SUPREME COURT OF INDIA

Reserve Bank of India

Vs.

S.S. Investments

(S.P. Bharucha and T.K. Thommen JJ.)

14.08.1992

JUDGEMENT

BHARUCHA, J.

Leave to appeal granted.

This is an appeal against the Judgment and order of the Madras High Court whereby it declared that arbitration awards given on 7th and 30th December, 1989, by the 2nd and 3rd respondents respectively, in respect of a dispute between the appellant and the first respondent, were not valid; and that the subsequent proceedings conducted by the Umpire, the 4th respondent, were also not valid. The order of the Madras High Court remitted the matter to the 2nd and 3rd respondents to pass awards afresh in the light of its observations.

An agreement for the sale of five blocks of residential flats and a community complex, along with the land, was entered into between the appellant and the 1st respondent on 4th June 1984. Clause 36 of the agreement provided that disputes between the parties would be resolved by arbitration; if the parties could not agree upon a common arbitrator each would nominate an arbitrator, who would appoint an Umpire before entering upon the reference. Disputes having arisen the appellant appointed the 2nd respondent, who was a former Judge, and the 1st respondent appointed the 3rd respondent, who was a member of the Bar, as their arbitrators. The 2nd and 3rd respondents entered upon the reference on 19th April 1988, appointed the 4th respondent as umpire and heard the appellant and the Ist respondent. On 7th December 1989 the 2nd respondent made an award holding the 1st respondent to be in breach of the agreement with the appellant and gave consequential directions. On 12th December 1989 the 3rd respondent wrote to the 2nd respondent stating that he could not subscribe to the award made by the 2nd respondent. He said that "for the purposes of the record I shall write a separate award....." he added, "We could have sat together and discussed matter before writing the award even if our points of view or judgments therein varied or even if differed on any issues or points for determination." On 30th December 1989 the 3rd respondent made his award. He came to a conclusion quite different from that arrived at by the 2nd respondent. The last day upon which an award could have been made was 31st December 1989. On 3rd April 1990 the appellant requested the 2nd and 3rd respondents to refer the matter to the 4th respondent as Umpire in view of the differing awards made by them. On 19th April 1990 the 1st respondent objected to the 4th respondent entring upon the reference. It stated that the 2nd respondent had made is award unilaterally and without any deleberations with the 3rd respondent. The 3rd respondent had made his award on 31st December 1989. Both the awards had been made without joint deliberation

and, therefore, the arbitration proceedings were vitiated and there had to be afresh arbitration. A copy of this letter was sent to the 4th respondent. On 19th November 1990 the 4th respondent entered upon the reference as Umpire. Counsel on behalf of the appellant presented his submissions to the 4th respondent in the presence of the 1st respondent's representatives and counsel on 22nd December 1990 and 12th, 15th and 19th January 1991. On 26th January 1991, the arguments on behalf of the appellant were concluded and the matter was adjourned to 4th February 1991 to enable counsel for the 1st respondent to address the 4th respondent. In the meantime, on 17th January 1991, counsel for the appellant and the 1st respondent made a written submission to the 4th respondent which noted that his time to make the award expired on 18th January 1991 and that the proceedings before him were in progress. The submission stated, "The claimant and the respondent have no objection for extension of time by two months from 18th January 1991 for the Umpire to make the Award." On 31st January 1991 the 1st respondent filed the proceedings before the Madras High Court upon which the judgment and order under appeal were passed. It prayed for declarations that the arbitration proceedings and awards passed therein were invalid and unenforceable, that the arbitration agreement was invalid and unenforceable and had ceased to have effect and that the reference to the 4th respondent was without jurisdiction and invalid. The 1st respondent also prayed that 4th respondent's authority as Umpire be revoked and a permanent injection be granted restraining the appellant and the 2nd, 3rd and 4th respondents from proceeding to pass any award or execute any award in respect of the reference before the 4th respondent.

The High Court held that the case was "one in which admittedly there has been no joint deliberation or consultation between respondent 2 and 3 before the passing of the awards and, therefore, the award passed by respondents 2 and 3 individually in the circumstances will become void." "It also stated that it was not possible to hold that the 1st respondent had acquiesced in the competency of the reference to the 4th respondent. In the result, the High Court declared that the awards of the 2nd and 3rd respondents were invalid and that the entering upon the reference by the 4th respondent and the subsequent proceedings conducted by him were not valid. It remitted the matter to the 2nd and 3rd respondents to pass awards afresh in the light of the observations it had made. Mr. Sibal, learned counsel for the appellant, drew our attention to Section 3 of the Arbitration Act, 1940, which states that an arbitration agreement unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule to the Act in so far as they are applicable to the reference. Clause 4 of the First Schedule states that if the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the Umpire a notice in writing stating that they cannot agree, the Umpire shall forthwith enter on the reference in lieu of the arbitrators. In Mr. Sable's submission, the awards individually made by the 2nd and 3rd respondents and sent to the parties indicated that they could not agree and the 4th respondent was, therefore, entitled to enter upon the reference as Umpire. In the alternative, Mr. Sibal submitted, if the awards made by the 2nd and 3rd respondents were not awards in law, the 2nd and 3rd respondents had allowed their time to expire without making an awards, in which event also the 4th respondent was entitled to enter upon the reference. Our attention was invited by Mr. Sibal to the Judgment of this Court in Keshavsinh Dwarkadas Kapadia etc. v. M/s Indian Engineering Company, [1972] 1 S.C.R. 695, wherein the Court stated thus :-

"As to what constitutes disagreement cannot be laid down in abstract or inflexible propositions. It will depend upon the facts of the case as to whether there was a disagreement.....Disagreement between the arbitrators may take various shapes and forms. In the present case the arbitrators by reason of attitude of a party in correspondence addressed to the arbitrators could not agree to proceed with the matter. Where one of the arbitrators decline to act and the other is left alone it will

in a case of this type amount to disagreement between the two arbitrators in the present case, there was disagreement between the arbitrators. Time to make the award also expired. Therefore, from both points of view the Umpire had authority to enter upon the reference."

Mr. V.A. Bobde , learned counsel for the 1st respondent, submitted that there had to be, between the arbitrators, a joint deliberation and application of mind to the case after the hearing was concluded. There had to be such discussion because each arbitrator should have the opportunity to change the other's mind. When parties selected the forum of joint arbitrators for resolution of their differences they were entitled to have a result arrived at after discussions between the arbitrators. Emphasis was laid by Mr. Bobde upon the authorities to which we now refer.

In the matter of the arbitration between Allen pering and John Keymer, 111 E.R. 406 (K.B.), a reference was made to stevens and Vincent and such person or persons as they should appoint. They appointed a barrister as Umpire. Stevens and Vincent did not agree and the three proceeded with the reference. After the case had been heard, at a meeting of the three the Umpire stated the terms of a proposed award, to which stevens objected. After some discussion Stevens left the other two to draw up the award saying he would not join in it if he could not change their minds. The three did not meet again. Afterwards, by a mistake of Vincent's clerk, the draft of a proposed award made by Vincent at an earlier stage of the case was sent to Stevens. Stevens, considering it to be a draft of the award that was then proposed to be made, sent it to the Umpire with written objections. After this, and without any further communication with Stevens, the other two executed the award in the terms that they had proposed at the last meeting of the three. The award was objected to on the ground that it had been made by one of the arbitrators and Umpire without any consultation with or intimation to Stevens. The learned Judges upheld the objection. Lord Denman, C.J. after setting out the facts, noted that Stevens had placed his objections to the draft award that had been sent to him in writing but the other two, without meeting him or considering how far their view may be varied by the objections, executed an award. They were bound to here what Stevens had to say. It was only upon full notice given to him that they were entitled to proceed without him. It is important to note that Lord Denman, C.J. said "If, after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him. Here, Stevens, the arbitrator appointed by Pering, always took a view more favourable to pering than the other arbitrators; and on one occasion he said that he would have no more to do with the matter. Had that declaration been acted on, I do not say that the award would not have been valid. The same view was expressed by Coleridge. J. thus :- "One of them refused his assent. I do not say that this might not have authorised the others to proceed without him; but they got into communication with him again, and he sent them his objections. Now they either did or did not take those objections into their consideration. If they did not, the award is clearly bad for that reason; if they did, they ought to have consulted him upon them, before they made the award. Instead of this, they made another award."

In Dalling v. Matchett, 125 E.R. 1138 (C.P), it was held that when a cause is referred to three persons and if they or any two of them are empowered to make an award, an award made by two of them is good if the third had notice of the meetings. But if he had no such notice, then such an award is bad.

The same principle was applied by the Calcutta High Court in Abu Hamid Zahir Ala v. Golam Sarwar, A.I.R. 1918 Calcutta 865, thus "

"....the presence of all the arbitrators at all the meetings and above all at the last meeting, when the

final act of arbitration is done, is essential to the validity of the award".

The judgment quoted the then current edition of Russell on Arbitration, which said :

"As the arbitrators must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow Judges, so that by conference they shall mutually assist other in arriving at a just decision."

In J. Kuppuswami Chetty v. B.V. Anantharamier & Anr., (1947) 1 M.L.J. 297, the court held that it was well established that whilst an arbitration agreement might provide that the decision of the majority of the arbitrators would prevail, nevertheless the law required that all the arbitrators must give their united consideration to all matters arising in the arbitration which had been referred to them.

In Mamidi Appayya & Ors. v. Yedan Venkataswami & Ors., A.I.R. 1919 Madras 877, a learned Single Judge held that for a final award by arbitrators to be valid it was essential that all the arbitrators should have been present at all the meetings, including the last, that witnesses should have been examined in the presence of all and that all should have consulted together as to the form that their award should take.

The last of the judgments referred to is Sheodutt v. Pandit Vishnudatta & Anr., A.I.R. 1955 Nagpur 116. This was a case, where, upon the facts, it appeared to the Court that one of the five arbitrators had dominated the proceedings and taken undue advantage of the fact that two arbitrators were illiterate. The court was left "with an uneasy feeling that all the arbitrators did not jointly deliberate in the proceedings or in the making of the award" and held that there had been such a "mishandling of the arbitration" as to result in substantial miscarriage of justice, for which reason the award was set aside.

Before we proceed further we must note that the relevant passage in Russell on Arbitration, 20th Edn., now reads "All the arbitrators must act together. As they must all act, so they must all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all. All must make award together. Where there are two or more arbitrators, all should execute the award at the same time and place. If they do not, the award may be invalidated, but as the objection is one of a formal character, if no other objection is shown, the Court may remit the award to the arbitrators for correction". While on Russell on Arbitration, we may refer with advantage to the discussion on what constitutes disagreement. It is said, "The question what constitutes such a disagreement between arbitrators as will entitle the Umpire to make an award.....is one upon which no definite rule can be laid down. It has been held that there was such a disagreement where one of the arbitrators declined to proceed further with the case and also where one arbitrator refused to permit certain evidence to be produced which his fellow arbitrator declared to be essential, and in another case it was decided that non-agreement on important points was equivalent to disagreement". One of the cases referred to by Russell in this context is Winteringham v. Robertson, [1858] 27 L.J. Ex. 301. A submission provided that the matters in difference should be referred to two arbitrators, and in case they should not agree it should be lawful for them to appoint another person to be Umpire or to concur with them in considering the matters referred. The arbitrators appointed an Umpire, who sat with them throughout the reference. On the

arbitrators submitting their views to the Umpire, it appeared that they were not agreed on important points, and the Umpire formed the opinion that there was no likelihood of their agreeing. The Umpire then made his award in favour of the plaintiff. The defendant objected to the award on the ground that it had been made before the arbitrators had disagreed. It was held that the non-agreement of the arbitrators was equivalent to disagreement' that on their non-agreement as to some of the matters in dispute the Umpire could make an award as to all these matters, and that his award should be enforced.

In the present case it is not in dispute that the 2nd and 3rd respondents were present at all the meetings in the arbitration proceedings. It is urged that there had been no joint deliberation and application of mind by them so that it cannot be said that there was any disagreement between them and the 4th respondent was, therefore, not entitled to enter upon the reference.

Regard must be had, in our view, to the ordinary course of conduct of judicial and arbitration proceedings, especially considering the fact that one of the arbitrators was a former Judge and the other was a member of the Bar. Discussions do ordinarily take place during the course of the arguments between counsel and the Judges or arbitrators. Questions are asked by the Judges or arbitrators which would indicate their minds to counsel and to each other. Discussions also, ordinarily, take place between the Judges or arbitrators inter se during the course of the hearings and immediately before or after the same. It is not, therefore, imperative that arbitrators should meet upon the conclusion of the hearings to discuss the matter and agree to an award or agree to disagree in that behalf. That there had been divergent views expressed even during the course of the present arbitration hearing is clear from the letter written by the 3rd respondent to the 2nd respondent for he says, "We could have sat together and discussed matters before writing the award even if our points of view or judgments varied or even differed on any issues or point for determination." That the 2nd respondent wrote out his own award indicates that he had no doubt in his mind that the differences between him and the 3rd respondent about the case before them were irreconcilable. As has been said, disagreement can take a variety of forms. Upon the facts of this case we are of the view that there was a disagreement between the 2nd and 3rd respondents; the facts of such disagreement was conveyed to the parties when the 2nd respondent sent them his award and the 4th respondent then become entitled to enter upon the reference as Umpire.

We think that the High Court was not justified in placing reliance upon the fact that there was no plea on behalf of the appellant that there was a joint consultation between the 2nd and 3rd respondents after the submission of the arguments by both sides and before the passing of the award by the 2nd respondent, which, in its view, established that there was "no joint deliberation or united consideration" by the 2nd and 3rd respondents. Parties to an arbitration cannot be expected to know that such joint consultations or deliberations had taken place between the arbitrators.

Mr. Sibal drew our attention to the written submission made by counsel on behalf of the appellant and the 1st respondent to the 4th respondent extending time for him to make the award. In Mr. Sibal's submission, there was a categoric statement therein that the 1st respondent had no objection to the extension of such time for the 4th respondent to make the award, whereby the 1st respondent had waived its objection to the 4th respondent entering upon the reference as Umpire. Mr. Bobde submitted, on the other hand, that the protest made by the 1st respondent about the 4th respondent entering upon the reference as Umpire continued. In his submission, the 1st respondent could not have acted otherwise because the authorities laid down that it is not open to a party to abstain from appearing before an arbitrator or Umpire, although he objects to that arbitrator or Umpire having

entered upon the reference. The authorities do not say that the party so objecting is obliged to extend the time for the arbitrator or Umpire to make the award. At any rate, the agreement to extend the time for the 4th respondent to make the award should have been qualified by the Ist respondent and should have reserved to it the right to agitate its objection to the 4th respondent's jurisdiction. The terms of the joint submission made by counsel for the appellant and the 1st respondent to the 4th respondent are unqualified and we think that, in the circumstances, the 1st respondent must be held to have waived its objection to the entering upon the reference by the 4th respondent as Umpire.

In this view of the matter the appeal is allowed, the judgment and order of the Madras High Court dated 8th July 1991 is set aside and the petition and application filed by the 1st respondent are dismissed. The 1st respondent shall pay to the appellant the costs throughout. T.N.A. Appeal allowed.

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