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Eastern Equipment and Sales Limited Vs Mitsui and Company

Court: Calcutta High Court

Date of Decision: June 15, 1976

Acts Referred: Arbitration Act, 1940 â€" Section 41, 5, 9
Civil Procedure Code, 1908 (CPC) â€" Section 115

Citation: 80 CWN 1023 : (1976) 2 ILR (Cal) 407

Hon'ble Judges: R. Bhattacharya, J; Jonah, J

Bench: Division Bench

Advocate: P.L. Khaitan, Mahabir Prosad Choudhuri and S. Tibrewal, for the Appellant;Dinesh Chandra Nandi, Soumen Mukherjee and S.R. Banerjee, Avds., for the Respondent

Judgement

Jonah, J.
This rule is directed against order No. 19 dated May 30. 1973 rejecting the Petitioner"s application under Sections 5, 9 and 41

of the Arbitration Act by the learned Judge, Second Bench, City Civil Court, Calcutta.

2. The facts giving rise to this rule, briefly, are as follows : On December 18. 1962, there was an agreement in writing between the Petitioner and

the opposite party by which the Petitioner agreed to purchase from the opposite party and the opposite party agreed to sell to the Petitioner certain

goods as per specification mentioned in the said agreement. The agreement contained an arbitration clause which provided that if any dispute or

difference arose between the parties relating to due performance of the contract, then the matter in difference shall be referred by either party on

15 days" notice to the other, to an Arbitrator to be appointed by the Petitioner and the opposite party jointly or in the absence of such agreement

to two Arbitrators, one to be appointed by the Petitioner and the other by the opposite party and in case of disagreement between the Arbitrators

to an Umpire to be appointed by the Arbitrators before proceeding with the arbitration and the decision of such Arbitrator/Arbitrators or Umpire

shall be final and binding on both the parties. The provisions of the Indian Arbitration Act, 1940 and the Rules made thereunder were also made

applicable to such arbitration. In or about May 2, 1972, dispute arose between the parties regarding the payment of certain alleged commission by

the Petitioner to the opposite party. On May 30, 1972, the Petitioner received from the opposite party a letter dated May 30, 1972, appointing

one Mr. B.K. Sampat as its Arbitrator and calling upon the Petitioner to notify its choice of Arbitrator within 15 days of the receipt of the said

letter. The Petitioner did not, however, appoint its own Arbitrator in terms of the aforesaid agreement. The Petitioner thereafter received a letter

dated July 24, 1972, from the said Mr. B.K. Sampat stating that in spite of receipt of the letter dated May 26, 1972 from the opposite party as the

Petitioner did not take any step to appoint its Arbitrator the said Mr. Sampat shall act as the sole Arbitrator in the matter and the Petitioner was

requested to submit its papers and statements of its case. On August 3, 1972 the Petitioner wrote to the opposite party and also informed Mr.

Sampat by sending him a copy of that letter, that the Petitioner had nominated Mr. L.P. Murarka as the Petitioner"s Arbitrator in the dispute.

Thereafter the Petitioner received a letter from the opposite party dated August 11, 1972 informing it that as the time for appointment of the

Petitioner"s Arbitrator had long elapsed the Arbitrator appointed by the opposite party had already entered upon the reference in terms of the

letter dated July 24, 1972 and the arbitration will be proceeded with by the opposite party before the said sole Arbitrator. The said letter was

received by the Petitioner on August 16, 1972. On August 28, 1972 the Petitioner moved an application before the City Civil Court praying inter

alia, for an injunction restraining the opposite party from proceeding with the said reference before the aforesaid sole Arbitrator. The Petitioner

further prayed for accepting its nomination of Mr. L.P. Murarka to act as an Arbitrator with the said Mr. B.K. Sampat after condoning of delay in

making the appointment by the Petitioner. The said application was contested on behalf of the opposite party and it was dismissed by the trial

Court. Against the said order the Petitioner has obtained the present rule.

3. Mr. Tibrewal, learned Advocate appearing in support of the rule, has contended in the first place that there was no appointment of Mr. Sampat

as the sole Arbitrator in the present case and as such, he has no jurisdiction to proceed with the reference as the sole Arbitrator. His contention is

that after the appointment of Mr. Sampat as the Arbitrator on behalf of the opposite party as communicated to the Petitioner by the opposite

party"s letter dated May 26, 1972, there was no appointment of Mr. Sampat by the opposite party as sole Arbitrator after the expiry of the

statutory period of 15 days. He contends further that the Petitioner was never informed of the alleged appointment of Mr. Sampat as the sole

Arbitrator by the opposite party. The provision for appointment of a sole Arbitrator is contained in Section 9 of the Arbitration Act, 1940, the

relevant portion of which is as follows:

Where an arbitration agreement provides that a reference shall be to two Arbitrators, one to be appointed by each party, then unless a different

intention is expressed in the agreement,

(a) ... ...

(b) if one party fails to appoint an Arbitrator either originally or by way of substitution as aforesaid for fifteen clear days after the service by the

other party of a notice in writing to make the appointment, such other party having appointed his Arbitrator before giving the notice, the party who

has appointed an Arbitrator may appoint that Arbitrator to act as sole Arbitrator in the reference and his award shall be binding on both parties as

if he had been appointed by consent:

Provided that the Court may set aside any appointment as sole Arbitrator made under Clause (b) and either, on sufficient cause being shown, allow

further time to the defaulting party to appoint an Arbitrator or pass such other order as it thinks fit.

Explanation.....

It is clear, therefore, that the section contemplates two appointments. Firstly, the appointment of an Arbitrator of the choice of one of the parties to

the dispute and after informing the other party of such appointment by him, if the other party fails to appoint his Arbitrator, then the party who has

appointed his Arbitrator may appoint that Arbitrator as the sole Arbitrator. It was, accordingly, contended by Mr. Tibrewal that unless the second

appointment as the sole Arbitrator is made the Arbitrator has no power to arrogate to himself the functions of a sole Arbitrator and act as such. It

was further contended by Mr. Tibrewal that even if an appointment is made as the sole Arbitrator so long as that fact is not made known to the

other party to the dispute, the appointment is not complete and the Arbitrator cannot proceed with the reference as a sole Arbitrator. In support of

his contention Mr. Tibrewal relied upon the decisions in Donald Campbel and Co. v. Jeshraj Girdharilal AIR 1920 P.C. 123, AIR 1948 11 (P &

H.) and M.I. Shahdar v. Mohd. Abdulla Mir AIR 1967 J&K 120. The view taken in these decisions is that unless the appointment of the sole

Arbitrator is in accordance with the provisions of Section 9, Clause (b) the appointment is not valid in law and the mere failure of the other side to

the dispute to appoint its own Arbitrator does not automatically make the Arbitrator appointed by one party the sole Arbitrator in the dispute. The

fact that notice is given by the Arbitrator to one of the parties to the dispute that the Arbitrator is going to act as the sole Arbitrator in the case

cannot be regarded as substantial compliance with the provisions of Section 9(b) unless there has been an appointment as a sole Arbitrator. That

being so, the opposite party''s letter dated August 11, 1972, addressed to the Petitioner cannot confer the power of a sole Arbitrator upon Mr.

Sampat.

4. Mr. S.R. Banerjee, appearing on behalf of the opposite party, contended before us that all that Section 9(b) requires is that there must be

appointment of the Arbitrator already appointed as a sole Arbitrator. According to him, it is not necessary that the other party should be informed

of such appointment as the sole Arbitrator. In support of his contention he relied upon annex. B'' to the affidavit-in-opposition which is a photostat

copy of a letter said to have been written on July 10, 1972, by his client to Mr. B.K. Sampat informing the latter that the opposite party has

appointed Mr. Sampat to act as sole Arbitrator in the reference. It appears from the said letter that a carbon copy thereof was sent to M/s. S.K.

Sawday and Co. which is a firm of Advocates and which is acting on behalf of the opposite party. From this letter Mr. Banerjee argued that the

appointment of Mr. Sampat as sole Arbitrator by the opposite party was made on July 10, 1972, which is long prior to the Petitioner''s letter dated

August 4, 1972, intimating Mr. Sampat about the appointment of Mr. Murarka by the Petitioner as its Arbitrator. Mr. Tibrewal on behalf of the

Petitioner characterised this letter as an afterthought and he strongly contended that this letter was brought into existence for the purpose of meeting

the present case of the Petitioner. Mr. Tibrewal contended that if this letter had really been in existence it was only natural that Mr. Sampat would

have mentioned about the same in his letter dated July 24, 1972, which is annex. ''B'' to the present petition before us. On the other hand, Mr.

Sampat''s letter dated July 24, 1972, mentions that since the Petitioner did not appoint its Arbitrator although a long time had elapsed from the

receipt of notice about the appointment of the Arbitrator by the opposite party, Mr. Sampat would act as the sole Arbitrator. He does not mention

in his letter that he has already been appointed the sole Arbitrator by the opposite party. Secondly, Mr. Tibrewal has contended that in the letter

dated August 11, 1972, written by the opposite party it has not been mentioned that the opposite party had appointed Mr. Sampat as the sole

Arbitrator on July 10, 1972. It is merely stated in the said letter that the time for the Petitioner to choose its own Arbitrator has long elapsed and

the sole Arbitrator has already entered upon the reference. It is not stated that the Petitioner not having chosen its own Arbitrator, Mr. Sampat was

appointed as the sole Arbitrator by the opposite party on July 10, 1972. Thirdly, it was contended that even this photostat copy was not produced

before the trial Court. What was annexed to the affidavit-in-opposition filed in the trial Court is a plain copy of the aforesaid alleged letter which

did not disclose that a copy of the letter was purported to have been received on August 8, 1972, by the Advocates'' firm M/s. S.K. Sawday and

Co. It was pointed out that there was no explanation why a letter sent from Calcutta on July 10, 1972, would be received on August 8, 1972, in

Calcutta where the Advocates'' firm as well as the Calcutta Branch office of the opposite party are situate. Mr. Tibrewal further contended that the

very language of the aforesaid letter dated July 10, 1972, indicated that it was drafted by a lawyer. In our view, there is considerable force in the

contention put forward by Mr. Tibrewal in this behalf. In our view, therefore, the said letter must be left out of consideration for the purpose of

deciding whether there was any appointment of Mr. Sampat as the sole Arbitrator in the reference. In this connection it was worthwhile to note the

view upon which the trial Court proceeded with regard to this aspect of the case. On this point the that Court has observed

that in matters under the Arbitration Act the Court generally proceeds on affidavits and annexures and things are taken on their face value. Whether

a particular letter is genuine or not cannot be decided in such a proceeding.

It is true in such proceedings the Courts generally go by affidavits only. But affidavit evidence, that is, evidence brought before the Court by way of

affidavit, is also evidence in the case and therefore, it is the duty of the Court to consider how far such affidavit evidence can be believed or not. In

our view, it is not correct to say that in a matter like this affidavits and annexures are to be taken at their face value. If that is so, then any and every

statement can be made in an affidavit and whatever document one chooses to rely upon may be annexed to an affidavit and the Court will have to

accept everything as true and correct.

5. Mr. Banerjee has argued that if the aforesaid letter dated July 10, 1972, written by the opposite party to Mr. Sampat is taken into

consideration, then the appointment of Mr. Sampat as the sole Arbitrator cannot be questioned even though the said fact was never brought to the

notice of the Petitioner. He has relied upon the language used in Section 9 of the Arbitration Act and has contended that the sand section does not

require any further notice to be given in respect of appointment of the sole Arbitrator. We need not, however, go into this question as we have

already found that there was no appointment of Mr. Sampat as the sole Arbitrator by the opposite party. The trial Court has taken the view that if

a party does not appoint its Arbitrator after the lapse of 15 days from receipt of the notice, the Arbitrator appointed by the other party will be

deemed to be the sole Arbitrator in terms of Section 9 of the Arbitration Act For this proposition of law the trial Court has relied upon the decision

in Dominion of India Vs. Kalyan Kumar Purkayastha . But in the said decision there is nothing which supports the view taken by the trial Court.

On the contrary, the authorities clearly show that unless there has been an appointment as the sole Arbitrator appointed by one party to act as the

sole Arbitrator merely because the other party has failed to appoint its Arbitrator within the statutory period of 15 days.

5. Lastly, Mr. Banerjee addressed us at length on the power of the High Court to interfere with the order u/s 115 of the Code of Civil Procedure.

He cited a number of decisions before us to substantiate his contention that the present case is one where this Court has no power to interfere u/s

115 of the Code of Civil Procedure. The decisions cited by him in this regard are reported in 53 C.W.N. 485 Misrilal Parasmal Vs. H.P.

Sadasiviah and Another, and Major S.S. Khanna Vs. Brig. F.J. Dillon, . It is not necessary for us to discuss these cases in details. It is well-

established that the revisional power of the High Court is confined only to cases where the Court below has acted in excess of its jurisdiction

vested in it by law or has acted illegally and with material irregularity in the exercise of its jurisdiction. Mr. Banerjee contended that the order

complained against may suffer from an error of law, but that would not entitle this Court to interfere with the same in revision. He has submitted

that at the most the order passed by the trial Court may be an erroneous order, but that does not confer upon this Court the power to interfere

with the said order in revision. In the facts and circumstances of the present case we are unable to accept this contention advanced by Mr.

Banerjee. In our view, the present case comes clearly under Clause (c) of Section 115 of the Code.

6. Mr. Tibrewal made a prayer before us that in the event the rule is made absolute, the delay on the part of his client in appointing its Arbitrator

may be condoned and the appointment of Mr. L.P. Murarka be accepted. In para. 7 of the petition it has been stated that the Director-in-charge

who was looking after this matter was not in Calcutta when the letter dated May 26, 1972, was received by the Petitioner and the said Director-

in-charge of the Petitioner could not attend the Petitioner''s office before August 3, 1972. Accordingly, the Petitioner could not take any action on

the aforesaid letter dated May 26, 1972. In the affidavit-in-opposition which has been filed there is no denial of the fact that the Director-in-charge

who was looking after this matter was not in Calcutta at the relevant time. In these circumstances we think that the delay in appointing its Arbitrator

by the Petitioner should be condoned and the appointment of Mr. L.P. Murarka as a co-Arbitrator with Mr. Sam-pat should be accepted.

7. In view of what has been discussed above the order passed by the trial Court cannot be allowed to stand and this rule is, therefore, made

absolute. In the circumstances of the case we make no order as to costs.

8. As the Petitioner did not have any opportunity to deal with the allegations made in the affidavit-in-opposition, let it be recorded, as prayed for

by Mr. Tibrewal, that the Petitioner does not admit the allegations made in the affidavit-in-opposition.

R. Bhattacharya J.

9. I agree.