(1912) 07 BOM CK 0029

Bombay High Court

Case No: O.C.J. Suit No. 917 of 1910

Haji Ahmed Haji Hassam		APPELLANT
	Vs	
Essaji Tajbhoy		RESPONDENT

Date of Decision: July 19, 1912

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 104

Citation: (1912) 14 BOMLR 1007 : 17 Ind. Cas. 696

Hon'ble Judges: Dinshaw D. Davar, J

Bench: Single Bench

Judgement

Dinshaw D. Davar, Kt. J.

1. This suit was filed on the nth of October 1910 as a Short Cause. The plaintiff is the mortgagee of several Immovable properties belonging to the defendant and he seeks to recover in this suit Rs. 5,69,166-8-9 with further interest from the 6th of October 1910. In his plaint the plaintiff relies on an alleged adjustment of account which he says took place on the 31st of August 1910 whereby a sum of Rs. 5,71,770-2-0 was found to be due by the defendant to the plaintiff. The defendant has put in a long written statement whereby he disputes the genuineness of the accounts of the plaintiff and states that the adjustment was obtained from him by false and fraudulent representations and is not binding on him and counter-claims that the plaintiff may be ordered to recovery the mortgaged properties to him on payment of what may be found due to the plaintiff on proper accounts being taken by and under the directions of this Court. To his written statement he annexes a formidable list of what he calls " particulars of false and fraudulent items in the plaintiff''s books."

2. It was at first arranged between the parties that the matter should be referred to the arbitration of Mr. Lowndes but that arrangement having fallen through, on the 16th of March 1911 the parties obtained a Consent Order from the Court whereby

all matters in dispute in the suit were referred to the arbitration of two Parsee gentlemen with a proviso that in case the arbitrators did not agree upon their award, the matters in dispute between the parties should stand referred to Mr. Kaikhushro Framji Modi as umpire. The arbitrators appointed by the order were unable to agree and the matters in dispute were referred to Mr. Modi as umpire.

3. The first meeting was held by the umpire on the 8th of ''September 1911 and the investigation of the accounts continued before him till the middle of March last when there was a serious split between the respective parties and Mr. Dinsha Jijibhoy who represented the defendant before the umpire retired from the reference alleging that gross breach of faith was committed on the plaintiff''s part and that the umpire had acted in direct contravention of the order of the Court and intimated that his client was no longer willing to proceed with the reference and revoked the umpire''s authority in the matter. The umpire, however, proceeded ex parte and on the 28th of March, six days after the defendant''s attorney retired, made and published his award whereby he adjudged that Rs. 7,06,639 were due by the defendant on the 25th of March 1912 and he awarded that sum to the plaintiff with further interest at 9% per annum and directed that the defendant should pay the plaintiff''s cost of the suit and of the reference before the arbitrators and umpire including the fees paid both to the arbitrators and the umpire.

4. On the 6th of April 1912 the defendant''s attorneys gave notice that they would move that the award made by Mr. Modi, the umpire, may be set aside, that the arbitration may also be set aside and that the Court should proceed with the hearing of the suit. This notice of motion was partly argued before me on the nth and 12th of April last and then stood over for further argument till after the summer vacation. The notice has now been fully argued before me after I had an opportunity of going through all the affidavits filed on the motion together with other papers in the suit and reference and the proceedings that have taken place before the umpire.

5. The main question in the suit is whether the umpire can be said to have so acted in the reference before him as to justify the Court in coming to a conclusion that his action amounts to what is known in law as " misconduct" and whether under the circumstances that have happened this Court ought to set aside the award made by the umpire. After a very careful perusal of the affidavits of Messrs. Dinsha Jijibhoy and N. H. Moos, the respective attorneys of the parties, and the correspondence which has subsequently taken place, it is quite clear to me that the order of reference was obtained after due deliberation and much discussion between the said attorneys. The main consideration, I find, which induced the defendant to agree to refer matters to arbitration was the plaintiffs consent to abandon his contention as to the adjustment of the 31st of August 1910. The order specifically provides as follows :-

And it is further ordered by and with such consent that the said arbitrators do proceed on the basis of there having been no adjustments and the adjustments

relied upon by the plaintiff in this suit shall not be taken into consideration by them. " It is further provided by the Order that in the event of reference falling through for any reason whatever, the plaintiff would be entitled to rely on the adjustments in the plaint referred to.

6. The accounts between the plaintiff and the defendant which the umpire had to take are very long and extremely complicated. To the accounts filed by the plaintiff the defendant filed numerous objections and surcharges. During the protracted hearings before the umpire commencing from the 8th of September 1911, I find that up to the middle of March 1912 the umpire was able to settle only three disputes. One was with reference to an item of Rs. 5,000, another was with reference to an item of Rs. 10-6-0 and the third was as to whether interest to be allowed to the plaintiff should be at the rate of 6 or 9 per cent. This last question was settled after prolonged hearings by the oath of the plaintiff and it got rid of about twenty-six objections but other objections remained to be dealt with. A formidable list of sur-charges had to be considered and decided and long and complicated steamer-accounts had remained untouched. The split commenced when an objection as to Rs. 1,300 came to be considered. I do not think it is necessary to set out in detail the contentions of both parties as to this item of Rs. 1,300. As to what happened when this objection was taken in hand by the umpire Mr. Dinsha Jijibhoy in his affidavit has given a very clear and explicit account. Although Mr. Moos has made two affidavits, he has not specifically denied the accuracy of Mr. Dinsha''s version and I must accept this as the correct version. He says in para 4 of his affidavit affirmed on the 1st of April this :-

I this deponent further say that on objection 35 being reached in the proceedings before the umpire and any stating to him the facts relating to that objection, the umpire road the entry in the plaintiff''s book relating to the acceptance by the plaintiff of the transfer of Rs. 4,800. * * * * After doing be the umpire told Mr. Mous that from that entry it clearly appeared that the plaintiff had accepted the transfer and that therefore if the plaintiff now wanted to hold the defendant liable for Rs. 1,300 which sum he the plaintiff had given up out of the said sum of Ks. 4,800 he the umpire was of opinion that the burden of proving that the defendant was liable lay upon him the plaintiff. Thereupon Mr. Moos said that that would mean his calling the plaintiff: into the witness box and that he would rather submit to that objection than put his client into the witness-box. The meeting was then adjourned and at the next meeting both Mr. Moos and Mr. F. E. Dinsha appeared on behalf of the plaintiff! and tendered in evidence the said writing of adjustment dated 31st of August 1910. I very strongly objected to the of the said writing of adjustment pointing out, as was the fact, that the plaintiff''s attorneys in tendering the said document in evidence were to their own knowledge acting in direct violation of the specific are rangemen'' aforesaid which was embodied in the said Consent Order of reference and that the said arrangement was the basis and a fundamental the from on the footing and faith of which alone I had agreed on behalf of the defendant to the said arbitration.

7. After hearing and noting the contentions of the solicitors, the umpire decided in favour of admitting the adjustment in evidence and he makes the following note :-" I admit this account purely as a statement of account acknowledged to have been signed by the defendant." And he marked the adjustment as Ex. A18. From the further notes made by himself it appears that the moment this adjustment was put in and marked as an exhibit, Mr. Moos relied upon it as a clear admission by the defendant and argued that the onus has now shifted and lay on the defendant to prove that he was not liable to be debited with this Rs. 1,300. Evidently what was taking place so dazed the defendant''s attorney that he is not shown in the arbitration proceedings to have said anything against Mr. Moos''s contention and the arbitrator records his decision that the onus of proving that he was not liable for this sum was on the defendant. On the following day the defendant''s attorney appeared and pointed out very clearly and forcibly the injustice and hardship of the action of the umpire and suggested that as a special case the question should be submitted for the opinion of the Court. Mr. Moos''s only answer was that he had no notice of this application. The umpire referred the defendant''s solicitor to the Court and postponed consideration of that particular item only, for a week within which he directed Mr. Dinsha to make any application he liked to the Court. The umpire proposed to proceed with the reference without waiting to see if the defendant did make any application and if he did to see what was the result of such application. When Mr. Dinsha Jijibhoy found that the umpire proposed to go on with the reference, with the adjustment Ex. A 18 before him, he decided to withdraw from the references and gave notice of such withdrawal.

8. It is now for me to consider whether the action of the umpire in admitting Ex. A18 as evidence before him is such as to amount to what is in law called "misconduct," and such as would justify an interference of the Court. This application has been the subject of much anxious consideration. The umpire is an officer of this Court who occupies a high position and has, for many years, been doing very important and responsible work in this Court. I have been all along most anxious not to do anything that would in any way cast the smallest reflection on his ability or his capacity to deal with questions that come up before him for adjudication. I am glad to say this throughout the prolonged discussion of this matter before me no reflections are cast and no allegations made of any kind affecting the strict probity of the umpire. All that is alleged against him is that he has committed a grave error of judgment and has shown a very strong bias in favour of the plaintiff and against the defendant. Mr. Setalwad has pointed out various circumstances in connection with the umpire''s judgment with reference to the sum of Rs. 5,000 in justification of his imputation of bias against the umpire. I refuse to go into this question. The umpire was the chosen Judge of the parties. His decision is final and the Court has no right whatever to touch that decision or interfere with it merely on the ground that it is not corrector that it is the result of bias. I have no doubt whatever that when the umpire came to the decision adverse to the defendant he did so on

convictions forced on his mind by the evidence before him and it is not for this Court to express any opinion as to the correctness or otherwise of such a decision and therefore I have given no thought whatever to the arguments addressed to me on the item in question.

9. The admission, however, of the adjustment as an Exhibit in the case is a matter of very grave importance and requires very careful consideration. It must be remembered that that document, the adjustment of the 31st of August 1910, is a powerful piece of evidence against the defendant. If that stands and is established against him, all his contentions with reference to the plaintiff''s accounts go by the board and ;it would be held that he was liable to pay Rs. 5,65,711 with further interest on the date of the adjustment. If the suit had gone to a hearing before the Court, the defendant would have found it necessary to establish the allegations of fraud, misrepresentation, &c, which he sets up in his written statement before he would be allowed to go behind that adjustment. His legal advisers seem to have realised the difficulties of his position and appreciated the very great gain to the defendant if this adjustment could be got rid of by some means. Mr. Dinsha Jijibhoy has stated that on behalf of his client he agreed to the reference to arbitration because thereby he got rid of the adjustment and he swears that " the basis and a fundamental term on the footing and faith of which alone " he agreed to go to arbitration was that the arbitrators were not to take into consideration this adjustment. The directions to the arbitrators in the order itself are clear, explicit and imperative. They are directed to proceed on the basis of there having been no adjustment and they are told that such adjustment shall not be taken into consideration by them. These directions contained in the Consent Order of reference are as binding on the umpire as they were on the arbitrators. In spite of this explicit order, in breach of clear understanding between the solicitors, in the face of the strenuous opposition by the defendant''s solicitor, the plaintiff''s solicitor Mr. Moos not only tendered this document which it had been agreed should be excluded from the arbitrators'' consideration but insisted on having the same recorded as an exhibit in the proceedings and unfortunately succeeded. I feel almost certain that if the umpire instead of acting on the spur of the moment had taken time to consider his decision as he seems to have done on many other points of far smaller importance, he would have realised that the opposition to the admissibility of the adjustment was sound and would have decided accordingly. It was argued before me that the defendant''s solicitor himself had got this document marked for identification at an earlier stage of the reference before the umpire. I have read notes of proceedings when this document was marked for identification. It was merely called for as one of various other documents which the defendant alleged he had been induced to sign. It was never intended to be used as evidence in the case by the defendant. Here, however, not only has it been admitted in evidence but used against the defendant in deciding an important question of the onus of proof. In the face of the Havala entry in the plaintiff''s own book the onus of

proving the defendant''s liability to the plaintiff for this Rs. 1,303 lay clearly and heavily on the plaintiff. That was the opinion of the umpire. The meeting of the 16th of March stood over on that understanding. At the next meeting of the 18th of March the umpire was engaged in considering the question of initiating the books of the plaintiff. At the meeting of the following day, the 19th of March, Mr. Moos reopens the question of the onus, tenders the adjustment and advances certain plausible but fallacious arguments in support of his application to get this document in. The umpire admits the adjustment, marks it as an exhibit but at the same time attempts to make some sort of distinction. He says :-"I admit this account purely as a statement of account acknowledged to have been signed by the defendant." It is quite clear from this that the umpire had before his .mind the fact that he was implicitly directed not to look at the adjustment. He, therefore, tries to make a distinction between an adjustment of account and a statement of account acknowledged to be signed by the defendant. 1 confess I fail to see the distinction. As soon as it is put in, it is made use of for the purpose of shifting the onus. What is then the position of the defendant 1 He must establish his allegations of fraud and misrepresentation before he can get rid of the effect of the admission said to be contained in that adjustment. If this merely affected one item of Rs. 1,300 it might have been said to be a matter of small importance, but once this document is before the umpire, it is quite clear that it would affect a great many very large and very important items; and while it would, in some cases, be used for shifting the onus from the plaintiff to the defendant in many other matters it would be used as it was used as admissions on the part of the defendant. When this matter was argued before me by the Advocate General on behalf of the plaintiff, he stated that when the document was admitted the umpire had decided most of the important matters in dispute between the parties and that very little remained to be done. He asked me to take a note of the offer he made on the 12 the of April and accordingly I took the following note :-

The Advocate General offers to have Ex. A18 struck oft from the proceedings and all matters decided after the admission of Ex. A18 be set aside and be reconsidered by the umpire, if the defendant will consent to have the award remitted to him. This offer to be without prejudice to all his contentions.

Mr. Setalwad declines to go again to Mr. Modi. He says he would not advise his client to go back to Mr. Modi under any circumstances.

10. With a fuller knowledge of facts and after having looked at the accounts, the objections and the surcharges, I am able to say that the learned Advocate General was in error when he stated that most of the disputes between the parties had been decided when this exhibit was admitted. It seems to me that on the day this document was put in more than six months after the umpire commenced the hearing of this reference, the parties had really made very little progress in the reference. Several of the objections were held to be surcharges and were

transferred to the list of surcharges. The surcharges which contain many and some very heavy items had never has touched. The steamer-accounts had never been taken in hand. The effect of disregarding the order of the Court and allowing the adjustment to go in as an exhibit is manifestly unjust to the defendant. A few instances would be quite enough to demonstrate this. In his list of sur-charges the defendant claims credit for a sum of Rs. 75,000 which he says he has paid in cash to the plaintiff but for which no credit is given to him. There is another sum of Rs. 10,000 which he says he paid and which has not been credited to him. There is a sum of Rs. 25,000 which he says he repaid on the very day that Rs. 40,000 are debited to him but which have not been credited to him. There is again another sum of Rs. 50,000 which he says he repaid and which has not been credited to him. No doubt he would have had to prove these sur-charges but when he had given all his evidence in support of his surcharges and his allegations of payment of these large sums he would be immediately faced with Ext. A18 and he would be asked " If you repaid all these sums of moneys, here is an account which you have acknowledged to be correct and signed which shows no such payments." And it would be argued-as was argued by Mr. Moos-that this adjustment contains clear admissions, and that he never repaid any such sums and that if he had done so he would never have signed an account which contains no credit for these large repayments. This is only one of the many ways in which in this reference this adjustment could be used as a deadly and destructive piece of evidence against the defendant. He stipulated specifically that it should not be so used. And though I much regret to be driven to this conclusion I have no option but to hold that the admission of this adjustment by the umpire in the course of the proceedings before him was a clear case of "misconduct" on his part, misconduct as is understood in law. This act, I am driven to say, is an act of injustice to the defendant and calls for redress. It seems to me that the only course open to the defendant under the circumstances was the course adopted by his solicitor. As soon as the defendant''s solicitor withdraws from the reference, the accounts are rushed through before the umpire and within six days all the accounts are passed and award made and published by the umpire.

11. It would be, I think, convenient here to see wout, in law, amounts to "misconduct" on the part of an arbitrator or umpire. In Ganga Sahai v. Lekhraj Singh ILR (1886) All. 253 the question has been considered by a Bench consisting of Mr. Justice Straight and Mr. Justice Mahmood. The judgment of the Court was delivered by Mr. Justice Mahmood in which he has held what "The word '' misconduct,'' as used in the Civil Procedure Code, should be interpreted in the sense in which it is used in English Law with reference to the arbitration proceedings. It does not necessarily imply moral turpitude, but it includes neglect of the duties and responsibility of the arbitrator and of what Courts of Justice expect from them before allowing finality to their awards."

12. In the body of his judgment, the learned Judge has quoted two long paragraphs from Russell on the Powers and Duties of an Arbitrator and he has held that we in

India must interpret the word "misconduct" in the same sense in which it has been interpreted by English Judges.

13. It is because the award of an umpire or arbitrator is final and the party against whom it is made is debarred from appealing to any Court of Law, however unjust the award may be, that the Courts in England and here in India have been most anxious to see that nothing unfair or irregular is done by the arbitrator or umpire while discharging his duties as such. The Courts have always been most alert to interfere and set aside any award in which it appears that the arbitrator or umpire has not acted with scrupulous fairness towards both parties and that seems to have been the tendency of the Court from very early times.

14. In Jervis v. Bruton (1691) 2 Vern. 251 an arbitrator promised to hear more witnesses but he made his award without hearing them, and the award was set aside. In Burton v. Knight (1705) 2 Veru. 515 the arbitrators hearing one party in the absence of another were held to have been guilty of partiality and that was held to be sufficient misconduct on the part of the arbitrator to justify the award being set aside.

15. In Walker v. Frobisher (1801) 6 V. J 70 the award was set aside on the ground of the arbitrator having received evidence after notice to the parties that he would receive no more; in which they acquiesced and the Lord Chancellor Lord Eldon in the course of his judgment says:-" He (referring to the arbitrator) recommended to them not to .produce any more witnesses. To that recommendation they accede and in effect say "Upon the view of what is disclosed to you, do what is right between us." After this he hears these other persons; and Haji he admits, he took minutes of what was said. It did not pass as mere conversation. It does not appear, that he afterwards held any communication with the other party ; or disclosed Dai what passed to him : but the arbitrator swears it had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that which I cannot reconcile to general principles. A Judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice :- but upon general principles it cannot be supported."

16. In Halsbury''s Laws of England, Vol. I, page 478, this is what is stated as the result of the authorities which are all collected immediately below that paragraph :-" It is difficult to give an exhaustive definition of what amounts to misconduct on the part of an arbitrator or umpire. The expression is of wide import, including on the one hand bribery and corruption and on the other a mere mistake as to the scope of the authority conferred by the submission." Then follows a long list of acts of commission and omission on the part of an arbitrator or umpire which have been held in e Courts in England to be acts of misconduct.

17. It seems to me from the authorities that the Courts in cases of reference to arbitration through the Court have always exercised a most careful and vigilant supervision over the conduct of the arbitrator to whom at the request of the parties it delegates the duty of deciding disputes between the parties and any irregularity or action which is not consonant with the general principles of equity and good conscience which ought to govern the conduct of an arbitrator is resented by immediately brushing aside the award of the arbitrator against whose decision there is no appeal.

18. It was argued before me that the admission of a document which the arbitrator was ordered not to look at was not an irregularity as the Indian Evidence Act expressly excludes the application of the rules of evidence embodied in that Act to proceedings before an arbitrator. Exactly the same argument seems to have been advanced by counsel before the Calcutta Court as appears from the report of the case of Maria Ellen Howard v. Charlotte Margaret Wilson (1878) 2 C.L.R. 488 where Mr. Allen says to the Court-" The Evidence Act does not apply to proceedings before arbitrators." To which Sir Richard Garth, i) Chief Justice, replies :-"The meaning of that is that the strict rules of evidence do not so apply. It does not refer to those rules which are founded on the clearest public policy."

19. It is noteworthy to remark that in this case Mr. Justice Pontefex refused to pass judgment on the award on the ground that the defendant communicated with the arbitrator behind the back of the other party and used a letter which was headed " without prejudice." The Appeal Court, however, pointed out that the plaintiff''s advisers had not objected to the letter being received on that ground.

20. In this case the action of the umpire complained of is not a mere formal irregularity nor is it merely a mistake of admitting in evidence a document which ought not to have been admitted. The putting on record of the adjustment as an exhibit in the case was an obvious breach of the directions of the Court contained in the Reference Order made by the Court. This act changed the defendant''s position most materially. He was faced with the very difficulty which he wanted to avoid because it was only in consideration of the adjustment not being used against him that he agreed to go to arbitration. It seems to have had great effect on the umpire''s judgment for on the mere admission of it he changed his mind and held the; the onus of proving a particular item which he had xid lay on the plaintiff was now on the defendant. In opinion the admission of that document in evidence was act of injustice to the defendant and I think the defend, it was perfectly justified under the circumstances in withdrawing from the reference and in subsequently asking the Court to set aside his award. In my opinion the arbitrator committed a grave error of judgment in allowing the plaintiff''s solicitors to persuade him to admit the adjustment in evidence before him. This error has very greatly prejudiced the defendant''s case and I am forced to the conclusion that the umpire in admitting the adjustment in evidence and marking it as an exhibit in the proceeding before

him was guilty of what in law is called misconduct.

21. This being a reference through the Court the second Schedule to the CPC governs the procedure. Clause 14 provides for remitting the award to the same arbitrator or umpire. None of the grounds mentioned in this clause covers the present case and therefore I am precluded from considering the suggestion made by the learned Counsel for the plaintiff to remit; the award to the same umpire. No doubt I could have remitted the award to the same umpire with a direction to expunge Ex. A18 and proceed with the reference from the point where he admitted the adjustment as an exhibit, if the defendant had consented to such a procedure. But that consent is not given in spit of some pressure from the Court and therefore it is not on to me even to consider the advisability or otherwise o ''emitting the award to the same umpire under the provisions of Clause 14 of the second Schedule to the Civil Procedure Code.

22. My finding on the question of " misconduct" makes it unnecessary for me to consider the other ground urged in support of the plaintiff''s application to set aside the award, viz., that the plaintiff has been " guilty of wilfully misleading the umpire."

23. Clause 15(a) of the second Schedule to the CPC provides that the misconduct of the arbitrator or umpire is one of the grounds for setting aside an award and I am driven to the conclusion that it is imperative in the interests of justice that the award should be set aside. Such an order, I feel, would be but a bare act of justice to the defendant. I accordingly set aside the award and make an order superseding the arbitration. Strangely enough neither Section 104 nor Order XLIII permit an appeal against an order setting aside an award but it has been held to be a judgment and I am glad an appeal lies against my order-If an appeal is filed the suit will be subject to such order as the appeal Court may pass. If no appeal is filed after the expiration of the time for doing so, the Prothonotary will put this suit down on such Board as to him may appear most convenient in order that it may be proceeded with.

24. The plaintiff will pay all costs of the defendant of the application to set aside the award. The Judge hearing the suit will deal with costs of the reference and proceedings before the arbitrators and the umpire including the fees paid to them.