(1933) 03 BOM CK 0013

Bombay High Court

Case No: None

Ahmed Abdulla Moosa		APPELLANT
	Vs	
Cassum Ahmed Barwadia		RESPONDENT

Date of Decision: March 28, 1933

Citation: AIR 1934 Bom 388 : 153 Ind. Cas. 949

Hon'ble Judges: Kania, J

Bench: Single Bench

Judgement

Kania, J.

This summons is taken out by the plaintiff asking for leave of the Court to revoke a consent decretal order of reference to arbitration made in this suit on November 1, 1932. A preliminary objection to the summons is taken on behalf of the defendants that no such application lies. It is contended on behalf of the defendants that the allegation of the plaintiff only amounts to an allegation, of partiality on the part of one of the arbitrators, and nowhere in the Second. Schedule to the CPC it is provided that an application for revocation of the submission could be made on such a ground. It is urged that the only contingency of supersession, of the arbitration before an award is made is contemplated and provided for in para. 3 of the Second Schedule to the Code. In this connection reliance is placed on para. 3(2) which provides as follows:

Where a matter is referred to arbitration, the Court shall not, save is the manner and to the extent provided in this schedule, deal with such matter in the same suit.

2. Relying on this provision it is contended-that, except as provided in para. 5, the Court has no power to order a revocation, of arbitration once it is made an order of the Court under the schedule. In this, connection strong reliance is placed on the decision in Halimbhai Karimbhai v. Shankar Sai 10 B. 381, and also on Thoongan Vs. Chinna Alagu Kudumban, . It is contended on behalf of the plaintiff that the jurisdiction of the Court is not confined to the provisions contained in the Second Schedule and the meaning sought to be attached to para. 3(2) is not correct. It is

urged that the provisions of the Code are not considered by our High Court exhaustive as to the law of arbitration and the decision in Halimbhai Karimbhai v. Shanker Sai 10 B. 381 has no application as the present application is not for the appointment of a new arbitrator but for a revocation of the submission.

3. In Pestonjee, Nusservanjee v. Maneckjee & Co. 12 M.I.A. 112 : 9 W.R. 51 : 2 Suther 169 : 2 Sar. 390 : 3 M.H.C.R. 183 where the arbitration was under an order of the Court, it was stated that the plaintiff could not revoke the submission ; he was bound by it, and the arbitration must proceed subject to the provisions of the law. It was further held, in that case, that the submission could be revoked only with the leave of the Court and that too on good cause being shown. It should be noted that that decision was given when the Code of 1859 (Act VIII of 1859) was in force and the corresponding Section 315 in that Code did not contain any claxise similar to para. 3(2) of the Second Schedule to the present Code. Those observations of the Privy Council are in accordance with the law in England. After a change was effected in the Code and a paragraph similar to para. 3(2) was added at the end of Section 508 of the Code of 1882, when the point next came to be, considered, it was urged in Halimbhai Karimbhai v. Shankar Sat 10 B. 381, that the Court had no jurisdiction. to allow a reference to be superseded except as contained in the Code itself: On a closer scrutiny of the facts it is clear that the applicant in that case, after consenting to an order of reference, made an application to appoint a new arbitrator in place of the person against whom he made an allegation of, partiality. That application was not heard by the Subordinate Judge at once but came for hearing after the arbitrators in fact made their award. The Subordinate Judge considered that the ground of partiality alleged against the arbitrator was Unfounded and refused to countenance the application or set aside the award on the ground mentioned in that application. When the matter came before the High Court, the point whether such an application could lie was considered. I would emphasise again that, whether on the ground of alleged in competency or partiality, an application would lie to substitute another arbitrator, was the only point before the Court in that case for its consideration. The learned Judges considered that Sections 507, 510 and 511 of the Code of 1882 were complete and the Court had no j urisdiction to revoke the authority of one arbitrator and appoint another in his place for the reasons alleged in the application. Towards the end of the judgment certain observations are somewhat broadly worded and they are now relied upon for the contention that the Court has no jurisdiction on any ground whatsoever to revoke a submission except as mentioned in para. 5 of the Second Schedule.

4. I am unable to agree with that contention. The learned Judges who delivered the judgment in Halimbhai Karimbhai v. Shanker Sai 10 B. 381 were of the opinion that the words "good cause," mentioned, in Pestonjee Nusservanjee v. Maneckjee & Co. 12 M.I.A. 112 : 9 W.R. 51 : 2 Suther 169 : 2 Sar. 390 : 3 M.H.C.R. 183 were limited to the contingencies pro-,1 vided for in the specific sections of ; the Code, of 1882. With all respect, "I am unable to agree with that interpretation," I do not think that by

adding para. 2 to Section 508 of the Code of 1882 (which is the same as para. 3(2) in the Second Schedule of the present Code) the legislature deprived the Court of all its powers over an arbitration, proceeding under its order, except in the cases incorporated in paras. 5, 8 and 15 of the Second Schedule. I should hesitate considerably before deciding that even when a clear and gross case of misconduct, to which there is absolutely no answer, is made out, the Court is powerless to supersede the arbitration and compel the parties to go to the end of the arbitration and consider the grievance only after the award is made and submitted to the Court. This might give rise to considerable expense and if the time for making the award, as originally fixed, was long, might cause considerable delay before the rights of the parties are ascertained. Under the circumstances, lam unable to agree that the words "good cause," mentioned in Pestonjee Nusservanjee v. Maneckjee & Co. 12 M.I.A. 112 : 9 W.R. 51 : 2 Suther 169 : 2 Sar. 390 : 3 M.H.C.R. 183 have been limited by the amendment of the Code to what is expressly contained in the provisions of the Second Schedule.

5. Paragraph 3(2) of the Second Schedule only provides that in respect of the subject-matter of an arbitration, the Court shall not deal with the matter except to the manner and to the extent provided in the Second Schedule. That would only mean that so long as the arbitration was subsisting and had not been revoked, the Court shall deal with the subject-matter, only as provided in the Schedule. Paragraphs 12 and 16 provide for what the Court has to do in respect of the subject-matter of the suit which is referred to; arbitration. It does not, therefore, follow, that the words "gave in the manner and to the extent provided in this Schedule" in para. 3(2) in connection with the subject-matter of the suit are meaningless. The decision in Thoongan Vs. Chinna Alagu Kudumban, is not reported in any authorized reports, and I do not consider myself bound by that decision. The judgment is a short one and it does not appear that the point was fully argued. Under the circumstances. I therefore, hold that the Court has jurisdiction, in a proper case, to grant leave to revoke an arbitration on good cause being shown. I however feel that that jurisdiction has to be exercised with great care and caution and should never be considered a venue for making applications from time to time, in pending arbitrations, with a view to obstruct the progress of the arbitration. Unless therefore a strong and irresistible case is made out, the Court should be reluctant to supersede an arbitration. In taking this view no injustice is done to the parties, because after the award is made, the aggrieved party has always the right to come to the Court and contend that the award should be set aside on the grounds mentioned in Clause 15 of the Second Schedule to the Code. These grounds are sufficiently wide and give the Court a wide jurisdiction to inquire into the matter and deal with the same on merits. I am, therefore, unable to hold that the preliminary objection is sound.

6. Coming to the merits of the application, the only ground of misconduct, impropriety or partiality suggested is contained in para. 5 of the affidavit in support

of the summons. It should be noted that the matter in dispute is between some members, of the Jamat. By consent, the parties got the matter referred to the arbitration of Sir Suleman Cassum Mitha and Mr. IDlias,5 Barrister-at Law, with Mirzia, J., as umpire. The affidavit shows that after the order of reference was made by, consent some informal discussions, with a view to settle the matter, took place, and in those discussions Sir Suleman took part with a view to bring about a settlement. It is alleged that when no settlement was arrived at Sir Suleman stated that he would decide the matter against the plaintiff and that the order of Wadia, J., was wrong and the plaintiff must submit to the Jamat. The defendants deny that Sir Suleman had expressed an opinion that he would decide the matter against the plaintiff. According totnemheonly expressed, an opinion that he might decide the same against the plaintiff. This expression of opinion, in the course of such conversations, is not a sufficient ground at all for revoking the reference. Mr. Elias is the co-arbitrator of Sir Suleman and, even if it be suggested that Sir Suleman had shown a tendency against the plaintiff, there is no reason, to believe that the other arbitrator was not impartial and independent enough to give his own judgment on the merits of the case. In the event of there being any difference between the two arbitrators, Mirza, it will have to act as the umpire in the matter; and he is not suggested to have any bias against the plaintiff. For these reasons, I consider that the allegations contained in para. 5 of the affidavit in support of the summons, even if they are true, are quite inadequate to justify the application. The Summons is, therefore, dismissed with (taxed) costs. Counsel certified.