

PETITIONER:
R.N. KUMAR

Vs.

RESPONDENT:
R.K. SORAL

DATE OF JUDGMENT 13/04/1988

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
RANGNATHAN, S.

CITATION:
1988 AIR 1205 1988 SCR (3) 527
1988 SCC (2) 508 JT 1988 (2) 204
1988 SCALE (1) 788

ACT:
Arbitration Act, 1940. Section 20-Arbitration agreement-Duty of Court to direct filing of-Whether obligatory.

Indian Contract Act, 1872. Section 10-Contract-Whether there is complete novation of a contract in a particular case-Held, it depends on facts and circumstances of the case.

HEADNOTE:

An agreement for distribution of the film "Savere Wali Gadi" was entered into on 19th March, 1983 between the petitioner as the distributor and the respondent as the producer. The agreement contained an arbitration clause. A sum of Rs.3.40 lakhs paid to the respondent and acknowledged by him earlier to the agreement was deemed to have been adjusted against the first instalment. In or about 1984 about Rs. 3 lakhs were further advanced to the respondent. As per the agreement the respondent was to hand over the prints of the film by 10th August, 1983, but it was not done.

On 11th March, 1985 a further agreement was entered into between the parties whereby the respondent agreed to pay a total sum of Rs.6.50 lakhs to the petitioner for giving up his distribution rights in the first agreement. The first agreement was accordingly irrevocably cancelled and superseded by the subsequent agreement.

The respondent took up the matter with Motion Pictures Association to de-register the film in the name of the petitioner. The Motion Picture Association stated that de-registration would be allowed only when the respondent pays Rs.6.50 lakhs to the petitioner or deposits the amount with the Association. The petitioner's claim before the Association was that the respondent committed breach of the subsequent agreement.

A civil suit was filed in the High Court for recovery of Rs.6.50 lakhs with interest, by the petitioner against the respondent. Later, an application under section 20 of the Arbitration Act was made. The Single Judge held that the first agreement had revived and directed the

filing of the agreement. On appeal, the Division Bench confirmed the order. This special leave petition is against the order of the Division Bench of the High Court.

Dismissing the special leave petition, this Court,

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HELD: 1.1 Whether in any particular case there was a complete novation of a contract in the sense that the new contract replaced or substituted the old contract, could depend upon the facts and circumstances of the case. [531B-C]

1.2 When the agreement of 1985 was entered into, it was the intention of the parties that the earlier agreement would be superseded and a new arrangement was sought to be brought about whereby the rights of the petitioner under the earlier agreement were to be yielded for a sum of Rs.6.50 lakhs. This amount of Rs.6.50 lakhs was never paid by the respondent, and it was the case of the petitioner that the earlier agreement stood cancelled. The petitioner who claimed rights under the earlier agreement, sought the continuation of his registration of distributorship. This registration could continue only by virtue of the earlier agreement which had revived. [530G-HG; 531B]

Babulal Marwari and others v. Tulsi Singh and others, A.I.R. 1940 Patna 121, referred to.

2.1 Sub-section (1) of Section 20 of the Arbitration Act gives an option to the parties by the use of the expression 'may', but the other sub-sections, if the conditions are fulfilled, make it obligatory for the Court to direct filing of an arbitration agreement. [532G]

2.2 Indubitably, there was an arbitration clause in the agreement. The parties have applied for reference. The Division Bench has reiterated that the original agreement dated 19th March, 1983 which ceased to have effect and came to an end by the agreement dated 11th March, 1985 stood revived by virtue of the two letters dated 15th July, 1985 and 11th September, 1985 by the appellant. It is clear that the petitioner in the above letters fell back on the original contract of 19th March, 1983. This was accepted by the respondent. Hence there was at all relevant times a valid and binding contract between the parties. That contract contained an arbitration clause. There was nothing to disentitle the parties to have their rights adjudicated in terms of an arbitration clause. The civil suit filed does not by itself preclude filing of proper arbitration agreement between the parties. There being no impediment
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in filing the arbitration agreement which was subsisting at the relevant time when the High Court directed that the arbitration agreement be filed, that discretion should not be interfered with. [532G-H; 531F-G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 4221 of 1988.

From the Judgment and Order dated 3.12.1987 of the Delhi High Court in FAO (OS) No. 120 of 1987.

Mukul Rohtagi and Miss Bina Gupta for the petitioner.

Soli J. Sorabji, D.K. Sorab, P. Jain, Sushil Kr. Jain and Sudhanshu Atreya for the Respondent.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. This is an application for leave to appeal under Article 136 of the Constitution from the order of the Division Bench of the Delhi High Court

affirming the order of the learned single Judge of that High Court. It appears that on 19th March, 1983, there was an agreement for distribution of the film "Savere Wali Gadi" entered into between the parties, the petitioner as the distributor and the respondent as the producer. The agreement contained an arbitration clause. It is stated that a sum of Rs.3 lakhs was paid by the petitioner and acknowledged by the respondent earlier to the execution of the said agreement and therefore, the first instalment payable under the agreement to the respondent of Rs.3.40 lakhs was deemed to be adjusted. Under the aforesaid distribution agreement by 30th August, 1983, the respondent was to hand over the prints of the film by this date which he never did. In or about 1984 certain other moneys of about Rs.3 lakhs were further advanced to the respondent. On 11th March, 1985 a further agreement was entered into between the parties whereby the respondent agreed to pay a total amount of Rs.6.50 lakhs to the petitioner and the petitioner to give up his distribution rights in the first agreement of 19th March, 1983. The first agreement was accordingly irrevocably cancelled and superseded by this subsequent agreement. On or about 2nd June, 1985 respondent wrote to the Motion Pictures Association, Delhi to de-register the film in the name of the petitioner in view of the petitioner having given up the distribution rights by virtue of Annexure P/2 dated 11.3.85 where under the petitioner had agreed to receive Rs.6.50 lakhs and finished the deal within six months of 11.3.85. It is the case of the petitioner.

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however, that the sum of Rs.6.50 lakhs was never paid by the respondent to the petitioner. On 3rd July, 1985 the Motion Picture Association wrote to the respondent acknowledging receipt of respondent's letter dated 22nd June 1985 whereby he had asked for de-registration of the film in view of Annexure P/2. The Motion Picture Association stated that de-registration would be allowed only when the respondent pays Rs.6.50 lakhs to the petitioner or deposits the amount with the Motion Picture Association. It is stated that between July 1985 and September 1985, the petitioner wrote two letters to the Motion Picture Association stating that the respondent had committed a breach of the subsequent agreement dated 11th March, 1985 executed between the parties whereunder the respondent was to make payment of Rs.6.50 lakhs and it was clear that the respondent had no desire to make payment and the respondent wrongly wanted to deal with the film and sell the distribution rights to somebody else thereby enjoying benefit of the same and also to deprive the petitioner of the amount of Rs.6.50 lakhs. Civil suit was filed in February, 1986 for recovery of Rs.6.50 lakhs with interest by the petitioner against the respondent. The written statement was submitted. An application was made under section 20 in June, 1986. This application had been made later than the institution of the civil suit in the same High Court. The learned single Judge directed that the arbitration agreement to be filed and reference was directed according to the agreement. There was an order passed by the learned single Judge to that effect. There was an appeal to the Division Bench of the High Court and the Division Bench confirmed the order of the learned single Judge. Hence this petition.

It appears that there were two agreements one dated 11th March, 1985 and the other dated 19th March, 1983. The learned Judge found that there could be little doubt that the intention of the parties when agreement dated 11th March, 1985 was entered into was that the earlier contract

dated 19th March, 1983 should be superseded. But it appears that the agreement fell through because when the agreement of 1985 was entered into, it was the intention of the parties to the earlier agreement would be superseded and a new arrangement was sought to be brought about whereby the rights of the petitioner herein under agreement dated 19th March, 1983 were to be yielded for a sum of Rs.6.50 lakhs. This amount of Rs.6.50 lakhs was never paid by the respondent. It was the case of the petitioner herein that thereby the agreement of 11th March, 1985 stood cancelled. The petitioner who claimed rights under the earlier agreement dated 19th March, 1983 and sought the continuation of his registration of distributorship. The learned single Judge found that it was at the instance of petitioner 531

herein that respondent No. 2 confirmed vide its letter dated 19th September, 1985 that as the petitioner, before the learned single Judge, had failed to pay Rs.6,50,000 the aforesaid picture stood registered in the name of the petitioner herein. This registration could continue only by virtue of the earlier agreement dated March 19, 1983. The learned single Judge further found that the agreement dated 11th March, 1985 had come to an end and the earlier agreement dated 19th March, 1983 had revived. In this connection reference may be made to the observations of the Patna High Court in Babulal Marwari and others v. Tulsi Singh and others, A.I.R. 1940 Patna 121. Whether in any particular case there was a complete novation of a contract in the sense that the new contract replaced or substituted the old contract, could depend upon the facts and circumstances of the case.

In that view of the matter, the single Judge of the High Court, in our opinion, rightly directed that the first agreement be filed.

The Division Bench of the High Court pointed out after referring to the letter dated 19/21st September, 1985 the Motion Pictures Association confirmed that in view of the failure of the producer to comply with his earlier letter regarding payment of Rs. 6.50 lakhs plus interest, the picture in question stood registered in the name of M/s. Raja Movies in the Motion Pictures Association. This position was accepted by Suyog Films in the letter dated 5th November, 1985 and the subsequent letter by them. The non-performance of the terms of the contract dated 11th March, 1985 may not by itself revive the earlier contract of 19th March, 1983, but the petitioner in his letters dated 15th July, 1985 and 19th September, 1985 fell back on the original contract of 19th March, 1983. This was accepted by M/s. Suyog Films and thus a binding contract came into existence. In this case the Division Bench came to the conclusion on the construction of the letters and the conduct of the party that the contract dated 19th March, 1983 continued. The contract dated 19th March, 1983 contained an arbitration clause. There is no reason why that arbitration agreement should not be filed. A civil suit had been filed but that by itself unlike under section 34 of the Arbitration Act, 1940 does not preclude filing of proper arbitration agreement between the parties. There being no impediment in filing the arbitration agreement which indubitably was subsisting at the relevant time when the High Court directed that the arbitration agreement be filed, that discretion should not be interfered with. Section 20 of the Arbitration Act provides as follows:

"20. Application to file in Court arbitration agreement-

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(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder is defendant or - defendants, if the application has been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) on such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

It is significant to note that the sub-section (1) gives an option to the parties by the use of expression 'may' but the other sub-section if the conditions are fulfilled, makes it obligatory for the Court to direct filing of an arbitration agreement. Indubitably, in this case there was an arbitration clause in the agreement. The parties have applied for reference. The Division Bench has reiterated that the original agreement dated 19th March, 1983 which ceased to have effect and came to an end by the agreement dated 11th March, 1985, stood revived by virtue of the two letters dated 15th July, 1985 and 11th September,

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1985 by the appellant. The High Court has confirmed that the said two letters were acted upon by the Motion Pictures Association. By letter dated 19/21 September, 1985 the Motion Pictures Association confirmed that in view of the failure of the producer to comply with his earlier letter regarding payment of Rs.6,50,000 plus interest, the picture "Savere Wali Gadi" stood registered in the name of M/s. Raja Movies in the Motion Pictures Association. This position was accepted by Suyog Films in letter dated 5th November, 1985 and the subsequent letter by them. It is clear that the petitioner in his letters dated 15th July, 1985 and 11th September, 1985 fell back on the original contract of 19th March, 1983. This was accepted by the respondent. Hence, there was at all relevant times a valid and binding contract between the parties. That contract contained an arbitration clause. There was nothing, in view of the reasons indicated above, to disentitle the parties to have their rights

adjudicated in terms of an arbitration clause.

In the premises the High Court was right in the view it took. This petition fails and is accordingly dismissed.

G.N.

Petition dismissed.

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JUDIS