

ORIGINAL CIVIL.

Before Chaudhuri J.

CROMPTON & Co., LD. AND MOHAN LAL,
Re ARBITRATION BETWEEN.*

1913
July 9.

Arbitration—Legal misconduct of arbitrator—Award set aside—Remission of Award—Arbitration Act (IX of 1899), ss. 13 and 14.

Where an award was set aside on the grounds of the legal (as distinguished from moral) misconduct of the arbitrator, and the indefiniteness of the award :—

Held, that the Court had the power to remit the award to the arbitrator for reconsideration.

Re Arbitration between Montgomery Jones & Co. and Liebenthal & Co. (1), and *Anning v. Hartley* (2) followed.

In re Keighley Maxsted & Co. and Bryan Durant & Co. (3) referred to,

APPLICATION.

This was an application under section 14 of the Arbitration Act of 1899 to set aside an award *inter alia* on the ground that the arbitrator had misconducted himself.

Rai Bahadur Mohan Lal and Lal Chand were printers and publishers carrying on business in Calcutta under the firm-name of Gulab Singh & Sons.

In the year 1907, with the object of introducing electricity as the motive power of their machinery, they entered into certain contracts with Crompton & Co., electrical engineers, for the supply of the necessary motors, wiring, plant and fittings. During the years 1907 and 1908 Crompton & Co. supplied goods of the nature ordered and fixed and installed

* Original Civil Jurisdiction.

(1) (1899) 78 L. T. 406.

(2) (1958) 27 L. J. Exch. 145.

(3) [1893] 1 Q. B. 405.

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the same at the printing works. It was charged by Gulab Singh & Sons that the goods supplied were not fit for the purpose for which they had been ordered and that the installation had been unskilfully and negligently performed, with the result that in the year 1909, they were compelled to have the electric machinery removed and replaced by steam driven machinery. From time to time Crompton & Co. had submitted their bills for goods supplied and work done which, on the 7th February 1911, amounted to Rs. 25,769-13-9. Messrs. Gulab Singh & Sons had already paid Rs. 9,000 on account without, however, admitting the correctness of the bills, and refused to make any further payment on the grounds of the unfitness of the goods supplied, unskilful and negligent workmanship, and the rates and prices charged being not in accordance with the accepted estimates.

There were negotiations for settlement of the disputes and differences and finally the parties agreed to refer the same to arbitration; and it was agreed that Mr. H. G. Pooler, an assistant in the firm of John Dickinson, Ltd., should be appointed arbitrator.

By a letter dated the 29th December 1911, Crompton & Co., through their agents Martin & Co., requested Gulab Singh & Sons "to kindly confirm in writing the suggestion that Mr. Pooler should be appointed as arbitrator in the matter of your outstanding accounts with us, many points in connection with which are still in dispute," to which Gulab Singh & Sons replied on the 15th January 1912 "we are quite willing to abide by any decision given by Mr. Pooler."

On the 16th September 1912, Mr. Pooler made his award. It was a detailed document professing to be based on the estimates and the correspondence. Certain bills were passed in full; in respect of others

deductions were made with the ultimate result that the sum of Rs. 5,050 was deducted and the claim allowed to the extent of Rs. 11,000. The award concluded with the following: "I further recommend that if Crompton & Co. can make any use of any of the motors lying useless with Gulab Singh & Sons, that they take these over at half the cost originally charged by John Dickinson & Co., or Crompton & Co. as the case may be. This is at Crompton & Co.'s option as regards the motors purchased from John Dickinson & Co., but the machines charged for in 2409 and 2935 should be certainly taken back at half cost, *if in good condition*, credited and deducted from the above award. The amount credited will not of course include cost of wiring and fitting but only the bare charge of the motors."

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The award was duly filed in Court.

On the 9th June 1913, Mohan Lal and Lal Chand filed this petition to set aside the award. The grounds on which the petitioners sought to set aside the award were the following: (i) that the arbitrator had misconducted himself; (ii) that the submission was not duly stamped, and that in consequence the appointment of the arbitrator was invalid; (iii) that the time for making the award had not been properly enlarged, and that, in consequence, the award was vitiated; and (iv) that the award was uncertain in so far as it related to the motors.

With reference to the charge of misconduct the petitioners complained that with the exception of a visit from the arbitrator to the printing works of ten minutes' duration, the petitioners were not aware of any steps being taken by the arbitrator in connection with the reference, that no notice was given them of the arbitrator's intention to enter upon the reference, or of any time or place of meeting, and that

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the petitioners had no opportunity of stating their case or adducing evidence, although they were desirous of doing so. They charged the arbitrator with having had inspection of the books of Crompton & Co., and frequent telephonic conversations with persons in the office of Martin & Co., and relied on the following letter dated the 22nd February 1913 from Mr. Pooler to Lal Chand: "As requested by you I have much pleasure in stating that I made the award without taking any defence from you. I went through your files of correspondence between you and Crompton & Co., and also their files on the matter, but I did not place the proposed award before you for your criticism or defence. I hope this is what you require."

The application was supported by affidavits from Lal Chand who affirmed that when handing the file of correspondence to Mr. Pooler, he informed the latter that the file was not complete, and that he was left under the impression that due notice of the reference would be given to them, and from Moti Ram, the assistant manager of the petitioners, who affirmed that Mr. Pooler had informed him he had seen the books of the Company prior to making the award.

There was no charge of corruption or other moral misconduct made against the arbitrator, and the suggestion that he held telephonic conversations with Martin & Co. with reference to the matters under arbitration was denied.

Mr. Buckland, for the petitioners Gulab Singh & Sons. It is clear from the affidavits the arbitrator has been guilty of misconduct within the meaning of section 14. It is clearly *legal* misconduct not to afford a party an opportunity of stating his case. It is not necessary to establish *moral* misconduct. The authorities are clear that where *legal* misconduct is proved,

the award must be set aside: *Walker v. Frobisher* (1), *Dobson v. Groves* (2) and *Re Tidswell* (3), where Romilly M. R. further refused to remit the matter to the arbitrator for reconsideration. Sections 13 and 14 of the Arbitration Act are mutually exclusive. Where an award is set aside by the Court for misconduct, the Court has no power to remit the award. Section 13 deals with cases other than that of misconduct.

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Mr. Zortab (with him *Mr. A. N. Chaudhuri*), for the opposite party, Crompton & Co., Ltd. Assuming that the award cannot stand as it is, the proper order would be to remit the award under section 13. There is no charge of *moral* misconduct against the arbitrator and in such circumstances the Court will remit the award to him: *Anning v. Hartley* (4), Russell on Arbitration and Awards, 9th edition, p. 291. Section 13 corresponds with section 10 of the English Arbitration Act of 1889, and with reference to the last mentioned section, it was said by Chitty L. J. in *Re Arbitration between Montgomery Jones & Co. and Liebenthal & Co.* (5) that "there are four grounds upon which the matter can be remitted to an arbitrator for reconsideration," the second being "where there has been misconduct on the part of the arbitrator." See Slater on Arbitration and Awards, 5th edition, p. 121. There is not much doubt that a substantial sum is due to Crompton & Co., Ltd., and it would be a great hardship if the award were merely set aside, as it is doubtful whether a suit can now be maintained in view of the law of limitation. We are willing, if the Court thinks fit, to have the remission made to another arbitrator.

(1) (1801) 6 Ves. 70.

(3) (1863) 33 Beav. 213.

(2) (1844) 6 Q. B. (N. S.) 637.

(4) (1858) 27 L. J. Exch. 145.

(5) (1898) 78 L. T. 406.

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Mr. Buckland, in reply. We are not willing to accept the suggestion of a fresh arbitrator. This award must be set aside and Crompton & Co. left to such remedy as they may be advised.

Cur. adv. vult.

CHAUDHURI J. This is an application on behalf of Rai Bahadur Mohan Lal to set aside an award made by one Mr. Pooler dated the 16th September 1912. The grounds upon which the application is made are set out in the affidavits of Rai Bahadur Mohan Lal and Mr. Lal Chand.

The petitioners complain that they received no notice from Mr. Pooler of his intention to enter upon the reference, and that he paid the defendant firm one visit for about ten minutes only, and save and except for that visit the petitioners did not know, prior to the said Mr. Pooler making his award, of any steps being taken by him in connection with the said reference, nor was any notice of the time or place of meeting sent or given to the petitioners, nor had they or either of them any interview with or communication from the said Mr. Pooler with regard to the reference; that they were desirous of being heard, and of adducing evidence before the arbitrator, but no opportunity was given to them. This is admitted by Mr. Pooler, who says in a letter, set out in the said affidavit, addressed to Mr. Lal Chand, that he had made the award in the case without taking any defence from the defendant Company. He says he went through the file of correspondence between them and Crompton & Co., and also their file on the matter; but he did not place the proposed award before them for criticism or defence.

It is quite clear from the affidavits that Mr. Pooler ought to have given the petitioners an opportunity

of putting their case before him, and the petitioners not knowing that the reference had been taken up or that it was being dealt with, have been prejudiced.

One of the points in dispute between the parties is about some motors which the defendants said were useless. They said that although on one occasion Mr. Pooler went with them to the place where the motors were lying, he did not examine them. Mr. Lal Chand says that he understood from Mr. Pooler that due notice of the reference was going to be given in the ordinary course. Nothing was done by Mr. Pooler, and the defendants had no opportunity of placing what they had to say in respect of their defence.

The award itself is defective in some respects. Take the last paragraph "I further recommend that if Crompton & Co. can make use of any of the motors lying useless with Messrs. Gulab Singh & Sons, that they take these over at one-half of the costs originally charged, etc. . . . This is at Crompton and Co.'s option. The machineries charged for in 2409 and 2935 should be certainly taken back at one-half the costs if in good condition. . . ."

Now these were some of the matters in dispute between the parties, and it cannot be said that the arbitrator has decided these points or given any definite directions with regard to them, as he ought to have done. I am clearly of opinion that the conduct of Mr. Pooler in proceeding with the reference in the manner he did was not proper, and that it amounts to legal misconduct. The award therefore must be set aside.

The petitioners have strenuously contended that the matter should not be remitted to Mr. Pooler. Mr. Buckland appearing for them contended that in cases of misconduct if so held by the Court, the Court had no power to remit the award to the arbitrator.

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He relies upon sections 13 and 14 of the Indian Arbitration Act, Act IX of 1899, which run as follows:—
 “The Court may from time to time remit the award to the reconsideration of the arbitrators or umpire.”
 Section 14 says, “where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the Court may set aside the award.” His argument is that there is no provision, in the section for remitting the award, in the case of misconduct but that power is given merely to set aside the award, and that section 13 dealt with cases other than that of misconduct. Section 13 of the Arbitration Act corresponds with section 10 of the English Arbitration Act of 1889, 52 and 53 Vict. c. 49, and section 14 corresponds with section 11, sub-clause 2. Section 10 of the English Act of 1899 is the same as section 8 of the Common Law Procedure Act of 1854: under section 8 an award could be remitted upon certain specified grounds. The same rule as laid down in section 8 has been held to apply to section 10 of the English Act of 1889. This was so stated by Lord Esher M.R. in *In re Keighley Maxsted & Co. and Bryan Durant & Co.* (1). In *Re arbitration between Montgomery Jones & Co. and Liebenthal & Co.* (2), Smith L.J. and Chitty L.J. held the same. They said that they agreed that with regard to section 10 of the English Arbitration Act of 1889 there were four grounds upon which the matter could be remitted to an arbitrator for reconsideration. Those grounds are (1) where the award is bad on the face of it, (2) where there has been misconduct on the part of the arbitrator, (3) where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted, (4) where additional evidence has been discovered after the making of the award. Chitty

(1) [1893] 1 Q. B. 405.

(2) (1898) 78 L., T. 406.

L.J., however, thought that it was not necessary to limit the operation of section 10 to those four grounds. In this case there is no question of moral misconduct and there is no suggestion that the arbitrator is corrupt or partial in any way. All that is said is that he acted irregularly in the discharge of his duty.

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There was a statement in the affidavit of Mr. Lall Chand that he had been informed that Mr. Pooler when in Calcutta had frequent conversations on the telephone with persons in the office of Martin & Co., the Agents of Crompton & Co. This is denied by Mr. Theobald in his affidavit of the 25th June 1913, paragraph 11. He says that so far as he is aware no conversation took place over the telephone between January and September 1912 between Martin & Co. or the said Crompton & Co. with Mr. Pooler with reference to the said arbitration, save and except that on certain occasions he caused enquiries to be made over the telephone of Mr. Pooler as to when he would make his award in this matter.

Under the circumstances the question is whether it would be right to remit the award to Mr. Pooler. I think I have power to remit it, and it would be entirely right in the circumstances of this case to remit the award to him for further consideration.

I have already drawn attention to the indefinite character of the directions in the last paragraph of the said award. The award must be definite with regard to all points in dispute between the parties.

In *Anning v. Hartley* (1), Pollock C. B. held in the circumstances of that case that he ought to remit the award to the arbitrators. One of the objections taken in that case was that the third arbitrator had heard evidence in the absence of the parties and their

(1) (1858) 27 L. J. Exch. 145.

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attorneys. The learned Judge did not find that there was the slightest imputation on the conduct of the arbitrators as to their intention, and said "it would be indeed lamentable if the Court was not able to send back the award to them to be set right, as otherwise all the expenses already incurred would be thrown away." Watson B. was of the same opinion and said: "The Court sends back an award to the same arbitrators in such cases where there is no reason to believe they are not to be trusted."

There is also a serious question in this case as to whether the claim of Crompton & Co. would not be barred by the Statute of Limitations if the award was simply set aside and the Company was left to their remedy by suit.

I hold that the present award cannot be upheld. I asked if the petitioners could agree to refer the matter to any other person; but they were unwilling to make any suggestion and only insisted that the award should be set aside. I therefore order that the present award be set aside and the matter be remitted to the arbitrator Mr. Pooler for further consideration. He is to give the parties an opportunity of placing their respective cases before him, and he is to consider the cases made by them.

The petitioners would be entitled to the costs of this application from Crompton & Co.

Award set aside and matter remitted.

Attorneys for the petitioners: *Sanderson & Co.*

Attorneys for the opposite party: *Morgan & Co.*

J. C.