

(1971) 07 KL CK 0019

In the High Court Of Kerala

Case No : A.S. No. 32 of 1971 and C.R.P. 326 of 1971

K. Mohammadkutty

APPELLANT

Vs

The Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd.

RESPONDENT

Date of Decision : 14-07-1971

Acts Referred:

Arbitration Act, 1940 — Section 30

Citation : AIR 1972 Ker 272 : (1972) KLJ 299

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;P. Unnikrishna Kurup, J

Bench : Division Bench

Advocate : K.P. Radhakrishna Menon and K.K. Ravindranathan, in A.S. No. 32 of 1971, K. Bhaskaran, P. Thankappan, P.K. Suresh and G.K. Bharathan, in C.R.P. No. 326 of 1971, for the Appellant; K.P. Kesava Menon, for the Respondent

Final Decision : Dismissed

Judgement

Krishnamoorthy Iyeb, J.—The appeal and the revision petition arise out of arbitration proceedings without intervention of Court based on the Arbitration Act in pursuance to the contract dated 6-4-196] between the appellant and the respondent for the construction of certain buildings and other engineering works at Mavoor in Calicut for the wood pulp division of the respondent. Clause 67 of the Contract provided that any dispute between the parties arising out of the same had to be referred to two arbitrators one to be nominated by the appellant and the other by the respondent and the said clause authorised the arbitrators to appoint an umpire to act in case of any difference of opinion among them.

2. In view of the difference of opinion in the working of the contract the parties invoked clause 67 of the Contract. The appellant nominated Sri S. Ganapathia Pillai a retired Judge of the High Court of Madras, while the respondent nominated Sri K. Sankaran. a retired Chief Justice of the Kerala High Court as arbitrators to act and the arbitrators in their turn appointed Dr. P, V, Rajamannar, retired Chief Justice of the Madras High Court as the umpire. In view of the difference of opinion between the arbitrators the matter was referred to the

umpire who passed the award dated 23-9-1965.

3. The appellant filed O. p. 236 of 1965 u/s 13 of the Arbitration Act. 10 of 1940 in the Court below to set aside the award on the ground that the umpire misconducted himself within the meaning of Section 30(a) of the said Act. The petition was dismissed by the Court below and the appeal is directed against the said order.

4. The umpire produced the award in Court with a statement u/s 14(2) of the Arbitration Act and the said statement was registered by the Court below as O. S, 102 of 1965. The learned Judge passed a decree in terms of the award and the revision petition is directed against the said decision,

5. In paragraph 12 of the award it is stated thus:--

"In view of the complexity and extensive nature of the evidence likely to be adduced, it was considered desirable that the Umpire should sit along with the two Arbitrators throughout the hearing to obviate the necessity of adducing the entire evidence over again before the Umpire, in case there was a difference of opinion between the Arbitrators".

It is agreed between the parties that the umpire sat with the arbitrators throughout the course of the entire proceedings. The misconduct in the umpire alleged by the appellant is that he was during such sitting participating in the proceedings before the arbitrators. Paragraph 5 of the Original Petition to set aside the award states:

"From the very commencement of the proceedings, the Umpire Shri P. V. Rajamannar, also sat along with the arbitrators, taking a very active Part in the conduct of the proceedings and in the discussions in the course of the proceedings".

One of the arbitrators Sri K. Sankaran examined as R. W. 1 deposed as follows; "Before commencing the recording of evidence there was a discussion between myself and Ganapathia Pillai about the probable volume of evidence that may have to be recorded in view of the points of dispute between the parties. We felt that a considerable volume of evidence will have to be recorded. We also felt that in case of difference of opinion between us the matter will necessarily have to go before the umpire. In such an event it will be in the interest of the contesting parties to avoid repetition of the recording of the evidence before the umpire and such a petition would have entailed avoidable delay in the final decision. It would also have entailed considerable additional expenses for both parties. In view of all these aspects we thought that it would be to the benefit of all concerned to permit the umpire also to sit with the arbitrators at the recording of the evidence so that in the event of his being called upon to pronounce a final award, it may be necessary for him only to hear the arguments of both sides in the light of the evidence already recorded. The idea was put to the respective parties by the Arbitrators and they also agreed that it will be better to permit the umpire to sit

along with the arbitrators at the recording of the evidence. Accordingly the entire evidence was recorded in the presence of all the 3 of us The procedure stated above was adopted with the full consent of both the parties".

6. It has to be pointed out at this stage that no point was made by counsel for the appellant from the fact that the umpire was present during the entire proceedings before the arbitrators. On the other hand, counsel for the appellant submitted that this was very necessary to avoid duplication of the proceedings before the umpire in case of difference of opinion between the arbitrators his only complaint being that the umpire was actually participating in the proceedings before the arbitrators.

7. Rule 4 in Schedule I of the Arbitration Act is in these terms:

"If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators".

The above rule was relied on to show that any active participation of the umpire in the proceedings can be only on a difference of opinion between the arbitrators. The question for consideration is was there any active participation by the umpire in the proceedings before the arbitrators. The plea of the counsel for the appellant was if the umpire has put any questions to any of the witnesses examined before the arbitrators and if he has thus taken part in the discussion at the time of the examination of witnesses it will amount, to active participation by the umpire in the proceedings. In support of "his contention counsel for the appellant relied on a decision of the Nagpur High Court in AIR 1955 126 (Nagpur) . The learned Judge observed:

"The word "umpire" is a term of art and has a special meaning in the law relating to arbitrators. The agreement was scribed by a lawyer who evidently understood what an umpire's functions are in arbitrations. An umpire may be appointed by the selected arbitrators or the appointment may be made by the con-tending parties. The umpire only acts when there is a difference between the arbitrators themselves. He may sit with the arbitrators and watch the proceedings, hear the evidence and look into the papers, but he is not supposed to confer with the arbitrators so as to mould their decision.

* * * * In our opinion, Nagarmal was appointed an umpire and his position was correctly understood by the parties and by the arbitrators, including Nagarmal. If Nagarmal acted before there was a difference, this would constitute an illegality, though there was no objection to his sitting with the arbitrators. He could not influence their opinion. See "Winter-ingham v. Robertson". (1858) 27 Ex 301

Counsel for the appellant submitted relying on the above observations that the umpire was in the course of the Proceedings putting some questions to some of the witnesses and this amounts to his having acted in the reference which will

vitiating the entire proceedings. In our view, the proposition advanced by counsel for the appellant is very wide and cannot be supported by the decision relied on by him.

8. In AIR 1952 314 (Nagpur) also relied on for the appellant a bench of the Nagpur High Court observed quoting a passage from Sircar's Law of Arbitration thus:

"The next point is that the award being the result of the joint deliberations of the two arbitrators and the umpire was illegal. In support of this argument the learned counsel relies upon the following observations at "page 154 of Sircar's Law of Arbitration:

"The umpire cannot sit with the arbitrators and hear evidence, but this fact by itself will not be sufficient ground for setting aside the award, if the umpire does not interfere in any way".

These observations make it perfectly clear that the participation by an umpire in arbitration proceedings is no ground for setting aside an award".

In the two cases of the Nagpur High Court the question considered was whether it was open to an umpire to participate in the proceedings. The question mooted before us was not considered and did not arise for consideration in those proceedings. On the other hand, in Russell on Arbitration Seventeenth Edition, at page 152 it is stated:

"In order to save the delay and expense of two investigations of evidence, it is often arranged that the umpire shall sit with the arbitrators and hear the evidence once for all. If without any special arrangement the umpire sits with the arbitrators and hears the evidence, that is no ground of objection to the award, but the umpire ought not in such a case to interfere with the arbitrators when they discuss the case".

In support of his statement of law the learned author has relied on three decisions which we think it unnecessary to repeat in this judgment. In this connection we will also refer to the decision in (1858) 27 Ex 301 Watson. J. observed:

"The umpire was appointed to concur in considering and determining the matters referred: that is, to sit with them and concur with them in hearing and considering those matters, and to make the award if they could not agree".

It was not suggested before us that the umpire took part in the discussions of the arbitrators of the disputes referred to them. It was also not suggested that any attempt was made by the umpire to influence in the course of the proceedings by making suggestions regarding the conclusions to be reached on any of these matters. It is clear from the evidence of H. W. 1 that the recording of evidence -before the umpire by the arbitrators was done with the full consent of the parties also. R. W. 1 has also stated further that "excepting matters

regarding the procedure to be followed to expedite the recording of evidence, no other matter was considered at that stage by the arbitrators Or the umpire". Much was made from the statement of R, W. 1 to the effect that the umpire at the time of recording of the evidence was also on some occasions used to put questions to the witnesses for clarifying certain matters. Apart from that it was also stated by R. W. 1 that there was a discussion between the arbitrators and the umpire regarding the procedure to be followed in the matter of marking certain undisputed entries in the books of account between the parties. We do not think that from this it can be inferred that the umpire was acting in the reference. When on account of his appointment the umpire can sit and is expected to follow the evidence taken before the arbitrators it is open to him to put questions to the witnesses to clarify certain matters. The very purpose of the presence of the umpire at that stage was to avoid a duplication of the proceedings before him, when it became necessary for him to act in the reference and if that is the purpose to hold that putting questions by an umpire when witnesses are examined before the arbitrators to clarify certain matters will vitiate proceedings will defeat the very purpose of taking of the evidence in the presence of the umpire also.

9. We therefore, do not find that the proceedings or that the award is vitiated by any misconduct in the umpire. We, therefore, hold that the appeal has no merit; we dismiss the same with costs. In view of our decision in the appeal the civil revision petition also is without any merit and we dismiss the same. We have our own doubts whether it was not necessary for the party to have preferred an appeal against the decision in the original suit. But it is not necessary for the purpose of this case to decide the same as no preliminary objection was raised at the time of hearing against the sustainability of the revision petition. We make no order as to costs.