

ALLAHABAD HIGH COURT

Seth Shambhu Nath

Vs.

Sm. Surja Devi

F.A.F.O. No. 44 of 1953. , against decree of Civil J. Shahjahanpur

(S.S. Dhavan, J.)

10.01.1953. 21.08.1959

JUDGMENT

S.S. Dhavan, J

1. This is an application against an order of Sri Murtaza Husain, Civil Judge, Shahjahanpur, rejecting the applicant's objections against an award made by an arbitrator, and pronouncing judgment in terms of that award. The facts which have led to this appeal are these. The applicant Seth Shambhu Nath and the respondent Smt. Surja Devi belonged to the same family and appear to have been joint at one time. There was a partition of the joint family property as a result of which one shop, the property in dispute, is alleged to have been allotted to the respondent Smt. Surja Devi. In May 1949, the applicant Shambhu Nath occupied the shop, presumably claiming ownership. This naturally led to a dispute between him and Smt. Surja Devi. The prospect of litigation between two members of the same family was unpleasant for both of them and they agreed to have the dispute settled by arbitration. A Government official, Sri Bhagwati Prasad Singh, the then Addl. District Magistrate, Sitapur, was selected as arbitrator. In the preamble to the arbitration agreement, which was read out in Court by learned counsel for the applicant, it was stated that this official was selected because he was a friend of the family in whom both had the utmost confidence. It was also stated that it was the desire of both of them to avoid a quarrel (Jhagra) and prevent the disruption of family relationship, he was asked to decide two questions, (1) whether the applicant Seth Shambhu Nath or Smt. Surja Devi was owner of the shop in dispute, and (2) if the applicant was held not to be the owner, on what terms or conditions he should be admitted into tenancy and on what rent. On 5-11-1951 the arbitrator sent notices to the parties to appear before him. The hearing did not take place till the 12th April, 1952. On that date the parties appeared but the case was not taken up because the arbitrator was indisposed. On 13th April, the hearing took place and evidence of the parties recorded. On 15th April, the arguments were heard. On 23rd April the arbitrator made and signed the award and sent notices of this fact to the parties by registered post. On 28th April the present applicant Seth Shambhu Nath wrote to

the Arbitrator asking for a copy of the award. On 2nd May, 1952, he filed an application before the learned Civil Judge under Section 14(2) of the Arbitration Act, requesting the Court to direct the arbitrator to file his award in Court along with all other relevant papers. Simultaneously he filed his objections against the award. His application was registered as a plaint and he was directed to file fresh objections against the award after it had been filed in Court by the arbitrator.

2. Before the learned Judge the applicant contended that the arbitrator had misconduct himself, that the award was illegal as it was not made within four months, and also because the arbitrator had not sent a proper notice to the parties under Section 14 of the Arbitration Act. All the objections were rejected by the learned Judge, who pronounced the judgment in terms of the arbitration award and directed that a decree be prepared. Aggrieved by this decision, the applicant has come to this Court in first appeal from order.

3. Mr. Ambika Prasad, learned counsel for the applicant, raised three objections against the legality of the award. First, he contended that the Arbitrator having made the award beyond the statutory period of four months, it is void. It was denied by learned counsel for the respondent that the award had been made beyond time. In the trial Court the controversy centered round the date when the arbitrator is supposed to have entered upon the reference, and the learned Judge held that the date was not 5th November, 1951, but 24th February, 1952. However, it is not necessary for me to decide the actual date upon which the arbitration proceedings shall be deemed to have commenced, for this point can be decided on the facts alleged by the applicant himself. Assuming that the award was made beyond the period of four months, what is the legal effect? Section 3 of the Arbitration Act enjoins that an arbitration agreement, unless a different intention is expressed there under, shall be deemed to include the provisions set out in the first schedule in so far as they are applicable to the reference. The first schedule contains, "the implied conditions of arbitration, agreements". The third condition is :

"the arbitrators shall make their award within 4 months after entering upon the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

4. The combined effect of Section 3 and condition No. 3 is that every arbitration agreement contains a condition as to time which is of the essence of the agreement. If this condition is broken, either party to the agreement can treat the arbitration as at an end. But a condition in an agreement has not the same effect as a statutory condition which goes to the root of the jurisdiction of a Court or any other authority. It is like any other condition in an agreement and can be waived by the parties. This general principle under the law of Contract is given statutory recognition by Section 28(2) of the Arbitration Act, which says :

"Any provision in an arbitration agreement whereby the Arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the

award, shall be void and of no effect."

In other words, any condition in an agreement empowering the arbitrator or umpire to extend the time for making the award is void, but not a condition enabling him to do so with the consent of all the parties to the arbitration agreement.

It is thus clear that the time limit of four months can be waived with the consent of both the parties. In the present case, according to the applicant, the four months expired on or about 4th March, 1952 he was entitled to take advantage of condition No. 3 and inform the Arbitrator and the other party that the arbitration proceedings were at an end and that he would not be bound by any award made by the Arbitrator after that date. But what did he do? He sent no such intimation either to the Arbitrator or to the respondent Smt. Surja Devi. On the contrary, he appeared before the Arbitrator and led evidence without protest, and his counsel addressed the arguments on his behalf. When the arbitrator sent him a notice that he had made and signed the award, he did not invoke condition No. 3 even at that stage, and merely asked for a copy of the award. It was only when he found that the award was not to his liking, that he decided to avail of condition No. 8. I do not think that it is either just or equitable that he should be allowed to do so. A party to an arbitration agreement who voluntarily takes part in the arbitration proceedings after the expiry of the period of four months will be deemed to have waived the implied condition as to time. I, therefore, reject this contention.

5. Secondly, learned counsel argued that the Arbitrator had not complied with the mandatory provisions of Section 14(1). That Sub-Section enjoins that when the Arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. It was conceded that the Arbitrator did send a notice to the parties that the award had been made. But learned counsel stated that the arbitrator only informed the parties of the making of the award but not of the signing of it. It is true that Section 14 requires an Arbitrator to sign the award and to inform the parties that he has made and signed it. The emphasis on the signing of the award and giving notice to the parties of this fact is a precaution against the possibility of fraud or tampering with the award after it has been made. But the mere omission of a mention in the notice of the fact that the award has been signed is a technical irregularity which would not invalidate the award. It was not alleged by learned counsel for the applicant that the award had not been signed or that it had been altered after it had been made and then signed. No prejudice is shown to have been caused to the applicant by the formal omission to mention the fact of signing in the notice to the parties. This contention must, therefore, fail.

6. Thirdly, learned counsel argued that the Arbitrator had exceeded the terms of reference. According to him he was called upon to decide (1) who was the landlord of the shop in dispute and (2) if Smt. Surja Devi was held to be the owner, the terms of the applicant's tenancy. Learned counsel contended that the Arbitrator had the power to fix the rent for the future but he could not award any sum as rent for the period before the date of reference. I do not agree. The relevant

terms of reference are as follows :

"Woh yeh bhi tai kar den ki fariq doyem ab kin sharton ke sath uprokt dookan par kiraya par baithen aur kiya kiraya ada karen."

Translated into English, it means, "He (the Arbitrator) shall decide the terms and conditions according to which the party No. 2 (Seth Shambhu Nath) shall be admitted to the tenancy and what rent he shall pay".

7. The first part of this reference empowered the Arbitrator to decide the conditions under which the landlord should be prepared to allow the applicant to continue as tenant. It was open to the landlord to contend before the Arbitrator that she was not prepared to keep the applicant as tenant unless he paid rent for the period for which he had already occupied the shop, and it was open to the Arbitrator to decide whether he should allow the applicant to occupy the shop without paying any rent for the past period or only after paying rent for the whole or part of this period. This is an interpretation justified by the language of the reference and also in accord with equity and justice. If the applicant's contention is accepted, the result will be that he will have occupied the shop for a fairly long period without paying a single pie as rent. This could not have been the intention of the parties who wanted the entire dispute to be settled amicably and gave wide powers to the Arbitrator to resolve the dispute. The third contention of the applicant must therefore fail.

8. No other point was argued before me. The appeal is dismissed with costs.
Appeal dismissed.