
Asutosh Deb Sarkar Vs Apurba Kumar Deb Sarkar

None

Court: Calcutta High Court

Date of Decision: Aug. 24, 1909

Citation: 4 Ind. Cas. 370

Hon'ble Judges: Vincent, J; Mookerjee, J

Bench: Division Bench

Judgement

1. We are invited in this Rule to set aside an order made by the Court of first instance, by which the matter in controversy between the parties has

been referred to arbitration. It appears that a Commissioner was appointed to examine a witness in the case. On the 25th July last when he went to

examine the witness, the parties presented to him a petition in which they agreed to refer the matters in controversy to the arbitration of the pleader

for the plaintiff. On the following day, the Commissioner returned his commission unexecuted and filed the petition in Court. On the 29th July the

plaintiff, with the consent of the defendant, made an application to the Court in which it was stated that the arbitrator had declined to act without

fees and that time would be necessary to fix the amount of fees to be paid to him. The case was accordingly adjourned till the following day. The

plaintiff then made an application by which he prayed that two other arbitrators might be added so that the matter might be heard by three

arbitrators together, and he stated that if this was not agreed to by the defendant, he would not consent to have the matter referred to arbitration at

all. The Court considered this application, held that it was not open to the plaintiff to resile from the position which he had taken up on the 25th

July, and made the order which we are now called upon to set aside. It is quite clear that the application of the 25 th July was not an application as

contemplated by the Code. Under paragraph I of the Second Schedule of the CPC of 1908, the application for reference to arbitration has to be

made to the Court. It is not disputed that the Commissioner had limited authority; he could only examine a witness and it was not competent to him

to receive any application for reference to arbitration. It is also clear from the application of the 29th July that there was no final agreement to refer

the matters in dispute to arbitration. Apparently when the application of the 25th July was made, the parties were under the impression that the

proposed arbitrator would act without fees. They discovered later on that he would not act without remuneration and they could not come to any

agreement, either as between themselves or as between the suitors on the one hand and the arbitrator on the other, as to what fees would have to

be paid. Under these circumstances, it is impossible to hold that the plaintiff had on the 25th July agreed to a reference to arbitration in such a

manner as to make it impossible for him to resile from the position which he had taken up. We are further of opinion that in the events which have

happened in this case, it is not desirable that the matters in dispute should be decided by an arbitrator. The Rule is, therefore, made absolute and

the order of the Court below discharged. We make no order as to costs. The record will be sent down at once so that the case may be tried out

by the Court of first instance.