BOMBAY HIGH COURT

K.P. Dalal

Vs

R.S. Jamadar

(Divatia, J.)

01.12.1944

JUDGMENT

Divatia, J.

1. This revisional application has been preferred by the plaintiff against the decision of Mr. Lalkaka, Small Cause Court Judge at Bombay. The plaintiff had filed an application which was registered as suit No. 170 of 1944 for ejectment against the opponent. According to the plaintiff the opponent was his sub-tenant of certain premises situated at Gowalia Tank Road, and he wanted possession of the premises for his own use. The suit first came up for hearing before Mr. Lalkaka on January 27 last. The plaintiff's case is that it was suggested by the opponent's counsel on that day that the learned Judge should inspect the premises on February 9 and accordingly the learned Judge saw the premises and the hearing of the suit was adjourned to February 11. On that day the parties agreed that the matters in dispute between them should be decided by the learned Judge as an arbitrator; Mr. Lalkaka suggested that he would pass a decree in the petitioner's favour if the latter found for the opponent before March 30 some premises reasonably suitable to the opponent and in respect of which the latter would have to pay rent not exceeding Rs. 25 per month. The said suggestion of the learned Judge was accepted by the parties, no evidence was taken or recorded on that day and the hearing of the said suit was adjourned till March 30. According to the petitioner he searched for and found certain premises for the occupation of the opponent, but the latter did not approve of the same. On March 30 the suit was adjourned to the next day without any evidence being heard. On March 31, when it was mentioned to the Court by the opponent's advocate that none of the premises pointed out by the petitioner were suitable to him, the learned Judge immediately passed an order dismissing the petitioner's suit.

2. The opponent's case as appearing from the affidavit filed in this Court is that at the first hearing of the suit on January 27, the learned Judge enquired of the advocates of the parties as to whether they wanted a formal trial or whether they were prepared to leave the matter to him to be summarily decided as an arbitrator after hearing the respective advocates and inspecting the

premises. Both the advocates agreed to the learned Judge hearing the facts from them and after inspection of the premises by the Court to submit to his decision as suggested. Thereafter the learned Judge inspected the premises on February 9, and gave his decision on March 31. According to the petitioner, however, the suggestion for arbitration was not made until the hearing on February 11 after the inspection of the premises and that it Was on February 11 that the learned Judge suggested that the matter should be referred to the sold arbitration of the respondent's advocate. That proposal was not agreed to by the petitioner, and ultimately both parties agreed that the matters in dispute should be decided by the learned Judge as an arbitrator.

3. It would thus appear that the parties are not agreed as to the capacity in which the learned Judge was to make his final decision. According to the petitioner he was to decide as an arbitrator, while according to the opponent, although he says in his affidavit that the learned Judge was to decide the dispute as suggested, viz. summarily as an arbitrator, he had not to act as a pure arbitrator, but that his decision as a Judge was to be accepted as final by the parties. The learned Judge in his order of March 31 observes as follows:Parties having agreed that I should decide this application summarily as arbitrator after seeing the premises and hearing the learned advocates and such evidence as I may allow to be led, I award that this application should be dismissed no order as to costs. Application dismissed; no order as to costs.

4. It is against this order that the plaintiff has filed this revisional application and it is contended by Mr. D.B. Desai on his behalf that the learned Judge had no jurisdiction to pass that order. His main contention is that the learned Judge was to decide the dispute as an arbitrator and follow the procedure laid down in the Arbitration Act of 1940 under which the arbitration agreement must be in writing. It is further contended that the combined effect of Sections 2(c), 21 and 40 is that though a dispute in a suit pending before the Small Cause Court may be referred to an arbitrator, that Court cannot direct that the award made by the arbitrator should be filed and a decree drawn up in its terms, but it is the High Court alone that can do so, because all that Section 21 does is to enable the Small Cause Court to refer a matter to arbitration and nothing more. It has no power to pass a decree or an order on an award. The question, therefore, is whether the learned Judge acted as an arbitrator and his procedure was governed by the Arbitration Act. It is on the other hand contended by Mr. Thakor on behalf of the opponent that although the words "as arbitrator" are used by the learned Judge in his order, it was not intended by the parties that he should act as an arbitrator under the Arbitration Act. It was only intended that he should decide the dispute between the parties after inspecting the premises and hearing such evidence as ha allowed to be led, with the result that he had the jurisdiction to decide in any manner he liked and that his decision was not to be challenged in appeal or in revision. There is no doubt that if the words " as arbitrator " had not been used in the order by the learned Judge and if it appears that the parties agreed that he should decide the dispute in any manner he liked after taking such evidence as he

thought necessary, his decision would have been final and that it would not have been an award falling under the Arbitration Act. But the difficulty is caused by the use of the words "as arbitrator" by the learned Judge himself in his order. On the affidavits of the parties he was to decide the dispute, according to the plaintiff-petitioner, as an arbitrator, and according to the opponent as if he were an arbitrator as urged in this Court although in the affidavit itself it is stated that the advocates of both sides agreed to submit to the decision as suggested, viz. to be summarily decided as an arbitrator.

5. Where the parities merely agree that they will abide by the decision which the Court may give after taking such evidence as it thinks fit or after inspecting the property, the Court does not act as an arbitrator, although there is a difference of opinion among the High Courts as to whether the decision in such a case is appealable or not. The point arising in this case, however, is not so much as to whether the decision is appealable but whether the Judge was a pure arbitrator and his decision an award under the Arbitration Act of 1940, so that the application for reference must be in writing and the formalities for making the award a decree of the Court must be complied with. Mr. Desai has strongly urged that the opponent's own affidavit as well as the order of the Judge show that the learned Judge was to decide the dispute as arbitrator, and that therefore the procedure must be under that Act, because under Section 47 of that Act its provisions "shall apply to all arbitrations and to all proceedings there under," and it is further urged that the Arbitration Act of 1940 is not merely an amending but a consolidating measure. The question, therefore, is whether the proceedings before the Judge became an arbitration when he was asked to decide the dispute as an arbitrator. The word "arbitration" is not defined in the Act, but Chapter IV relating to arbitration in suite-and we are concerned only with such arbitration here-clearly provides that after a written application is made by the parties to refer the dispute to arbitration, the Court shall by order refer the matter to the arbitrator and shall specify a reasonable time for making the award, and that thereafter the Court shall not deal with the matter in the suit save in the manner and to the extent provided in the Act. It is further provided that in certain circumstances the Court may modify or remit the award to the arbitrator or even supersede the arbitration and proceed with the suit. In my opinion, it is clearly implied in these provisions that the arbitrator in this chapter must be a person other than the Judge who forms the Court, and I agree with the reasons given by Sadasiva Aiyar J. in Chengalroya Chetti v. Raghava Ramanuja Doss holding that such an application is not one under schedule II of the Civil Procedure Code of 1908, which is now replaced by the Arbitration Act of 1940. There also the parties agreed to abide by the decision of the Judge passed as an arbitrator, and it was held that although the decision was in the nature of an award and binding on the parties to the reference, it was not governed by the provisions of Schedule II, and the decision was not appealable not because it fell under that schedule but because a party cannot go back on his consent to abide by

the decision. The learned Judge did not agree with the reasoning to the contrary *in Nidamarthi Mukkanti v. Thammana Ramayya*[1] although he agreed with the actual decision in that case that no appeal would lie against the decision. In a later decision of the same High Court in *Sankaranarayana v. Ramaswamiah*[2] *the* learned Chief Justice differed from the reasoning in both the former decisions in Chengalroya Chetti v. Raghava Ramanuja Doss and Nidamarthi Mukkanti v. Thammana Ramayya although he agreed with the final orders in both the cases, and he held that on the particular terms of the reference before him the right of appeal was not barred. However, the learned Chief Justice does observe in his judgment that (p. 44) A Court acting extra cursum curi has been said to act as quasi-arbitrator which may be a convenient expression but it does not involve art application of the second schedule to the Code of Civil Procedure which is applicable to arbitration.

6. The view taken by Sadasiva Aiyar J. in Chengalroya Chetti v. Raghava Ramanuja Doss which to a certain extent is shared by the learned Chief Justice in Sankara-narayna v. Ramaswamiah (1922) I.L.R. 47 Mad. 39(Supra), is also the view taken by the Allahabad High Court in *Baijnath v. Dhani Ram*[3] In that case a Munsif was asked to decide a case on an inspection of the documents filed and of the locality, and the parties agreed to accept his decision. The High Court held that the Munsif, in accepting the position off an arbitrator, had a two-fold capacity. He was an arbitrator, but he was also the Court. It was observed (p. 906):The Civil Procedure Code does nowhere contemplate that a court may give up its own duties and take up those of an arbitrator in a suit before it. If an officer should accept such a position, he should act after the case has gone to some other court. In that case, his own proceedings will be subject to all the rules in schedule II of the Civil Procedure Code and the arbitration, will be regular and legal, and the anomalous position that now has arisen will never arise.

7. I am entirely in agreement with these observations. In my opinion, when, a Judge is asked to arbitrate between the parties to a suit before him, he does not cease to be the Court and become a pure arbitrator. As I observed before, the provisions of Ch. IV of the Arbitration Act, as well as the provisions of Schedule II of the Civil Procedure Code before that, imply necessarily that when a dispute in a pending suit is referred to arbitration, the arbitrator must be a person other than the Judge presiding in the Court. Otherwise, the provisions of that chapter would not be applicable at all. It follows, therefore, that even though the learned Judge purports to act as an arbitrator, he is deciding the dispute not as an arbitrator under the Arbitration Act but because the parties agreed that whatever he decides will be treated as final and will be accepted by the parties. As observed in Halsbury's Laws of England, Hailsham Edn., Vol. I, p. 624:When in proceedings pending before the Court the parties agree to accept the judge's decision as final, it is said that they thereby constitute the Judge a quasi-arbitrator. The effect of such an agreement is that the decision of the judge is unappealable and cannot be questioned in any way; but the judge

is not thereby really placed in the position of an arbitrator : and his decision is not, and does not in any way resemble, an award.

8. Mr. Desai has relied on a statement of law in Russell on Arbitration, 13th Edition, p. 34, where it is observed that " the subject-matter of an action may be referred to a Judge as arbitrator. The Judge in such a case is merely an arbitrator and has no special powers by virtue of the fact that he is a Judge and his award is not subject to appeal." I do not think that those observations necessarily mean that the Judge ceases to be a Judge and becomes a pure arbitrator in the sense that he can refer the dispute to himself and also remit the award to himself.

9. As I have been referred to some Indian decisions in the arguments, I will briefly deal with them. It is held in *Sayad Zain v. Kalabhat*[4] where both parties to a suit referred the matter in dispute between them to the Court, and agreed to abide by its decision, and the Court passed a decree awarding a certain sum to the plaintiff, that no appeal lay from the decree, the decision of the Court being in the nature of an arbitrators award. In that case the words " as arbitrator " were not used in the reference. It was agreed that the Court should make a settlement of the dispute between them according to ch. xxxviii of the then Civil Procedure Code which related to the power of the parties to state a case for the Court's opinion. The decision of the Court was that the proceedings of the Court were extra cursum curi, and the judgment of the Subordinate Judge was in the nature of an arbitrator's award against which an appeal cannot be entertained. It is further observed that the fact that the Subordinate Judge gave his award in the form of a decree will not make it a decree from which a regular appeal can lie. This decision was followed by the Calcutta High Court in *Baikanta Nath Goswami v. Sita Nath Goswami* [5]There the parties had agreed to leave the questions in dispute between them to the determination of the Court after it had made a local inspection, and had also agreed not to raise any objection to the same or to prefer an appeal, and it was held that the decision of the Munsif was in the nature of an award land that he could not alter the award once made, or review his own decision. This Calcutta decision was not approved of in *Baijnath v. Dhani Ram*[6] The learned Judges there were of opinion that the Munsif was entitled to review his own decision. But the difference of opinion does not touch the point arising before us which is whether the learned Judge lost his capacity as a Judge and became a pure arbitrator governed by the Arbitration Act. In my opinion, he did not, and therefore the provisions of the Arbitration Act would not apply to him. That being so, it is not necessary that the reference to him must be in writing, and the provisions of Ch. IV of the Arbitration Act would not apply.

10. For these reasons I hold that the order passed by the learned Judge is correct, and this revisional application must be dismissed. The rule is discharged with costs.

Cases Referred.

1(1902) I.L.R. 26 Mad. 76
2(1922) I.L.R. 47 Mad. 39
3(1929) I.L.R. 51 All. 903
4(1899) I.L.R. 23 Bom. 752 : S.C. 1 Bom. L.R. 366
5(1911) I.L.R. 38 Cal. 421
6(1929) I.L.R. 51 All 903