CALCUTTA HIGH COURT

Haji Ebrahim Kassam Cochinwalla

Vs.

Northern Indian Oil Industries Ltd

Suit No. 110 of 1949

(P.B. Mukharji, J.)

19.01.1950

JUDGMENT

P.B. Mukharji, J.

1. This is an application made on behalf of Haji Ebrahim Kassam Cochinwalla on a notice of motion dated 30-11-1949, asking to set aside the award dated 22-7-1949 and filed on 20-8-1949.

2. The facts of the case may be stated briefly. By contract dated 2-1-1949 the applicant purchased from the Northern India Oil Industries Ltd., 3 wagons of pure Mahuya Oil. The respondents claimed Rs. 3368-9-3 as damages for non-acceptance being based on the difference between the contract price and the market price. After some disputes, by a letter dated 9-2-1949 the respondents' solicitor informed the applicant of the appointment of Pannalal Kasera as the sole Arbitrator. An application was thereafter made by the present applicant on 24-5-1949 restraining the sole Arbitrator from acting and for allowing the applicant to appoint an Arbitrator on his behalf. That application was finally heard by Banerjee J., and by an order dated 5-7-1949 the learned Judge held that the application should fail and did not allow the applicant to appoint his Arbitrator as no sufficient cause had been shown. I would quote from my learned brother's judgment delivered on 5-7-1949 the following observations which I consider material for the purpose of the present application before me:

> "I do not see any reason why I should set aside the appointment. No allegation has been made against Mr. Kasera. Petitioner's counsel has said that the petitioner has confidence in Mr. Kasera who is a man of business and who deals in the contract commodity. His fitness to act as an Arbitrator has not been questioned." Those observations are material because although the applicant did not succeed before my learned brother he has repeated practically the same allegation of misconduct against the same Arbitrator in the present application before me.

3. The other part of the order of 5-7-1949, which is material for the purposes of the present application is :

"The Arbitrator must file the Award by 23-7-1949. If the Arbitrator thinks that he would not be able to complete the Award by that time he should forthwith inform the parties about his inability to do so."

4. Reliance has been placed upon this part of the order for the contention of the applicant that the Arbitrator did not file the Award within the time indicated in that order.

5. Mr. S. K. Das learned counsel for the applicant has made the following submissions on which be asks me to set aside the award of the Arbitrator :

(1) The Arbitrator misconducted himself in not stating a special case for the opinion of the Court and in refusing to grant an adjournment for such purpose as alleged in para. 11 of the petition.
(2) That the Arbitrator had no sufficient evidence before him to hold that the Railway booking was closed on 3-1-1949 in Railway Stations in the U. P. and Behar as alleged in paras. 12, 13 and 14 of the petition.
(3) That the award of the Arbitrator was filed on 20-8-1949 instead of 25-7-1949 as directed by the order of Banerjee J.

6. Section 13, Indian Arbitration Act, 1940 provides in sub-para. (b) thereof that the Arbitrators have power to state a special case for the opinion of the Court on any question of law involved. While English decisions offer valuable guide, it is essential to observe that there is a very important difference in this particular matter between Indian law and the English law. Section 9, English Arbitration Act, 1934, empowers the Court to direct an Arbitrator to state a question of law, but not so under the Indian Arbitration Act. There are no powers in the Courts in India under the Indian Arbitration Act, 1940, to direct the Arbitrator to state a special case. Mr. S. K. Das learned counsel for the applicant relied on the well known observation in *Czarnikow v. Roth*[1], where it has been said that the Arbitrators are guilty of misconduct in not granting adjournment for enabling the parties to apply in Court for the statement of a special case. In my judgment that is not misconduct under the Indian Arbitration Act, 1940. The principles of English decisions in the case I have mentioned as well as *in Re Palmer and Co*[2]*.,* are in my view not applicable in India. The view that I have expressed finds support from Sir N. N. Sarkar's Tegore Law Lectures on the Law of Arbitration in 1942 at pp. 130-1.

7. Nor do I consider the question raised in para. 10 of the petition to be a question of law which the Arbitrator was required to state to the Court for a decision. In my view it was not such a question of law which arose at all on the facts of the case, and the refusal to state which for the opinion of the Court can be either described as misconduct of the Arbitrator or as his perversity.

8. On the question of refusal to hear evidence I am not satisfied on the affidavits that there was any refusal on the part of the Arbitrator to hear evidence in the manner alleged by the applicant. I hold that the facts of the case placed before me do not at all justify the conclusion that there was any refusal to hear any evidence on the part of the Arbitrator. Mr. Das argument on this branch of his case really boiled down to a consideration

[1] (1922) 2 K. B. 478: (127 L. T. 824)
[2](1898) 1 Q. B. 131
whether the appraisement of the evidence by the Arbitrator was correct or not and not whether the Arbitrator decided without any evidence at all where evidence was necessary. In my opinion appraisement of evidence by the Arbitrator is ordinarily never a matter which this Court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisement of evidence. It is not a question here in this case of any violation of natural principles of justice in refusing to give a hearing to any party or in refusing to have the evidence of a particular party. The Arbitrator in my opinion is the only judge of the quality or the quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the Arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion than the Arbitrator but that by itself is no ground in my view of setting aside an award of an Arbitrator. It is familiar learning but requires emphasis that by Section 1, Evidence Act the Evidence Act in its rigour is not intended to apply to proceedings before an Arbitrator.

9. Mr. Das has tried to tempt me with the decision of the Court of Appeal in *Chhogmal v. Sankalchand*[3], and in order to bring the present application within the limits of the decision of the Court of appeal he has urged before me that the Arbitrator came to a finding in this case on the extension of dates without taking evidence. I am entirely unable to take that view on the facts in the present case before me. Not a word is suggested in the petition that the Arbitrator decided on the extension of dates without taking any evidence. Chatterjee J., delivering the judgment of the Court of Appeal observes at p. 830 of the Report:

> "It is impossible for any Arbitrator to hold in favour of extension without any evidence and without any material. It is not a matter which is within the special knowledge of the Arbitrators as businessmen of experience and they can only decide that the due dates of the contract were extended provided that there were some materials on the point. That may be right or that may be wrong but they are entitled to come to a conclusion if there is evidence or if there is material on which they can determine the matter. But in the absence of any evidence or any material or even any allegation to that effect they are guilty of legal misconduct if they came to any such finding or determine damages on the basis of extension."

10. On the facts of this case there was not only some evidence but a large amount of evidence and it is not a case in which the Arbitrator has decided any question either without "any evidence or any material."

11. I need only observe and notice the relevant observations of Lord Goddard C. J. in *Mediterranean and Eastern Export Co. Ltd. v. Fortress Fabrics Ltd*[4]., where the Lord Chief Justice of England came to the conclusion that the Arbitrator having been appointed because of his knowledge and experience in the trade was entitled to fix the damage without hearing expert evidence thereon. The learned Lord Chief Justice makes the following observations at pp. 188-9 of the Report:

> "A man In the trade who is selected for his experience would be likely to know

[3]53 C. W. N. 828
[4](1948) 2 ALL E. R. 186

> and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavor to uphold Awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an Arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow Indeed to set aside his award."

12. The third argument of Mr. Das is that the Award must be set aside because it was filed on 20-9-1949 instead of 25-7-1949, as directed by the order of Banerjee J., dated 5-7-1949. I am unable to accept the contention of Mr. Das on this point.

13. The award was made by the Arbitrator on 22-7-1949 and that was within the time limit. Filing of an award by an Arbitrator is a ministerial act and not judicial or quasi-judicial act of the Arbitrator. While the Arbitrator is functus officio if he allows the specified time to expire before making his award that doctrine is inapplicable in my view so far as filing of the award is concerned. A decision of this Court reported in *Anandi Lal v. Keshavdeo*[5], came to the conclusion that filing of an award was a ministerial act, and I respectfully follow that decision on this point. Gentle J., at p. 551 of that report observes "In causing the Award to be filed the arbitrators do not perform a judicial act but one of a ministerial nature."

14. On the facts also I do not consider Mr. Das contention can be upheld. What actually happened in this case was that the Arbitrator did file the award on 23-7-1949, which was within the time specified by Banerjee J., and the same was accepted by the Department but the Department later on informed the Arbitrator that the stamp put on the said Award was insufficient whereupon the excess stamp was duly put in later. On 22-7-1949 the Arbitrator by letter (filed with the Award papers in Court) to the Registrar sent the Award describing it to have been "duly stamped" along with the copy of the proceedings of the two meetings held by him with three exhibits. It was thereafter discovered by the office that there was deficit in the stamp. The deficit was made good and the Award was finally filed as on 20-9-1949. A somewhat similar situation arose in the reported decision in *Keshrimull v. Meghraj*[6], It was there held by Gentle J., that Article 178, Limitation Act which provides for a limitation of 90 days for filing of an Award in Court from the date of service of the notice of making the Award would not apply to an Award which has already been filed in the Court though the act of filing took place after more than 90

days.
[5] AIR 1949 Cal 549 : (I. l. r. 1945-2 Cal. 526)
[6] I. l. r. (1942) 2 Cal. 69: (AIR 1942 Cal 542)

That was also a case where the delay in filing was due to deficit in stamp.

15. Even if the law were otherwise I would still have held on the construction of the order of Banerjee J. that what the learned Judge intended by his order was that the Arbitrator should "complete" his Award within 23-7-1949 and it will be apparent from the language the learned Judge used. The relevant portion of his judgment runs as follows:

> "The Arbitrator must file the Award by 23-7-1949. If the Arbitrator thinks that be would not be able to complete the Award by that date he should forthwith intimate to the parties about his inability to do so."

That shows that although the learned Judge used the word "file" he was not contemplating the completion and filing of the Award by the date he specified. He was only contemplating the "completion" or making of the Award.

16. I am therefore unable to set aside the Award on the ground urged by Mr. Das. In my opinion filing of the Award should have nothing to do with the validity of the Award excepting so far as Article 178, Limitation Act affects the question. But no question under Article 178, Limitation Act. arises in this case.

17. This disposes of all the major arguments of Mr. Das.

18. But the learned counsel for the applicant has also urged before me three other grounds one is that the Arbitrator failed to make a disclosure of his interest. The second is that the Arbitrator omitted to file necessary documents with the Award. The third is that there is error apparent on the face of the Award. I propose to deal with them separately.

19. Regarding the applicant's contention that the Arbitrator failed to disclose his interest in the matter, the necessary averment is to be found in para. 8 of the petition where the applicant's solicitor by letter dated 12-7-1949, required the Arbitrator to answer certain particulars. It is said that no answer was given by the Arbitrator to such a query. In my view Mr. Das has entirely misconceived the law on this subject. It is settled law that where the interest is known to the parties at or before the time of the appointment of the Arbitrator no complaint can be made by a party who has agreed to appoint such an Arbitrator with full knowledge of the Arbitrator's interest either in the parties or in the subject of the arbitrator. It is equally well settled law that if the arbitrator has undisclosed or concealed personal interest either in the parties or in the subject-matter of the arbitration then that is a sufficient ground for setting aside the Award. But the fact of the Arbitrator having such interest or bias must be established and satisfactorily proved before the Court and if so established and proved the Court will set aside his award. It is, however, no part of the Arbitrator's duty to answer a query whether he has or not any personal interest in the subject-matter or parties. Failure to reply to a query of this description does not mean that the Arbitrator's interest or bias is ipso facto proved by reason of such failure to reply. Mr. Das apparently contended that because the Arbitrator did not answer the letter therefore he must have

an interest or bias. That is a proposition which I hold altogether unsound or untenable.
20. The next submission of Mr. Das is that the Arbitrator omitted to file necessary documents with the Award. That is a ground which is not taken at all in the petition and it is an attempt to add a new ground. Mr. Sen has objected to such a ground being taken. As the ground was not taken in the petition Mr. Das filed an affidavit of Abdul Gaffar affirmed on 21-12-1949, during the course of the hearing of this application before me and on the basis of such new affidavit applied to set aside the award on the ground stated therein. Article 158, Limitation Act, provides that an application to set aside the Award must be made within 30 days from the date of the notice of the filing of the Award. On 21-12-1949, when the affidavit is affirmed stating this new ground in an application made thereon that must be treated as a new application which was clearly barred by time and I hold accordingly.

21. In the affidavit of 21-12-1949, affirmed by Abdul Gaffar an Assistant Manager of the applicant a statement is made in para. 2 thereof that the Arbitrator took down notes in his hand-writing either by pen or pencil when evidence was given but such notes have not been filed with the Award. This omission is supposed to have been noticed on 20-12-1949, in the after, noon when the application was being heard. This belated notice of the alleged omission is pleaded with a view to avoid the limitation. But this plea cannot in my opinion succeed in avoiding limitation. When the notice of the filing of the Award is given any party interested in it may certainly have inspection of the papers filed with it and if he has not done so then it is not for him to say that he discovered any omission with regard to papers which required to be filed with the Award in the course of the hearing of the application which may be long after the period of limitation.

22. On the merits also I am satisfied that this alleged new ground of omission to file necessary documents is an unsound plea. The affidavit of Abdul Gaffar of 21-12-1949 makes two points. They are that the Arbitrator omitted to file (1) his pen or pencil notes of evidence and (2) that the books of Hossain Kasam Dada which were supposed to have been produced before the Arbitrator have not been filed by the Arbitrator. Section 14 (2), Arbitration Act, 1940, provides that the Arbitrator shall at the request of the party or if so directed by the Court cause the Award together with any "deposition and documents which may have been taken and proved before him" to be filed in Court. The requirement of the Statute is confined to (1) deposition and (a) documents. The minutes in this case which contained short notes of the deposition or the nature of evidence have been filed with the Award, The minutes are clear that the alleged books of H. K. Dada were not tendered and taken by the Arbitrator as part of the record. On the facts here I am satisfied that the Statute has been fully complied by the Arbitrator. Pencil or pen notes of evidence when there is a formal minute of the evidence and proceedings before the Arbitrator do not require to be filed having regard to the language used in Section 14 (2), Arbitration Act. Mr. Das was attempting to come within the ambit of a decision on which he relies. That decision is *Yusuff Khan v. Riyasat Ali*[7], That decision proceeded entirely on a different set of facts. There the Arbitrator did not file the original depositions of witnesses recorded by him but filed only the fair copies of such depositions which were not even shown to be accurate copies of such depositions. Here no allegation even had been made that the minutes are inaccurate, and there is not the slightest suggestion to that effect. It was also found there in that Lucknow case that the Arbitrator did not file the documentary evidence produced before him. There the Arbitrator returned the rent receipts filed before

[7]1 Luck. 139 : AIR 1926 Oudh 307

him by the tenants to the parties and on the facts of that case it was held that the Arbitrator had

committed judicial misconduct.

23. The last submission made by Mr. Das is that I should set aside the Award in this case on the ground that there is error of law on the face of it. What that error is Mr. Das inspite of his arguments has not been able to elucidate. So far as I have been able to follow his argument it comes to something like this. The Arbitrator in his Award specifically mentions "read and carefully considered the papers in this case" and the contract No. L186. Therefore Mr. Das contends the papers and the contract in the case are necessarily incorporated by reference in Award and this Court can scrutinize such papers and contract whatever they may be in order to discover error on the face of the Award.

24. The law on this point has been settled by the House of Lords and by the Privy Council. In *Government of Kelanton v. Duff Development Co. Ltd*[8]*.,* Viscount Cave Lord Chancellor says that unless it can be shown by something appearing on the face of the Award that the Arbitrator has proceeded illegally his Award must stand. In *Champsey Bhara and Co. v. Jivaraj Ballo Spinning and Weaving Co. Ltd*[9]*.,* the Judicial Committee of the Privy Council observes that an Award of an Arbitrator can be set aside on the ground of error of law on the face of the Award only when in the Award a document is incorporated with it as for instance a note appended by the Arbitrator stating the reasons for his decisions and there is found some legal proposition which is the basis of the Award and which is erroneous. The Privy Council in that case held that they could not set aside the Award and the terms of the contract were not so incorporated with the award as to entitle the Court to refer to them as showing either that the Award was wrong in law or that under them the contract has come to an end and therefore the jurisdiction of the Arbitrators had terminated. Then again the Judicial Committee of the Privy Council in *Salleh Md. v. Nathoomal*[10]*,* comes to the conclusion that a statement in the Award that the dispute is under a contract between the parties of a certain date does not so incorporate the contract with the Award as to entitle the Court to refer to its terms and by so doing to find that there is an error of law. It is therefore not permissible in my opinion in this case to refer either to the contract which is mentioned by the Arbitrator or to the papers in order to find out the error of law. The language of the Arbitrator is not such in the Award which can be construed to mean that either the contract or the papers are incorporated in the Award. The last pronouncement of the Judicial Committee of the Privy Council on this point is in *Durga Prosad v. Shewkissen Das*[11]*,* There again the Privy Council repeated the law on the point and Lord Radcliffe delivering the judgment of the Privy Council expressed the opinion that before a Court can set aside an Award on the ground that an error of law appears on the face of it in the reference to some documents, it must be demonstrated affirmatively that the law was departed from by the Arbitrator in noticing the existence or contents of those documents and accordingly, mere reference to certain documents in the Award was insufficient to establish that it was wrong in law to refer to them. Applying the law on this point I hold that the Award in this case is not bad on the ground of error of law on the face of it.

25. In the circumstances the application fails and is dismissed with costs.
Application dismissed.

[8](1923) A.C. 395 at pp. 409-10 : (92 L. J. Ch. 307)
[9]50 I. A. 324 : (AIR 1923 PC 66)
[10]54 i. a. 427 : (AIR 1927 PC 164)
[11]54 C.w.n. 74 : (AIR 1949 PC 334)