The Kalyan People's Co-Operative Bank

Vs

Dulhanbibi Aqual Aminsaheb Patil

Civil Appeal Nos. 555 & 556 of 1960

(J. L. Kapur, K. C. Gupta, Raghuvar Dayal JJ)

23.04.1962

JUDGMENT

DAS GUPTA, J. -

Disputes having arisen between the appellant, a Co-operative Bank and one Amin Saheb Patil, who had taken loans from the Bank and Kutubuddin Mohamad Ajim Kazi, who had stood surety in respect of the loans they were referred to arbitration in two references under s. 54 of the Bombay Co-operative Societies Act, 1925. The Board of Arbitrators originally consisted of Mr. L.V. Phadke, Mr. C.K. Phadke and Mr. Trilokeker. After the Board had several meetings and recorded some evidence Mr. Trilokeker, who was the nominee of the borrower, Amin Saheb, retired. Thereafter the Board was re-constituted with Mr. Kotwal as the new nominee of the borrower. This Board also recorded some evidence but after sometime Mr. Kotwal also retired. There was a fresh constitution of the Board with the other two members as before and Mr. M.D. Thakur as the nominee of the borrower. Further evidence was recorded by the Board thus constituted and finally the Board gave its award in the matters on March 14, 1955.

Dissatisfied with these awards Amin Saheb filed two revision applications before the Bombay Co-operative Tribunal. Apart from certain objections on the merits of the awards a preliminary objection was taken before the Tribunal as regards the legality of the awards on the ground that the Board as last constituted had acted on evidence not recorded before it. The Tribunal accepted this preliminary objection, set aside the awards and remanded the cases to the Assistant Registrar for a re-hearing.

Shortly after this Amin Saheb died but his heirs and legal representatives made two applications to the Bombay High Court under Art. 227 of the Constitution against the Tribunal's decision. The High Court held that the Tribunal had erred in thinking that the Board of Arbitrators had acted illegally in seting on the evidence recorded by the previous Boards when this was done with the full knowledge of the parties and without any objection on either side. Accordingly, they set aside the orders passed by the Tribunal and restored the awards made by the Board of Arbitrators.

The Bank has now appealed against the decision of the High Court after obtaining special leave from this Court.

Three points are raised before us in support of the appeal. The first is that the Tribunal had not made any error in holding that the Board had acted illegally in acting upon the evidence recorded by the previous Boards. Secondly, it is urged that even if the Board had erred it was not such an error as would entitle the High Court to interfere under Art. 227 of the Constitution. Lastly, it was contended

that in any case, the High Court was not justified in setting aside the awards when the Tribunal had disposed of the application only on preliminary points and had not considered it on merits. In our opinion there is no substance in the first two contentions. As the High Court has pointed out normally it would have been wrong and indeed illegal for the Tribunal to act on evidence not taken before it. The position is however different when the parties expressly or impliedly agree that some evidence not taken before the Tribunal should be treated as evidence and taken into consideration. It is settled law that question of mode of proof is a question of procedure and is capable of being waived and therefore evidence taken in a previous judicial proceeding can be made admissible in a subsequent proceeding by consent of parties. This applies to proceedings of a civil nature. While what is not relevant under the Evidence Act cannot in proceedings to which Evidence Act applies, made relevant by consent of parties, relevant evidence can be brought on the record for consideration of Court or the Tribunal without following the regular mode, if parties agree. The reason behind this rule is that it would be unfair to ask any party to prove a particular fact when the other party has already admitted that the way it has been brought before the Court has sufficiently proved it. We are therefore of opinion that in the facts of these cases when the appellant Bank not only raised no objection to the Board as last constituted proceeding on the evidence already recorded before the previous Boards, but indeed appears to have invited the Board to act on such evidence previously recorded, the appellant cannot be allowed later on to object to the Board having considered the evidence - merely because the decision has goes against it. The Tribunal was clearly wrong in thinking otherwise and the error cannot but be considered to be an error apparent on the face of the record and as such the High Court had not only the power but duty to interfere with the Tribunal's order.

It appears to us however that having come to the conclusion that the Tribunal was wrong in allowing the preliminary objection raised before it the High Court was not entitled to ignore the fact that before the Tribunal other questions had been raised which had not been considered by it. The proper order to pass in such a case, in our opinion, would be to set aside the order of the Tribunal and direct it to decide the applications for revision on their merits.

We therefore allow the appeals in part, and order, in modification of the order made by the High Court, that the Tribunal's order remanding the cases to the Assistant Registrar be set aside but the Tribunal should now proceed to hear the revision applications on their merits. In the circumstances of the case, we order that the parties will bear their own costs.

Appeals allowed in part.

</html