

ALLAHABAD HIGH COURT

Gajanand Sita Ram

Vs

Phul Chand Fateh Chand

(Niamatullah, J.)

18 March, 1930

JUDGMENT

Niamatullah, J.

1. This appeal arises from an order, dated 7th May 1928, passed by the learned District Judge of Cawnpore setting aside two separate awards made by two arbitrators appointed by the parties.

2. Messrs. Phul Chand Fateh Chand, the respondents, agreed to purchase and Messrs. Gajanand Sita Ram, the applicants, agreed to sell, on 23rd March 1918, 45 bales of mulls. The latter expected to be able to supply the 45 bales which they agreed to sell as Banarsi Das & Co., who are not parties to this case, in their turn, had agreed to supply that commodity to the appellants. Banarsi Das & Co. failed to perform their part of the contract with the appellant, with the result that the latter could not fulfil their undertaking with the respondents. The agreement between the parties to this case is evidenced by an indent signed by the respondents. It is on a printed form, which appears to be in vogue in the commercial circle at Cawnpore. One of the conditions stipulated for in the indent is No. 15, which runs as follows: Any claim or dispute arising in connexion with this contract, including claims or disputes in connexion with the non-delivery, unless an amicable settlement can be arrived at, must be referred to arbitration in Delhi, in accordance with the Survey and Arbitration Rules of the Delhi Piecegoods Association except when we refuse to accept and pay the draft, in which case the goods may be surveyed at the port of discharge). When the arbitrators or the surveyors disagree and do not appoint an umpire, the Delhi Piecegoods Association, if applied to by either party to the dispute, shall appoint an umpire. The decision of the arbitrators or surveyors or of the umpire shall be final and binding on both parties. In all other respects the Indian Arbitration Act 9 of 1899 shall apply. It is further agreed that if within 30 clear days... after being requested by letter addressed to his or their usual place of business either party fail to appoint an arbitrator or surveyor ready and willing to act, the decision of the arbitrator or surveyor appointed by the other party shall be in like manner binding on both parties....

3. It should be mentioned that the Arbitration Act 9 of 1899 has been extended to Cawnpore. It is common ground that in accordance with the Survey and Arbitration rules of the Delhi Piecegoods Association the parties had to appoint one arbitrator each.

4. Messrs. Phul Chand Fatah Chand, respondents, instituted, in the Court of the Subordinate Judge at Cawnpore, a suit for recovery of Rs. 24,000 as damages against Gajanand Sita Ram, the appellants, for breach of their contract to supply 45 bales of mulls, which they had contracted to do in terms of the indent, dated 23rd March 1918. The appellants moved the learned District Judge of Cawnpore under Section 19, Arbitration Act, for an order of stay of the aforesaid suit on the ground that the parties were bound to submit their differences to arbitration. The suit was accordingly stayed. Each party nominated one arbitrator. Lala Dina Nath Kapoor was appointed arbitrator by the respondents, while Mr. Khosla was appointed by the appellants. The arbitrators never met. Lala Dina Nath, however, made his award on 5th May 1924. Mr. Khosla, in his turn, gave his award on 8th May 1924. Each arbitrator found in favour of the party nominating him. The arbitrators filed the so-called awards, under Section 14, Arbitration Act, in the Court of the District Judge, Cawnpore, who set them aside on 27th August 1925. The parties proceeded to nominate their arbitrators for a second time. The respondent again nominated Lala Dina Nath Kapoor, while the appellant nominated one L. Bhim Raj under protest.

5. Lala Dina Nath Kapoor proposed to arbitrate on 6th October 1925. Accordingly he intimated to L. Bhim Raj his intention to sit on that date, requesting him to attend. Bhim Raj did not attend. It is alleged that he replied to Dina Nath asking for postponement; but the latter denies having received any communication from Bhim Raj. No meeting was held on that date. It does not appear how the next date 13th October 1925, was fixed, when both the arbitrators met. Bhim Raj desired Dina Nath to postpone the hearing of the case till after the long vacation in the Allahabad High Court to enable the appellant to file an appeal against the order of the District Judge, dated 27th August 1925, setting aside the award made by the appellant's arbitrator. Dina Nath Kapoor did not agree and Bhim Raj left the place. The former sat for arbitration on 20th October 1925, when Bhim Raj pressed for adjournment, at least, till 3rd November 1925. The intercessions of R.M. Vikramajit Singh, an advocate, and a telegram from Dr. Katju of this Court intimating that the appeal would be filed immediately after the High Court reopens and asking for adjournment were of no avail. At this date (20th October 1925) Dina Nath made an award decreeing respondent's claim to the extent of Rs. 20,700 (the entire claim was for 24,000).

6. On the reopening of the High Court an appeal was filed on behalf of the present appellant; but it was dismissed on 18th March 1926. Bhim Raj then intimated to Dina Nath Kapoor that he was ready to proceed with the arbitration, inviting the latter to join him. Dina Nath replied that he had already made his award. Thereupon Bhim Raj gave his award, dismissing the claim of the present respondent in toto. The awards were filed before the District Judge of Cawnpore, who has set them aside by an order dated 7th May 1928. The present appeal is from that order.

7. It is greatly to be regretted that a controversy which relates to a transaction of March 1918 should be still raging and a suit instituted on 19th April 1921 should be still pending. The object of the provision in the indent that disputes between the contracting parties should be referred to arbitration evidently was to prevent delays in settlement of disputes in the interest of the commercial community at Cawnpore. The utter lack of all sense of duty and fairness on the part of the arbitrators, their total ignorance of the rules which ought to guide them and the anxiety on the part of each to support the case of the party nominating him contributed to the result which should have been the endeavour of all concerned to avoid.

8. We understand that the services of Messrs. Khosla, Dina Nath Kapoor, Bhim Raj and a few others are frequently requisitioned for arbitration in commercial cases like the one before us. They and those who appoint them ought to understand that an arbitrator nominated by one of the parties is not "his arbitrator" to whose care the party nominating him commits his interests. Once the arbitrator is appointed by a party and undertakes to discharge his duty as such, he becomes a judge in the case and is bound to act impartially and with scrupulous regard to the ends of justice. He should in no sense consider himself to be the advocate of the cause of the party appointing him, nor is such party to be deemed as his client. He should refrain from identifying himself with the interests of such party and from looking forward to future employment as arbitrator, an office, which, it should be mentioned, carries emoluments. This case is a sad commentary on what the arbitrators thought to be their duty. Each did his utmost, in utter disregard of propriety and sense of proportion, to try to further the interests of the party nominating him. Mr. Bhim Raj was determined to put off the arbitration till the appellant filed an appeal before the High Court. L. Dina Nath Kapoor, on the other hand, was equally determined to rush the arbitration through and prevent an appeal being filed before the arbitration was over. Each succeeded and failed in his efforts: Bhim Raj in preventing what would legally amount to a meeting of arbitrators, and Dina Nath in producing an award which, however, is not an award in law. It is not surprising that the attempts of both proved abortive in the long run.

9. The learned District Judge has observed in setting aside the award that: there may be ample misconduct in the legal sense to make the Court to set aside an award even when there is no ground for imputing the slightest improper motive to the arbitrator.

10. He characterizes the conduct of the arbitrators as "legal misconduct"... "sufficient to set aside the award." While agreeing with the learned District Judge we are not inclined to take as charitable a view of the conduct of arbitrators as he did. It was not merely a misconduct in the legal or technical sense but was grossly improper and in-consistent with their plain duty as arbitrators seriously disposed to settle a dispute referred to them for arbitration.

11. We go further than the learned District Judge and hold that there was no arbitration and that no award was made. The sitting of one arbitrator alone and the giving by him a decision cannot be considered to be arbitration. When more than one arbitrator is appointed, they must meet, hear

the parties and their evidence, if any, and arrive at a conclusion after due consultation and exchange of views. If they cannot agree, they may deliver dissentient awards, in which case the last word will rest with the umpire to be appointed in accordance with the arbitration clause quoted by us in an earlier part of the judgment. We may remark in passing that there is no provision in the submission or elsewhere binding the parties and the arbitrators as to who is to be the convener of the meeting of arbitrators. This is absolutely necessary in view of the possibility that the arbitrators may not agree as to the time and date of sitting or one of them may refuse to attend on the date fixed by the other without refusing to act as an arbitrator in which case alone he is to be deemed as having vacated his place giving rise to the necessity of another arbitrator being appointed. This is exactly what happened in the present case. Dina Nath Kapoor insisted on proceeding with the arbitration forthwith; Bhim Raj did not renounce his character as an arbitrator, nor did he refuse to act as such but desired the arbitration to be put off. Each was powerless in making the other to act as he desired. If one of them had the power to convene the meeting of arbitrators so as to make it compulsory on the other to attend, and the latter refused to attend, his conduct could, under certain circumstances, be construed as amounting to refusal to act as an arbitrator, in which case the party nominating him would be called upon to appoint another arbitrator; and if he had failed to do so within a certain time only one arbitrator would have sufficed: Section 9(b), Arbitration Act of 1899.

12. What purports to be the award of Dina Nath Kapoor, dated 20th October 1925, or that of Bhim Raj, dated 13th April 1926, is not an award in law. It is the ex parte opinion of each, expressed not in arbitration proceedings but at a sitting of himself alone. As regards the actual decision, they are poles asunder: one practically decreeing the claim and the other dismissing it. The time and attention bestowed on a controversy which would have taken days before a Court were brief in the extreme for the obvious reason that each was determined to decide the case in favour of the party nominating him. It is only such adjudication by arbitrators as is the result of their joint deliberation that can be considered to be an award, The so called awards such as we have before us are, therefore, no awards, and apart from misconduct, which has been found by the learned District Judge and by us, his order is justified on the broader ground mentioned above.

13. The result is that this appeal is dismissed with costs.

