The Regional Provident Fund Commissioner, Punjab, and another
v.
Lakshmi Ratten Engineering Works Ltd.

Dulat, J.

Limited (Letters Patent Appeal No. 413 of 1958) and the East India Cotton Manufacturing Company, Private Limited (Letters Patent Appeal No. 414 of 1958) with costs, and allow the three appeals by the Regional Provident Fund Commissioner (Letters Patent Appeals Nos. 392, 393 and 394 of 1958) also with costs and set aside the order made by Grover, J., in these three cases and discharge the rule in each case.

Dua, J.

INDER DEV DUA, J.—I agree.

K.S.K.

APPELLATE CIVIL

Before Daya Krishan Mahajan, J.

SHORI LAL,—*Appellant.*

versus

SARDARI LAL AND ANOTHER,—*Respondents.*

First Appeal from Order No. 85 of 1961

1962

Feb., 16th

Arbitration Act (X of 1940)—Section 5—Whether applies to reference only or to arbitration agreement as well—Contract Act (IX of 1872)—Section 62—Parties to an arbitration agreement—Whether can substitute one agreement by another.

Held, that an arbitration agreement is distinct from a reference, and the words of section 5 of the Arbitration Act, 1940, particularly the words "authority of an appointed arbitrator" indicate that the provisions of section 5, merely apply to a reference and not to an arbitration agreement.

Held, that there is no prohibition in the Arbitration Act, for the substitution of one arbitration agreement by another and under section 62 of the Indian Contract Act, it is always open to the parties to a contract to substitute that contract by another, unless the substituted contract is either illegal or void.

First appeal from order of Shri Adish Kumar Jain, Sub-Judge, Ist Class, Amritsar, dated 17th February, 1961, referring the matter to the arbitrator.

Application under section 20 of the Indian Arbitration Act.

BHAGIRATH DASS, ADVOCATE, for the Appellant.

D. R. MANCHANDA, ADVOCATE, for the Respondent.

JUDGMENT

MAHAJAN, J.—This appeal must be allowed on the short ground that the Court below has not understood the law on the subject. Mahajan, J.

A partnership deed was executed between three persons, Thakar Das, Shori Lal and Sardari Lal, to carry on the business of textile manufacturers and cloth merchants under the name and style of Dhawan Textile Mills. In the partnership deed, clause No. 20 is to the following effect:—

> "That in case of any dispute, that may arise amongst the partners in respect of this partnership or as to the meaning of any clause of this deed or any other difference or dispute that may arise concerning this partnership or its business, the same shall be referred to the sole arbitration of Shri Hans Raj Mittal, Advocate, Amritsar, whose decision shall be final, conclusive and binding upon all the partners."

On the 15th of November, 1959, another agreement was executed whereby clause No. 20 was replaced. The replacement was merely to the effect that instead of Mr. Hans Raj Mittal, the arbitrator named in clause 20 to settle the disputes, Mr. Sahib Dayal would be the arbitrator. In November, 1960, after the execution of the second agreement, an application was made under section 20 of the Arbitration by Sardari Lal for filing the arbitration agreement in Court. Objections were raised to the same by the respondents, the principal objection being that the disputes were to be settled by the arbitrator named in clause 20 of the original agreement and not by the arbitrator named in the subsequently

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altered agreement. The contention of the appellant was that the later agreement will govern the arbitration while the contention of the respondents was that the earlier agreement would govern the same. The trial Court came to the conclusion that the earlier agreement would govern the parties. This decision is based on the provisions of section 5 of the Act. Dissatisfied with this decision, one of the respondents to the petition under section 20 of the Act has preferred the present appeal.

The contention of Mr. Bhagirath Das, learned counsel for the appellant is that the provisions of section 5 of the Act, which are in these terms:—

> "The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement;"

have no applicablity to the facts of the present case, because the earlier arbitration agreement was substituted by the later arbitration agreement and this substitution was brought about by an agreement between all the parties to the earlier agreement; whereas the contention of the learned counsel for the respondents is that in view of the provisions of section 5 of the Act, an arbitration agreement once entered upon cannot be terminated, substituted or revoked by another arbitration agreement by the consent of the parties to the earlier agreement, but this could only be done by recourse to the provisions of section 5. It may be mentioned at the very outset that section 5 deals with the revocability of a reference and has nothing to do with the revocability of the arbitration agreement. Arbitration agreement and reference have been defined in section 2 of the Act as under :—

> "2(a) 'arbitration agreement' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;
>
> (e) 'reference' means a reference to arbitration."

Therefore, in view of the fact that arbitration agreement is distinct from a reference, the only question that requires determination is whether section 5 of the Act embraces an arbitration agreement or merely a reference. In my view the wording of section 5 of the Act, particularly the words "authority of an appointed arbitrator" indicate that the provisions of section 5 merely apply to a reference. I am supported in this view by a Division Bench decision of the Calcutta High Court in *Prafulla Chandra Karmakar* v. *Panchanan Karmakar* (1), wherein Chakravartti, J., (as he then was) observed as under :—

> "In my opinion, such room is to be found in section 5 of the Act. That section provides that the authority of an appointed arbitrator shall not be revocable except by leave of the Court, implying thereby that with such leave it may be revoked. At first sight it might seem that this provision applies only to the authority of a particular arbitrator or arbitrators and has no application to the reference itself. But the real scope of the section will appear if the meaning of the word "authority" is closely examined. In the corresponding provision in the English Arbitration Act of 1889, section 1, the word used is 'submission' and in criticising that section Brown L. J., pointed out in *In the Smith and Service and Nelson and Sons* (2), that the word 'submission' had been used with some inexactitude because the agreement to refer, which the term 'submission' might seem to denote, was always irrevocable and it was only necessary to provide for the irrevocability of 'the authority of the arbitrator'. The agreement to refer is one thing, the actual submission, whether by act of the parties or by an order of the Court, that is to say, the reference, is another

(1) A.I.R. 1946 Cal. 424.
(2) (1890) 25 Q.B.D. 545.

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and the latter is nothing but the consignment of the case to particular arbitrators and the authority conferred on them. The Indian Legislature seems to have met the criticism of Brown L. J. by accepting the exact language suggested by him and when the section speaks of the authority of the arbitrator, it means the reference."

There is another way of looking at the matter. It is always open to the parties to a contract to substitute that contract by another, unless of course the substituted contract is either illegal or void. See in this connection, section 62 of the Indian Contract Act, which is in these terms:—

"62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

There is no prohibition in the Arbitration Act for the substitution of one arbitration agreement by another, and I am unable to see any reason for prohibiting such a substitution. The reason why revocation of a reference is not left to the will of the parties is based on a different principle. That is that when a reference is made to an arbitrator, his authority cannot be revoked just as when a suit is filed in a Court the jurisdiction of the Court is not dependent on the will of the parties. An arbitrator is merely an alternative forum for the settlement of dispute *vis-a-vis* a Court of law. Therefore, on public policy the provisions of section 5 have been enacted, namely, that the parties cannot shift the venue of the settlement of their disputes from one forum to another at their own will, for the policy of the law is not to encourage litigation but to minimise it. Therefore, an argument based on the analogy of section 5 of the Act with regard to a reference can have no bearing so far as an arbitration agreement is concerned. Like all contracts, arbitration agreement is a contract and unless there is any specific prohibition in the statute, the contract can be revoked, altered or

varied by the parties to the contract. To illustrate, suppose the partnership deed in which clause 20—the arbitration clause—occurs was rescinded by the parties and instead a new partnership deed was drawn wherein there was no arbitration clause, can it in that situation be said that the old partnership deed which had been thrown overboard by the parties would still govern the parties in any dispute arising under the new partnership agreement. In my view, the old partnership agreement, which contained the arbitration clause, will have no relevancy so far as the new partnership agreement is concerned. Therefore, if this result can be achieved by replacing one contract by another, why can't the arbitration clause be altered by agreement of the parties to the contract. That would merely be an alteration of the original contract and would be justified in view of the provisions of section 62 of the Contract Act.

Mr. Manchanda, learned counsel for the respondents, has relied on *Seth Dwarkaparsad* v. *Dipchand Parsram* (3), *James Finlay & Co., Ltd.* v. *Gurdayal Pahlajrai* (4), *Ram Chand Gurdasmal* v. *Gobindram Gurdasmal* (5), and *Smt. Dulari Devi* v. *Rajendra Parkash* (6). None of these decisions has any applicability to the facts of the present case. In all these cases there was a reference to an arbitrator, which reference was sought to be revoked and it was held that in view of the provisions of section 5 of the Act, the reference could not be revoked without the leave of the Court. These decisions do not, in any way, come in conflict with the contention of the learned counsel for the appellant that the provisions of section 5 have no applicability to an arbitration agreement. That like any other contract can be substituted, revoked or varied. The present is a case where the contract has been varied. Not a single case has been cited where the substitution or variation of an arbitration agreement was held to be illegal.

(3) 44 I.C. 360.
(4) 76 I.C. 660.
(5) A.I.R. 1927 Sind 124.
(6) A.I.R. 1959 All. 711.

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For the reasons given above, I allow this appeal and set aside the decision of the Court below and hold that the second arbitration agreement will govern the parties and the disputes of the parties will have to be settled by the arbitrator named in the aforesaid agreement.

The appellant would be entitled to his costs of the appeal.

R.S.

CIVIL MISCELLANEOUS

Before D. Falshaw, C.J., and Harbans Singh, J.

SEWA SINGH GILL,—*Petitioner*

versus

THE COMMISSIONER OF INCOME-TAX, NEW DELHI AND ANOTHER,—*Respondents*

Civil Writ No. 469-D of 1957

1962

March, 14th

Income-tax Act (XI of 1922)—Section 23(3)—Assessment order prepared by Income-tax Officer, but not signed as he wanted to obtain the approval of Inspecting Assistant Commissioner—Whether valid order of assessment—Notice under section 22(4)—Whether can be issued afresh later on.

Held, that the order of assessment passed by the Income-tax Officer was intended to be his final decision in the matter unless he was ordered to revise it by the Inspecting Assistant Commissioner. There is no provision in the Act for such a direction being given which must be held to be illegal and unwarranted. Once the Income-tax Officer had given his considered judgment on the matters which he was called on to decide, the process of submitting his order for the approval of his superior or, as the case may be, for revision carried out under his directions, was something which simply could not be done. The assessment order of the Income-tax Officer called a draft assessment by the respondents was in fact his assessment order and that therefore the issuing of fresh notices under section 22(4) of the Act to the petitioner was illegal and further proceedings on the basis of those notices must be quashed.