

(1954) 07 CAL CK 0024**Calcutta High Court****Case No:** Award No. 137 of 1954

Murarka Paint Varnish Works
Ltd.

APPELLANT**Vs**

S.N. Tebriwalla and Company

RESPONDENT**Date of Decision:** July 19, 1954**Acts Referred:**

- Arbitration Act, 1940 - Section 27(2), 3

Citation: (1956) 2 ILR (Cal) 491**Hon'ble Judges:** Bachwat, J**Bench:** Single Bench**Advocate:** M.M. Banerjee, for the Appellant; A.K. Banerjee, for the Respondent

Judgement

Bachawat, J.

This is an application to set aside and declare void an award.

2. By an agreement dated October 6, 1951, the Petitioner appointed the Respondent as banian for sale of its products for a period of ten years certain. Clause 15 of the contract contains an arbitration clause which is as follows:

15. Any dispute that might arise between the parties in relation to or concerning this agreement shall be decided by arbitration, each party being entitled to nominate an arbitrator of his own under the provision of Indian Arbitration Act, 1940 or any modification or re-enactment thereof and in the case of difference between the arbitrators, they shall have right to nominate jointly an umpire before entering on the reference and the decision of the umpire shall be final and binding upon the parties and valid in all legal Courts.

3. By a notice dated June 12, 1952, the Petitioner cancelled the contract. Thereupon disputes arose between the parties. The Respondent appointed Sri Jitendra Nath Banerjee, a pleader, as arbitrator and the Petitioner appointed Pundit Ajoy Singh,

advocate, as its arbitrator. The two arbitrators appointed Sri Basanta Lal Murarka as umpire. The Respondent claims Rs. 2,97,000 and a further sum of Rs. 34,800 as losses and damages for wrongful breach of contract by the Petitioner.

4. The Petitioner counter-claimed Rs. 20,202-6-3 on account of price of goods and Rs. 6,18,019-6 on account of damages for wrongful breach of contract by the Respondent.

5. Several issues were raised. Substantially the issues raised question as to whether there was any breach of contract; if so, by whom and if so, whether either party was entitled to the damages claimed or any part thereof and as to what amount, if any, was due from the Respondent to the Petitioner on account of price of the goods.

6. The arbitrators held several meetings.

7. In the meeting of the arbitrators held on September 23, 1952, the parties informed the arbitrators that they had adjusted the differences referred to arbitration and requested the arbitrators to record the adjustment and to make an award. The arbitrators recorded the adjustment in the minutes of the meeting. The adjustment provided that the Respondent would pay to the Petitioner Rs. 11,684-8-6 and that the payment would be made by returning certain goods and by endorsement of certain uncollected bills and by payment in cash. The substance of the operative part of the adjustment was embodied in the award of the arbitrators dated September 24, 1952.

8. The minutes of the meeting of the arbitrators dated September 23, 1952, also record that-

With this adjustment, no further dispute remains between the parties according to the settlement of the parties and the arbitrators are not required to adjudicate on any other claim put forward by the parties, and the parties will adjust the other matters amongst themselves.

9. The parties acted upon the award. Goods were returned and unrealised bills were endorsed to the Petitioner.

10. The case of the Respondent is that the award settled only the disputes relating to the accounts and the price of goods and that the rest of the disputes was withdrawn from the arbitration that the parties agreed to settle those disputes later on directly and that the managing director of the Petitioner gave an undertaking to the Respondent to settle the remaining disputes.

11. On October 23, 1952, the Respondent wrote to the arbitrators complaining that the managing director of the Respondent had not implemented the undertaking. The arbitrators severally replied by letters dated November 4, 1952 and November 18, 1952, stating that they were functus officio and that they could not resolve the disputes without a fresh reference.

12. On March 11, 1953, the Respondent wrote to the Petitioner appointing Sri J.N. Banerjee as its arbitrator and calling upon the Petitioner to appoint an arbitrator and stating-

Whereas you have failed and neglected to settle other matters as indicated in paragraph (E) of the arbitration proceedings, dated September 23, 1952, in spite of our repeated reminders, we are reluctantly compelled to refer the matter again to the arbitration as per terms of the Banianship agreement, dated 4th October 1951.

13. The letter is headed.

In the matter of arbitration proceedings and in the matter of award of 24th September, 1952 and our letter to you No. 885/ARB/52, dated 10th October, 1952.

14. On March 16/17, 1953, the Petitioner wrote to the Respondent stating-

With reference to your letter dated March 11, 1953, we hereby appoint Mr. Naresh Chandra Banerjee, advocate, Calcutta, Court of Small Causes, as our arbitrator in the above matter.

15. This letter also bears the same heading.

16. On March 26, 1953, the arbitrators appointed Lala Hemanta Kumar as umpire. On March 30, 1953, the Respondent filed a statement of its claim claiming Rs. 2,97,000 and Rs. 18,800 for damages for wrongful cancellation and breach of the contract dated October 6, 1951. On March 15, 1953, the Petitioner filed its counter-statement claiming Rs. 6,18,019-6 as damages for alleged breach of contract by the Respondent. In paragraph 13 of its counter-statement the Petitioner contended that the Respondent had no right to appoint a second set of arbitrators for determining distributes which had been given up and/or waived and that the Respondent should have abided by the terms of the agreement arrived at the previous arbitration proceedings leaving the whole matter to the discretion of Sri Sohanlal Murarka, one of the directors of the company.

17. Substantially the same issues which were raised in the first reference were raised in the second reference except that the issue as to the claim for the price of the goods was dropped and the following additional issue being issue No. 1 was raised:

Is the agreement dated 4th October, 1951, still subsisting and is the present reference to arbitration in order,

18. The arbitrators appointed Lala Hemanta Kumar as the umpire.

19. On May 4, 1953, the arbitrators held their 10th meeting at which issue No. 1 was dismissed. On May 8, 1953, the arbitrators held their 11th meeting at which the arbitrators differed in opinion. One of the arbitrators was of the opinion that the reference could not proceed and the other arbitrator was of the contrary opinion.

20. On May 11, 1953, the arbitrators wrote to the umpire stating that they had failed to agree on the preliminary point and requiring him to decide that point and to return the papers to the arbitrators if the decision of the umpire was in favour of the maintainability of the reference.

21. Pending the decision of the umpire, the arbitrators held their 12th and 13th meeting on May 16, 1953 and on May 25, 1953, in which directions regarding fees of the arbitrators were given. On May 25, 1953, the umpire held a meeting at which the parties and the arbitrators attended. After two reminders by the arbitrators the umpire made his award on the preliminary point on June 20, 1953, holding that the reference was maintainable, that the disputes could be settled by arbitration only and that the two letters dated March 16/17, 1953 and March 11, 1953, amounted to a valid reference to arbitration. On the same day, the umpire communicated his award to the arbitrators. On June 24, 1953, the arbitrators sent copies of the finding of the umpire to the parties and fixed June 27, 1953, as the date when the arbitrators would hold their next meeting.

22. On June 27, 1953, the Petitioner wrote to the arbitrators requesting them to stay the proceedings for three weeks in order to enable the Petitioner to take steps for supersession of the arbitration agreement. The request for stay was opposed by the Respondent. On the same day, the arbitrators held their 14th meeting at which they considered the letter of the Petitioner and the opposition of the Respondent and refused to stay the arbitration proceedings. They were of the opinion that the Petitioner was obstructing the arbitration proceedings and had waited until the eleventh hour, when time to make the award was about to expire, and that the award of the umpire was conclusive on the question of maintainability of the reference. They appointed July 1, 1953, as the date of the next arbitration meeting and stated that they would proceed in the absence of the Petitioner if the Petitioner failed to appear.

23. On June 29, 1953, the arbitrators sent a copy of the minutes of the meeting held on June 27, 1953, to the Petitioner and asked him to attend the meeting on July 1, 1953. On the same day, Messrs. Mitra and Mitra, attorneys for the Petitioner, wrote to the arbitrators stating that the second reference was misconceived, that the arbitration agreement did not exist after the making of the first award and that instructions had been received from the Petitioner to apply to this Court for revocation of the authority of the arbitrators and for supersession of the reference and requesting the arbitrators to adjourn the meeting for 10 days. The request for stay was opposed by the Respondent. On July 1, 1953, the arbitrators held their 15th meeting at which the arbitrators after considering the letter of Messrs. Mitra and Mitra dated June 29, 1953 and the opposition of the Respondent refused to grant any adjournment and proceeded with the arbitration.

24. On July 2, 1953, the arbitrators wrote to Messrs. Mitra and Mitra stating their inability to stay the proceedings as the time at their disposal was very short. On the

same date, they held their 16th meeting.

25. On July 3, and July 5, 1953, the arbitrators held their 17th and 18th and 19th meeting. At the 19th meeting they made and published their award by which they directed the Petitioner to pay to the Respondent Rs. 20,000 as damages and Rs. 2,264 as costs. On July 1, 2 and 5, 1953, both arbitrators demanded and received from the Respondent large sums on account of fees. On July 5, 1953, the Respondent also paid the cost of stamp which had been purchased by one of the arbitrators for the making of the award.

26. On July 6, 1953, the arbitrators wrote to the Petitioner giving notice of the making of the award and sending copies of the minutes of the 15th, 16th, 17th, 18th and 19th meetings.

27. The Petitioner seeks to set aside the award on several grounds. The charges are summarised in para. 24 of the petition.

28. Charge under paragraph 24(a), (b), (c), (d), (e), (f), (g), (h), (i), (k) and (l) of the petition:

29. From (a) the minutes of the meeting held on September 23, 1952, (b) paragraph 13 of the counter-statement of the Respondent dated April 15, 1953, (c) letters dated October 23, 1952, November 4, 1952 and November 18, 1952, passed between the Respondent and the arbitrators, (d) statements filed in the first reference, (e) the award dated September 24, 1952 and (f) the affidavits in these proceedings, I am satisfied that (1) by the adjustment and compromise dated September 23, 1948, the parties settled the disputes relating to the accounts and price of goods only, (2) that the terms of settlement relating to those disputes only were embodied in the award dated September 24, 1952 and (3) that the parties agreed that the rest of the disputes would stand withdrawn from arbitration and would be settled amicably later on. The parties agreed to settle the other disputes directly without recourse to arbitration. In other words, the parties agreed that they would not invoke the arbitration clause for settlement of the other disputes. By mutual agreement between the parties, therefore, the arbitration clause was superseded and ceased to exist with reference to other disputes and can no longer be invoked for their settlement.

30. The claim regarding losses and damages for breach of contract was withdrawn from arbitration and, therefore, the award does not operate to merge and extinguish the claim in respect of such losses and damages and the claim is not barred by res judicata or by principles analogous thereto. The dispute relating to such claim cannot however be now settled by arbitration under the arbitration agreement contained in the contract dated October 6. 1951 and must be resolved by other means.

31. The letter dated March 11, 1953, written by the Respondent to the Petitioner and the letter dated March 16/17, 1953, written by the Petitioner to the Respondent do not amount to a new arbitration agreement. The letters were written on the footing and upon the assumption that there was an existing arbitration agreement which could be invoked with reference to the outstanding disputes. The parties never intended to enter into a new arbitration agreement by exchange of these two letters. There was neither a proposal for a new arbitration agreement nor an acceptance of such proposal.

32. Charge under paragraph 24(j), (m), (n) and (o) of the petition:

The arbitrators clearly had jurisdiction to decide whether the claim in the second reference was barred in res judicata or by principles analogous thereto. By consent of the parties, they could also decide whether the arbitration agreement was still subsisting. Even if they could not conclusively determine that question, they could enquire into it with a view to determine if they would proceed with the reference.

33. There was disagreement between the arbitrators on the question whether the arbitration agreement was subsisting and whether the second reference was maintainable. One of the arbitrators was of the opinion that the reference ought to proceed: the other arbitrator came to the conclusion that the reference ought not to proceed. The arbitrators gave notice to the umpire that they could not agree and called upon the umpire to determine that question. The umpire then entered on the reference, gave his finding and award on that question and then returned the papers to the arbitrators with his award. The arbitrators thereupon again entered on the reference and made their award. In my opinion, the procedure adopted was wholly illegal and is not warranted by law.

34. The arbitration agreement refers the disputes to two arbitrators, one appointed by each party and in case of difference between the arbitrators, to the umpire appointed by the two arbitrators.

35. There was clear difference of opinion between the arbitrators with regard to the question whether they ought to proceed with the reference. Even if there is disagreement between the arbitrators with regard to one point, the umpire must be called in and he must then adjudicate upon the whole case, *Wicks v. Cox.* (1847) 11 Jurist 542. *Re. Probodh Kumar Sarkar* (1951) 56 C.W.N. 436, 439.

36. By para. 4 of sch. 1 of the Indian Arbitration Act read with Section 3 of the Act, it is an implied term of the arbitration agreement that in case of such disagreement, the umpire shall enter upon the reference in lieu of the arbitrators.

37. The arbitrators may make an interim award with reference to the matters on which they are agreed, where they have the power to make such an award either by the express terms of the arbitration agreement or by Section 27(2) of the Indian Arbitration Act and the umpire may then make his award on the remaining disputes

on which the arbitrators are not agreed; (Radhakrishna murthy v. G.C. Chetty and Company AIR (1948) Mad. 365; Lang v. Brown (1855) 25 L.T. (O.S.) 397). In the absence of such power, the arbitrators cannot make an award with reference to part of the matter submitted to arbitration and refer the rest to the umpire, (Tasker v. Keary (1733) 2 Barnard K.B. 317, Bhagwandas v. Shivdayal AIR (1914) Lah. 436). An award in part by the arbitrators on which they agree and in part by the umpire on matters on which the arbitrators cannot agree is invalid. (Tollit v. Saunders (1821) 9 Price 612).

38. In the absence of any express power reserved by the arbitration agreement, if the arbitrators disagree on one question, they cannot refer that question only to the umpire and reserve their authority with regard to the other matters, nor can an umpire give an award with reference to one question and refer back the remaining disputes to the arbitrators. In case of difference between the arbitrators, the umpire enters on the reference in lieu of the arbitrators. He is required to adjudicate upon the whole dispute between the parties. He is not called in to determine a difference between the arbitrators. The limited reference to the umpire, the award of the umpire on such reference and the subsequent award of the arbitrators upon reference back to them by the umpire are, therefore, illegal and invalid.

39. The umpire was a senior advocate and a person skilled in law. The arbitrators could consult him on the question of maintainability of the reference with a view to prevent disagreement between themselves. If they did so, they could not then substitute the opinion of the umpire for their own and were bound to exercise their own judgment. Here the arbitrators finally disagreed on the question. They did not consult the umpire to prevent any disagreement between themselves. They treated the award of the umpire as binding and conclusive. The arbitrators acted under a total misapprehension of their duties and responsibilities.

40. The Petitioner did not participate in the arbitration proceedings after the umpire had made his award. The objection that the arbitrators had no jurisdiction after the umpire had entered upon the reference upon disagreement between the arbitrators was never waived by the Petitioner.

41. Charge under sub-paragraphs (p), (q) and (r) paragraph 24:

In the circumstances of this case the Petitioner's requests for adjournment of the arbitration proceedings by the letters dated June 27, 1953 and June 29, 1953, were reasonable. Complicated questions arose having regard to the award dated September 24, 1952 and the award of the umpire in the second reference and the Petitioner was entitled to an adjournment in order to enable the Petitioner to consider the question and to apply for supersession of the reference and for revocation of the authority of the arbitrators and umpire. The arbitrators ought to have adjourned the proceedings for a short time. Instead of doing that the arbitrators refused to grant any adjournment whatsoever. The arbitrators appear to

have rushed the proceedings. They gave no notice of the meetings held on July 3, 5 and 7, 1953. In the letter dated July 2, 1953, they do not mention that a meeting was held on July 1, 1953 and that they were going to hold further meetings. One of the arbitrators purchased stamps for the award in anticipation of the award being made. A close perusal of the minutes of the several meetings held on July 1, 3, 5 and 7, 1953, gives the impression that the object of the arbitrators was to earn as much fees as possible before the time to make the award expired. In the circumstances the arbitrators misconducted themselves and the proceedings.

42. In the circumstances I must set aside the award.

43. Looking at the matter as a whole, I think each party should pay and bear its own costs.

44. I order that the award be and is hereby set aside. Each party will pay and bear its own costs of this application.