(1871) 12 CAL CK 0007

Calcutta High Court

Case No: None

Bhabasundari Dasi		APPELLANT
	Vs	
Makhunlal Dey and Others		RESPONDENT

Date of Decision: Dec. 14, 1871

Judgement

Phear, J.

As to the second objection, I think that does not furnish sufficient cause against the present application. In the case of Maharaja Sri Jai Mangal Sing v. Mohan Ram Mawari[1], it seems to have been laid down by one of the two learned Judges who decided the case on appeal that an award of arbitrators is not a good award within the arbitration sections of the Civil Procedure Code, unless it be signed by all the arbitrators at the same time in the presence of each other, but the other learned Judge expressly declined to concur in this doctrine, and the case itself was disposed of upon other and independent grounds. No doubt it has been held in England that in an action of debt on an award, it is a good plea that the award was not signed by the arbitrators in each other"s presence and at the same time. I cannot say that the reasoning, on which this conclusion of law is generally based, is altogether satisfactory to my mind. It is said that the award is not given or pronounced by the arbitrators until the last man has signed it, and that up to that moment the parties are entitled to have the benefit of such chance as there may be of the prior signers changing their minds, during the interval that may elapse from the time when each man respectively signs and the time when the last man signs. It is hardly to be disputed that until the last man has signed the award, and the award has been published or delivered by the arbitrators, any one of them might change his mind and might withdraw his signature. If in any particular case it could be shown that that had happened, doubtless the signed document would not be the conjoint award of the arbitrators. But I cannot myself see why the mere fact of the arbitrators having signed the document at different times, should alone without more be taken as sufficient to support the presumption that the arbitrators may not have finally agreed on the award which is actually signed. However, it is now probably too late to question this rule of law in a civil

Court in England. But I don''t think it follows that I am bound by that rule in carrying into effect the arbitration sections of Act VIII of 1859. An action on an award in England is, as it seems to me, a very different matter indeed from an application made to this Court to file an award and upon the filing of it to pass judgment and make a decree under the arbitration sections to which I have referred. It may be necessary to observe the strict rule in an action or suit on an award in England, but I don''t think there is any such necessity in the case of an application to our Courts such as the present one. I think the question I have to determine is, was the award which appears here to have been signed by all the arbitrators the actual award made by those arbitrators conjointly. Doubtless, to constitute a good award, the arbitrators must have heard the whole matter, brought before them, together and in each other''s presence. They must also join in making the award, but it seems to me that if this has occurred, the award will be a good one, and such as this Court ought to give effect to under the arbitration sections of Act VIII of 1859, even though the document in which the award is embodied may have been signed by the arbitrators at different times. Now, in the present case, I have ample evidence, altogether unimpeached, to the effect that this award is the jointly made award of the arbitrators. Nilmani Bannerjee, one of the arbitrators, testified most distinctly to this. He said that the case was from beginning to end heard by the arbitrators together; that the parties appeared before them; that the objections filed by the parties were considered by them; and finally that a draft award was agreed upon by them all acting together. He added that this draft award was sent to the parties to be fair copied; that it was returned to the arbitrators fair copied and then signed by them; but he admitted that he signed that fair copy at a different time from the others. There is not a suggestion that the fair copy was not a true copy; there was nothing in cross-examination or otherwise to give the least ground even for a suspicion that this signed award does not represent verbatim the actual award which Nilmani Bannerjee said the arbitrators together agreed to. I have not the smallest doubt that this is the joint award of all the arbitrators, and if I held that I could not give effect to it under the arbitration sections of Act VIII, merely because it was not signed by all the arbitrators at the same time, and in each other''s presence, I think I should be defeating justice for the sake of a pure technicality.

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[1]Before Mr. Justice Norman and Mr. Justice E. Jackson.

The 14th September 1869.

Maharaja Sri Jai Mangal Sing (Defendant) v. Mohan Ram Mawari (Plaintiff)[*].

In this case which had been referred to arbitration, one of the arbitrators had made and signed his award on 10th December 1868, and the other arbitrator made and signed his award on 28th December 1868, giving different reasons but coming to the same conclusion as the first. The Judge returned the papers to the arbitrators with an order that they should conjointly sign another document as their award. This document was signed by the arbitrators on different days, viz., by one on 29th January and the other on 31st

January 1869. The Judge, on its being returned to him signed, proceeded to pass judgment on it as the award of the arbitrators on 3rd February 1869.

From that decree the defendant appealed.

Norman, J. (after stating the facts, continued)--The first question is what was the award in the present case? Now I think it is plain that the two papers which were sent in to the Judge signed, one on the 10th and the other on 28th December 1868, are not an award and that the Judge in remitting these papers to the arbitrators did so on the ground that the objection to the legality of those papers as an award, was apparent on the face of the award. Now the making of the award is a judicial act that must be done by the arbitrators in the presence of one another, and at the same time. Section 320 appears to show that the award is to be one single instrument complete in itself. The decision contained in the two papers signed by Mr. Sandys and Moulvi Wahiduddin, if award it can be called, could only have been gathered from a comparison of the two papers above referred to. If arbitrators were allowed to sign different papers, expressed in different terms though intended by them to show that they had arrived at the same conclusion, there would be no means of determining that the arbitrators were both precisely of the same mind as to what they had awarded and decided, except from argument and inference. The award could not be final and complete in itself. We have no doubt therefore that the Judge was quite right in sending back the papers to Mr. Sandys and Moulvi Wahiduddin and requesting them to sign their award conjointly. The Judge so disposed of the matter on the ground that the illegality of the award was apparent on the face of it. Roscoe on Evidence, Title, Action on an award, says:-- "An award to be made by two arbitrators must be signed by them in the presence of each other, and at the same time and place. And it is no award unless so signed." (After holding that the decision of the Judge of 3rd February was not a judgment u/s 325, Act VIII of 1859, and therefore not final, his Lordship proceeded:--) It has been pressed on us that the award which was made in pursuance of the suggestion of the Court on 29th January 1869 is itself bad, because it was signed by Mr. Sandys and Moulvi Wahiduddin on different days,--namely, the 29th and 31st January respectively. There is no distinct evidence to show when the original signatures were affixed, and we are not disposed to draw inferences one way or the other on a matter on which, if the party intended to rely, he ought to have given distinct and positive evidence. Moreover, this point may be raised before the Judge where a satisfactory explanation may possibly be given. We do not desire to do more than point out to the Judge the principle of law on this subject. That principle is stated by the Chief Justice in Khelut Ckunder Ghose v. Tarachurn Koondoo Chowdhary 6 W.R., 269 and Mahomed Akil v. Asadunnissa Bibee Case No. 253 of 1868; 14th December 1867 and the rule applicable to arbitrators is shortly expressed in the passage already cited from Roscoe on Evidence, page 324. The Judge appears to have understood that, because he remitted the award to the arbitrators in order that they might sign it conjointly. But this they did not do. The Judge will consider whether it would not be proper again to send back the papers signed in pursuance of his former suggestion, that an award may be duly

and regularly signed by the arbitrators in the presence of each other.

Jackson, J.--I am not prepared to acquiesce in holding that the last award of the arbitrators is bad, because it was signed by the arbitrators, one on 29th and one on 31st. A decision of a Court would not be set aside on a question of form which I hold this to be: much less an award of arbitrators. It did not in any way affect the decision of this case on the merits. As, however, my learned colleague is of an opposite opinion, I am ready to concur with him in remanding this case to the Judge, in order that he may take steps to have the award formally signed by the arbitrators, at the same time, and not on different dates. I think also that there must be a remand in order that the appellant may obtain ten days'' time after the award is signed within which to prefer any objections he can legally urge against the award.

*Regular Appeal, No. 107 of 1869, from a decision passed by the Judge of Bhaugulpore, dated the 3rd February 1869.