

(1954) 08 CAL CK 0014
In the Calcutta High Court
Case No : Suit No. 4174 of 1951

Narayan Prosad Bhotica

APPELLANT

Vs

Kalawati Sethani

RESPONDENT

Date of Decision : 31-08-1954

Acts Referred:

Arbitration Act, 1940 — Section 5
Civil Procedure Code, 1908 (CPC) — Section 24
Criminal Procedure Code, 1898 (CrPC) — Section 526

Citation : (1956) 1 ILR (Cal) 506

Hon'ble Judges : Mallik, J

Bench : Single Bench

Advocate : Sankar Banerjee and Nirmal K. De, for the Appellant; H.N. Sanyal and Gouri Mitter for Defendants Nos. 3, 4 and 6 and Subimal Roy and P.R. Das, for Defendant No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Mallik, J.—This is an application u/s 5 of the Arbitration Act to revoke a submission. This reference to arbitration was made in a suit instituted by the Plaintiff on September 5, 1951. The suit is for partition of the joint family properties and in the said suit a number of declarations have been asked for and injunctions claimed. By an order dated July 21, 1952, the disputes amongst the parties were referred So the arbitration of Mr. B.D. Jhunjhunwala, a partner of Messrs. P.D. Himatsingka and Company a firm of solicitors representing one of the parties in the same suit. Pursuant to the reference Mr. Jhunjhunwala entered upon the reference and held two meetings—one on July 28, 1952 and the other on August 2, 1952. The arbitration not having been completed within four months, by an order made by this Court on January 19, 1953, time for filing the award was extended by six months. It appears that on March 14, 1953, another meeting was held by the arbitrator but the proceeding was not completed within the time allowed by the Court. On June 17, 1953, a second application was made for extension of time before Sarkar, J. This application for extension was opposed

by Grobindram Bhotica, the Defendant No. 4 who is the Petitioner before me. Two grounds were taken in opposing this application for extension of time. First ground was that the arbitrator was guilty of inordinate delay. The second ground was that the arbitrator Mr. Jhunjhunwala joined the Board of Directors of Bhotica Trading Company being a private company promoted by Onkarmall Bhotica, clients of Messrs. P.D. Himatsingka and Company and substantially owned by him. Sarkar, J. held that the delay was due the fact that the parties had agreed that the arbitrator might hold his hands till the parties arrived at a settlement. He noted that in the meantime the arbitrator did appoint a surveyor and valued that did in fact survey and value the property and submit its report of valuation. Sarkar, J., further, held that the arbitrator had reason to think that the parties wanted to proceed with the arbitration. In the result he condoned the delay in making the award and extended the time for filing the award till January 15, 1955. Sarkar, J., expressed his opinion that the other point, sought to be raised in the application for extension ought properly to be raised in an application for revocation and not by way of objection to the extension of time. Thereupon the present notice was taken out by the Petitioner Gobindran Bhotica.

2. The learned Standing Counsel with Mr. Nirmal Dey appeared in support of the petition and both of them argued the case record my appreciation of the fairness with which the Learned Counsel placed the case of their client. They made it clear that they make no allegation against Mr. Jhunjhunwala, the arbitrator. The arbitrator was a senior and respectable attorney of this Court and is a partner of a reputed firm of solicitors. Their client entered into the arbitration agreement with full knowledge of the fact that the arbitrator was a partner of Messrs P.D. Himatsingka and Company, attorneys for Onkarmall Bhotica an attorney for him in this very suit. They had confidence that in spite of this fact, the arbitrator would conduct the arbitration fairly and properly without any bias towards their client and would make a fair award. But subsequent to the reference Mr. Jhunjhunwala had become a director of the private company promoted by Onkarmall and as such director would be entitled to substantial financial advantage as will appear from Article 42 the articles of association of the said company. Under the said articles, a director is entitled to a remuneration of not exceeding Rs. 250 per meeting whether attended or not. A director would be entitled to a further remuneration for extra work done special service rendered. This fact has made the Petitioner apprehensive that the arbitrator may be biased in favour of Onkarmall to his prejudice and he would not get justice in the hands of the arbitrator. It is pleaded in the petition that because of such appointment as a director of the said company the arbitrator has become unfit to act judicially and make a fair and unbiased award. It is stated that there is reasonable apprehension that the Petitioner may be gravely prejudiced by the award to be made by Mr. Jhunjhunwala as arbitrator and in consequence there would be failure of justice. On this allegation and on the allegation of delay the Petitioner claims to revoke the submission.

3. It is to be noticed that the Petitioner's interest in the properties to be

partitioned is 1 anna. The petition is been opposed by Onkarmall and two other parties. Their total interest in the joint family properties is 12 annas. The remaining parties owning the balance of 3 annas share are not appearing in the application. Two opposing parties other than Onkarmall state that they feel no apprehension that the arbitrator would be biased in favour of Onkarmall. One of them Kalabati Sethani through her counsel Mr. P.E. Das submitted before me that the arbitrator is a family friend of the parties and as such she still has the advantage of appearing before him personally in the arbitration proceedings and make her submission. She pleads that she should not be deprived of this advantage.

4. Of the two grounds on which revocation is sought-the first Ground of delay may be taken up first. It is true that the reference was made as far back as July 21, 1952 and the award was not yet been published. But as noticed before the periods for filing the award have been extended by orders of the Court, and the last such application the lapses of the arbitrator was specifically raised by the Petitioner but the finding of the Court against the Petitioner and Sarkar, J., who heard the application thought fit to extend the time for filing the award till January 15, 1955. Having regard to this order passed by Sarkar, J. on June 1954, extending time to file the award till January 15, 1955, it is no longer open to the Petitioner to rely a delay as a ground for revocation.

5. Other ground for revocation is the apprehension of the Petitioner that the arbitrator might be biased in making the award or reasons stated before. Considerable argument has been addressed on this point by the Learned Counsel appearing for the Petitioner. The learned Standing Counsel appearing in support of the petition urged that he would contend that apprehension of bias on the part of the arbitrator is enough to entitle him to a revocation of submission. The point has been argued on principle and several authorities have been cited.

6. The learned Standing Counsel contended that the Court in determining an application for revocation of submission u/s 5 of the Arbitration Act should apply the same principle on which the Court transfers a proceeding from one court to another u/s 24 of the CPC or Clause 13 of the Letters Patent or Section 526 of the Code of Criminal Procedure, I do not accept the contention. In certain cases the Court is entitled to look to analogous statutes and cases decided thereunder for the purpose of construction but in my judgment it could be wrong to look to the principles underlying entirely different statutes dealing with entirely different subject matter had the cases decided there under for the purpose of construing a statute. Apart from my determined objection to import criminal law-substantive or procedural-in civil matters, I do not find by analogy between revocation of a submission and transfer of proceeding from one court to another. It is next argued that the arbitrator is in the same position as a judge and consequently the rule that a judge ought not to hear a case in which he might be suspected of a bias in favour of one of the parties applies to an arbitrator. The learned Standing Counsel invoked in support of this argument the well known maxim that justice

not merely should be done but also should appear to be done as well and contended that this maxim not merely apply to judges but to arbitrators as well who occupy the same position as a judge Mr. Sanyal has drawn my attention to a decision of the appeal court in England in *Eckersely v. Mersey Docks and Harbow, Board* (1894) 2 Q.B. 667 which directly lays down the contrary proposition. I am, therefore, unable to decide this case on principles relied on by the learned Standing Counsel as stated above. The learned Standing Counsel next contended that on principle and authorities a submission is liable to be revoked if there is apprehension on bias on the part of the arbitrator. If facts are proved from which an apprehension of bias can be inferred, the court is bound to revoke the submission. In support of this proposition reliance has been placed on the case of *Kemp v. Rose* (1858) 22 J.P. 721, 722. In this case under the terms of the contract between the contractor and the party the architect was made the sole arbitrator in all matters on difference between the parties. It was a case of building contract and the architect, before the building contract was entered into was applied to for a guarantee that the cost of building would not exceed ₹2,500. The architect, however, refused to give the guarantee but he gave an assurance to the party that the price should not exceed that amount. On the basis of this assurance the party entered into the building contract with the contractor. The contractor was ignorant of this assurance having been given by the architect to the party. Sir James Stuart, V.C. held of this evidence that the decision of the architect was not binding on the contractor. The Vice Chancellor observed:

It is certain that assurance was not communicated to the Plaintiff (contractors) and without imputing the slightest corruption to Mr. Lam (architect), it is enough for the Court, if in his position, there is a circumstance calculated to bias his judgment, which was unknown to a contracting part and which in point of fact may not have biased at all..... The power placed in the architect is almost unbounded and therefore the court is bound to consider any speck of circumstances which was unknown to the contracting party and which might, by possibility affect the judgment of the Engineer.

7. This is not a case of revoking the submission; the award was already given when the court was called upon to consider in validity. I notice in this case the court found in fact that the conduct of the architect in respect of certain items of dispute was considered by the court to be illiberal and unjust to the Plaintiff. The ratio of the decision is that the assurance given by the architect to the party to the effect that cost cannot exceed ₹2,50 might by possibility affect the judgment of the architect and that this fact was not known to the contractor when the agreement was entered into. Moreover, the court in fact found evidence of this on the part of the architect as noticed above. It is not a case mere apprehension of bias at all. It was a case where from the facts proved the court held that the architect was likely to be biased that this fact was not known to the aggrieved party at the time of the agreement and further, the architect was found in fact to be illiberal and unjust to the contractors. The decision of the court appears to be that the fact of assurance having been given by the architect to the effect that

costs would not exceed. ₹2,500 is a material fact and if known by the contractors at the time of agreement, they would not have agreed to have accepted his decision on all matters in disputes as final. I do not think that this case can be read as laying down a broad proposition of law to the effect that a mere apprehension of a party that the arbitrator may be biased is enough for the court to revoke a submission. The next case relied on, is the case of *William Dimes v. The Proprietors of the Grand Junction Canal* (1870) 3 H.L.C. 759. It is a case in which the Lord Chancellor who heard an appeal had shares in the company which was a party to the litigation. It was held that inasmuch as the Lord Chancellor was a shareholder of the company-a party to the litigation-the Lord Chancellor was not competent to sit as a Judge on the principle that no man is to be a Judge in his own case. This case does not say anything more than this that in the case of a Judge interest in a litigation, constitute an absolute bar and a Judge is not entitled to sit in judgment in a case wherein he has got an interest. I apprehend that in the case of arbitration also, if the arbitrator had interest in the subject matter of the dispute, he will be disqualified, if either party at the time of appointment was ignorant of this fact. This case obviously does not touch the point I am called upon to decide. The next case cited by the learned Standing Counsel is *In re: Haigh's Estate: Haigh v. Haigh* (1862) 31 L.J.Ch.N.S. 420, 423. In this case the award was set aside on the ground that the arbitrator improperly excluded his own son and a shorthand writer whose evidence was thought to be tendered by a party. Facts of this case cited are apparently very different from the case before me, but reliance has been placed by the learned Standing Counsel on an observation made by Turner, L. J. at p. 423. The said observation is as follows:

but on the other hand, arbitrators, like other Judges, are bound, where they are not expressly absolved from doing so, to observe in their proceedings the ordinary rules which are laid down for the administration of justice; and this Court, when called upon to review their proceedings, is bound to see that those rules have been observed. The difficulty which the Court has to encounter in determining a question of this nature is not as to the principles by which its decision ought to be governed, but in determining whether what has been done falls within the range of the arbitrator's judgment or contravenes the rules which ought to be observed in collecting the materials on which that judgment is to be exercised.

8. General observation of the learned Lord Justice does not help me in determining the question, I am called upon to decide in this case. It has not been disputed that the observation of the learned Lord Justice is sound and wholesome but Mr. Sanyal submitted that it is of no assistance to me in deciding this case with which submission I agree.

9. Mr. Sanyal submitted that law on the point is clear and is to be found in *Halsbury's Laws of England* (Hailsham Edition) Vol. I, p. 635.

The power to grant a leave to revoke is exercised by the Court in a sparing and

cautious manner, and unless the applicant can establish that there will be failure of justice, if the reference is allowed to proceed, he will not be allowed to revoke.

10. Mr. Sanyal has urged that the court is not entitled to revoke and has not in any case revoked a submission on the ground that a party apprehends that the arbitrator may be biased. Mere apprehension according to him is not enough. The party complaining must satisfy the court that there would be a miscarriage of justice or at least its probability. He relies on an observation of Stephen, J. made in the case of *James v. James and Bendall* (1889) 22 Q.B.D. 669, 674. Observation relied on is to be found at p. 674 which is to the following effect:

In the case of *East and West India Docks Company v. Kirk and Randall* 55 L.T.N.S. 245: (1887) 12 A.C. 738 I expressed an unqualified agreement with the opinion of my brother Grove, that before the Court exercises its discretion in granting leave to revoke a submission it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal; and I have seen no reason to change my mind.

11. Mr. Sanyal strongly relies on the case of *Bright v. River Plate Construction Company* (1900) 2 Ch. 835, 839. The facts are interesting. There was a tripartite agreement relating to negotiation by the Plaintiff of a consolidation and extension of tramway concession by a municipality. There was an arbitration clause in the agreement. Disputes having arisen between the parties with reference to the agreement, the said disputes were referred to the arbitration of a barrister. The conduct of a firm of solicitors alleged to be the solicitors for all the parties at the time of the agreement and now a solicitor for one of the parties was involved. The arbitrator was sought to be revoked on the ground that the arbitrator who was a barrister was in close professional touch with the said firm of solicitors and that the said firm of solicitors are and have been active and lucrative clients to the said arbitrator, who constantly advises and acts on their behalf in relation to matters involving company law. It was contended that the arbitrator cannot properly undertake to determine the issue of alleged misconduct of the said firm of solicitors. It was submitted that under such circumstances the barrister ought not to act as arbitrator in the matter because circumstances may exist or arise such as to cause a suspicion of bias. The case was argued by Sir Edward Clarke Q.C. on behalf of the applicant for revocation. The contention was overruled by Cozens Hardy, J. At p. 839 the learned Judge observed:

It was laid down that in the case of a named arbitrator all those considerations which affect the qualification of a person who may be suspected, though unreasonably suspected, of bias in a judicial position must be laid aside, unless it can be shown that the arbitrator has prejudged the case or has actual bias.

12. With the statement of law I respectfully agree. The case of *Ives and Banker v. Williams* (1) is the case of building contract. In a subsequent contract between the contractor and sub-contractor the previous contract was referred to and adopted as the principal agreement. In that contract there was an arbitration

clause whereby all disputes between the contractor and sub-contractors were to be decided by the arbitration of the company's engineer. The sub-contractor wanted to get rid of the arbitration. At p. 488 of the report Lindley, L.J. observed:

It is obvious that the sub-contractors must prove a great deal more than that the engineers have formed an opinion already upon the subject of the dispute. They must attack the character of the engineers to such an extent and in such a manner as to show that the engineer will probably be guilty of some misconduct in the matter of arbitration that they will not act fairly..... It is said that these contractors and - these engineers are co-promoters of companies. That is an allegation that may amount to anything and may amount to nothing and we cannot entertain such a loose statement as that.

13. Lopes, L.J. in his judgment referred to and followed *Eckersley v. Mersey Docks and Harbour Board* (1894) 2 Ch. 478, 488, see also *Drew v. Drew and Leburn* (1855) 2 Macq. 1. In the case of *Bhuwalka Bros. Ltd. Vs. Fatehchand Murlidhar*, 74, 76: AIR (1952) Cal. 294, 295, 296, Banerjee, J. reviewed the entire case law and recorded his opinion in the following terms.

In granting leave, u/s 5 of the Arbitration Act), the court exercise its discretion..... There are two limits within which discretion is to be exercised, one the Court should not lightly release the parties from their bargain; that follows from the sanctity the Court attaches to contracts ; the other, that the Court should be satisfied that substantial miscarriage of justice will take place in the event of its refusal to grant the leave.

14. In this state of authorities, I am unable to accept the contention if the learned Standing Counsel that the mere apprehension of the party that the arbitrator may be biased is enough for the Court to revoke submission.

15. What are the facts on which I am called upon to revoke the submission? It is not contended that Mr. Jhunjhunwala is actually biased-nor is it disputed that Mr. Jhunjhunwala is a senior member of the profession with reputation of integrity, His reputation as an honest man is so high that all the other parties to the litigation including the Petitioner nominated him as an arbitrator even though they knew that Mr. Jhunjhunwala was and is a partner of Messrs. P.D. Himatsingka and Company, attorneys for Onkarmall in this very action in which reference to arbitration is made. The parties knew or should have known that as solicitor for Onkarmall he would be rendering professional services to Onkarmall for which he would be paid. It is common, practice amongst business men to take in their companies their solicitor as a director and pay him proper remuneration. The reason why a trusted solicitor is taken in the Board of Directors of a private company is that the management consider their advice useful and their association would be for the benefit of the company. For the service of the solicitor proper remuneration has to be paid. I do not think that for a senior solicitor of Mr. Jhunjhunwala's position the remuneration provided in Article 42 of articles of association is fantastic or even high. The remuneration paid is not only

for attending the meetings but for thousand and odd advice intended to be taken by the managing member not necessarily in the meeting. Further, I have no reason to think that this directorate was given to Mr. Jhunjhunwala by Onkarmall for the purpose of influencing him. There are other and less public way of influencing, if the man can be influenced by financial consideration. It is difficult for me to believe that Mr. Jhunjhunwala will part from the path of rectitude and would give an unfair award in favour of Onkarmall and against the Petitioner merely because Onkarmall has made him a director in his new company. I have no reason to think that such directorship is a sine-cure job and Mr. Jhunjhunwala is selected to be a guinea-pig director. In my judgment, the apprehension expressed in the petition is wholly unfounded and there would be no miscarriage of justice if Mr. Jhunjhunwala is allowed to continue the arbitration and make his award. Nor should it be forgotten that if at any stage in the proceedings Mr. Jhunjhunwala gives any evidence of partiality or unfairness or files an unjust award, the Petitioner has his remedy to come to this Court for appropriate relief. At present on the present materials I will not be justified to exercise my discretion in favour of 1 anna shareholder and revoke the submission against the wishes of the appearing parties representing 12 annas share. I apprehend that it would be miscarriage of justice if I grant this application. The petition fails and is dismissed with costs.