

(1969) 09 CAL CK 0025

Calcutta High Court

Case No: Award Case No. 181 of 1969

Bhagirathi Debi Kirti Krishna

Ladia

APPELLANT

Vs

Free India Pictures Private Ltd.

RESPONDENT

Date of Decision: Sept. 5, 1969

Acts Referred:

- Arbitration Act, 1940 - Section 21
- Partnership Act, 1932 - Section 18, 19, 19(1), 19(2), 20

Citation: (1969) 1 CALLT 1 : (1970) 2 ILR (Cal) 630

Hon'ble Judges: S.A. Masud, J

Bench: Single Bench

Advocate: N.K. Roy Choudhury, for the Appellant; B.K. Bachawat, for the Respondent

Final Decision: Dismissed

Judgement

S.A. Masud, J.

This is an application on behalf of two partners of a partnership firm known as Greer Pictures, the Respondent No. 2, for setting aside or recalling an order of reference made u/s 21 of the Arbitration Act in Suit No. 2127 of 1966 (Greer Pictures v. Free India Pictures Private Ltd.).

2. Mr. N. K. Roy Choudhury, on behalf of the Petitioners, has submitted that in the said suit the Respondent No. 3, H. P. Goenka, a partner of the said firm agreed to refer the disputes and differences without the knowledge or consent of the Petitioners. Relying upon Rajendra Prosad Vs. Panna Lal-Champa Lal and Another, he has contended that the said order of reference u/s 21 of the Act is without jurisdiction and should be set aside inasmuch as the Petitioners who are admittedly the partners of the Plaintiff firm did not give their consent inasmuch as the said H. P. Goenka, the Respondent No. 3, has no implied authority within the meaning of Section 19 of the Partnership Act to refer the disputes in the suit to arbitration

without the consent of the Petitioners. Mr. Bachawat, on behalf of the Respondent No. 1, has submitted that the present application should be dismissed both on facts and on law.

3. By an agreement entered into between the said firm and the Respondent No. 1, hereinafter described as "the company", the company was appointed as the sole distributor of a film known as Chandi-ki-Diwar for the area known as C.P.--Berar circuit in the film trade for a period of 10 years from the date of the first release of the said picture in the said circuit. The terms and conditions of the said agreement would appear from the documents dated August 4, 1962, November 13, 1964 and January 14, 1965. The said agreement contained, inter alia, an arbitration clause. It appears that the said documents dated August 4, 1962, November 13, 1964 and January 14, 1965 were signed by Madhav Prosad Jatia, the Petitioner No. 2. Disputes and differences arose between the parties on April 22, 1966, and the said Goenka wrote to the company for referring the said disputes to the arbitration of one Mr. M. D. Chatterjee. On the next day, the company informed the firm that disputes were being referred to the arbitration of the Central Circuit Cine Association, Bhusawal. It may be stated here that a copy of this letter was sent to Jatia and Goenka. On April 27, 1966, the Company wrote again to the firm that the disputes were being referred to the said Association at Bhusawal and that they were not agreeable to have the arbitration held at Calcutta. A copy of this letter was also sent to Jatia and Goenka. In reply to the -said letter the firm intimated the company that as the company failed to appoint its arbitrator the firm's nominee Mr. Chatterjee had become the sole arbitrator in the matter. This letter was also addressed to Jatia and Goenka. On May 17, 1966, the company informed in writing the partnership firm, Jatia and Goenka, that" they were not agreeable to the appointment of Mr. Chatterjee as arbitrator. On May 19, 1966, the company referred the disputes to the arbitration of the Association at Bhusawal claiming Rs. 25,000. On June 14, 1966, the firm wrote again that the matter should be referred to the arbitration of Mr. Chatterjee. This letter was signed by one S.R. Khaitan on behalf of the firm. On August 8, 1966, the firm addressed a letter to the said Association at Bhusawal challenging its jurisdiction. The said letter was also signed by Khaitan. On October 5, 1966, the firm instituted the pending Suit No. 2127 of 1966 claiming a sum of Rs. 2,00,000. The plaint was verified by Goenka and S.K. Ganguly & Co., the Solicitors, acted for the firm. Paragraph 26 of the plaint in the said suit reiterated the fact that the disputes between the parties were referred to arbitration of the said M. D. Chatterjee. It may be stated here that the said S.K. Ganguly & Co. has appeared in this proceeding as the Solicitors on behalf of the firm and, strangely enough, the counsel on behalf of the firm, instructed by the said Goenka, is now supporting the Petitioners on the plea that, under a bona fide mistake of law, they referred the disputes to the arbitration which is pending now. On February 17, 1967, the company made an application for stay of the said suit. S.K. Ganguly & Co. acted for the firm in the said application. On June 21, 1967, at the hearing of the application,

by consent of the parties Mr. Mullick was appointed the sole arbitrator for adjudicating the disputes between the parties. The firm preferred an appeal against the said order dated June 21, 1967, and also made an application for stay. On July 10, 1967, the counsel for the company contended that the appeal was not maintainable as the order against which the appeal was preferred was made by consent. The matter was sent back to the Court below when on July 24, 1967, Sen J. after hearing the parties delivered a judgment and held that the order of June 21, 1967, was made by consent. On August 16, 1967, the firm instituted another suit against the company being Suit No. 1840 of 1967 for a declaration that the order dated July 24, 1967, was without jurisdiction and made beyond the scope of authority of the learned Counsel. The plaint in the said suit was also verified by Goenka and S.K. Ganguly & Co. was recorded as Solicitors for the firm. Thereafter, on January 24, 1968, an application for referring the disputes between the parties in the earlier suit, i.e. Suit No. 2127 of 1966 was filed. The petition was prepared by Mukherjee and Biswas, Solicitors, and approved by S.K. Ganguly & Co., Solicitors. Order was passed on the said application whereby the disputes were referred to the arbitration of Mr. M. N. Banerjee, who happened to be the counsel for the firm. Mr. M. N. Banerjee thereafter entered upon the reference. Arbitration sittings took place on February 12, 1968, April 8, 1968, July 10, 1968, March 10, 1969, May 16, 1969, May 17, 1969, May 20, 1969, June 12, 1969 and June 26, 1969. It may be added here that the firm made applications on May 20, 1969, for amendment of its statement of claim before the arbitrator and on the next three days the firm took adjournment on the plea of such amendment. The Petitioners, thereafter, made the present application on July 8, 1969, and prayed for interim stay of the arbitration proceedings before the said Mr. M. N. Banerjee which was granted by me.

4. It may be stated here that the partnership firm consists of four partners, namely, (i) Bhagirathi Debi Kirti Krishna Ladia, (2) Madhab Prasad Jatia, (3) H. P. Goenka and (4) Asoke Goenka. H.P. Goenka is the father of Asoke Goenka and Bhagirathi Debi is the sister of H. P. Goenka. Madhab Prosad Jatia is the adopted son of Bhagirathi Debi. Thus all the partners are related to each other. The business of the firm is carried on in Calcutta and Bombay by Goenka. Admittedly, he has been managing the affairs of the partnership business in Calcutta and Bombay offices. It is stated in the petition that the Petitioners are living at Khurja, Uttar Pradesh. Agreements between the firm and the company were signed by Jatia. S.K. (Janguly & Co. have been given the Warrant of Attorney by Goenka on behalf of the firm In the present petition the Petitioners have nowhere sated that H. P. Goenka in initiating and continuing the said proceeding on behalf of the firm has acted against the interests of the partners. It is significant that no allegation of fraud or dishonesty has been made by the Petitioners against Goenka.

5. In the premises, the present application has been filed with an ulterior object and the statements in the petition cannot be accepted to be correct. It is true that if the Petitioners have got legal rights to get a relief, the mala fide conduct of the

Petitioners cannot be a ground for dismissing their application: vide Mayor of Bradford v. Pickles (1895) A.C. 585.

6. In my view, the Petitioners have no legal right to make the said application inasmuch as they had full knowledge of the steps that were taken by H.P. Goenka on behalf of the firm. The contention of the Petitioners that Goenka had no legal authority to refer the disputes in the suit to arbitration without the consent of the Petitioners can only be accepted if the Petitioners can prove that H. P. Goenka and S.K. Ganguly Sc Co., the Solicitors for the firm, have acted without the knowledge or the authority of the Petitioners. Earlier, when the firm through Goenka referred the disputes to the arbitration of Mr. M. D. Chatterjee the Petitioners did not raise any objection to Goenka's authority to refer disputes of the firm to arbitration and also his decision to institute the suit on behalf of the firm. As stated earlier, the plaint itself contains Goenka's power to refer the disputes to arbitration. No objection had been raised against Goenka's authority to refer the disputes to arbitration. In fact, no allegation has been made even in the present petition against Goenka.

The stand taken by Mr. Sen, counsel for the firm, instructed by S.K. Ganguly & Co. in the present application before me, confirms my view that the present application has been made by the Petitioners in collusion with Goenka. Sections 19 and 20 of the Partnership Act have been enacted for the protection of the partners against unauthorised conduct of the managing or other partners in the management of the affairs of the partnership business. In the present case, Goenka and S.K. Ganguly & Co. have not acted on behalf of the firm secretly or fraudulently. In the facts of this case, the Petitioners had knowledge of all the steps that were taken by Goenka and S.K. Ganguly & Co. The Partnership Act cannot be allowed to be used as an instrument of fraud and, in my view, in the facts of this case, the Petitioners have no legal right inasmuch as they are being set up by Goenka who gave consent to refer the disputes to be adjudicated by Mr. M. N. Banerjee, the firm's own counsel in the suit. In the premises, the contention of Mr. Roy Choudhury cannot be accepted on the facts of this case.

7. The decision in *Rajendra Prasad v. Pannaial* (Supra) was made on the facts of that case. It is true that in the said decision Rankin C.J. and Pearson J. made observations to the effect that the authority of a partner instructing his Solicitors to institute a suit does not include an authority to refer the disputes in the suit to arbitration, but, in my view, the learned Judges there proceeded on the basis that the complaining partner had no knowledge of the reference and had acted bona fide. Further, the principles discussed in the present case were not argued in that Bench. The judgment was a short one and the facts and the laws have not been fully set out in the said judgment. I have, however, come to a different conclusion on the facts of this case.

8. Mr. Roy Choudhury has drawn my attention to Section 19 of the Partnership Act, 1932, the relevant portions of which are stated as follows:

19(1). Subject to the provisions of Section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. The authority of a partner to bind the firm conferred by this section is called his "implied authority".

(2) In the absence of any usage ^or custom of trade to the contrary, the implied authority of a partner does not empower him to ♦ (a) submit a dispute relating to the business of the firm to arbitration, (b) open a banking account on behalf of the firm in his own name, (c) compromise or relinquish any claim or portion of a claim by the firm, (d) withdraw a suit or proceeding filed on behalf of the firm, (e) admit a liability in a suit or proceeding against the firm, (f) acquire immoveable property on behalf of the firm, (g) transfer immoveable property belonging to the firm, (h) enter into partnership on behalf of the firm.

On the basis of the said provisions he has contended that Goenka had no implied authority to submit the disputes between the firm and the company to the arbitration of Mr. M. N. Banerjee, and as such, the learned Judge's order dated January 24, 1968, on Goenka's application referring the disputes to arbitration u/s 21 of the Arbitration Act, 1940, is without jurisdiction and a nullity. In my view, this contention also should be rejected.

9. Firstly, u/s 18 of the Partnership Act H.P. Goenka, as a partner, is an agent of the firm for the purposes of the business of the firm and, as such, Goenka's act in moving the Court for referring the disputes to arbitrator u/s 21 of the Arbitration Act is binding on the firm and, therefore, on the partners. But Section 18 has-been qualified by the words "subject to the provisions of the Partnership Act." It is, therefore, necessary to examine if any other provision of the said Act disentitles the company to bind the Petitioner. The provisions of Section 19, on which Mr. Roy Choudhury mainly relies, begins with the qualifications "subject to the provisions of Section 22." Section 22 provides:

In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

The Suit No. 2127 of 1966 has been filed in the name of the firm. An application u/s 21 of the Arbitration Act in the said suit is an act done by a partner, that is Goenka, on behalf of the firm and, therefore, the order of the Court passed on the said application is binding on the firm and also its partners including the Petitioners. Similarly the act of S.K. Ganguly Sc Co., the Solicitors for the firm, in agreeing to the arbitration of Mr. M. N. Banerjee also binds the firm.

10. Secondly, the Warrant of Attorney in favour of S.K. Ganguly & Co. has been duly filed on behalf of the firm in the suit and has not been challenged by the Petitioners. The application u/s 21 of the Arbitration Act has been filed in the suit by the same Solicitors under the same Warrant and they have, therefore, acted on behalf of the

firm, and, therefore, this act is also binding on the Petitioners under s. 22-

11. Thirdly, there is no question of implied authority in this case. The institution of the suit has been done by a duly constituted Attorney on the instruction of Goenka. The Respondent has nowhere challenged or denied their authority or the necessity or validity of filing such suit. The same Solicitor has filed the said application on the instruction of the same partner. Admittedly, the Warrant of Attorney in favour of S.K. Ganguly & Co., Solicitors, had not been withdrawn and its authority to make application in the said suit has not been withdrawn. Nor it can be shown that the Solicitors have acted against the interests of the firm or the partners. In this case, the firm's own counsel in the suit has been appointed arbitrator and, therefore, it cannot be said that Mr. Banerjee's appointment as arbitrator would involve miscarriage of justice. The authority of Goenka to refer disputes to arbitration was allowed in the past. The plea of implied authority is only relevant if the express authority was not already there.

12. Fourthly, the institution of a suit to recover the firm's claims or dues cannot, strictly speaking, be construed as an act to bind the firm within the meaning of Section 22 in the sense that the firm, as the Plaintiff, is taking a risk or burdening the firm. In the premises, the act of making application u/s 21 of the Arbitration Act cannot be said to have been done under "implied authority" within the meaning of the concluding portion of Section 19(1)-of Partnership Act.

13. Fifthly, Section 19(2) of the Partnership Act, which debars a partner from doing eight classes of acts, does not include a partner's right to apply to the Court in a pending suit u/s 21 of the Arbitration Act for the purpose of referring disputes to arbitration. In my view, Section 19(2)(a) contemplates cases where one partner refers the disputes relating to the business of the firm to arbitration where there is no pending suit. This construction is supported by an examination of the cases mentioned in Section 19(2). The bar of a partner to act without the consent of others in respect of pending suits for or against the firm is mentioned in Section 19(2)(d), 8c (e). The act of a partner to institute a suit or to apply to Court u/s 21 of the Arbitration Act on behalf of a firm is not set out in the Sub-section. In the present case, the wisdom of instituting the suit to recover the claims of the firm has not been challenged as being detrimental to the interests of the firm. Nor any reason has been given as to why reference to arbitration of Mr. Banerjee is harmful to the Petitioners.

14. Sixthly, the authority of one partner to refer the disputes to the arbitration of Mr. Chatterjee has been admitted in para. 26 of the plaint filed on behalf of the firm in the said Suit No. 2127 of 1966. The affidavit-in-opposition to the company's petition, affirmed on April 3, 1967, by Goenka on behalf of the firm, specifically admits in para. 41 the validity of the reference to arbitration of Mr. Chatterjee by Goenka (p. 93 of the affidavit of the company). The said statements in the plaint and the affidavit have not been challenged by the Petitioners at any stage. Thus the

Petitioners are estopped from denying the authority of Goenka to refer the disputes to arbitration of Mr. M. L. Chatterjee.

15. Before I conclude, two other points argued by Mr. Bachawat before me may be referred to. He refers to Clause 11 of the partnership deed whereby the partners have in effect extended u/s 20 of the Partnership Act the powers of implied authority of a partner, some of which are mentioned in Section 19(2) of the Partnership Act. He has, therefore, argued that Goenka has the authority to refer the disputes to arbitration on the basis of the maxim expressum facit cessare taciturn. The partnership deed is not a part of the records before me and, as such, I am not expressing any opinion on the said contention. Mr. Bhattacharjee other contention, however, has great force and I accept the same. Neither of the Petitioners has chosen to verify the petition. The petition and the affidavit-in-reply have been filed by one Purushottam Das Saraf, a constituted Attorney of the Petitioners. The averments in the petition to the effect that the Petitioners did not give consent to the reference are not based on their personal knowledge and must have been based on information received. It is significant that the Petitioners have avoided the Court to state on oath their alleged grievances and, as such, this Court is not inclined to make an order on such unsatisfactory averments.

16. For all the reasons stated above, the contention of the Petitioners must fail both on fact and on law. The application is dismissed with costs.