ALLAHABAD HIGH COURT

Khub Lal

Vs.

Bishambhar Sahai

(Walsh, Ag. C.J)

17.06.1924

JUDGMENT

Walsh, Ag. C.J.

1. This is in many ways a lamentable specimen of the abuse of a valuable and simple piece of machinery which has been provided by the legislature, to enable people, if they wish to avoid Law Courts, to settle their disputes in a friendly way with the assistance of friends and members of their own brotherhood. That is not to say that the legal aspect of the questions which have been argued before us have not been admirably handled, but nobody acquainted with this litigation, or listening to such parts of the case as have been relevant to the argument before us, can have the slightest doubt that the two main parties to this arbitration proceeding, namely, Khub Lal and Bishambhar Sahai were well advised to seek the assistance of three arbitrators to adjudicate upon their controversy; that they succeeded in obtaining apparently gratuitously able, conscientious and honest arbitrators and that, in the main, it would be difficult in the whole history of arbitration to find work which had been better done. It is heart breaking (except to those who regard quarrelling with members of their own family and litigating in the Law Courts as an existence in itself) to find that one of these parties, after all this labor and expenditure of time, and usefulness and hard honest work, should be so lost to any sense of decency, as to try and upset the whole arrangement. It does not follow that he is not entitled to succeed. Unfortunately it has been only too truly said of the law that from time to time under its protection knavery flourishes, but we are glad to say that the attack upon the arbitrators in this case, and the childish objections which have been raised to this admirable award, have entirely broken down. But the matters in dispute were substantial, and the variety of items, which had to be dealt with was considerable. How long the arbitration proceedings actually lasted, it is impossible to say. But it would be equally impossible to conduct such an arbitration from beginning to end without exposing the proceedings to attacks, which at any rate, in the hands of an able advocate can be made to look formidable, until they have been pulverized by the respondents on the other side and there were, when this appeal was opened before us, a certain number of formidable points which were worthy of consideration in the way they were presented by Mr. Iqbal Ahmad. The

appeal comes before us in a way which is not unfamiliar. The Judge, or the arbitrator has not yet been invented who is able to satisfy both parties in a difficult and complicated controversy. He will probably never be found in our day, and therefore when this award was published it was almost certain that one or other of the parties would be dissatisfied. It would net perhaps be a violent presumption to assume that the party, Khub Lal, who is dissatisfied in this case, has not done quite so well as he hoped. Possibly he hoped that the other party to the award would ba the one to be dissatisfied. But being apparently dissatisfied, and not willing to accept the decision of the arbitrators, he indirectly forced his opponent to take the necessary proceedings under paragraphs 20 and 21 of the second schedule of the Code to have the award tiled as a decree and made finally binding upon the two branches of the family. Then of course his batteries opened fire and the usual string of objections were filed in the Court below - too numerous and some of them too trifling to be set out in detail here - and a very thorough enquiry was held in the Court below in the proceedings of the arbitrators, who, as a matter of course, were charged with misconduct - apparently they would not be real arbitrators if they did not lay themselves open to suspicion - and various other technical points were raised. A great deal of evidence was taken, including the evidence of a well-known and highly respected Vakil of this Court what happened to be the Umpire, and the evidence of one of his colleagues. To this matter we will refer again in s moment. But the learned Judge before whom the matter came, after apparent a most painstaking hearing, wrote an admirably clear and comprehensive judgment dismissing the objections and ordering the award to be filed. Thereupon the usual appeal was filed in this Court. The memorandum of appeal shows that the proceedings in the Court below had been in substance an appeal from the arbitrator's decision, and that an attempt was being made also in this Court by way of appeal from the Court below, to continue the appeal from the arbitrators. As an example of the kind of attack which was being made upon the proceedings, it is interesting to note that the 6th ground asks this Court to set aside the award upon the ground that Mr. Panna Lal, Vakil, High Court, was suffering from a defective memory with regard to something which he had decided about somebody or another's house, a matter which he must have desired to forget as soon as possible and now had nothing to do with for several months. If a defective memory is to be a ground for setting aside legal proceedings, there would be very few decrees which would ever achieve absolute finality. This attack upon an arbitrator for defective memory has a bearing upon something which we will have to say hereafter. But out of these numerically heavy attacks which have been made upon the proceedings of the arbitrators and of their conduct, one or two points have emerged in the skilful handling by Mr. Iqbal Ahmad in this Court which deserve to be dealt with by us and which necessitated our calling upon Sir Tej Bahadur Sapru to put his client's view of the matter, more out of respect for the points that were raised than for any legal difficulty which they created. A detailed and to some extant microscopic examination of the property which was dealt with by the arbitrators, and of the proceedings of the arbitrators, and of the award does disclose that certain matters, which were originally intended to be disposed of by the arbitrators, have bean ignored or omitted from the award, or as it is sometimes said, left undetermined.

2. Now in this case the agreement bat wean the lawyers on either side about the principles is so complete, that it is hardly necessary to refer to authorities. Id is agreed, on the one hand, that if an arbitrator chooses to undertake the decision of a variety of matters with the consent of parties, and he deliberately, or by an oversight without the consent of the parties omits from his decision anything really material, it is sufficient to destroy the award. The reason for that is obvious. We are discussing, be it observed, an arbitration without the intervention of the Court. The tribunal derives its authority only from the consent of the parties and. from the moment when it goes outside that consent, either by omitting to decide what they have submitted to him, or by deciding something which they have not submitted to him, he cases to be clothed with the legal authority from which alone ha derives his jurisdiction. About that there has bean no controversy before us. Similarly there has been no controversy with regard to a corollary which follows. If in the course of events which have happened since ha took upon him his office, it has become impossible, or no longer desirable, either in the view of the arbitrator or in the view of the parties themselves, to decide any one or another of the points originally submitted, and the parties themselves realise that the arbitrator should disregard that point, the defect which would otherwise invalidate the award, ceases to be a defect. To take a simple illustration, if the matter in dispute ware an elephant which had died (a thing which really happens I think to elephants) in the course of a dispute, it would be absurd to suppose that an award could be upset merely because an arbitrator failed to divide among the parties the elephant which was dead and buried before the award was issued. It is not necessary, as we have said, to go through the authorities which Sir Taj Bahadur Sapru rightly cited from the English and Indian Reports establishing this proposition. There are several items in this case which the arbitrators have left undetermined. The learned Judge, with regard to those of any importance, has found that that was done with the consent of the parties. There was abundant evidence upon which ha could come to that conclusion, and was sea no reason to interfere with it. The consent for such a purpose may take various forms : an expressed withdrawal, a mutual understanding not to submit the necessary materials, a mutual recognition by the parties that a condition of things exists which mike a decision impossible, or a diplomatic silence with regard to a mutual understanding. Almost every one of these illustrations exists hare. 'Two admirable illustrations occur in this particular case, one which was pressed upon us by Mr. Iqbal Ahmad, and one which was not. It so happened that in this wealthy family there were implements or accessories connected with indigo factories, which were scattered, difficult to value, impossible to divide, and altogether a troublesome item to handle. Whether the objection came, from the arbitrators themselves, all of whom were lawyers, and who, as they were giving their services freely at great sacrifice to themselves, could hardly be expected to make the necessary journeys and to undertake the burdensome task of collecting assessing, dividing and apportioning these factory implements, or whether the parties themselves anticipated the objection which was certain to coma sooner or later from the arbitrators, by a kind of tacit understanding, which is only to be expected of reasonable businessmen, the arbitrators ware given to understand that the factory implements were in themselves so trivial, or at any rate the dispute with regard to them abominate, that they need not trouble their heads about them. Nobody we imagine was batter pleased by this decision than the arbitrators themselves, except

possibly the Subordinate Judge who might be asked to hear an appeal on the question as to whether these implements had bean fairly divided. Another illustration is what we have described as the diplomatic tacit understanding. There was an unfortunate skeleton in the family cupboard. Skeletons in cupboards may be perfectly innocuous, but sometimes, when they are galvanized into activity, they may become extremely troublesome, and this skeleton appeared to belong to the latter class. There was a house which has bean left severely alone by the arbitrators. The evidence is clear that the arbitrators were given to understand that no decision could be arrived at with regard to this house without opening the door of the cupboard, and letting the skeleton out, and it was agreed by one of those tacit diplomatic understandings, which are so mush more frequent in real life than ii legal agreements, that the clipboard should be kept closed and that nothing should be said about the house, and nothing was said about the house. Thai point is clearly covered by the principle relied upon by Sir Taj Bahadur Sapru, namely, a point left undetermined by the consent of parties, and if there is one thing about which Khub Lal is to be congratulated in this ease, it is that he preferred it should be left undetermined. Another formidable point raisad by Mr. Iqbal Ahmad was the question of the two villages, which certainly gave us a great deal of trouble. In substance what has been done about these two villages is this. Strictly speaking it was the duty of the arbitrators to divide these villages as they ware in the zamindari held in common and recorded in the revenue papers of a tahsil which still remained undivided, and although with regard to the property relating thereto the parties approved of the agreement which the arbitrators adopted, and although the arbitrators were prepared, and indeed carried out a declaration of right as to the rateable shares of both parties corresponding to the type of declaration contemplated by Order 20, Rule 18, the view of Mr. Panaa Lal, Umpire, as expressed in box, was that it was practically impossible if not absolutely impossible, and there is no difference between practical and absolute impossibility so far as an arbitrator in a matter of this kind is concerned, to go over the ground and to make the necessary partition by mates and bounds. Therefore they did what they could, and did not attempt to do what they realised they could not, and by way of explanation or possible justification of the excellence of their decision. Sir Tej Bahadur Sapru has produced in Court for our inspection the result of the partition which has actually bean carried out by the revenue authorities with all their experience and knowledge, leaving us to draw a lucid picture of what would have happened if Mr. Panaa Lal and his colleagues had even endeavoured to do the same thing, their failure to do which, Mr. Iqbal Ahmad suggests, ha3 invalidated these proceedings. It is difficult to see how anybody would have profited by that proceeding. We think that Sir Tej Bahadur Sapru has put the proper construction on these proceedings. Mr. Iqbal Ahmad's contention naturally made was that there was no clear evidence of consent by the parties to the omission. Sir Tej Bahadur Sapru's answer is, that ha does not suggest that this was a point left undetermined by the consent of the parties, Either was it a point which has been decided in the only way in which it was humanly possible for the arbitrators to decide. One or two other points, which would have been of great interest, ware raised by Mr. Iqbal Ahmad, but we have come to the conclusion that his client is prevented from raising them in this Court as they were not properly raised in the Court below. This much suffices for the disposal of this appeal, but it leaves two matters untouched which we feel we

cannot entirely ignore : (1) a simple and pleasant task, (2) the other not so pleasant and somewhat difficult. The first task is this, that was think we ought to express our admiration for the way in which this arbitration proceeding has been carried out as wall as for the way in which it has bean handled by the Judge in the Court below, and by the gentlemen who have discussed it before us during the last two days. I have some experience of agreements of reference, and I am bound to say that have seldom seen one, which seemed to ma more admirable, than that which Mr. Panna Lal prepared for the parties in this arbitration. I have no experience of large arbitration proceedings but we both of us felt that in this matter all the arbitrators must have devoted themselves with extraordinary industry, and on the whole with unparalleled success to the preparation of a clear document which should successfully record the right of the parties for all time, and in spite of Khub Lal's dissatisfaction, we think both parties ought to be grateful to the arbitrators for the way in which they have done their work. In our view the learned Judge has handled the matter in the Court below with one exception admirably. The exception is this, and after what has bean said before us in argument we think we ought not to pass the matter over without some observation. As a matter of policy it is obvious that if arbitration is for the general benefit of the community in India, it can only become so by being put in the hands of men of position and ability, and if it is to become, as we are afraid it has to a large extent, a recognised practice the moment an award is completed to start an unjustifiable attack upon the personal character and conduct of those who have only bean doing their beat to please the parties, and to drag them before a Court of law, to cross-examine them as witnesses, and have offensive suggestions flung at them, the thing will become so unpopular as to be almost impracticable. But it is not merely as a matter of policy that we would mention it. As a matter of law it should be clearly understood by the Courts below that an arbitrator is not in the position of an ordinary witness. All those concerned in this casa recognise that a great deal of the examination to which Mr. Panna Lal was submitted as Umpire was quite unjustifiable. The Judge could not stop it because Mr. Panna Lal's evidence was taken on commission. But if the principles governing the competence of. arbitrators are clearly understood, it is obvious that a Judge ought never to issue a commission to an arbitrator. We are not prepared to go the length of Sir Tej Bahadur Sapru'a suggestion that a Judge ought not to summon an arbitrator without an affidavit as to what ho is required to say, but he certainly ought not to submit an arbitrator to a roving commission by way of examination by the parties uncontrolled by the Judge himself. Assuming without deciding that a Judge cannot refuse the issue of a summons to an arbitrator, when the arbitrator appears before him the Judge ought to exercise the severest possible control and circumspection over the examination. The practice of calling arbitrators indiscriminately as though they were witnesses to the issues of fact is not only an unreasonable burden upon the arbitrators and certain to lead to a great deal of irrelevant evidence, but it also tends unfortunately to lead the Judge unconsciously into a kind of rehearing of the arbitration. Nothing can be worse than that, because there is no appeal from an arbitrator, and a Judge ought, from the first severely to discountenance any proceeding which attempts to take that form, Bat more than that he ought to exercise a severe control over the interrogatories or examination of the arbitrator when summoned. An arbitrator is a judicial person in respect of the matter of which ho has been appointed. He is entitled to the

respect and consideration due to a person occupying that position, and his evidence ought to be confined strictly to the points which are in the eyes of the law material as coming from him. That is to say, any question of fact upon some evidence, or allegation tending to establish or disprove his own misconduct, may no doubt be put to him if he is charged with misconduct. So with regard to Mr. Iqbal Ahmad's contention in this case, his failure to decide the point submitted to him. So too with regard to that withdrawal by the parties of points originally submitted, bearing this in mind that Sir Tej Bahadur Sapru was right when he argued that where an arbitrator finds as a fact that a party did withdraw or did agree to certain things, that is a finding of fact which a Court of law cannot go behind. In short an arbitrator may be examined upon the course of procedure which he has adopted, the material which he has utilized in arriving at his decision, and all matters affecting the award itself, that is to say, the drawing up of the award, the piece of paper and so forth. The slightest attempt to get to the materials of his decision to get to the back of his mind, and to examine him as to why and how he arrived at a particular decision, should be immediately and ruthlessly excluded as undesirable. We think this view is fully supported by a dictum to be found quoted in the judgment of Lord Watson in the case of *O'Rourke v. The Commissioner for Railways*[1] quoted from a judgment of Earl Cairns in a previous authority in the House of Lords:

[1]15 A.C. 371

> He (i.e., the arbitrator or umpire) was properly asked what had been the course which the argument before him had taken what claims ware made and what claims wore admitted; so that we might be pat in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased.

3. In our view that is a short and comprehensive statement of the liability of an arbitrator to be questioned in the presence of or by the Court with regard to matters affecting the award, and we trust that Judges before whom this direction of ours may come on a future occasion, will adhere to that principle. Strangely enough the learned Judge for whom one has great sympathy had clearly in his mind, supported by authority, the rule that a Judge has no business in an application of this kind to sit in judgment on the decision of the arbitrators. But none the less in a long passage apportion of which precedes his correct declaration of the law, and a portion of which follows closely upon it the learned Judge was engaged in an analysis of the accounts and the decision of the arbitrators upon the accounts, which we are satisfied must have caused him hours of work.

4. The appeal must be dismissed with floats including in this Court, fees on the higher scale.

5. Inasmuch as Mr. Iqbal Ahmad has pressed upon us with great earnestness his objection to the way in which the arbitrators dealt with a specific piece of property which had originally been in this family and indeed still belonged to the family in one sense though undoubtedly impressed with a trust, either expressly or impliedly, created by the deceased head of the family, we will add

a word or two bout it although we are bound to say that it was not open to Mr. Iqbal Ahmad to argue it here. We agree with Sir Te Bahadur Sapru's construction of the decision of the arbitrators, that it was not a now disposition of the property, but merely a temporary and no doubt admirable arrangement for the provisional treatment of the property. One way of putting it is that it was not, as suggested by Mr. Iqbal Ahmad's client, an alienation at all. Nor is there the slightest foundation for the suggestion of any impropriety oil the part of the arbitrators, with the consent of the parties, to take part in the general administration and the provisional working of this property through a Committee to which they belonged. Mr. Iqbal Ahmad pressed upon us that as representing the minors, the grand-children of Khub Lal, who could not speak for themselves, ho was entitled to object to this part of the decision, although Khub Lal himself could not being sui juris. We recognize that it is somewhat Unusual, and perhaps hard on Mr. Iqbal Ahmad, that we should rule him estopped from raising the point, because he had not raised it adequately in the Court below and at the same time that we should decide against the point in the course of observation in our judgment. But we would merely add this, in regard to the interest of the minors, that in our opinion, though it is not necessary for us to arrive at any decision on the point, the guardian having been properly appointed and the minor properly represented in this proceeding, and the guardian having bean a party to the award both in his own capacity and as guardian, the award must be binding upon the minors for the time being through their guardian, and they cannot be heard to raise any objection which might be open to them as minors on the ground that their interest as infants have not been properly looked after until they reach majority, and raise it in the ordinary way, and when if ever they do so they will doubtless be reminded, if they are not at that age already keenly conscious of the fact themselves, that the arrangement which was arrived at was one which received the unanimous and almost enthusiastic approval of all those who were sui juris and who were best able to judge what was best in the general interest of the family and of the minors themselves, and also the approval of the Judge before whom the matter came originally and of the Court of appeal.

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