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Court : Kolkata

Decided On : Apr-07-1930

Reported in : AIR1931Cal53,129Ind.Cas.428

Appellant : Brojendra Kumar Pal and anr.

Respondent : Purna Chandra Pal and anr.

Judgement :

Graham, J.

1. In this case a Rule was issued to show cause why a judgment and decree of the Second Additional Subordinate Judge of Noakhali based upon an arbitration award should not be set aside, and why the suit should not be remitted to the learned Subordinate Judge to be dealt with according to law.

2. The facts of the case may be shortly stated. The opposite parties Puma Chandra Pal and Chandra Kumar Pal brought against the petitioners a suit for accounts (No. 246 of 1927) in the Court of the Subordinate Judge of Noakhali alleging that the petitioners had been engaged as gumasthas to manage a business in betel-nuts and had rendered no account. The defence was that the defendants were not servants of the plaintiffs, but were partners in the business; that plaintiffs could not sue for accounts till the business had been wound up and accounts had been rendered by the plaintiffs; and that the papers relating to the business were with the plaintiffs who were therefore not entitled to any relief.

3. The opposite parties also brought another suit (No. 316 of 1927) in the same Court for khas possession of a hut alleging that it was their private property and that the defendants had refused to give up possession of it. That suit was defended by petitioner 2 Jashada Kumar Pal.

4. The two suits were tried together and on 17th April 1929 both parties in a joint petition prayed that the matters in dispute between them might be referred to the arbitration of three arbitrators. The prayer was allowed and in due course the arbitrators filed their award on 17th August 1929. Their finding was that the business was a partnership one, that the share of the plaintiffs in the profit and loss was nine annas and of the two defendants, three and half annas each. They found further that on an examination of the accounts the defendant Brojendra Kumar Pal was liable to the plaintiff for a sum of Rs. 3,657 odd and the other defendant Jashada Kumar Pal for Rs. 3,542 odd. As regards the hut in dispute in Suit No. 316 they found that it was partnership property and not the property of the plaintiffs as claimed by them.

5. To this award both parties submitted objections which were overruled by the learned Subordinate Judge and a decree was passed, as already stated in accordance with the award.

6. The decision of the Court below has been assailed before us upon two grounds. The first ground taken is that the award as well as the judgment and decree based thereon are bad in law on the ground that one of the three arbitrators was not present at some of the sittings of the arbitrators; and secondly that the learned Subordinate Judge acted illegally and with material irregularity in the exercise of his jurisdiction in not setting aside the award on the ground of misconduct of the arbitrators by reason of the fact that two of them deposed as witnesses, the contention being that the arbitrators could not be witnesses in a case in which they were themselves Judges so as to combine the dual functions of Judge and witness.

7. With regard to the first point it is to be observed that no objection, was taken before the arbitrators. There is authority too in this Court for the view that the absence of an arbitrator cannot be deemed to amount to misconduct where it is

clear that no business of a disputed character was gone into during the absence of the arbitrator, and where the decision upon the matters in dispute is the decision of all the arbitrators, *Nadir Chand v. Gobinda Chandra* [1905] 2 C.L.J. 61. It has been found by the learned Subordinate Judge that on the occasions when one of the arbitrators was absent nothing of importance was done, and that as a matter of fact every- thing was done over again at the sittings when all the arbitrators were present.; That being so it cannot be held that the case of misconduct has been substantiated.

8. The second contention urged on behalf of the petitioners relates to the procedure whereby two of the arbitrators were examined as witnesses in the course of the arbitration proceedings. It may be observed at the outset that no objection. was taken on this ground before the arbitrators, nor does it find place in the six grounds of objection taken before the Subordinate Judge. It is only now at the eleventh hour on an application for revision by this Court that this objection is raised for the first time. And the reason¹ for this is, I think, not far to seek because it is abundantly clear from the petition praying for submission to arbitration that both parties were fully aware that the arbitrators were also witnesses in the case. That petition expressly mentions the fact. We are informed that one of the arbitrators was examined for the plaintiffs, and another for the defendants. It seems clear that both parties contemplated that the arbitrators might be examined as witnesses and they evidently acquiesced in the course adopted. Having; regard to these facts such an objections comes with an ill grace from the defendants, and it is idle for them to contend, now that the award has been given against them, that it is vitiated by this circumstance. Their conscience has evidently become more elastic since the cases was before the Subordinate Judge since they did not then venture to make capital out of this objection upon which so much stress has now been laid.

9. But apart from this no authority has-been shown to us, at all events in this country, though there are no doubt English authorities to the contrary, in support of the proposition that the examination of an arbitrator as a witness before an arbitration tribunal will invalidate an award. Even in England there have been cases where it has been held that where a tribunal consists of a number of

persons e.g., arbitrators or a jury, one or more of such persons may be examined as a witness or witnesses before the remaining members of the tribunal. The case of a single Judge is obviously on a different footing because if examined as a witness, he would then combine wholly in himself the dual functions both of Judge and witness. As a matter of fact while we have not, as I have said, been shown any authority to the contrary, there is in this Court authority for the view that there is no impropriety in an arbitrator giving evidence before his colleagues: *Haridas v. Baidyanath* [1917] 40 I.C. 646. The decision in that case, the facts of which cannot be distinguished from the present case, is binding upon us, and the only course open to us, if we disagree with it, would be to refer the matter to the Full Bench in order to determine whether that case was rightly decided or not. I do not think it is necessary to express an opinion on the point of law involved, nor should I be justified in doing so while that decision holds good. The reason why I do not think a reference to the Full Bench necessary is that in my opinion this case is not a fit one for interference in the exercise of our revisional powers under Section 115, Civil P.C. We are not bound to interfere under that section unless we are satisfied that there has been some gross and palpable error of law resulting in a grave miscarriage of justice. Having regard to the facts of this case it cannot I think be said that any grave injustice has been done. The parties agreed to abide by the result of the arbitration, the matters in dispute were inquired into, and substantial justice seems to have been done. It is not a case in which we should be justified in my opinion in exercising our special powers.

10. Both the contentions which have been urged therefore fail and the rule must be discharged with costs. Hearing-fee three gold mohurs.

Mitter, J.

11. That an award given by arbitrators who gave evidence in the arbitration proceedings before themselves should be upheld raises *prima facie* some surprise in a judicial mind. Yet it is in accordance with the authorities that it can be so upheld if the parties agreed that the arbitrator should also be a witness. This is the question raised by this Rule.

12. This rule is directed against a judgment and decree passed in accordance with an award of the arbitrators in a suit brought by the plaintiffs opposite parties for accounts of a partnership business.

13. It appears that by a petition dated 17th April 1929 the defendants who are petitioners before us and the plaintiffs opposite parties referred to the arbitration of three persons the dispute arising in the suit for accounts. It is mentioned in the petition for reference to arbitration that the arbitrators were witnesses in the suit and were local men of influence. Both parties agreed to be bound by whatever award the arbitrators would give. It was also agreed that no party would be entitled to raise any argument or objection to the award and if any objection is raised that would be rejected. The petition for reference also stated that in the case of difference of opinion amongst the arbitrators the opinion of the majority would prevail. It was also stated in the petition for reference that the arbitrators who take evidence from both parties and after examining the accounts would come to a final decision.

14. In accordance with this submission the arbitrators took evidence including their own evidence, for each arbitrator was examined before the two other arbitrators in connexion with the dispute, and they made an award by which plaintiff was held entitled to get different sums from defendant 1 and defendant 2 respectively. Both sides took several objections to the award but all the objections were overruled by the Court below which passed a decree based on the award. The defendants who have obtained the present Rule attack the judgment and decree on two grounds: (1) the arbitrators are guilty of misconduct as one of them was not present in some sittings in the month of Ashar; (2) the arbitrators were guilty of misconduct as they were examined as witnesses and were at once in the position of Judges and witnesses.

15. With regard to the first ground taken it is sufficient to state that nothing important was done in those sittings of the month of Ashar when they only took a cursory view of the papers and heard the parties in the cases generally. The finding of the lower Court is that the arbitrators did these works over again in the sittings in which all of them were present. This ground must therefore fail.

16. The second ground taken is of substance. The position seems to be one of extreme anomaly that the arbitrators would be put in the position of Judges and witnesses. In the case of *Bristol Corporation v. John Aird & Co.* [1913] A. C. 241 Lord Shaw said this : .

it is a contradiction of terms to say that the Judge can appear as his own witness, be examined and cross-examined and pronounce judgment upon his own memory, credibility or evidence. Such a thing is a traverse of all ideas of judicial decorum.

17. It is true that the arbitrators were cited as witnesses in the suit but the question is : Could the parties have contemplated that the arbitrators would put themselves in the position of witnesses and adjudicate on their own evidence Para. 2 of the petition of reference makes it abundantly clear that the arbitrators were to take evidence from both parties and after examining the khata accounts would come to a final decision in regard to the matter in dispute between the parties. In the case above cited it is instructive to refer to the following observation of Lord Atkinson, p. 248.:

My Lords, I have listened with great attention to the able arguments which have been addressed to the House and I am utterly unable to get rid of the notion that upon two of the most important matters namely this filling and the, excavation between the monoliths, Mr. Squire will necessarily be at once in the position of a Judge and a witness. I think he must necessarily be in that position. I cannot imagine any position more unpleasant, any position more undesirable. If ho be really a witness, then he must in effect be examined before himself and cross-examined before himself and he must decide upon his own veracity or reliability. I think there could be no stronger reason to induce the Court not to exorcise their discretion to stay the action than that any gentleman who has taken upon himself the duties of arbitrator should be put in such an entirely anomalous position.

18. And again Lord Atkinson said this:

My Lords, there is another matter on which Mr. Gore Brown dwelt at some length: he says that it must have been contemplated by the parties that questions of this

character would arise, and that therefore they must have been assumed to have contracted that they would go to arbitration, notwithstanding the fact that in that arbitration the arbitrator would be put in the position of Judge and witness. My Lords, I cannot read anything in the contract to that effect. The parties must be held to have contemplated that they would have to go before a man with preformed views but not to have contemplated that he would put himself in the position of a witness and adjudicate under such circumstances. This is, I think, to push matters to an extreme that is unwarranted.

19. In the case of *Haigh and G. W. Ry. Cos.* [1896] 1 Q. B. 649 Wright. J., pointed out that an arbitrator could not obviously act both as a Judge and a witness in the same inquiry. It is argued that where there is one arbitrator who is also witness this rule of law might apply but it has no application where there are more arbitrators than one. This view is no doubt supported by a decision of this Court, *Hari Das Dutta v. Baidyanath Ghosh* [1917] 40 I.C. 646(2) the broad Statement of law in which seems to be opposed to the decisions of the English Court which lay down that a Judge must not either when acting alone or with others adjudicate on his own testimony: see Phipson on Evidence, p. 19, and Taylor on Evidence Section 1379 It seems strange however that this objection was not taken specifically before the lower Court as one of the heads of misconduct as it goes to the very root of the matter and makes the whole proceedings regarding arbitration radically wrong and vicious if the parties did not assent to the course.

20. A passage is cited by the learned advocate for the opposite party from Taylor's book on evidence in support of the proposition that where there are three or more Judges one of them can give evidence before the other but the same author points out that the moment he does so he is to withdraw from his position as Judge as he could not take further judicial part in the trial. A distinction is drawn in the case where a Peer is tried before the House of Lords which is justified on the special method adopted for the trial of one member of the House of Lords by his Peers: see Tylor on Evidence, para. 1379. If the arbitrator becomes unfit to act as such the moment he gives evidence before the other arbitrators the tribunal of three, to whom the matter has been referred ceases to exist, and no award could be given by the arbitrator who has taken on himself the dual and incompatible position of

Judge and witness.

21. The question then arises whether there can be a waiver of this anomalous procedure by the conduct of the parties. Waiver means that the party has acquiesced in the proceedings with full knowledge of the circumstances. It does not appear clear from the petition of reference that the parties contemplated that the arbitrators although they might have previous knowledge of facts in connexion with the dispute will not be called on to give their own evidence and adjudicate on the same. It is true that the whole thing is radically vicious and wrong and yet if parties did contemplate that the arbitrators would be called as witnesses it is possible to uphold the award made by the tribunal of the parties' own choice . under circumstances where the arbitrator is also a witness. The petitioners defendants took as one of the grounds of misconduct that the arbitrators were partial, but they never made the question of the incompatibility of their position as arbitrators and witnesses as one of the heads of misconduct. At the first blush I was inclined to the view that one would not be justified in upholding the award of this kind. Yet if the parties did contemplate such a position they would be bound. It appears from the affidavit in answer of the opposite party that two of the arbitrators who had personal knowledge about the 'matter in dispute stated what they knew to the other arbitrators in the presence of both the parties. In these circumstances flit is difficult to say that the parties did not contemplate that the arbitrators would be examined as witnesses.

22. In this connexion the following observations of Lord Moulton in the ease of Bristol Corporation v. John Aird & Co. 1913 Appeal Cases 258 may be usefully referred to:

My Lords, I admit no secondary rules beyond the considerations to which I have referred. I think that in each case the Court is bound to consider all the circumstances. 'There may be something in the arbitrator which makes him an unfit person to be Judge in the matter. It may be his personal conduct; it may be the position in which his actions have placed him. The Court is bound to consider all these things; but in considering them it ought to hold that nothing known at the time of the contract, nothing fairly to be expected from the position of the engineer

when he be-comes arbitrator can be alleged as a ground why it should not keep the parties to the bargain because those things must be supposed to have been in their contemplation at the time when they entered into the contract.

23. Whatever doubt I had on the construction of the petition of reference as to whether the arbitrator would be called} on to give evidence, the petitioners' subsequent conduct in allowing the arbitrators to give evidence in their presence] and not objecting to it would go to show that it was within their contemplation and they must be bound, for this is a tribunal of their own choice.

24. It is next said that this Court should not interfere under Section 115, Civil P.C., as no question of jurisdiction arises. I do not agree with this view. The Court has jurisdiction to enforce the award of the domestic tribunal provided the award is not vitiated by the legal misconduct of the arbitrators. The existence of an award not tainted by misconduct of the arbitrators is essential to give the Court jurisdiction to enforce the award. If I had been of opinion that the award is one which would not be enforced I would be led to the conclusion that the Court had no jurisdiction to enforce the award and pass a decree on it. At the least there would be in such a case certainly an irregular exercise of jurisdiction within the meaning of Section 115.

25. As has been said in the recent case of *Maclean v. The Workers' Union* [1929] 1 Ch. D. 602 at p. 624:

Moreover it is well settled by decisions of the Court of appeal that, if the parties to a contract agree that a person who may well be suspected of a bias or who may be deciding in his own cause will not interfere : *Jackson v. Barry Ry. Co.* [1893] 1 Ch. 238; *Eckersley v. Mersey Docks and Harbour Board* [1894] 2 Q. B. 667. The position is one as Davey, L. J., remarked in the latter case at p. 678, which prima facie raises some surprise in a judicial mind; but he adds 'that is contract of the parties.'

26. I agree with my learned brother in discharging the rule for the reasons I have given.

