

(1954) 07 CAL CK 0032

Calcutta High Court

Case No: None

Alex Miller (Merchants) Ltd.

APPELLANT

Vs

A.C. Runo Aktiebolag

RESPONDENT

Date of Decision: July 12, 1954

Acts Referred:

- Arbitration Act, 1940 - Section 3, 9

Citation: 59 CWN 61

Hon'ble Judges: Bachawat, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Bachawat, J.

This is a petition for declaring void and setting aside an award. The petitioner is an Indian Company and the respondent Swedish concern. The petitioner supplied two tons of black horse tail hair to the respondent. The petitioner drew against the letter of Credit opened by the respondent on shipment of goods and obtained payment of the price. On arrival of the goods, the respondent contended that the goods were not of the contract quality and description. The petitioner disputed this contention.

2. By telegram, dated 18.12.51, the respondent suggested arbitration of the dispute in London. By letter, dated 7.1.1952, the petitioner stated that it might agree to a Calcutta arbitration if the respondent would agree to the same. On 19.1.52, the respondent wrote to the petitioner stating that "we are pleased to note that you have accepted Calcutta arbitration..... In order to show you our willingness to cooperate, we accept Calcutta arbitration and we hope to be able to notify you soon about the name of our arbitrators in Calcutta."

3. The respondent was thereafter represented by the Royal Swedish Consulate in Calcutta. Mr. S. Anderfelt was the Acting Vice-Consul and for some time Acting Consul for Sweden in Calcutta. Mr. Anderfelt enquired of the Secretary of the Bengal

National Chamber of Commerce by letter, dated 29th July, 1952 if it was possible for the Chamber to appoint a suitable and fully qualified arbitrator to arbitrate on the dispute and again by letter, dated 19.8.52., if the Chamber would arrange for the arbitration of the dispute. On 18.8.52, the petitioner enquired of Mr. Anderfelt as to how far the matter regarding the proposed arbitration had proceeded. On 19th August, 1952, Mr. Anderfelt replied stating that he had taken up the question with the Bengal National Chamber of Commerce with a view to ascertaining whether they would be able to assist in resolving the dispute. By letter, dated 30th August, 1952, the Secretary of the Bengal National Chamber of Commerce informed Mr. Anderfelt that the Chamber would be glad to take up the work of arranging for arbitration of the dispute. On 2nd September, 1952, Mr. Anderfelt passed on the information to the respondent and wrote to the Chamber acknowledging receipt of the letter, dated 30th August, 1952. On the same date, he wrote to the petitioner stating that "I am now pleased to advise you that the Bengal National Chamber of Commerce have agreed to arbitrate on this dispute. Kindly confirm by return that you will abide by the decision of the arbitrators in this matter.

4. For your kind information, I would mention that the Bengal National Chamber of Commerce have satisfied themselves that the persons they have selected for arbitrating on this question are fully competent and conversant with this item.

5. This news has been referred to Messrs. A|B Runo through my Legation in New Delhi."

6. On 5th September, 1952, the petitioner wrote to Mr. Anderfelt stating that "we are glad to confirm that we are agreeable to the arbitration of the Bengal National Chamber of Commerce as suggested by you and we hope Messrs. A|B, Runo have also agreed to the same, Kindly let us know the personnel of the arbitrator and advise us what you are expected to do next."

7. On 8th October, 1952, Mr. Anderfelt wrote to the petitioner stating: "I refer to your letter, dated the 5th ultimo, and I am pleased to note that you are agreeable to abide by the arbitration of the Bengal National Chamber of Commerce.

8. As regards your request for names of arbitrators, I am informed by the above Chamber of Commerce that they will write to you in this connection very shortly giving you all the information required. I hope this will be in order."

9. By letter, dated 22nd October, 1952, the Secretary of the Chamber wrote to the petitioner stating:--

As you may be aware, the Royal Swedish Consulate at Calcutta had approached the Chamber sometime back with a request to arbitrate in the above dispute, and the Chamber has agreed to the proposal. Sri D.N. Sen, an ex-President of the Chamber and ex-Sheriff of Calcutta, now a member of the Central Board of Directors, Reserve Bank of India, has been appointed the arbitrator in the dispute. I shall write to you

again as soon as Sri Sen takes up the work.

10. On 29th October, 1952, the Chamber wrote to the petitioner stating:--

I have not so far received any reply from you and shall be glad if you would kindly let me know at an early date whether you are agreeable to the arbitration of this Chamber. You will appreciate that the Chamber cannot proceed to arbitrate in the absence of any written agreement on your part.

11. On 3rd November, 1952, the petitioner wrote to the Chamber stating:--

Your favours No. Or. |2|I|3084 and Or. |2|I|3183 of the 22nd and 29th ultimo respectively duly to hand. In reply we are glad to note that you have agreed to take up the arbitration and that you have selected Sri D.N. Sen as the Arbitrator regarding whose ability and integrity we have the highest appreciation. It is, therefore, needless to add that we are agreeable to arbitration suggested by you and you may take steps accordingly.

12. Mr. D.N. Sen acting as the sole arbitrator held his first sitting on 4th December, 1952. On 28th March, 1953, both parties agreed that as the proceedings could not be completed within 4th April, 1953 application for extension of time should be made to this Court and the cost of the application should be borne by the respondent. The agreement is recorded in the minutes of the meeting held on 28th March, 1953.

13. The petitioner company applied to this Court for extension of time to file the award. The petition in support of this application states that

(a) By an agreement between the parties the disputes were referred to the arbitration of Mr. D.N. Sen of the Bengal National Chamber of Commerce.

(b) After notice to the parties the said Mr. D.N. Sen as the sole arbitrator duly entered on the arbitration proceedings and held his first sitting with the parties on the 4th December, 1952, in the presence of both the parties and |or their authorised agents.

(c) As under the Arbitration; Rules, the time to submit the Award expired on or about the 4th April, 1953, it was necessary that the time to file such Award be extended by a further period of four months as agreed to between the parties.

14. These statements were verified by an affidavit of the managing director of the petitioner company as true to, his knowledge.

15. By an order dated 21st April, 1952, the Court extended the time to Mr. D.N. Sen to file the award by four months and directed that the costs be costs in the arbitration proceedings.

16. The respondent paid and the petitioner accepted the costs of this application in view of the agreement dated 28th March, 1952.

17. The arbitrator held several sittings at which both parties were represented and eventually made an award which is dated 20th July, 1953.

18. The award is headed "The Bengal National Chamber of Commerce Tribunal of Arbitration" and recites that Mr. D.N. Sen was duly constituted by the Registrar, Tribunal of Arbitration, Bengal National Chamber of Commerce, as the court to adjudicate upon the dispute.

19. The petitioner contends that: (a) the disputes were referred to the Arbitration of the Bengal National Chamber of Commerce, (b) under the rules of the Tribunal of Arbitration of the Bengal National Chamber of Commerce, the Registrar was bound to constitute a Court consisting of two arbitrators and had no power to constitute a Court constituting of Mr. D.N. Sen only. (c) Mr. D.N. Sen was not lawfully appointed as the arbitrator and the award is invalid. (d) The petitioner came to know of the rules for the first time after the making of the award.

20. Sub-rules 1 and 2 of Rule V of the Tribunal of Arbitration, Bengal National Chamber of Commerce, are as follows:--

V(1). In every case where a dispute has arisen either in relation to a contract which provides for a decision thereof by the Chamber or the Tribunal or where the parties to a dispute agree in writing to refer it for settlement by the arbitration of the Chamber or of the Tribunal, an application for arbitration may be addressed by either party to the Registrar; a statement of the case may be submitted along with the application.

(2) The Registrar, on receipt of such application or at such time thereafter as he may think convenient, shall constitute the Court for the adjudication of the dispute by appointing and nominating in writing arbitrators who shall be two unless the arbitration agreement provides expressly otherwise. The arbitrators shall be selected by the Registrar from the Tribunal constituted as aforesaid.

21. Sub-rules (5), (6), (8) and (9) of rule V provide that (a) the selection made by the Registrar shall be final and shall not be questioned on any ground; (b) the names of the persons constituting the Court shall not ordinarily be disclosed to the parties; (c) the Registrar may constitute another court if the Court allows the time to expire. (d) The Registrar may substitute and appoint a new Arbitrator if any Arbitrator declines or fails to act or dies or becomes incapable of acting.

22. The respondent disputes the contentions of the petitioner. The respondent asserts that (a) Mr. D.N. Sen was persona designata, to whose arbitration the parties agreed to submit their dispute, (b) Rule V has no application to the arbitration agreement, (c) Assuming rule V applies, the petitioner was well aware of the rules and is barred by waiver and estoppel from taking the objection.

23. Affidavits of one Samarendra Nath Gupta stating that the petitioner was not aware of the rules was filed on behalf of the petitioner. The matter was set down for

cross-examination of Mr. Samarendra Nath Gupta on this question. Mr. Gupta admits that he had no personal knowledge of the statements made in the affidavit.

24. It is not the case of either party that there was no arbitration agreement.

25. It is common case that there was an arbitration agreement. The dispute is as to who the arbitrator was and as to the validity of his appointment.

26. Both parties agreed that the dispute would be settled by arbitration in Calcutta. The letter, dated 19th January, 1952 is a clear offer by the petitioner to refer the disputes to arbitration in Calcutta. I infer from the pleadings, admissions and the conduct of the parties that the offer was accepted by the petitioner. It was necessary for the parties to concur in the appointment of an arbitrator. There were negotiations about the choice of an arbitrator. The Bengal National Chamber of Commerce agreed to arbitrate and appointed Mr. D.N. Sen as the sole arbitrator.

27. By letter dated 3rd November, 1952, the petitioner agreed to the suggested arbitration and to the appointment of Mr. D.N. Sen as the sole arbitrator. I infer and find from the pleadings, admissions and the conduct of the parties that the petitioner also agreed to such arbitration and to the appointment of Mr. D.N. Sen as the sole arbitrator.

28. In other words, both parties agreed to the arbitration of the Chamber acting through the court consisting of Mr. D.N. Sen as the sole arbitrator.

29. Rule V applies to a case where the parties agree to arbitration by the Chamber or its Tribunal of Arbitration simpliciter. It has no application to a case where the parties agree to arbitration by the Chamber acting through a named arbitrator. The name of the arbitrator was disclosed and was agreed to by both the parties. Both the parties agreed to the arbitration because Mr. D.N. Sen was appointed as the arbitrator and the parties had confidence in his ability and integrity.

30. Mr. D.N. Sen was persona designata and there was no question of appointing a new court or a new arbitrator if Mr. D.N. Sen allowed the time to expire or declined or failed to act or became incapable of acting or died.

31. The Chamber acting through Mr. D.N. Sen had jurisdiction to make the award and the award is binding upon the parties.

32. Assuming that the parties agreed to the arbitration of the Chamber simpliciter and that the Registrar was bound to constitute a court consisting of two arbitrators and could not appoint Mr. D.N. Sen as the sole arbitrator, I must consider whether the petitioner will be permitted to raise this objection.

33. The general rule upon which a party to an arbitration proceeding will not be permitted to raise an objection to the award is enunciated by Sir James W. Colville in *Chowdhuri Murtaza Hossein v. Mussumat Bibi Bechunnissa* (1) (L.R. 3 Indian Appeals, 209) at 220 where he observes:--

On the whole, therefore, their Lordships think that the Appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself; and that it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award.

34. Equity will raise an estoppel against the party and will personally disqualify him from taking the objection by implying from his conduct waiver of the right to raise the objection. Waiver and equitable estoppel will bar an objection not only as to misconduct but also as to the validity of appointment of the arbitrator or umpire. Thus where an arbitrator is appointed by a parol agreement in place of an arbitrator appointed by an agreement under seal and where an umpire is appointed by the arbitrators by lot, *Re. Tunno and Bird* (2) (1833) 5 B & Ad. 488; where an umpire is appointed by arbitrators who have no authority to appoint the umpire at all, *Matson v. Trower* (3) (1824) Ry & Moo 17; where an umpire is appointed by the arbitrators after they entered on the reference though the arbitration agreement requires them to make the appointment before [*Re Hick* (4) (1814) 8 Taunt 619]; where two arbitrators having the power to appoint a third arbitrator appoint the third as umpire and not an arbitrator, *Re. Marsh* (5) (1847) 16 L.J. Q.B. 330; *Moseley v. Simpson* (6) (1873) L.R. 16 Eq. 226; and where an arbitrator appointed by one party is appointed as the sole arbitrator though the arbitration agreement provided for appointment of two arbitrators, one by each party, and the notice required by section 9 of the Indian Arbitration Act is not given, *Donald Campbell v. J. Girdharilal* (7) (A.I.R. 1920 P.C. 123) the appointment is invalid in each case but the court will not permit the objection to be taken by a party who participates in the arbitration proceedings without any protest with knowledge of the material circumstances.

35. Equitable estoppel is not a rule of evidence and is not dealt with in the Evidence Act. "But the estoppels in the sense in which the term is used in the English legal phraseology are matters of infinite variety and are by no means confined to the subjects dealt with by Chapter VII of the Evidence Act. A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular argument or contention, which the rules of equity and good conscience prevent his using as against his opponent." Per Garth, C.J., in *Ganges Manufacturing Co. v. Sourujmull* (8) (I.L.R. 5 Cal. 667, 678).

36. In order that equitable estoppel may arise the party must have clear knowledge of the material circumstances upon which, the objection is founded. But such knowledge is not essential for raising the legal estoppel arising from representation and dealt with in Chapter VIII of the Evidence Act. Such estoppel may arise though, the representation is made under error and without knowledge of the material circumstances. Thus a party nominating an arbitrator and by conduct representing

that the arbitrator is duly qualified to act will not be permitted to deny the truth of his representation though in fact the arbitrator was disqualified and the party was not aware of the disqualification. *Oakland Metal Co. v. D. Benacin* (9) (1953) 2 All E.R. 650; *Jungheim v. Frankleen* (10) (1909) 2 K.B. 949, 957.

37. In *Harakchand Damani v. Ramsarup Lakkar* (11) (85 C.L.J. 232), the arbitration agreement did not provide for the mode of appointment of arbitrator and by paragraph 1 of Schedule 1 of the Indian Arbitration Act, 1940 read with section 3 of the Act it was an implied term of the arbitration agreement that the reference was to be to a single arbitrator. The reference was actually made to two arbitrators, one appointed by each party and to an umpire appointed by the two arbitrators. The parties participated in the arbitration with clear knowledge of the material circumstances and expressly agreed not to object to the validity of the appointment of the umpire who eventually made an award. Chatterjee, J., held that the award was invalid and illegal and that there would be no waiver and estoppel as to the right to take this objection. Chatterjee, J., held that there was breach of the mandatory provision of paragraph 1 of Schedule 1 and that there can be no estoppel against statute. With respect I do not agree. Paragraph 1 of Schedule 1 is not a mandatory provision. It is imported into the arbitration agreement as an implied term in the absence of an express term to the contrary. The implied term may be varied and waived by consent. Where there is waiver equity will raise an estoppel. Chatterjee, J., also held that the award of a defectively constituted arbitral Tribunal in an arbitration without the intervention of the Court cannot be validated by consent just as the judgment of an illegally constituted Court of Law cannot be so validated. Again with respect, I do not agree. Judges represent the judicial power of the State and are removed and appointed by appropriate State Authorities. They cannot be appointed and removed by agreement between the parties. In an arbitration without the intervention of the Court arbitrators may be appointed and removed by the parties in such manner as may be agreed upon between them. As the appointment may be made by consent the defect in the appointment may be waived by consent.

38. The respondent alleges that the petitioner is debarred by waiver and equitable estoppel from taking the objection as to the invalidity of appointment of Mr. D.N. Sen as the arbitrator. In order to succeed in this contention the respondent must establish that the petitioner participated in the arbitration proceedings with clear knowledge of the rules of the Tribunal of Arbitration of the Bengal National Chamber of Commerce, and of other material circumstances on which the objection is founded.

39. The petition in support of the application for extension of time to make the award states that the time expired on the 4th April, 1953, under the arbitration rules. The only relevant rules are the Rules of the Tribunal of Arbitration of the Bengal National Chamber of Commerce and the petition *prima facie* and in the

absence of any explanation to the contrary refers to those rules. The petition is therefore a clear admission by the Managing Director that at least on the 20th April, 1953, the petitioner was well aware of the rules. The petitioner was admittedly aware of the rules on the date when the petition in support of the present application was prepared. The petitioner does not disclose when and how he came to know of the rules for the first time. It is the case of the petitioner that the rules are part and parcel of the arbitration agreement by which both parties are bound. The facts on the record raise a presumption that the petitioner knew of the rules at all material times and shift the burden of proving the absence of such knowledge on the petitioner. The petitioner does not produce any rebutting evidence. Upon the evidence on the record, I infer as a fact that the petitioner had knowledge of the rules not only on the date of the present application but also on the 20th April 1953, and also at all material times since after the making of the arbitration agreement.

40. With clear knowledge of the rules and of all material circumstances upon which the objection as to the invalidity of appointment of Mr. D. N. Sen as sole arbitrator could be founded, the petitioner participated in the arbitration proceedings, submitted to the jurisdiction of the arbitrator, obtained extension of the time to make his award, received payment of the costs of the application necessary for such extension and took the chances of a favourable award. The award has been made. Unfortunately the award is not favourable to the petitioner. The objection is made too late. Rules of equity and good conscience do not permit the petitioner to raise the objection now.

41. The petitioner has abandoned all other charges contained in the petition. The petition is dismissed with costs.