(1878) 08 CAL CK 0009

Calcutta High Court

Case No: None

Wilson		APPELLANT
	Vs	
Howard		RESPONDENT

Date of Decision: Aug. 16, 1878

Acts Referred:

- Evidence Act, 1872 - Section 1

Citation: (1879) ILR (Cal) 231

Hon'ble Judges: Richard Garth Kt., C.J; Markby, J

Bench: Division Bench

Judgement

Richard Garth, C.J.
The first question we have to decide is one raised by the respondent--Whether any appeal lies at all from the refusal of the Judge to confirm an award?

2. It is said that the refusal was not a judgment within the meaning of Section 15 of the Charter, and a Full Bench decision (B.L.R. Sup. Vol. 505; s.c.6 W.R. Mis., 83) was cited in support of that contention, where it was held that an appeal does not lie against the refusal of a Judge to allow an award to be filed u/s 327.

3. But we think that case very plainly distinguishable from the present. The application there was made in a case referred (not in a suit, but) by agreement of the parties. The object of the application was to give the Court jurisdiction in the matter, and to enable the successful party to enforce the award, summarily, by judgment and execution. He might in that case have brought a suit upon the award, so as to enforce it in another way; and if any doubt existed as to whether the award was valid, or ought to be enforced, the Court was quite right (in analogy to the rule which is observed is such cases in England) to leave the party to his remedy by action.

4. That question was one entirely for the discretion of the Judge to whom the application was made, and his refusal to allow the award to be filed did not deprive the successful party of his rights under the award, but only of his summary remedy.

5. In this case the reference was of a different nature. It was made in a suit, and it is by no means clear that, if the award were not confirmed by judgment, there existed any means of enforcing it.

6. Be that as it may, it appears to us that, in such a case as this, the refusal of the learned Judge to give judgment upon the award is in point of fact a judgment upon the whole subject matter of the suit against the applicant.

7. The only remaining question is whether the learned Judge was right in his refusal?

8. Mr. Allen contended that if the Judge saw no cause for remitting the award to the arbitrator upon any of the grounds mentioned in Section 323, he was bound to pass judgment according to the award, because no application had been made within the ten days limited by Section 324 to set it aside for misconduct, &c. But we think that, without laying down such a rigid rule as that (which it is not necessary for us to do in the present case), it is sufficient for us to say that we do not see any sufficient reason, in point of law, why the learned Judge in the Court below should have refused to give judgment upon the award.

9. There is no question that an arbitrator, after he has made up his mind as to the terms of his award, and has even informed the parties what those terms are, is perfectly at liberty, before the award is actually made, to hold another meeting or meetings, if he thinks fit, to discuss any fresh point that may be brought before him; and there is no objection to either of the parties applying to the arbitrator for a meeting for the purpose of submitting to him any new point that may have arisen.

10. In this particular instance the arbitrator would have acted more wisely and properly if he had at once informed the plaintiff''s advisers of the precise nature of the communication which had been made to him on behalf of the defendant. But the communication, for aught that appears, was of a perfectly unobjectionable character, and we have really no reason for saying that the arbitrator was guilty of impropriety in entertaining it.

11. Then, as regards the letter itself, upon which the learned Judge in the Court below has laid so much stress, it is perfectly true that it was a very improper thing for the defendant''s attorneys to use a letter in evidence which was written without prejudice, and obviously in the course of negotiation between the attorneys on both sides for an amicable adjustment of the plaintiff''s claim.

12. Communications such as these are clearly inadmissible in evidence. They are excluded on grounds of public policy and convenience; and the rule of law which excludes them is as binding upon the arbitrators as upon Courts of Justice, notwithstanding Section 1 of the Evidence Act (see Taylor on Evidence, 7th edition,

Section 795, and the authorities therein cited). One is only surprised that a rule, so well known amongst professional men, should have been transgressed in this instance by the defendant''s attorneys.

13. The arbitrator, too, was also wrong in receiving and acting upon this letter, but as he was a builder he was probably not conversant with the law regarding such communications; and therefore not so much to blame in the matter as the attorneys, who ought to have known better.

14. After all, the utmost that can be said is that the arbitrator made a mistake in receiving and using as evidence a document which, according to law, ought not to have been received. It is not suggested that he knew he was doing wrong, nor does it even appear that the plaintiff''s advisers, who were present, objected to the letter being received, upon the ground that it was written "without prejudice." They objected upon a different ground.

15. Under these circumstances, we think there was no sufficient reason to justify the learned Judge in refusing to confirm the award. His decision will, therefore, be reversed; and our order will be that judgment be given in accordance with the award in the usual way. The appellant will have her costs in this Court; but as her advisers were the means of creating the difficulty, which led to the decision in the Court below, we think that each party should pay their own costs in that Court.