

## APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and  
Mr. Justice G. H. Thomas

1935  
March 1

LALA NIHAL CHAND AND ANOTHER (DEFENDANTS-APPELLANTS)  
v. LALA JAI RAM DAS (PLAINTIFF-RESPONDENT)\*

*Civil Procedure Code (Act V of 1908), Schedule II, paragraph 15(1)(b)—Arbitration—Agreement of reference to arbitration—Award—Non-disclosure of relationship and monetary dealings between arbitrator and a party, whether a good ground for setting aside of award—Waiver—Party coming to know of relationship between arbitrator and opposite party after reference and before award but not objecting to arbitration, whether operates as waiver—Party unconscious of right to revoke reference, effect of—Misconduct of arbitrator—Award written by another at dictation of arbitrator, whether amounts to judicial misconduct—Leaking out of contents of award before its pronouncement to one party, effect of.*

Non-disclosure at the time of the agreement to refer to arbitration of the fact that the arbitrator named in the agreement was related to and had monetary dealings with one of the parties amounts to fraudulent concealment of matters which ought to have been disclosed to the other party within the meaning of rule 15, clause (1), sub-clause (b) of Schedule II of the Code of Civil Procedure and is a good ground for setting aside the award. *Mahomed Wahiduddin v. Hakimian* (1), relied on.

There can be no waiver without full knowledge of one's legal rights. Where, therefore, a party to a reference to arbitration comes to know of the relationship between the arbitrator and the opposite party after the reference and before the award but is not conscious of his right to revoke the submission and believed that having executed the agreement of reference he is bound by it and so does not refuse to have the arbitration carried out by that arbitrator, his failure to lodge an unequivocal protest against arbitration by that arbitrator does not operate as a waiver. *Darnley (Earl) v. London Chatham & Dover Rail, Co.* (2), relied on.

\*First Civil Appeal No. 41 of 1933, against the decree of S. Shaukat Husain, Subordinate Judge of Unao, dated the 28th of March, 1933.

(1) (1902) I.L.R., 29 Cal., 278.

(2) (1867) L.R., 2 H.L., 57.

The fact that a portion of the award is written by another person at the dictation of the arbitrator does not amount to judicial misconduct of the arbitrator and is not a good ground for setting aside the award. *Buta v. Municipal Committee of Lahore* (1), relied on.

1935

LALA NIHAL  
CHAND  
v.  
LALA JAI  
RAM DAS

In the absence of any evidence showing that the arbitrator in any way took a party into his confidence, no misconduct can be attributed to him by reason of the contents of the award having leaked out before it was pronounced. Help given by a party in the preparation of the copy of the award sent to the other party cannot also affect the award itself.

Messrs. *Radha Krishna Srivastava* and *S. N. Srivastava* for the appellants.

Dr. *K. N. Katju* and Messrs. *Ali Zaheer*, *Ghulam Imam* and *S. S. Saraf* for the respondent.

SRIVASTAVA and THOMAS, JJ.:—This appeal arises out of a suit for rendition of accounts. The original plaintiff Lala Jai Ram Das, who died during the pendency of the appeal in this Court and is represented by his son Shanti Lal who is now the respondent in the appeal before us, was the proprietor of the Unao Sugar Works. On the 11th of January, 1926, he entered into an agreement (exhibit A-1), with the two defendants, Lala Nihal Chand and Lala Jagannath, whereby the sugar mill was leased out to the defendants for a period of three years from the 15th of January, 1926 to the 31st of December, 1928. The defendants were to work the mill under their own management, and the profits were to be divided between the parties according to the terms and conditions laid down in the agreement. The agreement further provided that in case of any dispute in respect of it, the matter in dispute was to be settled by reference to arbitration. Admittedly actual possession of the mill was delivered by the plaintiff to the defendants on the 18th of January, 1926, and the defendants began forthwith to make arrangements for working the mill. It is also common ground between the parties that the manufacture of sugar was stopped by the defen-

1935

LALA NIHAL  
CHAND  
v.  
LALA JAI  
RAM DAS

*Srivastava  
and Thomas,  
JJ.*

dants from the 9th of August, 1926, and work was not resumed till January, 1927. This led to disputes between the parties in respect of the amount of profits for 1926. So in terms of the agreement the dispute was referred to Lala Bhana Ram, the arbitrator named therein. Lala Bhana Ram after he had carried on the proceedings for some time declined to proceed with the arbitration on the 8th of March, 1927. As the agreement exhibit A-1 provided that in case Lala Bhana Ram is unable to decide the matters in dispute then in his place Lala Makund Lal was to be appointed arbitrator, therefore in accordance with this condition of the agreement the matter was entrusted to Lala Makund Lal for decision. He gave an award on the 8th of May, 1927, but the plaintiff was not satisfied with it. He thereupon instituted the present suit in the Court of the Subordinate Judge of Unao on the 6th of November, 1928, asking for rendition of accounts and claiming his share of profits for 1926 and 1927 and damages for breach of certain terms of the agreement. He also impugned the award of Lala Makund Lal on various grounds, and pleaded that he was not bound by it.

The learned Subordinate Judge framed two preliminary issues. His finding in respect of them was that the plaintiff was bound to refer his disputes as regards the affairs of 1927 to arbitration. As regards the award dated the 8th of May, 1927, he found that Makund Lal was closely related to Jagannath, defendant No. 2, and that the plaintiff was not aware of the relationship at the time of the agreement. He further held that the plaintiff did not waive his right to object against Makund Lal acting as arbitrator after the plaintiff had become aware of the relationship. He was also of opinion that the arbitrator was guilty of judicial misconduct. He accordingly held that the award was invalid and was not binding on the plaintiff. In result he decided to proceed with the suit so far as it related to the claim for profits and damages for 1926. In pur-

suance of this the plaintiff, with the permission of the Court, amended the plaint confining his claim to the disputes relating to the working of the mill in 1926. The defendants also filed an amended written statement, and on these revised pleadings of the parties, the Subordinate Judge framed ten issues which were as follows:

1. (a) Were the defendants justified in stopping the manufacture of the sugar since the 9th of August, 1936, as alleged?

(b) Did the defendants close the workshop in August, 1926, as alleged?

(c) If so, what loss was caused to the factory on that account?

2. Were the defendants entitled to claim the entire sum Rs.70,000 as their share of the profits for the first year, or the year 1926?

3. Were not the defendants bound to deposit the profits, accruing to the plaintiff, in the Punjab National Bank, to the credit of the plaintiff as agreed under the terms of the agreement in suit?

4. Did the plaintiff take advances in cash and kind aggregating to a sum of Rs.48,167-8-0?

5. To what damages is the plaintiff entitled on account of the items mentioned in paragraph 6 of the plaint?

6. Is the question of the plaintiff's profits *res judicata*?

7. Are the defendants entitled to a sum of Rs.17,387-10-3 from the plaintiff as alleged?

8. Is that claim of the defendants barred by time?

9. To what profits, if any, is the plaintiff entitled?

10. Is not the plaintiff liable for the items shown in the defendants' Balance Sheet excepting the 9 items as alleged at page 92 of these proceedings?

Parts (a) and (b) of issue No. 1 and issues 2 and 3 were decided against the defendants and in favour of the plaintiff. Issue No. 6 was not pressed and was also

1935

LALA NIHAL  
CHAND  
v.  
LALA JAI  
RAM DAS

*Srivastava  
and Thomas,  
J.J.*

1935

LALA NIHAL  
CHAND  
v.  
LALA JAT  
RAM DAS

*Srivastava  
and Thomas,  
J.J.*

decided against the defendants. As regards issue No. 7 it was held that the defendants were not entitled to make the claim in question in the present suit. In view of the finding on issue No 7, issue No. 8 was left undecided. Under issue No. 10 it was held that the plaintiff was not liable for the amounts claimed by the defendants under the heads of law charges, miscellaneous expenses, general charges, hundian account, brokerage, motor expenses, post and telegrams, stationery and travelling expenses. It was also held that the items claimed by the defendants in respect of *gur* and coal should be reduced by two per cent. and five per cent. respectively. Lastly a few items were left over for determination in proceedings for the final decree. Under issue No. 4, the Subordinate Judge noted the plaintiff's admission of having received a sum of Rs.22,000 for the profits of the year 1926. For the rest the determination of the issue was postponed till the time of the final settling of accounts. As regards issue No. 5 and issue No. 1(c), the Subordinate Judge held that the plaintiff is entitled to damages for the loss suffered by him owing to the stopping of the factory in August, 1926, and laid down the method to be followed in determining the amount of the said damages. He also held that the plaintiff should be allowed interest at 9 per cent. per annum as damages on the sum found due to him as profits for the period ending 10th of August, 1926, from the 11th of August, 1926 till date of realisation and interest at the same rate on the balance of the profits from the 1st of January, 1927 till realisation. Under issue No. 9 he decreed the plaintiff's suit for profits but left the exact amount of the profits for determination in the proceedings for the final decree in accordance with the directions recorded in his findings under issues Nos. 5 and 10.

The defendants have preferred this appeal against this preliminary decree of the Subordinate Judge. They have in the first place contended that the arbitra-

tor's award is valid and binding on the plaintiff. As stated before the learned Subordinate Judge has set aside the award on two grounds (1) concealment of relationship between the arbitrator Makund Lal and Jagannath defendant No. 2, and (2) judicial misconduct.

1. *Concealment of relationship*

Lala Makund Lal had a paternal uncle Lala Gopal Das. The latter had a grandson Narsingh Das who was married to the sister of the defendant Lala Jagannath. This relationship is not disputed. We agree with the learned Subordinate Judge that according to the notions of Hindus, amongst whom the existence of joint families is a normal feature, the said relationship is a comparatively close one. The only question is whether the plaintiff was not aware of this relationship at the time when he agreed to the appointment of Makund Lal as an arbitrator. The oral evidence on the point is very conflicting. P. W. 1 stated that prior to the 9th of March, 1927, when Jai Ram Das wrote exhibit P. W. 1/2-exhibit A-2 inquiring from him whether he will take up the arbitration, he had at the house of Lala Kotu Ram a talk with Jai Ram Das in which the latter told him that he knew of his relationship with Lala Jagannath. D. W. 1 Lala Kotu Ram does not make any mention of this conversation at his house but says that Jai Ram Das had told him that he had full confidence in Lala Makund Lal in spite of his relationship with Lala Jagannath. The defendant Nihal Chand deposes that the plaintiff knew the relationship between Makund Lal and Jagannath years before the arbitration. Lala Jai Ram Das on the other hand swore that at the time of the execution of the agreement he did not know that Makund Lal was related to Jagannath. The learned Subordinate Judge has believed Jai Ram Das on this point. We see no sufficient reason to disagree with the Subordinate Judge. In exhibit A-3, which is a copy of a letter, dated the 10th March, 1927, written

1935

LALA NIHAL  
CHAND  
C.  
LALA JAI  
RAM DAS

Sriegastara,  
and Thomas  
J.J.

1935

LALA NIHAL

CHAND

v.

LALA JAI  
RAM DAS

to Lala Jai Ram Das by Makund Lal, the latter wrote as follows:

“and also say if you know that Lala Jagannath is related to me and you would like the arbitration to be done by me.”

*Srivastava  
and Thomas,  
J.J.*

Lala Jai Ram Das in his letter exhibit 87 of the same date replied as follows:

“You were kind enough to inform me of your relationship with Mr. Jagan Nath Syal who is a party in the matter of the dispute. Of course I never knew of it before but I should think that you can be the best judge under the circumstances to determine the position for yourself. The deed does not give me any option and as such I have to abide by what you order me.”

It is difficult to think that a leading lawyer of the position of Lala Mukund Lal should have written in the terms of exhibit A-3 if he knew that Jai Ram Das was aware of the relationship between him and Jagannath. The statement in Lala Makund Lal's letter, exhibit A-5, written eight days after Jai Ram Das had approached him to do the arbitration, telling him that he already knew of the relationship, seems to us quite inconsistent with his earlier letter exhibit A-3. It is clearly an afterthought and seems cunningly to have been introduced to avoid objection against his acting as an arbitrator, when he had made up his mind to take up the arbitration. Jai Ram Das's affirmation of his want of knowledge of the relationship in exhibit 87 written immediately after his receipt of exhibit A-3 also strongly supports his statement in the witness-box. It is no doubt true that Lala Makund Lal was known to Jai Ram Das for many years and that Jai Ram Das had been on terms of intimate friendship with both the defendants, but there being no relationship between Jai Ram Das and Jagannath, it cannot be expected that he should be aware of the marriage connections of Jagannath's relations. We must therefore uphold the Subordinate Judge's finding that the plaintiff Jai Ram Das

did not know of the relationship in question at the time when he entered into the agreement exhibit A-1.

One of the grounds laid down in rule 15, clause (1), sub-clause (b) of Schedule II of the Code of Civil Procedure for setting aside an award is fraudulent concealment by either party of any matter which he ought to have disclosed. We think that this relationship of Jagannath with Makund Lal was a matter which ought to have been disclosed to Jai Ram Das at the time of the agreement. It is in the highest degree unlikely that Jai Ram Das should have agreed to accept Makund Lal as an arbitrator if he should have been made aware of this relationship. The concealment of the relationship must under the circumstances be considered fraudulent.

It has, however, been argued that the plaintiff having been apprised of the relationship by Makund Lal before his entering upon the arbitration and the plaintiff having allowed Makund Lal to carry on the arbitration without any objection or protest, he must be deemed to have waived the objection. The argument proceeded that the plaintiff wanted to take the chance of a decision being given by the arbitrator in his favour and under the circumstances he cannot be allowed to turn round and question the award on this ground, when the award has been given against him. The following passage in Russell on Arbitration and Award, 12th edition, page 436. has been referred to in this connection :

“In proceedings before an arbitrator the practical question is: What form of protest is sufficient or what line of conduct should be followed to avoid the loss of a party's rights?

The strongest line of conduct and the strongest form of protest for a party to adopt or make is to retire from the proceedings, but such a course, when a party is brought before or tied to a particular tribunal, is obviously extremely dangerous, because he may ultimately find, when he has moved to set aside the

1935

LALA NIHAL  
CHAND  
v.  
LALA JAI  
RAM DAS

*Srivastava  
and Thomas,*  
JJ.

1935

LALA NIHAL  
CHAND  
v.  
LALA JAI  
RAM DAS

*Srinivasava.*  
*and Thomas.*  
J.J.

award made against him, that the irregularity of which he complains is not sufficient to upset the award.

The obvious course, therefore, is for a party complaining of irregularity to protest against the irregularity and to continue to conduct his case in the proceedings, before the arbitrator under such protest."

No doubt the plaintiff on becoming aware of the relationship did not refuse to have the arbitration carried out by Makund Lal. Our reading of the plaintiff's letter exhibit 87 is that when he came to know of the relationship he did not relish Makund Lal acting as arbitrator, but wished Makund Lal himself to decline to carry out the arbitration because of the relationship. At any rate, it cannot be regarded as a deliberate and free acceptance of Makund Lal as arbitrator. "A waiver must be an intentional act with knowledge" (per Lord CHELMSFORD in *Darnley (Earl) v. London Chatham & Dover Rail, Co.* (1)). There can in our opinion be no waiver without full knowledge of one's legal rights. There could be no waiver in this case unless the plaintiff had a consciousness of his right to revoke the submission. This appears to be clearly negatived by exhibit 87 where he says that the deed does not give him any option and as such he must abide by Makund Lal's orders. Thus it seems clear that rightly or wrongly Jai Ram Das at the time believed that having executed the agreement exhibit A-1 he was bound by its terms and could not discard Lala Makund Lal who had been nominated as an arbitrator in the agreement. Being in this state of mind, his failure to lodge an unequivocal protest against Lala Makund Lal acting as arbitrator does not in our opinion operate as a waiver.

Next there is the question of the indebtedness of Lala Nihal Chand to Lala Makund Lal. It was admitted in the lower Court that there were monetary dealings between Lala Nihal Chand and Lala Makund Lal.

We accept the Subordinate Judge's finding which has not been seriously disputed before us that the plaintiff was not aware of these monetary relations at the time when he entered into the agreement. But it has been argued that the money transactions between them were of a small amount and not of such a nature as to disqualify Lala Makund Lal from acting as arbitrator. This view seems to have found favour with the learned Subordinate Judge, but we are not inclined to agree with him on this point. Lala Makund Lal has not produced his accounts to show the extent of his monetary dealings with Lala Nihal Chand. The cross-examination of Lala Nihal Chand, D. W. 2, shows that they used to deal in large sums of money. We think that it was the duty of the defendants to disclose to the plaintiff at the time of the agreement the monetary dealings and business relations which existed between Makund Lal and Lala Nihal Chand. In a case of arbitration where the parties entrust their fate into the hands of an arbitrator it is essential that there must be abundant good faith. The arbitrator must be absolutely disinterested and impartial. In *Mahomed Wahiduddin v. Hakimian* (1) it was held that if an arbitrator is indebted to one of the parties at the time of the reference or becomes so indebted after the reference, and in either case does not disclose the fact to the other party, such party would be entitled to revoke the reference upon discovery of the fact, and any award made by such arbitrator would be invalid on the ground of judicial misconduct. We are therefore of opinion that as the arbitrator Lala Makund Lal was related to one of the defendants and had monetary dealings with the other, both of which facts ought to have been disclosed and were not disclosed to the plaintiff at the time when he entered into the agreement, the award has rightly been set aside.

1935

LALA NIHAL  
CHAND  
P.  
LALA JAI  
RAM DAS

*Srivastava  
and Thomas,*  
J.

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1935

2. *Judicial misconduct*

LALA NIHAL  
CHAND  
v.  
LALA JAI  
RAM DAS

*Srivastava  
and Thomas,  
J.J.*

As regards the ground of judicial misconduct, the only facts which have been made but are that Babu Lachhman Das, who works with Lala Makund Lal as his junior, wrote some portion of the award at the dictation of Lala Makund Lal, that Lala Nihal Chand remained all along at Feerozpur during the time that the award was under preparation, that he had an inkling into the award being in his favour before it had been delivered and that he filled in his hand-writing a blank space in the copy of the award which was sent to the plaintiff with a quotation from the agreement in Urdu. There is nothing to show that the arbitrator did not exercise his own judgment on the matters referred to him. The writing of a part of the award by Lachhman Das at the dictation of the arbitrator was an act of a ministerial character which could be delegated to a third party—*Buta v. Municipal Committee of Lahore* (1). In the absence of any evidence showing that the arbitrator in any way took the defendant into his confidence, no misconduct can be attributed to him by reason of the contents of the award having leaked out before it was pronounced. Any help given by the defendant in the preparation of the copy of the award sent to the plaintiff cannot also affect the award itself. We are therefore of opinion that these circumstances relied on by the learned Subordinate Judge, though raising some suspicion against the arbitrator are not sufficient to establish a charge of misconduct.

We accordingly uphold the lower Court's order setting aside the award only on the ground of fraudulent concealment of the relationship and monetary dealings between the arbitrator and the defendants.

[ED.—Their Lordships then proceed to decide the plaintiffs' share of profits and the amount of damages to which he was entitled on a consideration of the evidence on the record.]

*Appeal partly allowed.*