APPEAL FROM ORIGINAL CIVIL.

Before Costello and Lort-Williams JJ.

BAIJ NATH

v.

BAJRANG LAL KAMALIA.*

1937

April 12.

Arbitration—Award, Grounds of setting aside—Arbitrator hearing a party in the absence of the opponent.

The fact of an arbitrator hearing one party in the absence of the other party and also in the absence of his counsel and attorneys in accordance with an agreement entered into between parties to follow that procedure does not amount to misconduct or irregularity so as to vitiate the award.

Harvey v. *Shelton* (1) referred to.

APPEAL by the plaintiff against an order of Panckridge J.

In this case the parties referred the disputes between them to arbitration. During the arbitration proceedings the arbitrator suggested to the parties that in order to save time and costs he might be permitted to question the parties independently of each other and in the absence of their lawyers. This suggestion having been accepted by the parties the arbitration went on on that footing and an award was made dismissing the plaintiff's suit with costs. Thereafter the plaintiff applied before Panckridge J. to set aside the award; which application was dismissed. Hence the plaintiff preferred this appeal.

Harendra Nath Bhattacharjya for *M. N. Kanjilal* for the appellant.

The procedure adopted by the arbitrator was illegal and the award is bad and must be set aside.

S. C. Bose and *P. C. Basu* for the respondent were not called upon by the Court.

COSTELLO J. The suit out of which this appeal has arisen was started as long ago as the month of April, 1934. The suit took a very halting and dilatory

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course and eventually on May 24, 1935, it appeared in the Special List and was dealt with by Ameer Ali J. Apparently, in order to prevent a summary dismissal of the suit, the plaintiff put forward a suggestion that the matters in dispute between himself and the defendant should be referred to arbitration and it was agreed that the dispute should be referred to a gentleman named Sohan Lal Murarka who was apparently a friend of the plaintiff and of the plaintiff's family. An order for reference to arbitration was made on August 9, 1935. The plaintiff took no steps to complete the order and it was left to the defendant to do so. The order was eventually completed on November 27, 1935, and ultimately an award was made by the arbitrator on February 11, 1936, whereby he dismissed the plaintiff's suit and made an order with regard to costs. The plaintiff thereupon took out a notice of motion which is dated July 27, 1936, asking that the award made by Sohan Lal Murarka and dated February 11, 1936, should be set aside and the grounds on which was made that application are set forth in para. 22 of the affidavit which was put in on behalf of the plaintiff in the form of a petition in support of the notice of motion. Paragraph 22 reads as follows :—

> That under the circumstances the said arbitrator is guilty of gross misconduct and irregularity and that the award should be set aside and the suit be proceeded with.

Now, the misconduct and irregularity complained of are indicated in the preceding paragraphs and, in particular, in para. 14 where it is stated :—

> The said arbitrator at the commencement of the meeting intimated that he would not allow attorneys of the parties to discuss matter or to take part in the conduct of the proceedings before him, and he would hear one party, at a time, when the other party would remain outside the room where the arbitration meeting was held and that he would decide the matter in his own way and would not follow any other system which is foreign to him.

Stated shortly, therefore, the grounds of the plaintiff's application to set aside the award were that the arbitrator should not have heard the parties separately ; that he did not permit them to be represented by counsel or attorney ; that there had been

no cross-examination by one side or the other..... and that no arguments had been permitted. Now it is clear law as laid down in the case of *Harvey* v. *Shelton* (1) that an award will be set aside on the ground of interviews having taken place between the arbitrator and one party in the absence of the other. But as the learned Judge points out in his judgment that is subject to this qualification that if the parties choose to agree to a different mode of procedure then that procedure normally should be followed and it would be quite competent to the arbitrator to deal with the matter on the lines agreed upon by the parties. The learned Judge points out that the answer to the objection put forward by the plaintiff is that the defendants say that the plaintiff expressly consented to the arbitrators adopting the procedure which was followed in the arbitration. It seems common ground that the arbitrator did in fact hear the plaintiff or some one on behalf of the plaintiff, first of all, and then subsequently heard the defendants' witness. The arbitrator has himself dealt with the matter in an affidavit which was before Panckridge J. In para. 4 of that affidavit—the affidavit being dated August 6, 1936—Sohan Lal Murarka states :—

> With reference to the allegations contained in para. 14 of the said petition I state that before the commencement of the proceedings on the said February 5, 1936, I suggested to the parties that instead of proceeding to take evidence by examining and cross-examining witnesses which would considerably increase and add to the costs of the proceedings and delay the same I would put questions to the parties independently of each other and not in the presence of their respective solicitors provided both the parties agreed upon such a course, but if both the parties were not agreeable to such a course I would proceed in the way that may be desired by the parties.

Then he states categorically:—

> My suggestion was definitely accepted and agreed upon by the parties and thereupon I proceeded in the manner as appears from the minutes of the said meeting hereunder written.

I find this note in the minutes of the proceedings. "It is suggested that each party should state their case "separately and the arbitrator gave a necessary direc- "tion accordingly." It might perhaps have been a little more satisfactory if the note recorded by the arbitrator

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had been somewhat more definite in its terms. But taking it in conjunction with the clear statement of fact made by the arbitrator to the effect that the parties accepted and agreed with the proposal which had been made as regards the procedure it is, in my view, not possible for us to do otherwise than to accept the statement which the arbitrator himself has made. It is to be noted that in para. 5 of his affidavit Sohan Lal says :—

> After going through the whole matter and having very carefully considered the same I gave my decision which is embodied in the award.

It seems clear that the arbitrator was a person who took upon himself the duty of adjudicating between the plaintiff and the defendant upon the footing that he should be allowed to deal with the matter in his own way and in a way which he considered expeditious and likely to save xpense to the parties. As I have said, I must accept his statement. I can see no possible manner in which it is open to us to come to a conclusion different from that arrived at by the learned Judge. In order to succeed in this application the plaintiff (the appellant before us) would have to convince this Court that the arbitrator was not telling the truth. The only material before this Court is the material which was before the learned Judge who dealt with the matter in the first instance, namely, the affidavits of the parties. In my view, the learned Judge was quite right in accepting the statement of the arbitrator, who presumably was an independent person, rather than the statement made by the plaintiff who was obviously biased in the matter. On the footing that what the arbitrator stated in para. 4 of his affidavit is accurate, the learned Judge could not do otherwise than dismiss the application.

This appeal must be dismissed and with costs.

LORT-WILLIAMS J. I agree.

Appeal dismissed.

Attorney for appellant : *S. C. Palit.*

Attorneys for respondent : *Mitra & Mitra.*

A. K. D.