(1937) 03 CAL CK 0018

Calcutta High Court

Case No: Re: Arbitration and Re : Suit No. 1547 of 1936

Balkissen Mohta		APPELLANT
	Vs	
Brijmohan Biyani		RESPONDENT

Date of Decision: March 10, 1937

Final Decision: Dismissed

Judgement

McNair, J.

This is an application to have an award dated the 23rd July, 1936, which was filed on or about the 1st February, 1937, taken off the file. The application is made in a suit which was filed on the 22nd August, 1936, for a declaration that the partnership stood dissolved, for accounts and for an injunction and Receiver and costs. The plaint is not before me, but that is the manner in which the Petitioner has set out his cause of action in paragraph 1 of his petition. It appears that on the 11th May, 1936, there was an agreement to refer the matters in dispute between the parties to arbitration. An award was made in that arbitration on the 23rd July, 1936, and the Petitioner admits that a copy of that award was sent to him on that date. A month later, on the 22nd August, 1936, the Petitioner filed this suit in which this application is made. On the 1st December the Defendant filed his written statement. There was an order on the 16th January, 1937, directing the Defendant to file his affidavit of documents in that suit by the 1st February. On that date the solicitors to the arbitrator wrote to the Petitioner saying that they had sent the award dated the 23rd July to the Court for being filed. In his petition the Plaintiff says that the award was improperly procured and he gives particulars of misconduct which ho alleges on the part of the arbitrator.

2. The only question Which has been argued on this application is a question of law. Mr. P. N. Chatterjee argues that although the award was made before the suit was filed yet the suit was filed before the award was filed; that on the institution of the suit the arbitrator was functus officio and therefore he had no power to file the award which accordingly, he prays, should be removed from the file. Mr. Chatterjee

on this application does not contend that the award was invalid, but he contends that the filing of the award, which enables the Defendant to execute it as a decree, was ultra vires. He has referred to the case of Baijnath v. Ahmed Musaji Saleji I. L. R. 40 Cal. 219: s. c. 17 C. W. N. 395 (1912) where at page 230 of the report Sir Lawrence Jenkins in giving judgment states as follows:-

Sec. 15 of the Arbitration Act provides that an award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall, subject to certain exceptions, be enforceable as if it were a decree of the Court. The filing therefore is an act to be done, not on the application of the parties, but at the instance of the arbitrator; and when the award is filed the result is not that there is a suit in which a decree has been passed, but that there is an award which shall be enforceable as though it were a decree.

3. He contends therefore that, the arbitrator being the only person who can file the award, once a suit has been instituted the power of filing the award is taken away from him. He also relies on the case of Ramprosad Surajmull v. Mohanlal Lachminarain I. L. R. 47 Cal. 752 (1920) where the head-note is as follows:

Where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect, unless the suit has been stayed pending the arbitration.

4. Mr. Chatterjee relies also on a case reported in the same volume at page 849 [Jokhiram v. Ganeshamdas I. L. R. 47 Cal. 849: s. c. 25 C. W. N. 62 (1920)]. In that case there was a reference to arbitration on the 24th April, 1919. On the 24th August, when the arbitration proceedings had " fairly advanced," one of the parties to the arbitration filed a suit in the High Court, on the same contract. On the 16th October the arbitrators made their award, which was, on the application of the Respondent, set aside on the 17th November. The Defendant then applied for stay of the suit, which was refused, and the matter went on appeal to the Appellate Side of this Court. In delivering the judgment of the Court Mr. Justice Mookerjee considered the cases dealing with the matter and referred to and relied on the English decision in Dole-wan & Sons v. Ossett Corporation [1912] 3 K. B. D. 257. Mr. Justice Mookerjee quotes from the judgment of Fletcher Moulton, L. J., in that case where the learned Judge said:

The law will not enforce the specific performance of such agreements (that is, agreements to refer to private tribunals) "but, if duly appealed to, it has the power in its discretion to refuse to a party the alternative of having the dispute settled by a court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action, or if this Defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are

settled. It follows, therefore that in the latter case the private tribunal, if it has ever come into existence, is functus officio, unless the parties agree de novo that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred.....

" Consequently "

says Mr. Justice Mookerjee:

when a reference to arbitration has been made and the private tribunal has come into existence, the effect of the institution of the suit is that, from that very moment, the arbitrators become fundi officio, that is, their authority to deal further with the matter becomes extinguished." "The institution of the suit cannot, however,

says the learned Judge,

retrospectively affect the validity of the reference which, when it was made, was in exact conformity with the agreement of the parties. If this view were not adopted, the result would follow that a party to a submission, who had appeared through-out and had taken his chance before the arbitrators, might, at the very last moment, when the award, possibly an adverse award, was about to be made, and when there would be no time left for his opponent to obtain a stay order, institute a suit and thereby render infructuous the entire proceedings. Such a conclusion cannot, in our opinion, be defended, either on principle or on the authorities.

5. For the Petitioner it is contended that the present Respondent had his opportunity when the suit was filed of applying under sec. 19 of the Arbitration Act to have the suit stayed owing to the arbitration proceedings. Having failed to take advantage of these facilities the Respondent, he says, cannot now, having filed his. written statement, stay the suit, and inasmuch as the award had not then been filed there was no power in the arbitrator to file the award since the matter was then in the seisin of the Court.

6. Learned Counsel for the Respondent argues.that the whole basis of the procedure which is provided under sec. 19 is to avoid a conflict of jurisdiction, and he points out that in the present instance there is no conflict of jurisdiction, and there can be none, for the award had already beer made before the suit was filed. The award was a valid award admittedly, and it decided the matters in issue between the parties. None of the cases deal with facts simliar to those present here, for in no case, which has been cited to me, has there been a definite award before the suit has been instituted. In stating, as has been stated in most of the decisions to which I have referred, that the arbitrators are functi officio, the Court must, I think, be referring to the judicial function of the arbitrators and not to the merely ministerial function which they perform when they file the award.

7. The remarks of Mr. Justice Mookerjee at page 855 of the report in Ramprosad Surajmull v. Mohanlal Lachminarain I. L. R. 47 Cal. 752 (1920) appear to me to

support this view, for his Lordship pointed out that it was undesirable that a party to a submission who had appeared throughout in the arbitration proceedings and had taken his chance before the arbitrators should by instituting a suit render infructuous the entire proceedings. " Such a conclusion," states the learned Judge, " cannot be defended either on principle or on the authorities." The object of the Petitioner on this application by the institution of his suit is apparently to render infructuous the arbitration proceedings to which he has been a party, and in which he has been unsuccessful.

8. There is no case that I have been able to find, nor has any been cited to me by learned Counsel, which deals with the facts that arise on this application, but the learned Counsel for the Respondent refers me to the words of Farwell, L. J., in Doleman & Sons v. Ossett Corporation [1912] 3 K. B. D. 257 at p. 272.

It is well settled that a plea of an agreement to refer the subject matter of the action to arbitration is a bad plea, but that a plea of an award duly made before the action under an agreement between the parties is a good plea of accord and satisfaction.

9. In my view the award that was made was at the time a valid award. The arbitrators were undoubtedly functi officio in their judicial capacity at the time when the suit was instituted, but as there had already been a decision on the matters in issue between the parties I am of opinion that the arbitrator was not prevented from acting in a ministerial capacity in filing the award. This application; must be dismissed with costs.