A **UTTAR PRADESH CO-OPERATIVE FEDERATION LTD.**

v

M/S SUNDER BROTHERS OF DELHI

B *April* 20, 1966

[K. SUBBA RAO AND V. RAMASWAMI, JJ.]

Indian Arbitration Act, s. 34—Arbitration agreement—Parties how far bound to have dispute decided by agreed arbitrator—One of the parties filing suit—Court's discretion to stay such suit—Appellate Court's power to interfere with trial court's discretion under s. 34.

C The appellant society carried on business as public carriers on the Kanpur-Delhi route. By an agreement in 1954 they appointed the respondents as their Managing Agents for a period of 3 years. But much before the expiry of that period they terminated the agreement. Disputes arising between the parties were under the agreement, to be decided by arbitration as provided in the Co-operative Societies Act II of 1912. According to the relevant provisions of the said Act disputes were to be decided by the Registrar of Co-operative Societies or by an arbitrator or arbitrators appointed by him. The respondents however filed a suit against the Society asking for a declaration that the termination of the agreement by the society was illegal and for a mandatory injunction restraining the society from terminating the agreement. The Society thereupon filed an application under s. 34 of the Indian Arbitration Act praying for a stay of the aforesaid suit on the ground that the respondents had agreed to arbitration as provided in the Co-operative Societies Act. The trial Court stayed the suit but the appellate Court set aside the trial Court's order and dismissed the application under s. 34. The High Court upheld the appellate Court's order whereupon, by special leave, the society appealed to this Court.

HELD: (i) The High Court rightly refused to stay the suit. It rightly observed that it would be a difficult task for the arbitrator to investigate as to which of the rules made under the Co-operative Societies Act are consistent with and which of those rules are not consistent with the provisions of the Indian Arbitration Act. The suit, moreover, was filed as far back as 1954 and its stay would not be in the interests of its speedy disposal. [219 G-220 B]

(ii) It is, of course, the normal duty of the court to hold the parties to the contract and to make them present their disputes to the forum of their choice, but the strict principle of sanctity of contract is subject to the discretion of the Court under s. 34 of the Indian Arbitration Act. A party may be released from the bargain if he can show that the selected arbitrator is likely to show bias or there is sufficient reason to suspect that he will act unfairly or that he has been guilty of unreasonable conduct. [222 D]

In the present case the respondent had alleged that the Registrar Co-operative Societies had approved the termination of the contract of Managing Agency with the plaintiff and the Registrar was the Chairman of the Defendant-Society. In the circumstances the High Court must be held to have properly exercised its discretion under s. 34 of the Indian Arbitration Act in not granting a stay of the proceedings in the suit. [222 E].

Bristol Corporation v. *John Aird & Co.* [1913] A.C. 241, referred to. A

(iii) If it appears to the appellate Court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the Appellate Court to interfere with the trial court's exercise of discretion. [222 H] B

Charles Osenton & Co. v. *Johnston*, [1942] A.C. 130, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 426 of 1964.

Appeal by special leave from the judgment and order dated February 22, 1962 of the Punjab High Court (Circuit Bench) at Delhi in Civil Revision No. 311-D of 1958. C

S. P. Sinha and *Inder Sen Sawhney*, for the appellant.

K. K. Jain and *Bishambar Lal*, for the respondent.

The Judgment of the Court was delivered by

Ramaswami, J. This appeal is brought, by special leave, from the judgment of the Punjab High Court dated February 22, 1962 in Civil Revision No. 331-D of 1958 whereby the High D Court upheld and confirmed the judgment of the Appellate Court and set aside the judgment of the trial court staying proceedings in the suit.

The Uttar Pradesh Co-operative Federation Limited (hereinafter referred to as the 'Society') was registered under the Co-operative Societies Act No. II of 1912 at Lucknow and was carrying E on the business of plying public carriers on Kanpur-Delhi route. The Society had been granted, for this purpose, permits by the Uttar Pradesh Government and Delhi Administration for seven vehicles. In March, 1954, the Society entered into an agreement with the plaintiffs—M/s Sunder Brothers—through Bimal Kumar Jain and Dhan Kumar Jain by which they were appointed as Managing Agents for carrying on the business as public car- F riers. The terms of the Managing Agency agreement were embodied in a letter dated March 2, 1954 written by the Secretary of the Society. Clause 28 of the agreement reads as follows:—

> "That in the event of there being any dispute regarding the terms and conditions of this agreement and your appointment hereunder as Managing Agents of the aforesaid business G or any matter arising from and relating thereto or the subject matter thereof, such dispute shall be decided by arbitration as provided under Co-operative Societies Act II of 1912 and you undertake and agree to be bound by the provisions for arbitration in the said Act".

The agreement was to last for a period of three years but on July H 5, 1954 the Society terminated the agreement by its letter dated July 5, 1954. The plaintiffs therefore brought a suit on August

A 18, 1954 in the Court of the Subordinate Judge, First Class, Delhi praying for a declaration that the termination of the Managing Agency agreement by the Society was illegal and the plaintiffs were entitled to continue the business of Managing Agents in accordance with the terms and conditions of the agreement. The plaintiffs prayed for a mandatory injunction restraining the defen-
B dant-Society from terminating the agreement. The Society made an application under s. 34 of the Indian Arbitration Act, 1940 before the Subordinate Judge, Delhi, for an order for staying the suit. It was claimed by the Society that the suit was not maintainable because under s. 51 of the Co-operative Societies Act the dispute was to be adjudicated upon by the Registrar of Co-operative Societies. In the alternative it was alleged that by agreement
C between the parties the dispute was to be referred to arbitration in accordance with the Co-operative Societies Act and consequently proceedings should be stayed. The trial court stayed the proceedings but on the appeal of the plaintiffs the order of the trial court was set aside and the application of the Society under s. 34 of the Indian Arbitration Act was dismissed. The Society
D moved the Punjab High Court in revision but the revision application was dismissed and the order of the lower appellate court was confirmed.

It is necessary at this stage to set out the relevant provisions of the Indian Arbitration Act (Act 10 of 1940). Section 34 of this Act states:

E "34. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement
F or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings, and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and
G willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings".

Section 46 provides as follows:

"46. The provisions of this Act, except sub-section (1) of
H section 6 and sections 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an

arbitration agreement as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder". A

Section 47 reads as follows:

"47. Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder: B

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending". C

There was some controversy in the lower courts as to whether the arbitration under cl. 28 of the agreement was a statutory arbitration and whether s. 46 of the Indian Arbitration Act was applicable to the case. It was argued by Mr. Sinha on behalf of the appellant-Society that no statutory arbitration is created by cl. 28 of the agreement but the parties had merely agreed to act in accordance with the provisions of the Co-operative Societies Act (Act II of 1912) and the Rules made thereunder. It was contended that the parties had merely incorporated the statutory provisions by reference in their agreement and s. 47 of the Indian Arbitration Act will, therefore, be applicable to the case. This legal position was not controverted by Mr. K. K. Jain appearing on behalf of the respondent. The only question in debate was whether the lower court rightly exercised their jurisdiction under s. 34 of the Indian Arbitration Act in not granting the stay of the proceedings of the suit. D E

If the arbitration agreement is not to be treated as a statutory arbitration under s. 46 of the Arbitration Act but an arbitration agreement under s. 47 of the Act, then the procedure to be followed for the arbitration under that agreement will be that provided under the Co-operative Societies Act and the Rules framed thereunder. Under s. 47 of the Indian Arbitration Act the arbitration will be governed only by such rules of the Co-operative Societies Act and rules framed thereunder as are not inconsistent with the provisions of the Indian Arbitration Act. In this connection it is necessary to refer to Rules 115, 116 and 117 of the Co-operative Societies Rules framed under s. 43 of the Co-operative Societies Act. Rule 115 states as follows: F G

"Any dispute touching the business of a registered society (i) between members or past members of a society or persons claiming through a member or past member, (ii) or between a member or a past member or persons so claiming and the society or its committee or H

A any officer of the society, (iii) between the society or its committee and any officer of the society, and (iv) between two or more registered societies, shall be decided either by the Registrar or by arbitration and shall for that purpose be referred in writing to the Registrar".

B Rule 116 provides:

"The Registrar on receipt of a reference shall either decide the dispute himself, or refer it for decision to an arbitrator or to two joint arbitrators appointed by him or to three arbitrators, of whom one shall be nominated by each of the parties to the dispute and the third by the Registrar who shall also appoint one of the arbitrators to act as chairman".

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Rule 117 states:

"In case it is decided to appoint three arbitrators—

(i) The Registrar shall issue a notice calling on each of the parties to nominate one person as its nominee within 15 days of the receipt of the notice.

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(ii) if a party consists of more than one person, such persons shall jointly make only one nomination.

(iii) if more than one person is nominated by a party the Registrar shall appoint either one of the nominees or some other person of his own choice as the nominee of that party,

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(iv) if a party fails to nominate an arbitrator within the appointed time or if its nomination is not valid the Registrar may himself make the nomination,

(v) if one of the arbitrators fails to attend or refuses to work as an arbitrator, the remaining arbitrators may decide the dispute. If two of the arbitrators fail to attend or refuse to work as arbitrators and the claim is not admitted the remaining arbitrator shall refer the case to the Registrar who may authorise him to give an award or appoint one or more arbitrators to proceed with the reference or he may decide the case himself".

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It has been observed by the High Court that it would be a difficult task for the arbitrator to investigate as to which of the rules made under the Co-operative Societies Act are consistent with and which of those rules are not consistent with the provisions of the Indian Arbitration Act and therefore it was, a fit case in which discretion of the court under s. 34 of the Indian Arbitration Act should be exercised in not staying the proceedings of the suit. In our opinion, the reasoning of the High Court has much substance.

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There is also another reason why there should not be a stay of the proceedings under s. 34 of the Indian Arbitration Act. The suit was filed in 1954 and, though 12 years have elapsed, nothing has been done in the suit and it will not be in the interest of speedy disposal of the suit between the parties if the proceedings in the suit are further stayed and the parties are referred to arbitration.

There is also another ground why the proceedings in the suit should not be stayed in the present case. If Rules 115 and 116 of the Co-operative Societies Rules are applicable then the reference of the dispute has to be made to the Registrar of the Co-operative Societies who may either decide the dispute himself or refer the dispute to an arbitrator or two joint arbitrators appointed by him or to three arbitrators, of whom one shall be nominated by each of the parties to the dispute and the third by the Registrar who shall also appoint one of the arbitrators to act as Chairman. It is alleged by the respondent that the Registrar of Co-operative Societies is *ex-officio* President of the Society and it was with his approval that the agreement in dispute was terminated. It was also pointed out that the Registrar was the chief controlling and supervising officer of the Society under its bye-laws. It was submitted for the respondent that the Registrar may not, therefore, act fairly in the matter and it is improper that he should be an arbitrator in the dispute between the parties. In our opinion, there is much validity in this argument. The legal position is that an order of stay of suit under s. 34 of the Indian Arbitration Act will not be granted if it can be shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter or that it is for some reason improper that he should arbitrate in the dispute between the parties. It is, of course, the normal duty of the Court to hold the parties to the contract and to make them present their disputes to the forum of their choice but an order to stay the legal proceedings in a Court of law will not be granted if it is shown that there is good ground for apprehending that the arbitrator will not act fairly in the matter or that it is for some reason improper that he should arbitrate in the dispute. Reference may be made, in this connection, to the decision of the House of Lords in *Bristol Corporation* v. *John Aird & Co.*(1). This case was concerned with an application for stay of proceedings under s. 4 of the English Arbitration Act which is similar to s. 34 of the Indian Arbitration Act. Upon the settlement of the final account there arose a *bona fide* dispute of a substantial character between the contractor and the engineer, who was the arbitrator under the contract, involving a probable conflict of evidence between them. The House of Lords held, affirming the decision of the

(1) [1913] A.C. 241.

A Court of appeal, that the fact that the engineer, without any fault of his own, must necessarily be placed in the position of a Judge and a witness is a sufficient reason why the matter should not be referred in accordance with the contract. At pp. 247-248 of the report Lord Atkinson stated as follows:

B "Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the C engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shown in fact that there is any reasonable prospect that he will be so biased as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of D the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of law and they are entitled to say, in answer to an application to E the Court to exercise the discretion which the 4th section of the Arbitration Act vests in them, "We are not satisfied that there is not some reason for not submitting these questions to the arbitrator". In the present case the question is, has that taken place"?

Lord Moulton after tracing the growth of the law of arbitration F made the following observations in his speech:

"But, My Lords, it must be remembered that these arbitration clauses must be taken to have been inserted with due regard to the existing law of the land, and the law of the land applicable to them is, as I have said, that it does not prevent the parties coming to the Court, but only gives to the Court the power to refuse its assistance in proper G cases. Therefore to say that if we refuse to stay an action we are not carrying out the bargain between the parties does not fairly describe the position. We are carrying out the bargain between the parties, because that bargain to substitute for the Courts of the land a domestic tribunal was a bargain into which was written, by reason of the H existing legislation, the condition that it should only be enforced if the Court thought it a proper case for its being so enforced".

Lord, Parker, after pointing out that s. 4 of the Arbitration Act gave a discretionary power to the Court to be exercised after it was satisfied that there was no sufficient reason why the matter should not be referred in accordance with the submission, expressed the following views:

> "In making up its mind on this point the Court must of course give due consideration to the contract between the parties, but it should, I think, always be remembered that the parties may have agreed to the submission precisely because of the discretionary power vested in the Court under the Arbitration Act. They may, very well, for instance, have said to themselves, 'If in any particular case it would be unfair to allow the arbitration we are agreeing to proceed we shall have the protection of the Court".

It is manifest that the strict principle of sanctity of contract is subject to the discretion of the Court under s. 34 of the Indian Arbitration Act, for there must be read in every such agreement an implied term or condition that it would be enforceable only if the Court, having due regard to the other surrounding circumstances, thinks fit in its discretion to enforce it. It is obvious that a party may be released from the bargain if he can show that the selected arbitrator is likely to show bias or by sufficient reason to suspect that he will act unfairly or that he has been guilty of continued unreasonable conduct. As we have already stated, the respondent has alleged in the present case that the Registrar, Co-operative Societies has approved the termination of the contract of Managing Agency with the plaintiff and the Registrar was the chairman of the defendant-Society. We are accordingly of the opinion that the High Court properly exercised its discretion under s. 34 of the Indian Arbitration Act in not granting a stay of the proceedings in the suit.

It is well-established that where the discretion vested in the Court under s. 34 of the Indian Arbitration Act has been exercised by the lower court the appellate court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial Judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court

A to interfere with the trial court's exercise of discretion. This principle is well-established; but, as has been observed by Viscount Simon, L. C., in *Charles Osenton & Co.* v. *Johnston*[1]:

> "The law as to the reversal by a court of appeal of an order made by a Judge below in the exercise of his discretion
B is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case".

For these reasons we hold that the appellant has made out no case for our interference with the order of the High Court refusing stay of the proceedings in the suit under s. 34 of the Indian
C Arbitration Act. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.