that an appeal is provided but the stage of preferring the appeal is postponed. In the former, the legislation might be

rendered arbitrary, whereas in the latter, the legislature has, in its wisdom chosen the appropriate stage to provide the right of appeal. There is no

vested right of an appeal and as such the demarcating of the stage of appeal cannot be described as an arbitrary exercise of statute making power.

8. The classic illustration of this statutory restraint is Section 105(1) of the CPC. That section is as under:

105(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate

jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth

as a ground of objection in the memorandum of appeal"".

It provides that any error, defect or irregularity in order which effected the final decision in the cause can be set forth as ground of appeal while

challenging the final order. It is this principle that is behind Section 13(5) of the Act.

9. The English Law provided several stages of appeals before the award is made by the Arbitral Tribunal; whereas Indian Law confined to one

stage thus avoiding frequent, recourse to appeals which would inevitably postpone the final outcome. In a given case if the allegation of disability

turns out to be frivolous (as mostly it turns out to) still the parties are drawn to several stages of litigation before several forums under the English

Law before the dispute is finally decided. Ultimately the same Arbitrator may decide the dispute thus vindicating his stand. The result with respect

to such an allegation would be the same as in Indian Law as well. On the contrary if the allegations are well-founded, still the proceedings go

through in different forums and achieves the same result that would ultimately happen with respect to an award made by the Arbitrator under Indian

Law. Similar is the treatment with respect to the objections raised on the question of jurisdiction of the Arbitral Tribunal with respect to the

existence or validity of the arbitration agreement (vide Section 16 of the Act). There also, the right of appeal is postponed as provided in Section

16(6) of the Act.

10. The grievance is really that there is no right of appeal forthwith against the decision of the Arbitrator, that he is not biased, but that right is

postponed to be exercised at the end of the arbitration and after making the award and as the right of appeal is not a common law right that right is

conferred under the statute, the stage at which it should be exercised can be predicated by the statute creating the said right. The legislature thought

in its wisdom that frequent recourse to appellate remedy, destroys the essence of the spirit behind the enactment of the Arbitration and Conciliation

Act, 1996. As there is no inherent right of appeal except as conferred by the statute, it is difficult for the Court to hold that, it amounts to

arbitrariness violating the protective cover of Article 14 of the Constitution of India.

11. Thus, the contention of the Counsel that Section 13(4) and Section 13(5) of the Arbitration and Conciliation Act, 1996 is unconstitutional has

to fail. The writ petitions are accordingly dismissed.