CALCUTTA HIGH COURT

Abu Hamid Zahir Ala

Vs

Golam Sarwar

(A Mookerjee, C.J. Cuming, J.)

18.08.1916

JUDGMENT

A Mookerjee, C.J.

1. We are invited in this appeal to consider the propriety of an order of dismissal of an application under paragraph 17 of the Second Schedule to the Civil Procedure Code, 1908, for the enforcement of a private award. The relevant portion of the agreement of reference was in these terms: Considering it desirable to decide the matters in dispute by arbitrators and so appointing the above-mentioned gentlemen as arbitrators, we execute this deed of reference and agree that the award, which all the arbitrators unanimously or the majority of the arbitrators will make, will be accepted as a decree of a superior Court and will have force and be valid at all places. In case of difference of opinion among the arbitrators, the majority of them will make and be competent to make their award unanimously. To that no objection by any of us will be entertained nor shall we be competent to make any." Under this instrument, five gentlemen were appointed arbitrators, three of whom alone signed the award. The application with which we are now concerned was made for the enforcement of this award. The defendant objected that there was no valid award in law because two of the arbitrators had not attended all the sittings and one at least did not take part in the final deliberations. The plaintiff contended that inasmuch as three arbitrators who had made the award had attended all the meetings, and as a majority of the arbitrators was competent to make a valid award, the award was legal and enforceable. The Subordinate Judge has overruled these contentions on the ground that all the arbitrators should be present at all the meetings and particularly at the last when the final act of arbitration is done, though as a result of this united deliberation there may be an award by a majority only of them. 1n our opinion, the view taken by the Subordinate Judge is correct.

2. It is now firmly se tled, as ruled in *Nand Ram v. Fakir Chand* [1] that when a case has been referred to arbitration, 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. There the case had been referred by the Court to the arbitration of three persons and the parties had agreed to be bound as to the matters in dispute by the decision of the majority. One of the arbitrators subsequently refused to act and withdrew from the arbitration. Oldfield and Mahmood, JJ., held that the award of the majority was not binding. A similar view was taken in *Sreenath Ghose v. Raj Chunder Paul*[2] Our attention, however, has been drawn to the earlier

decision in *Kazee Syud Naser Ali v. Musammat Tinoo Dossia*[3] as an authority for the contrary position. We are of opinion that this case is clearly distinguishable, and is an authority only for the proposition that an award of arbitrators cannot be set aside on the ground that it is erroneous for that only two out of three arbitrators signed the award when the parties agreed to abide by the decision of the majority. There is nothing to indicate that the arbitrator who did not sign the award had not taken part in the deliberations. The principle which underlies the view we take is best stated in the words of Russell, which have now became classical, quoted as they were with approval in In re Beck and *Jackson*[4] and *Khelut Chunder Ghose v. Tarachurn Koondoo*[5] I 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 each other in arriving at a just decision." The same point of view had been emphasised in *Dalling v. Matchett*[6] where the Court of Common Pleas observed as follows: It has often been said that if that one had been present," that is, the arbitrator who did not attend, "he could not by his vote have turned the majority the other way, when all the rest were unanimous; yet it has always received this answer that every one has a right to argue and debate as, well as to give his vote and; it is possible at least that the person absent may, if he had been present at the meeting, have made use of such arguments as may have brought over the majority of the rest to be of his opinion." The matter was put substantially in the same way in Pering and Keymer, In the matter of (1835) 3 Ad. & E. 245 : 111 E.R. 406 : 42 R.R. 376(suupra). Lord Denman observed: Any two, under such submission as this, that is, a submission which provides for a valid award by the majority, may make a good award. But then it must be after discussion with the other arbitrator. If after discussion, it appears that there is no chance of agreement with one of the arbitrators, the others may indeed proceed without him." Coleridge, J., added: "The parties have not got what they stipulated for. They stipulated that two at least should make the award; but no two could make it till each arbitrator had been consulted." This view accords with that adopted in *Peterson v. Ayre*[7] *White v. Sharp* [8]*Templeman In re*[9] *Burton v. Knight*[10] *Morgan v. Bolt*[11] *and Doberor v. Morgan*[12]

3. We adopt the principle that inasmuch as the parties to the submission have the right to the presence and effect of the arguments, experience and judgment of each arbitrator at every stage of the proceedings, so that by conference they may mutually assist each other in arriving, at a just conclusion, it is essential that there should be a unanimous participation by the arbitrators in consulting and deliberating upon the award to be made; the operation of this rule is in no way affected by the fact that authority is conferred upon the arbitrators to mike a whole number of arbitrators may make a valid award, they cannot do so without consulting the other arbitrators. The inference follows that in the present case there is no valid award.

4. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at five gold mohurs.

Cases Referred.

17 A. 523 : A.W.N. (1885) 139 : 4 Ind. Dec. (N.S.) 539
28 W.R. 171
36 W.R. 95

4(1857) 1 C.B. (N.S.) 695 : 140 E.R. 286 : 107 R.R. 861
56 W.R. 269 at p. 272
6(1740) Wiles 215 : 125 E.R. 1138
7(1854) 14 C.B. 665 : 2 C.L.R. 722 : 23 L.J.C.P. 129 : 2 W.R. 373 : 139 E.R. 273 : 23 L.T. (O.S.) 67 : 98 R.R. 805
8(1844) 1 Car & K. 348 : 12 M. & W. 712 : 1 D. & L. 1039 : 13 L.J. Ex. 215 : 8 Jur. 344 : 152 E.R. 1385
9(1842) 9 D.P.C. 952 : 6 Jur. 324
10(1705) 1 Eq. Ca. Abr. 50 : 21 E.R. 866
11(1863) 7 L.T. 671 : 11 W.R. 265
12 (1903) 34 Can. Sup. Ct. 125