
(1921) 03 AHC CK 0042
In the Allahabad High Court

Firm Sitaram Nathmal

APPELLANT

Vs

Firm Sushil Chandra Das

RESPONDENT

Date of Decision : 31-03-1921

Acts Referred:

Arbitration Act, 1899 — Section 11

Citation : 64 Ind. Cas. 706

Hon'ble Judges : Walsh, J; Ryves, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This is an appeal from an order of the District Judge of Cawnpore directing an award to be filed u/s 11 of the Arbitration Act of 1899, In our opinion the appeal fails. Several objections were raised to the filing of the award at the hearing before the learned Judge. Some of them necessarily involved questions of fact which could only be satisfactorily determined upon hearing the evidence. There is reason to suppose that applications of this kind and similar applications, for example, to stay a suit under the Arbitration Act, which are dealt with in the District Court as what is known as miscellaneous matters, sometimes receive somewhat rough and ready treatment. We say this based upon our own experience. Sometimes almost insuperable difficulties are felt, both at the hearing and on the Bench in this Appellate Court, in grappling with the merits of a question upon which the record throws little or no light, or which necessitates a frantic struggle to extract from the record the salient facts in order to enable this Court to arrive at a right conclusion on the merits of the controversy. In this case no evidence of any sort or kind was taken except by way of reference to certain documents which were, no doubt, not in dispute. We hesitate to lay down any general rule for the guidance of the lower Court in considering these matters, because so much depends upon the actual circumstances of each case and it may be that the legal gentlemen representing the parties deliberately come into Court and expect the Court to adopt their statements and their admissions of fact, which raise questions of procedure and law which have to be adjudicated upon,

but unless this is in fact the way in which the case is presented to the lower Court, it should be borne in mind that sometimes these questions under the Arbitration Act, raising controversy as to the conduct of the Arbitrators or Umpire and the procedure adopted and the instructions and rules and so forth, are very important questions involving sometimes large sums of money and also often involving questions of procedure, which must sooner or later be settled as methods to be followed by the Courts in future applications of a similar nature, and if the Court would only take the trouble to insist on having either the evidence properly brought before it as in the trial of a suit, or deliberately withdrawn or abandoned by the parties raising the objection, a great deal of trouble would be saved in considering in the Appellate Court whether there really has been any grievance in the matters disposed of by the Court below.

2. The learned Judge has disposed of the various objections raised in a very clear judgment with which we, in the main, entirely agree, subject to the foregoing observations with reference to the absence of any real evidence before him on the questions of fact which were raised. Subject also to a general question of law with which we propose to deal in a few sentences later on, with reference to the duties of an Umpire where Arbitrators have been appointed.

3. The two points pressed upon us with great ability by Mr. O'Connor for the appellant were as follows :--That in this particular case the Umpire who was appointed, under a submission to which Mr. O'Connor's clients were a party, by the Delhi Piece Goods, Association, was appointed without his appointment or even his name being communicated to Mr. O'Connor's clients and without Mr. O'Connor's clients having any opportunity of submitting their case to him or even of asking that he should proceed and hear evidence from Mr. O'Connor's clients, in spite of the fact that hearing had already taken place before the Arbitrators. "Is it to be said," says Mr. O'Connor with plausibility and apparently an unanswerable challenge, "that my clients' right to call in question this award made against them by the Umpire is to be negatived because they did not make an application to a gentleman of whom they have never heard and whose name they did not know?" Of course if that were really a correct statement of the position, Mr. O'Connor's clients would have a real grievance. It is not really, according to the findings of the learned Judge and the materials before us, an accurate statement of the position. The salient features, so far as we have been able to gather, are that the Arbitrators had met and that the parties had done all that was within their power to lay their case before the Arbitrators, and before any question of the Umpire arose at all, the Arbitrators had completed their duties by each of them making an award in writing, such an award in each case being practically the case of the party appointing the particular Arbitrator. So that there was on record a complete statement by each party in the most favourable way in which it could be made, namely by the Arbitrator acting for such party, setting out the rights of each party and the reasons for the conclusion arrived at. That point being reached and there being, of course, a complete impasse the awards being totally at variance, the sellers applied, within the terms of the submission,

to the Delhi Piece Goods Association, for the appointment of an Umpire, and at some time or another, the Umpire was appointed, and three months later, namely, on the 5th of September, the application for his appointment having been made on the 6th of June, he made his award by adopting the view of the sellers"-Arbitrators" decision, and between the date of the application for his appointment and the issue of his award the buyers, who now complain of the proceeding, undoubtedly sent their papers into the Piece Goods Association together with the stipulated fee of Rs. 32 with the knowledge and the intention, that cannot be controverted, of enabling him to proceed with his duties. In doing so they undoubtedly acquiesced in the appointment, although as they now say, they did not know who was the person appointed. Their present complaint is that they wished to do a great deal more, namely, submit considerations which may induce him to take their view rather than the view of the sellers, but under the circumstances we have just stated, if they wished to show that the Umpire had gone contrary to the established principles of justice and refused them a bearing, the onus was upon them to call evidence to establish that fact in the Court below in answer to the application to file the Umpire's award. We are satisfied that they had the opportunity of doing so, and that, at any rate, no reasonable opportunity was refused to them of doing so. We think, under the circumstances, that their own conduct amounts to an acquiescence of the procedure adopted subsequent to the making of the admitted award by the two Arbitrators, and that they, therefore, cannot, in law, be allowed to question the regularity of these proceedings, if, in fact, irregularity there was. The appeal on this point fails.

4. The second point which was pressed by Mr. O'Connor is a purely technical one, but at first sight looked more formidable. The rules undoubtedly require an Umpire to make his award within a month of his appointment and if he does not either extend the time or make his award within such time, his award is worthless. There are good reasons for enforcing such a rule. No explanation is before us as to why this award was made three months after the application to the Association to appoint an Umpire. It is possible, though not likely, that two months elapsed before the Umpire was appointed, which would make his award within time, but we have come to the conclusion that this point was deliberately not pressed, as the learned Judge says in his judgment, in the Court below and not being in the memorandum of appeal to this Court, we do not think it is open to the appellant to raise it now. It is a matter requiring evidence and there is no clear evidence upon the point except the actual dates to which we have referred. Finally, we would say a word about the general duties of an Umpire in a matter of this kind, inasmuch as the point has been rightly raised and fairly argued by Mr. O'Connor for the appellant and has been rather glossed over by the judgment of the learned Judge. There is, of course, all the difference between a case such as this, where the Umpire is not appointed until the Arbitrators have actually disagreed, and a case where the Umpire is appointed before the disagreement, in anticipation of the probable failure of the Arbitrators to agree. The practice which prevails in England, where this Act, in almost its precise language, has been

much acted upon for very many years, is correctly set out in Russel on Arbitration in the 10th Edition by Mr. Hudson at page 412:--"in order to save delay," (he is speaking of a case where the Umpire is appointed before the Arbitration) "and expense of the two investigations of evidence it is often arranged that the Umpire shall sit with the Arbitrators and hear the evidence once for all." On page 411 he states the general duties of an Umpire. *prima facie* the duties of an Umpire are the same as those of the Arbitrators. The Umpire must hear the evidence of the parties and their witnesses, if application is made to him to do so by either party, notwithstanding that the same evidence has already been adduced before the Arbitrators, The Umpire is not justified, in the face of an objection by either party, in taking any part of the evidence from the notes of the Arbitrators unless there are specific provisions in the submission permitting him to do so. That statement of the law with which we agree and which, we think, when the question arises, the Courts ought to follow, is taken from a short but comprehensive judgment of Mr. Justice Paterson in an old case of 1841 to be found reported in the case of *Jenkins v. Leggo* (1841) 11 L.J.Q.B. 71 : 1 D. (N.S.) 277 : 6 Jur. 897. We adopt that view and we think that the principles contained in the statement which we have cited from Russel and the judgment of Paterson, J., are the principles which ought to guide Courts in deciding this matter. They clearly establish that the party who makes an objection must prove that he objected at the time to the Umpire to his proceeding in making a final award without hearing his witnesses. The appellants have failed to bring themselves within the mischief aimed at by this authority, the mischief being that all Courts, even Arbitration Courts, must act according to the principles of natural justice and not deliberately refuse a hearing or take evidence from one side behind the back of the other, and, having failed to bring this case within the mischief of those principles, the appellants' case must necessarily fail. The appeal must fail with costs and for the same reasons the revision application must be rejected.

5. We have carefully avoided any attempt to decide upon the merits, that is to say, from the materials on the record, a controversy arising out of a claim for damages between the parties, which is a matter entirely between the Arbitrators and the Umpire. They are the sole Judges of fact and law and also of the laws of evidence without appeal, but we cannot help noticing that in this particular case, in a claim by vendors for actual loss or damage arising from non acceptance, the vendors' Arbitrators and the Umpire have agreed in refusing any opportunity to the buyers to see the correspondence between the vendors and their principals in England. Of course a decision of that kind, namely, of the admissibility of the vendors' correspondence, turns upon the facts in each particular case, but as a general rule, it is wrong and the practice should not be encouraged where vendors are proving actual loss from non acceptance.

6. If in an ordinary suit, which came before us, the question of the disclosure of correspondence of this kind arose, we should be practically bound, except under very exceptional circumstances, to order the party in whose possession the

correspondence was, to disclose it to the other side as being relevant to the claim for damages. The appeal is dismissed with costs.