

(1976) 11 P&H CK 0003

In the Punjab And Haryana At Chandigarh

Case No : First Appeal From The Order No. 113 of 1965

Kehr Chand Dhiman and Another

APPELLANT

Vs

Sarvshri Dharam Chand Dhiman Etc.

RESPONDENT

Date of Decision : 12-11-1976

Acts Referred:

Arbitration Act, 1940 — Section 14, 3, 30, 33
Arbitration Rules, 1940 — Rule 2, 3, 4, 5

Citation : (1977) 1 ILR (P&H) 342

Hon'ble Judges : M.L. Verma, J

Bench : Single Bench

Advocate : H.L. Sibal and G.R. Majithia, for the Appellant; D.S. Nehra and Arun Nehra, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Verma, J.—The disputants including Mehar Chand are real brothers being sons of Tulsi Ram. They owned joint properties located within the limits of tehsil Phillaur and at Howrah.. They too had joint businesses at Phillaur and Howrah. Since disputes had arisen between them, they, by agreement executed on November 2, 1962, appointed Shri Gurditta Ram and Shri Anant Ram as Arbitrators and referred the various disputes to them for arbitration. One of the terms of the said reference was that in the event of difference of opinion between Shri Gurditta Ram and Shri Anant Ram, they could appoint an Umpire whose decision would be final. The arbitrators, viz., Shri Gurditta Ram and Shri Anant Ram, therefore, appointed Shri Devi. Chand Dhiman as Umpire, even before the commencement of the arbitration proceedings. The Arbitrators Shri Gurditta Ram and Shri Anant Ram, along with the Umpire gave the award on December 15, 1962. Therefore, Mehar Chand and Kishan Chand (now the Appellants) moved application u/s 14 of the Arbitration Act (hereinafter called the Act) on March 5, 1963 in the Court of the Senior Subordinate Judge, Jullundur, for filing of the award and making the same the rule of the Court. The award was filed. Dharam Chand (now Respondent No. 1) filed objections under Sections 30

and 33 of the Act, pleading, inter alia that the Arbitration Tribunal had not been constituted in accordance with the agreement arrived at between the parties and the Arbitrators Shri Gurditta Ram and Shri Anant Ram, had been guilty of misconduct because they had allowed themselves to be led and dominated upon by the Umpire, viz., Shri Devi Chand Dhiman and were allowed themselves to be influenced by Shri Jetley, legal practitioner, in making the award. They (the Arbitrators) did not afford opportunity to him to adduce evidence and they had gone beyond the scope of the reference in directing the transfer of his (Dharam Chand's) share in the joint properties to Mehar Chand, Kehar Chand and Kishan Chand instead of dividing the same by metes and bounds and the award was otherwise invalid because they, viz., Shri Gurditta Ram and Shri Anant Ram, had directed him (Dharam Chand) to get the land of the factory--Messrs. Dhiman Iron and Steel Company, Phillaur which did not belong to him, transferred in favour of Mehar Chand, Kehar Chand and Kishan Chand. The said objections were resisted by Kehar Chand and Kishan Chand and they controverted the material allegations made by Dharam Chand. Hence, the following issue was settled on merits:

Whether the award dated December 15, 1962 is liable to be set aside on the grounds mentioned in para 2 of the application of the Respondent?.

2. The, trial Court returned verdict on the said issue in the affirmative and consequently the objections raised by Dharam Chand prevailed, and the application moved by Kehar Chand and Kishan Chand for making the award the rule of the Court, was dismissed. Dissatisfied with the said result, they, viz., Kehar Chand and Kishan Chand came to this Court in appeal.

3. In support of the appeal, Mr. G.R. Majithia, learned Counsel for the Appellants, raised the contentions that the Arbitrators were legally bound to appoint the Umpire and that Dharam Chand had been appearing before the Arbitration Tribunal, so, he was estopped on principle of waiver or acquiescence from questioning the appointment of Shri Devi Chand Dhiman as Umpire or the validity of the award, and the division of the joint properties had been affected by mutual adjustment and the same constituted partition by metes and bounds for all intents and purposes, and thereby assailed the finding recorded by the trial Court on the aforesaid issue and the judgment rendered by it as unsustainable. Section 3 of the Act provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference. It is provided by Rule 2 of the First Schedule of the Act that if the reference is to an even number of Arbitrators, the Arbitrators shall appoint an Umpire not later than one month from the latest date of their respective appointments. Therefore, Mr. Majithia was right in contending that the appointment of Devi Chand Dhiman as Umpire by Shri Gurditta Ram and Shri Anant Ram, Arbitrators even prior to the commencement of the arbitration proceedings was warranted by law notwithstanding that Clause (b) of paragraph

4 of the agreement of reference provided that they could appoint the Umpire in the case of difference of opinion between them on any matter.

4. I may also agree with Mr. Majithia who is supported by judgment in *Firm Gaurishankar Shyamsunder v. Biharilal son of Bissessarlal* AIR 1952 Nag 314, that the participation of Shri Devi Chand in the arbitration proceedings will not be a sufficient ground for setting aside the award. Shri Devi Chand could even sit along with the Arbitrators and hear the evidence and the effect of Dharam Ghand's appearing before the Arbitrators and the Umpire may, constitute waiver or acquiescence on his part to the extent that he may not be able to challenge the appointment of Shri Devi Chand as Umpire by the Arbitrators prior to the commencement of the arbitrations proceedings or his (Shri Devi Chand Dhiman's) participation in the arbitration proceedings. But, the act of Dharam Chand's appearing in the arbitration proceedings with the knowledge that he (Shri Devi Chand Dhiman) had been appointed as Umpire by the Arbitrators and that Shri Devi Chand Dhiman was participating in the arbitration proceedings cannot be construed as his assent to the Arbitrators" viz., Shri Gurditta Ram and Shri Anant Ram, seeking advice from Shri Devi Chand Dhiman or the latter's influencing that in the matter of making the award. The award, when read carefully, leaves no manner of doubt that the decisions were taken and the award was made unanimously by the Arbitrators (Shri Gurditta Ram and Shri Anant Ram) and the Umpire (Shri Devi Chand Dhiman). The award is signed by all the three of them. It is also mentioned in first paragraph of the award that Shri Devi Chand Dhiman had been appointed as Umpire by Shri Gurditta Ram and Shri Anant Ram and its third paragraph relating to the decisions taken, contains the word "wah" which means Shri Gurditta Ram, Shri Anant Ram and Shri Devi Chand Dhiman. The most important question for determination is whether Shri Devi Chand could participate in the deliberations of Shri Gurditta Ram and Shri Anant Ram before any differences had arisen between them. My answer to the said question would be in the negative. Since Shri Devi Chand Dhiman was the Umpire and his decision was to be final, Shri Gurditta Ram and Shri Anant Ram could not overrule him even if they had agreed among themselves, and neither of the Arbitrators could afford to disagree when Shri Devi Chand Dhiman had agreed with the other. Therefore, Shri Devi Chand could not confer with Shri Gurditta Ram and Shri Anant Ram, and he could not mould their decisions and similarly Shri Gurditta Ram and Shri Anant Ram could not seek any guidance from Shri Devi Chand in taking decisions. Since it is evident from the award that Shri Devi Chand Dhiman had deliberated with Shri Gurditta Ram and Shri Anant Ram and, as such, the possibility of his moulding the decisions of Shri Gurditta Ram and Shri Anant Ram with his advice cannot be excluded. I am supported in this view by *Chouthmal Jivrajjee Poddar v. Ramchandre Jivrajjee Poddar and Ors.* AIR 1955 Nag 126, and *Maqanlal Gangaram Rathor and Anr. v. Ramaji Bondarji and Ors.* AIR 1966 MP 157. The said view is further fortified by the provisions contained in Rules 4 and 5 of the First Schedule of the Act which specify the functions of an Umpire. Rule 4 of the said Schedule provides that if the

Arbitrators have allowed their time to expire without making an award or if they 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. Rule 5 of the said Schedule says that the Umpire shall make his award within two months of entering the reference or within such extended time as the Court may allow. It is, thus, clear from the provisions contained in the said Rules 4 and 5 that an Umpire is not an Arbitrator ab initio and he cannot act as a third Arbitrator. It is only when the Arbitrators fail to make an award within the time allowed to them or fail to agree with each other that the Umpire comes into the picture and replaces them (the Arbitrators). When the award shows, as the award in the case in hand does, that the conclusions recorded in the award were arrived at as a result of deliberation between the Umpire and the Arbitrators, it would amount to illegality because the participation of the Umpire in the deliberations had moulded the decision of the Arbitrators. Thus, I have no hesitation in agreeing with the trial Court and accepting the contention advanced by Shri D. Section Nehra, learned Counsel for Dharam Chand, that the act of Shri Gurditta Ram and Shri Anant Ram, Arbitrators in allowing Shri Devi Chand Dhiman Umpire to participate in the deliberations for taking decision amounted to judicial misconduct on their part and, therefore, the award suffers from an illegality which vitiates it.

5. The judgments reported in Sukh Lal v. Mamchand AIR (32) 1945 Lah 84; Tika-ram-Khupchand v. Hansraj Hazarimal and Ors. A.I.R 1954 Nag 241, and R. Prince and Company v. Governor General in Council AIR 1955 P&H 240, cited by Mr. Majithia do not lay down a different proposition of law. These cases dealt with the appointment of Umpire by Arbitrators even before any difference of opinion between them (the Arbitrators) had arisen or taking part in the proceedings by the parties knowing full well about such an appointment of the Umpire or when the Umpire sat with the Arbitrators and heard the evidence with them or failure of the Arbitrators to appoint the Umpire in accordance with the provisions contained in Rule 3 of the First Schedule of the Act. But, in none of these cases the participation of the Umpire in the deliberations of the Arbitrators for making the award or the effect of the same had been subject of discussion or decision. So, none of the aforesaid judgments is an authority on the point that an Umpire can join the Arbitrators in making the award or that the award made by the Arbitrators in consultation with the Umpire without their having been in disagreement between them (the Arbitrators) can be regarded as valid. It has to be remembered that the attendance of an Umpire in arbitration proceedings is totally different from his participating in the deliberations of the Arbitrators for making the award. Therefore, none of the aforesaid judgment relied upon by Mr. Majithia can render any assistance to the Appellants.

6. The point other than illegality pointed out in the preceding para which invalidates the award, canvassed by Mr. D.S. Nehra, learned Counsel for Dharam Chand, is that the award is otherwise invalid. The expression "otherwise invalid" occurring in Clause (c) of Section 30 of the Act is of wide amplitude and it covers

all forms of invalidity including the objection relating to the scope of reference and the jurisdiction of the arbitrators to decide a matter. Mr. Nehra maintained that the Arbitrators had travelled beyond the scope of reference and thereby had gone out of jurisdiction because, firstly, they had partitioned some property against the mode of partition agreed to by the parties and also failed to partition the fourth property; secondly, they had recorded decision about the property belonging to the sons of Dharam Chand who were not parties to the agreement of reference, thirdly, they (the Arbitrators) had decided rights of the parties in business houses which were not referred for arbitration and fourthly, they omitted to record decision about the rights of the parties in the factory--Messrs. Dhiman Iron and Steel Company, Phillaur. Para 1 of the agreement of reference (Exhibit P. 1) required the Arbitrators to partition four properties mentioned thereunder by metes and bounds. So, the parties had provided the mode of partition of the said properties in the agreement of reference. The Arbitrators along with the Umpire had, however, directed in the award that Dharam Chand would transfer his one-fourth share in three out of the aforesaid four properties to the Appellants and Mehar Chand, and assessed the value of his aforesaid share in the said three properties at Rs. 19,500. The said three properties were, residential house known as "Dhiman Bhawan", situate at Phillaur, six houses situate in village Nangal and agricultural land measuring twelve standard acres situate in the area of tahsil Phillaur. The utmost that can be said is that the aforesaid decision of the Arbitrators may constitute adjustment of the shares of the parties, but in no case it can be termed partition by metes and bounds. It is, thus, manifest that the Arbitrators had changed the mode of partition agreed to by the parties respecting the aforesaid three properties. The Arbitrators allowed the fourth property, i.e., residential house known as "Tulsi Niwas" No. 115 Benaras Road, Salkia, Howrah to continue to be joint of the properties. That means that they did not decide the matter regarding partition of the said property.

Para 2 of the award points out that the Arbitrators directed Dharam Chand to get land of the factory--Messrs. Dhiman Iron and Steel Company, Phillaur, transferred from his sons in favour of the Appellants and Mehar Chand. That means that the land of that factory was found by the Arbitrators to belong to the sons of Dharam Chand. They, viz., the sons of Dharam Chand, were not parties to the agreement of reference. Therefore, the Arbitrators had no jurisdiction to decide about the transfer of the said land in absence of the sons of Dharam Chand. So, that part of the award directing Dharam Chand to get the said land transferred in favour of the Appellants and Mehar Chand from his sons is without jurisdiction.

Para 3 of the award reveals that the Arbitrators had decided the rights of the parties in three business houses, (a) Messrs. D.C. Dhiman and Brothers (Private) Limited, Calcutta, (b) Messrs. Western India and Welding Company (Private) Limited, Calcutta, and (c) Messrs. The Steel Equipment and Construction Company (Private) Limited, Calcutta. But, the agreement (Exhibit P. 1) not

indicate that the dispute respecting the aforesaid three houses between the parties had been referred for business Majithia referred to an agreement alleged to have been arrived at between the parties on August 4, 1962 in order to show that the parties had contemplated to refer the dispute to the aforesaid three business house for arbitration. I have been unable to agree with him because there is nothing on record to show that the said agreement, dated August 4, 1962 formed a part of the agreement of reference (Exhibit P. 1), secondly, the said agreement, dated August 4, 1962 had not been duly proved; and thirdly, there is nothing on record which reveals that the parties had ever contemplated to refer the dispute, if there was any between them, respecting the aforesaid three business houses to Shri Gurditta Ram and Shri Anant Ram, for arbitration. Thus, the aforesaid part of the award relating to the transfer or division of the rights of the parties in the aforesaid three business house was beyond the scope of the agreement of reference and, as such, the same is invalid for want of jurisdiction.

7. The award does not contain any decision with regard to the rights of the parties in the factory--Messrs Dhiman Iron and Steel Company. So, the omission to record any decision in the award by the Arbitrators in relation to the said factory, in my opinion, amounts to judicial misconduct of the Arbitrators.

8. True, it is remarked by the trial Court in para 1 of the judgment that the other objections were not pressed by the learned Counsel for Dharam Chand and relying on the said remarks, Mr. Majithia argued that Dharam Chand was estopped from raising the contentions, referred to in para 6 above.

9. It is well-settled that an Arbitrator derives jurisdiction-from the agreement of reference. Therefore, the question whether he has acted within his jurisdiction or not depends solely upon the agreement of reference. Lack of inherent jurisdiction in the Arbitrator goes to the root of the matter and vitally affects his powers to adjudicate upon the dispute between the parties. Neither assent nor acquiescence of the parties can grant the inherent jurisdiction to and Arbitrator to decide the dispute. Therefore, waiver of objections including the one respecting jurisdiction with the Arbitrators to decide disputes relating to three business houses at Calcutta and the land belonging to the sons of Dharam Chand does not estop him from challenging the award on the ground of want of inherent jurisdiction of the Arbitrators. (sic) Prasad and Ors. v. Kamala Varma and Ors. AIR 1965 All 51, and Jagannath Kapoor and Another Vs. Premier Credit and Instalment Corporation (P) Ltd., support my view in this connection.

10. It, thus, follows from the discussion above, that the award is also "otherwise invalid" as contended by Mr. Nehra.

11. For the foregoing reasons, I find that the impugned, judgment does not suffer from any infirmity and there is no merit in this appeal.

12. Consequently, I, maintaining the impugned judgment, dismiss this appeal with costs.