APPELLATE CIVIL

Before Falshaw, J.

M/s. D.L.F., HOUSING AND CONSTRUCTION, LTD., NEW DELHI,—*Appellants.*

versus

SHRI BRIJ MOHAN SHAH AND ANOTHER,—*Respondents.*

1956

Jan., 31st

First Appeal from Order No. 89 of 1955

Arbitration—Agreement providing for arbitration by Managing Agents or Technical Director—Whether words can be implied to the effect that by agreement between the parties one or the other can be selected Such agreement whether vague and uncertain and, therefore, invalid.

Held, that the arbitration clause was bad as being vague and uncertain. Two arbitrators are named with an indication that one of them is to be selected, but without any provision as to how the selection is to be made and it is not possible to imply the words in such a clause that one or either was to be selected by agreement between the parties.

First Appeal from the order of the Court of Shri Pritam Singh, P.C.S., Commercial Sub-Judge, Delhi, dated the 27th May, 1955, holding that the arbitration clause in the contract between the parties is vague, uncertain and was not valid and legal and, therefore, it could not be given effect to, and dismissing the application of the defendants.

A. N. GROVER, for Appellants.

A. R. WHIG, for Respondents.

JUDGMENT

FALSHAW, J. This is an appeal by a Company, the Delhi and Finance Housing and Construction Limited, against the order of the lower Court dismissing the Company's application under section 34 of the Arbitration Act, and refusing to stay proceedings in a suit instituted by Brij Mohan Shah respondent. Falshaw, J.

The plaintiff's case was that he and Nand Kishore, defendant No. 2, as partners under the name of Messrs. S. P. Kishore and Company entered into a contract with the appellate Company for carrying out the electrification scheme in the Company's colony known as Rajauri Gardens on the Najafgarh Road and deposited Rs. 12,000 with the Company as security. The contract was terminated by the Company in November, 1952, and the plaintiff filed this suit for the recovery of Rs. 21,000 on account of the return of his security deposit and also the price of goods supplied and work done.

The Company applied under section 34 of the Arbitration Act for stay of the proceedings on the ground that the contract between the parties contained a clause for reference of any disputes to arbitration. The application was opposed on several grounds by the plaintiff, all of which were decided in favour of the defendant Company except one, namely, that the arbitration clause in the contract was invalid as being vague and uncertain.

The clause in question, which is No. 68 in the contract, reads—

> "All disputes between the parties to the contract, arising out of or relating to the contract, shall, after written notice by either party to the contract to the other of them, be referred to the sole arbitration of the

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Managing Agents Technical Director, DLF Housing and Construction Ltd., New Delhi."

Since the words 'sole arbitration' are used, it must be assumed that the ',' which occurs between the names of the two arbitrators means 'or' and that one or the other of them was to be appointed as arbitrator, and the question which arises is whether in the absence of any provisions as to how the choice was to be made between the two arbitrators, the clause is invalid as being vague and uncertain.

On behalf of the Company it was argued that the clause either means that the Managing Agents should be appointed as arbitrators or, failing them, the Technical Director, or else that it means that either of the arbitrators named was to be selected by agreement between the parties, and that in either event the clause was good. It seems to me, however, that the very fact that even the learned counsel for the Company could find at least two alternative meanings which could naturally be ascribed to the word clearly shows that some vagueness exists.

Indeed he more or less chose to concentrate on the second of his suggested interpretations, namely that one or either of the arbitrators named was to be chosen by agreement between the parties and he contended that some such words were implied in the clause. In this connection he relied on the decision in *Indian Hosiery Works* v. *Bharat Woollen Mills, Ltd.*, (1). There the relevant words of the clause were—

"Shall be referred to arbitration at Calcutta".

and it was held by Chakravatti, C.J., and Sarkar, J., that an arbitration agreement, neither specifying the number of arbitrators nor specifying the mode of appointment, is perfectly effective and valid and the

(1) A.I.R. 1953 Cal. 488

incidents of such an agreement are that it is to take effect as an agreement for reference to a sole arbitrator, to be appointed by consent of the parties or, where the parties do not concur in making an appointment, to be appointed by the Court.

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It will, however, be seen that the case was totally different and the meaning ascribed to the words in the clause by the learned Judges is the perfectly natural meaning, but the case is different where, as in the present case, two arbitrators are named with an indication that one of them is to be selected, but without any provision as to how the selection is to be made, and I do not find it possible to imply the words in such a clause that one or either was to be selected by agreement between the parties.

The two cases most in point are those cited on behalf of the respondent, *Ganpatrai Gupta* v. *Moody Brothers Ltd.* (1) and *Luxmi Chand-Baijnath* v. *Kishanlal-Sohanlal* (2). In the first of these cases the contract contained a clause to the effect that "all disputes whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Tribunal of Arbitration, Bengal Chamber of Commerce or Indian Chamber of Commerce applicable for the time being for decision". These words were held by Sinha, J., to be vague and uncertain and the arbitration clause was in consequence held to be invalid.

~~"If there arise any dispute or trouble regard~~

"If there arise any dispute or trouble regarding this contract then the same shall be decided by the Arbitration Board of the Blanket and Shawl Traders' Association

(1) 85 C.L.J. 136
(2) A.I.R. 1955 Cal. 588

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or by the arbitrators appointed by the buyer and by the seller, one by each."

Bachawat, J., held that this could be interpreted in three ways—

"(a) The word 'or' is substitutional and appends a secondary alternative after a primary alternative, and the expression means 'by the Arbitration Board of the Blanket and Shawl Traders' Association and failing them by two Arbitrators one to be appointed by each party'.

(b) The expression provides for a panel of Arbitration Tribunals, and the reference is to a Tribunal to be selected out of the panel by the consent of the parties.

(c) The word 'or' provides for alternatives and the expression means 'either the Arbitration Board of the Blanket and Shawl Traders' Association or the Arbitration Tribunal consisting of the Arbitrators appointed by the buyer and by the seller one by each."

He went on—

"Mr. Meyer therefore bases his client's case entirely on the footing that the third construction is the correct construction and he argues that the Arbitration clause provides for reference of the disputes to either the Arbitration Board of the Blanket and Shawl Traders' Association which I will call Tribunal 'X' or by the Arbitration Tribunal consisting of two Arbitrators one to be appointed by each party which I will call Tribunal 'Y'. If this construction is accepted, the Arbitration

agreements do not say under what circumstances the reference is to be made to 'X' Tribunal and under what circumstances the reference is to be made to the 'Y' Tribunal, and it cannot be said with certainty whether 'X' Tribunal or 'Y' Tribunal is the appointed Arbitrator. Under this argument *prima facie* the Arbitration agreements are uncertain. Mr. Meyer contends that the uncertainty is curable by election. I agree that uncertainty in certain cases may be cured by election, e.g., in the case of a grant by giving a right of election to the party who is to do the first act towards completion of the grant—Halsbury, Volume X, Articles 349-50, pages 281-82, and in the case of alternative promises by giving right of election to the party who is to perform the promise—Halsbury, Volume VII, Article 461, page 331, and Article 267, pages 189-90.

It has also been held that where there are several legatees to whom the ~~opinion~~ option is given—e.g., where there is a bequest of one house each to the nephews and the nieces of the Testator in the event of disagreement between them—the choice may be determined by lot,—*In re Knapton, Knapton* v. *Hindle* (1). Reference may also be made to Stroud's Judicial Dictionary, 3rd Edition, page 2008, Norton on Deeds, 2nd Edition, pages 109—118, Jarman on Wills, 8th Edition, Volume I, page 477, and British Empire Digest, Volume XVII, pages 359—61.

(1) (1941) 1 Ch. 428

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An uncertainty is not curable by election in all cases. It is not curable by election where there is nothing to indicate who is to have the option. Thus a gift either to A or B is uncertain where the gift is not substitutional, Jarman on Wills. 8th Edition, pages 493—95. And a contract of sale for either Rs. 500 or Rs. 1,000 also is uncertain : Illustration (i) to section 29. Indian Contract Act.

An Arbitration agreement between A and B to refer disputes to the arbitration of 'X' or at the option of A to 'Y' is certain because the agreement itself shows who is to have the option : *Bhowanidas-Ramgobind* v. *Harsukhdas-Balkishendas*, (1), and *Sundermull Poreshram* v. *Tribhuban-Hirachand and Co.*, (2). The Arbitration agreements in this case do not indicate who is to have the option. Mr. Meyer contends that he who is to make the reference first is to have the option. I am unable to agree with the contention. Either party may commence the arbitration and may require that the dispute be referred and settled by arbitration. The Arbitration agreements do not require that one of the parties rather than the other is to commence the arbitration or to do the first act in making the reference.

There is nothing to indicate in the Arbitration agreement that one of the parties has the option of determining the Arbitration Tribunal to whom the reference is to be made.

(1) A.I.R. 1924 Cal. 524
(2) A.I.R. 1924 Cal. 828

Mr. Meyer contends that the disputes may be referred to either Tribunal 'X' or Tribunal 'Y' just as a suit may sometimes be instituted in either Court 'X' or Court 'Y'. This analogy is fallacious. Where two Courts have concurrent jurisdiction, the plaintiff has a choice of forum and may institute his suit in either Court. But there is no election in the sense that the choice of Courts is finally determined and the other Court is deprived of its jurisdiction.

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Either party may still institute a suit in the other Court which retains its concurrent jurisdiction. Under an Arbitration agreement two Arbitration Tribunals cannot have concurrent jurisdiction over the identical subject-matter at the same time. An arbitration agreement is an agreement that the disputes shall be settled by an Arbitrator named or designated in the agreement or by an Arbitrator appointed in accordance with the Arbitration agreement.

An agreement to refer either to 'X' or to 'Y' is not an agreement by a named Arbitrator because it is not certain who the Arbitrator is, 'X' does not become the appointed Arbitrator because one of the parties makes the reference to him first. The agreement does not authorise one of the parties to appoint either 'X' or 'Y' as Arbitrator by making a reference to him."

In these circumstances the arbitration agreement in question was held to be invalid and an award was set aside. In my opinion these remarks are applicable in the present case and I thus agree with the finding of the lower Court that the arbitration clause was bad as being vague and uncertain. I accordingly dismiss the appeal with costs.

Counsel's fee Rs. 50.