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Court : Chennai

Decided On : Apr-05-1922

Reported in : 75Ind.Cas.850

Judge : Kumaraswamy Sastriar, J.

Appellant : In Re: the Arbitration Act and the Reference, to Arbitration by Messrs. M. Narasimhalu Chetty and Co

Judgement :

Kumaraswamy Sastriar, J.

1. This is art application by one of the parties to a reference to arbitration to set aside the award which was passed by the arbitrators in pursuance of the submission. The petitioner entered into certain contracts with the counter-petitioner who was acting as agent of an English Firm, viz., Messrs. Johnstone Kelly and Macdona. Disputes arose between the parties as regards four indents and after some preliminary correspondence between the parties the matter in different was referred to the arbitration of Mr. Bradshaw of Messrs. Tetley and Whitley and Mr. Jackson, of Messrs. Beardsell & Co., under the terms of the arbitration clause in the indents. The case for the petitioner is that the arbitrators acted improperly and he states:

(1) that one of them, Mr. Bradshaw, who was appointed at the instance of the petitioner insisted on payment to him of Rs. 400-0-0 as fees for the arbitration which sum he paid,

(2) that the arbitrators gave notice on the 10th January 1922 fixing 15th January 1922 for the enquiry and calling upon the parties to be present and produce their evidence before them; that on that date he presented himself before the arbitrators at the appointed time and place and they asked him to hand over copies of correspondence, samples, etc., which he did and they asked him what his case was and he explained his case to them; that sometime afterwards the counter-pet tioner sent in his chit and the arbitrators asked him to wait and after hearing what the petitioner had to say, they asked him to go out and seat for the counter-petitioner; that he does not know what took place between the arbitrators and the counter-petitioner, and that there was no enquiry held by the arbitrators and, in any case, there was no enquiry in the presence of both parties,

(3) that the arbitrators subsequently went to the Bank to see the goods and when going asked the petitioner if he wished to follow them to the Bank and whether he had not sufficient confidence in them and he thought that if he accompanied them to the Bank, it might be suggested that he had no confidence and, therefore, he did not insist on following them to the Bank,

(4) that nothing further took place till 27th January 1922 when he received by post a letter purporting to be signed, by Mr. Jackson, one of the arbitrators, enclosing a copy of the award; that he had considerable evidence to adduce regarding the matters in difference between the parties and expected that in due course the arbitrators would fix another date after examining the goods in the Bank and hold enquiry for adducing evidence on his behalf and for meeting the case of the opposite side and that no such opportunity was given to him,

(5) that as the result of the arbitration, the arbitrators found in his favour as regards the three m nor contracts out that as regards the important contract relating to 20 cases of crimps, they held that he was bound to take the goods on an allowance of 25 per cent, being given whole even before the arbitration the counter-petitioner lad agreed to give a discount of 35 per cent., and

(6) that the award is invalid because there was no proper enquiry by the arbitrators because the arbitrators misconducted themselves by receiving fees before hand and by not enquiring into the case of the parties in the presence of each other, because there was misconduct and irregularity on the part of the arbitrarators in that no opportunity was given to the petitioner to place his evidence before them and to put forward his case after inspection of the goods in the Bank, because no notice of the making or signing of the award was given as required by law, and because the award was also opposed to natural justice and equity.

2. The counter-petitioner files a counter-affidavit in which he states that on the date fixed for hearing he came a little late; that the petitioner having come earlier was called by the arbitrators to state his case and file the evidence in support of it, that he appeared while this was going on and sent his card and he was asked to wait and told that he would be sent for; that the petitioner came out and he was asked to appear and when he went in he was asked to State his case and file documents, that after some consultation the arbitrators sent for both parties and after stating the points of difference between then asked them what they had to say in support of their respective cases; that the enquiry then went or in the presence of each other and when it was concluded the arbitrators told them that they had finished the case and it only remaned to compare the goods with the samples and that they would go to the Bank for the purpose, and that Mr. Bradshaw turned to the petitioner and asked whether he wished to accompany them to the Bank and the petitioner said he had sufficient confidence in them whereupon they said they would inspect the goods and pronounce the award. The counter-petitioner denies the various charges against the arbitrators as not being true. He states that it was not true that the enquiry was not held in the presence of the parties and what was really done was preliminary work before the parties were called in and he also says that if there was any irregularity the petitioner did not take the objection in time and must be deemed to have waived it. As regards the complaint of the petitioner that be was not given an opportunity to place his case before the arbitrators, he says that all the correspondence and samples were filed by the petitioner and he never said that there were other documents to file or witnesses to examine; that the arbitrators said they had finished the case and no suggestion was made that any further enquiry was to be held. As regards the

allowance which he had offered to the petitioner of 35 per cent., he states that the consideration for that was the acceptance of all the contracts whereas the arbitrators directed the cancellation of three out of four contracts and gave allowance only as regards one contract. According to the counter-petitioner there was a full enquiry by the arbitrators which took place from 9-45 A.M., to about 12-30 noon. Both the arbitrators have filed, an affidavit in which they set out what took place before them. They state that the petitioner came in first on the appointed day of hearing and they asked him to state his case and file any statement that he might like to file and he then filed a statement and also filed all the documents and samples in his possession; that the counter-petitioner was sent for and asked to file his documents and samples which he did and that after perusing the statements and the correspondence they commenced the hearing of the case which was done in the presence of both the parties. They then state that they took the evidence of both the parties; that they confronted the petitioner with the documents which were filed in the case, and that he made certain admissions and that there were also other questions on which they examined both the parties. They state that alter they heard all that the parties had to say and alter reading all the correspondence, they told the parties they had done with the case and proceeded to examine the goods in the Bank; that the petitioner agreed to their examining the goods and he never told them that he had any further evidence to let in or ever complained about the procedure adopted, and that after comparing the shipment samples with the original they came to the conclusion that as regards one contract the differences in quality, colour, finish and design were not substantial enough to have the contract cancelled and compensation would be sufficient relief, but that as regards the other three contracts, the differences were substantial and so they cancelled them. They state that the case was fully and properly heard by them and there could be no objection to that enquiry.

3. It seems to me that, having regard to the fact that the allegations before me consist of

(1) the allegations of the petitioner as regards certain irregularities which, he says, took place and

(2) the allegation of the counter-petitioner that everything was regular and proper, I should act upon the evidence of the two arbitrators, Messrs. Bradshaw and Jackson. So far as it appears, they had no interest in the matter in dispute, and they belong to firms which have been doing large business in piece-goods. Nothing is suggested as regards their competency to try the matters in dispute. In cases where the parties are at variance on the question as to what took place before the arbitrators, it seem to me that the proper course is to take the statement of the arbitrators as to the facts as prima facie representing the true state of affairs as to what took place at the time of the enquiry, unless there is very strong reason for doubting the accuracy of the statement of the arbitrators as regards the facts which took place before them and within their competence. The statement of a Judge holding an enquiry as to what took place before him is treated almost as conclusive as regards those facts, and I do not see why, as regards a statement before arbitrators appointed by the parties themselves, there should be any less rigid standard applied when dealing with questions of fact as to facts which are asserted by one side and denied by the other. Adopting, therefore, this criterion as regards the finding of facts, it seems to me that I must accept the statement made by the arbitrators in their affidavit and the statement made by the counter-petitioner in so far as his statement tallies with that of the arbitrators. On these facts it seems to me that the only points on which there can be any question as regards setting aside the award are

(1) whether the taking of fee by both arbitrators befere the enquiry commenced would vitiate the award, and

(2) whether the fact that the statements were recorded in the absence of the parties during what may be called spade work, before the enquiry, was such as would bring the case within the rulings cited by Mr. V.V. Srinivasa Aiyangar and thus vitiate the award as being the result of proceedings taken in the absence of the parties. Before proceeding to discuss these two points, I may state that, on the facts, I am not satisfied that there was any imperfect enquiry or that there was any ground for holding that the arbitrators acted in a manner which was not correct. There is nothing to show that the petitioner ever told the arbitrators that he had any witness to examine or any further documents to file. It is admitted that the

arbitrators required him to be present at the enquiry with all his documents and with his witnesses, and, that being so, if he had any further witnesses to examine, it was his duty to have told the arbitrators that he wanted to examine witnesses and to ask for an adjournment or to ask that the witnesses, if present, be called and examined. On the contrary, the arbitrators distinctly state that when they closed the enquiry they told the parties that the enquiry was closed and they would inspect the goods and pass the award. In these circumstances, whatever might have been in the mind of the petitioner, it seems that he cannot challenge the enquiry on the ground that opportunity was not given to him to call witnesses when he himself did not court opportunity by asking the arbitrators to call witnesses or adjourn the enquiry, so far as regards the statement that the petitioner had no opportunity to examine witnesses. As regards the petitioners not proceeding to the Bank when the arbitrators went there to inspect the goods, I am not satisfied that the arbitrators did anything which would have justified the petitioner in coming to the conclusion that heated not go to the Bank along with the arbitrators. The arbitrators do not say that they suggested to him that it might be left to them to inspect the goods in his absence or that anything was done by them which would lead the petitioner to believe that if he did accompany them to the Bank he would be prejudicing his case by leading the arbit ators to suppose that he had no confidence in them. It is highly improbable that the arbitrators would have made any such suggestion, especially when the counter-petitioner went with them to the Bank. I am not, therefore, in a position on the evidence to hold that any such statement was made to the petitioner which prevented his going along with the arbitrators to the Bank.

4. Turning now to the two legal objections on which it may be possible to set aside the award, I think that, as regards remuneration, there is nothing illegal or improper in what the arbitrators did. It is not suggested in this case, as it was in the cases cited before me, that such demand was exorbitant or improper or that there was anything in the conduct of the arbitrators in the making of the demand which would have led the parties to suppose that the arbitrators were doing something which the parties would not have done but for the demand. It is admitted that each party had agreed to pay a fee of Rs. 400-0-0 to the arbitrators for their trouble. I think that few merchants in Madras would waste their time in arbitration unless it

was worth their while to do so, so that in the present case the mere fact that Rs. 400-0-0 was fixed as payable by each party is no ground for holdihg that there was anything improper. Neither party demurred to make payment and it is not suggested that payment was made in such circumstances as would indicate that, if payment was not made, the consequences would be against the party that refused payment. I am referred to Section 11 of the Arbitration Act but there is nothing there which precludes the arbitrarors from either fixing the fees or receiving the fees beforehand. All that the section says is that in case the award is given the arbitrators shall state in the award what amount is payable to them for their fees. That assumes that they were not paid beforehand, and, to hold that the arbitrators are bound to conduct the arbitration on the off chance of their being paid or not at the end of the enquiry would be going beyound the provisions of Section 11. Reference was made to Russell on Arbitration, page 204, and to In re Enoch and Zareizky & Co. (1910) 1 K.B. 337 : 79 L.J.K.B. 363 : 101 L.T. 80.

5. That was a case where there was some improper conduct on the part of arbitrators. There the umpire made a demand which the Judge thought unreasonable and the party himself repudated it as unreasonable. It is far from establishing the proposition that in case of a lawful and reasonable fee agreed to be paid by the parties the arbitrator is guilty of misconduct if he takes his fee in advance. In the absence of any decision, I am not prepared to hold that, in this country at least, the arbitrators would be guilty of misconduct in getting payment of a reasonable fee beforehand and thus avoid the alternative, if they are hot paid, of suing the parties in Court, because there is no other remedy open to the arbitrators.

6. The next objection is that, on the facts and the statement of the arbitrators, a certain portion of the work was done in the absence of each of the parties. If that portion of the work which was done was judicial in its character, there can be no doubt that the authorities cited show that the award is liable to be set aside. The cases referred to by Mr. V.V. Srinivasa Aiyangar, namely, Harvey v. Shelton (1844) 7 Beav. 455 : 13 L.J. Ch. 466 : 49 E.R. 1141 : 64 R.R. 116 Dobson v. Groves : 9 Jur. 86 : 66 R.R. 509, Ganes Narain Singh v. Malida Koer : 13 C.L.J. 399, Cursetji Jehangir Khambatta v. Crowder 9 Ind. Dec. 707 no doubt lay down

the rule that, where an act judicial in its character is to be performed, the arbitrators are bound by the same rules as bind the Courts, and that the arbitrators are not entitled to decide or to give their award in the absence of one or more of the parties to the arbitration and without notice to them. But there are also cases which hold that, where the act done is not of a judicial nature but merely ministerial in its character, it is campetent to one of the arbitrators or all the arbitrators to have those acts performed in the absence of one or more of the parties. I need only refer to Anderson v. Wallace (1835) 3 C & F. 26 : 6 E.R. 1347 and Manindra Nath v. Mohanunda Roy 15 C.L.J. 360. In the present case what happened was, that both the parties did not turn up together, the petitioner turned up and the arbitrators asked him to state his case and file his document and he gave a written statement stating what his case was and filed such documents as he bad in his possession. While he was doing this the counter-petitioner turned up and the arbitrators sent for him, asked the petitioner to remain outside, and took from the counter-petitioner a written statement setting out his case and received his exhibits. Then the arbitrators state that after having gone through these statements and exhibits they called in both the parties and began the inquiry. It seems to me that what the arbitrators did in this case was what Courts do, namely, receiving statements and documents, before the enqiry commences. These acts are purely ministerial in their character and it is not suggested that before the filing of written statements or documents in Court the Registrar is bound to call the other party and do it in his presence. What really took place after this was the commencement of the judicial proceedings before the arbitrators and, so far as the affidavit of the arbitrators goes, when that act was done both the parties were present. I am there fore not prepared to hold on the facts of this case that the award is liable to be vitiated because there was a judicial act done by the arbitrators in the absence of the party. This disposes of the two main objections taken by Mr. V.V. Srinivasa Aiyangar on the facts as appear from the affidavits of the arbitrators.

7. The question of waiver has been raised by the counter-petitioner which I do not think it necessary to discuss at present. I have no doubt that it is open to the parties to waive any irregularities which may have taken place in the conduct of the enquiry so long as those irregularities are not fundamental and do not involve

any prejudice or hardship to the party. The question as to whether there is sufficient reason in this case to warrant my holding that there was a waiver does not arise on the facts found by me. I find that there was no irregularity in the conduct of the proceedings before the arbitrators.

8. The result will be that the application is dismissed with costs of the arbitrators and costs of the counter-petitioner (two sets).

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