APPELLATE CIVIL.

Before Mr. Justice Murphy and Mr. Justice Macklin.

1934
August 16

THE MUNICIPALITY OF AHMEDABAD (ORIGINAL DEFENDANT), APPELLANT *v.* RAVJIBHAI BHAILAL CONTRACTOR (ORIGINAL PLAINTIFF), PETITIONER.*

Arbitration—Legal misconduct—Arbitrator asking one of the parties to arrange papers and to sort exhibits—Ministerial act.

Where an arbitrator finds that the papers sent to him are badly arranged and sends for one of the parties and employs him to sort the papers and to find exhibits, this act of the arbitrator amounts to no more than using the party for the purpose of a ministerial act, and the award made by him is not vitiated on that account.

Legal misconduct on the part of an arbitrator arises where the arbitrator's procedure is so irregular as to be opposed to the principles of natural justice.

Ganga Sahai v. *Lekhraj Singh*,[1] followed.

The limits of the doctrine of legal misconduct, as determined by case law, is that where there has been an opportunity afforded to one side to get an advantage with the arbitrator over the other, either by lack of notice, or by the absence of the other side, and there is even a remote possibility that the advantage so obtained may have unconsciously influenced the mind of the arbitrator, the proceedings are vitiated by a breach of the principles of natural justice, and whether this is so or not must depend on questions of fact.

APPEAL from Order from an order passed by S. J. Yajnik, First Class Subordinate Judge at Ahmedabad, in Civil Suit No. 581 of 1927.

Arbitration.

In 1928, the Ahmedabad Municipality decided to introduce a new system of scavenging into Ahmedabad City. The work was entrusted to Ravjibhai, plaintiff, by a deed of contract dated January 29, 1921. After the municipal elections of 1923, differences arose between the parties which culminated in a reference to arbitration which was provided for in the contract. Each side appointed an arbitrator and the arbitrators chosen were Rao Saheb Dadubhai P. Desai and Himatlal D. Saheba. These

* Appeal from Order No. 31 of 1931.

[1] (1886) 9 All. 253 at p. 264.

gentlemen heard the evidence but differed in their findings. The proceedings were sent to H. B. Shivdasani, who had been appointed as umpire before the original proceedings began.

The papers were sent to the umpire about the middle of November 1926. He found that they were in great disorder. He, therefore, sent for the plaintiff, contractor, and asked him to sort the papers and to find the exhibits, which he was in need of and could not lay his hands on. He examined the papers and after hearing the parties made his award, to the effect that Rs. 54,000 were due to the contractor.

The plaintiff applied to the Court for a decree in terms of the award.

The defendant contended, *inter alia*, that the umpire's conduct in sending for the plaintiff and seeking his assistance to sort the papers in the absence of the defendant amounted to legal misconduct and the award could not therefore be filed.

The Subordinate Judge overruled the objection and passed a decree in terms of the award.

The defendant appealed to the High Court.

M. C. Setalvad, with *R. W. Desai*, for the appellant.

G. N. Thakor, with *N. P. Desai*, for the respondent.

MURPHY J. This is an appeal against an order of the learned First Class Subordinate Judge of Ahmedabad directing that an award, exhibit 16, made by Mr. Shivdasani on a reference to him from two arbitrators as final umpire, be filed, and that a decree should be drawn up in its terms and in accordance with certain directions made in the body of the judgment. The defendant Municipality was ordered to pay its own costs and those of the plaintiff.

The dispute was between the respondent, Ravjibhai Bhailal, and the Municipality of Ahmedabad, and the only

1934

MUNICIPALITY OF AHMEDABAD v. RAVJIBHAI BHAILAL

Murphy J.

question we have to decide is whether Mr. Shivdasani, the umpire in question, was guilty of legal misconduct in the proceedings which culminated in his award.

The history of these differences is as follows —

It appears that in 1921 the Municipal Committee had decided to introduce a new system of scavenging into Ahmedabad City. They entered into a contract with the respondent, and what was contemplated was that there should be a system of what were called "trailers" drawn by tractors, and that the refuse from the houses collected at certain fixed points should be carried in these trailers to the dumps, where it was to be disposed of. The system was, in the first place, tentative and applied to half the city only, but it was ultimately extended to the other half. Differences, however, arose apparently after the municipal elections about 1923, and these culminated in a reference to arbitration which was provided for in the agreements between the parties. Each side appointed an arbitrator, and the arbitrators chosen were Rao Saheb Dadubhai Purshottamdas Desai and Mr. Himatlal Dalsukhram Saheba. These gentlemen heard the evidence, and in the end differed from each other. Rao Saheb Desai was for awarding the contractor something over a lakh in damages, and Mr. Saheba thought that he should get nothing at all. One of the terms of the appointment was that before the arbitrators came to any decision, they should appoint an umpire, who was to decide any differences between them, and Mr. H. B. Shivdasani had been agreed on before the original proceedings began. The matter was accordingly referred to Mr. Shivdasani, and he seems to have received the papers somewhere about the middle of November 1926. He examined the papers, and hearings before him began on December 4, and the award was finally made on December 20, 1926, as the arbitrator having been unable to make his award within time had asked for an extension.

Mr. Shivdasani's finding was that a sum of Rs. 54,000 was due to the contractor.

The point taken in this appeal is, as I have already mentioned, that Mr. Shivdasani was guilty of legal misconduct in the course of the arbitration proceedings. Legal misconduct has been defined in *Ganga Sahai* v. *Lekhraj Singh*[1] by Mr. Justice Mahmood, who quotes with approval a long passage from Russell on Arbitration, on the power and duty of an arbitrator. The passage may be summed up, I think, to this, that legal misconduct ensues where the arbitrator's procedure is so irregular as to be opposed to the principles of natural justice.

In the course of the trial in the lower Court seventeen different points were urged before the learned Subordinate Judge, but in the appeal before us these have been reduced to one, or at most two. It appears that when the papers were first sent to Mr. Shivdasani in November, he found that they were in great disorder, and he could not find several of the exhibits, which had been mentioned in the awards made by Rao Saheb Desai and Mr. Saheba. He sent for the plaintiff-contractor and, he says, asked him to sort the papers and find the exhibits which he was in need of and could not lay his hands on. The contractor accordingly came to his office, Mr. Shivdasani being at that time an official liquidator, and helped him in arranging the papers which had been sent by the Municipality. This is said to have occurred two or three times and the interview to have lasted about an hour and a half on each occasion.

The second point taken is that Mr. Shivdasani must have made some notes as to the plaintiff's case before the trial began on December 4, and this is based on the fact that in Mr. Shivdasani's notes of the proceedings the first paragraph begins—

"Ravjibhai (which is the plaintiff), I would have made practically no profit if the contract had gone on owing to the present feelings shown by the Municipality."

[1] (1886) 9 All. 253 at p. 264.

1934

MUNICIPALITY OF AHMEDABAD v. RAVJIBHAI BHAILAL

Murphy J.

The question as to what happened at the interviews between the contractor and Mr. Shivdasani on the occasion when Mr. Shivdasani says the contractor was only employed in sorting the papers of the reference, is the second item relied on by Mr. Bhagat, who appeared as an agent for the Municipality in the proceedings, as showing that Mr. Shivdasani must have made notes of the plaintiff's case, and consequently must be held to have heard him in some way or other, and not merely to have employed him for the ministerial purpose of helping him with the exhibits. The fact that the plaintiff had been asked to help with the papers is mentioned by Mr. Shivdasani in the award which he made on December 20. What he there says is—

"I have also to put it on record that the papers when sent to me were very badly arranged, and it would have been difficult for me to find my way about had not the contractor kindly volunteered to assist me to find out the various papers and exhibits."

It appears that on December 18 Mr. Bhagat, who appears to have got on very ill with Mr. Shivdasani in the course of these proceedings, made a report to the Municipality in connection with the arbitrator's request for more time. His argument was that the arbitrator was biassed against the Municipality, and was likely to make an award adverse to them, and he therefore advised his masters that they should not agree to an extension of time, and to put an end to the proceedings by refusing the concession. This report was put before the general body, but it decided to grant the request made by the arbitrator and so impliedly refused to accept the allegation made by Mr. Bhagat. The cause of the quarrel was that when one Mr. Gore, who was then Municipal Engineer, was being examined before Mr. Shivdasani, Mr. Bhagat rebuked him for making what Mr. Bhagat thought were admissions against the Municipal interests. Mr. Shivdasani mentioned this incident in his award and commented very severely on

Mr. Bhagat's conduct in trying to suppress Mr. Gore's truthful evidence.

These are the main facts as to the case between Mr. Shivdasani and Mr. Bhagat. Mr. Shivdasani was examined in the course of these proceedings, and what he said was as follows :—

"Then I called Ravjibhai plaintiff. I do not remember whether I wrote to the plaintiff or sent my clerk to fetch him. I have mentioned this in my award. I have kept no *rojnama* or proceedings about my work in connection with the award. I called Ravjibhai between November 20 and 25, 1926. Plaintiff came to me at my liquidation office. I asked him whether he could find out the exhibits referred to in the award and his statement. He said yes. I called him again subsequently twice or thrice and he did so come. He came like that for about an hour and a half on every occasion. I had no other talk with plaintiff on those occasions. I was receiving the papers and plaintiff was finding the same out for me. I have kept no notes of this. This went on till the end of November. The papers were not arranged. I did not call plaintiff for that. I called him to find out the papers I wanted as I went on reading. I had no talk or discussion with plaintiff about the contents of any papers."

As to the other point Mr. Shivdasani's evidence was—

"I cannot remember whether I had any points jotted down for inquiry after reading the papers. My impression is I had not. The first point noted on December 4, 1926, in exhibit 69 was the statement of plaintiff. The words are in inverted commas as the words used by plaintiff himself. They are not my words dictated from any jotting of mine. Mr. Bhagat did not say then as to from what notes or jottings I dictated the point to the shorthand writer. In fact there was no such note or jotting of mine and there was no occasion to say any such things. I was sent all the papers which were filed before the arbitrators along with their award and I had read them all."

As between Mr. Shivdasani and Mr. Bhagat, the learned Subordinate Judge has believed Mr. Shivdasani. It is obvious from the facts I have narrated that Mr. Bhagat was a very zealous municipal partisan, and Mr. Shivdasani seems to us to have given a simple and straightforward account of what happened in his evidence before the learned Judge. On this evidence the facts we accept are that Mr. Shivdasani had no notes of the contractor's case at the opening of the proceedings, and also that Mr. Shivdasani only employed the contractor to sort out the disorderly

1934

MUNICIPALITY OF AHMEDABAD v. RAVJIBHAI BHAILAL

Murphy J.

record, and to find the exhibits which he wanted to consult before the proceedings began.

The next point we must consider is whether this incident amounts to legal misconduct on his behalf. Mr. Setalvad, for the appellant Municipality, has relied on a series of English cases on arbitration, and the first of these is that of *Harvey* v. *Shelton*.[1] What happened in that case was that the arbitrator heard one of the parties alone, and becoming satisfied with an explanation which that party gave as to an item in some accounts, accepted it as his own conclusion. The learned Judges in that case held that there had been legal misconduct on the ground that one party alone should not be permitted to satisfy the Court and enable it to come to a conclusion, and must not be allowed such means of influencing the Judge. The next case relied on is that of *Walker* v. *Frobisher*.[2] In this case the legal misconduct found was that the arbitrator received some evidence from one party after notice to both that he would receive no more, and it was held that he should not have done so, even though he deposed that he had not been influenced by this additional evidence. The third case is that of *Dobson* v. *Groves*.[3] The *ratio decidendi* of this case that once the case is within the general probability that the arbitrator's mind may be biassed by something which happened at the proceedings it is within the principle, and an objection subsequently made to the award is sufficient. Counsel next referred to *W. Ramsden & Co.* v. *Jacobs*.[4] Here the evidence for each side was heard separately, apparently by agreement between the parties, but the Courts held that such a procedure was wrong and contrary to natural justice, it being a procedure unknown to Courts of law. The fifth case relied on was *Sm. Toolsimony Dassee* v. *Sm. Sudevi Dassee*.[5] What

(1) (1844) 7 Beav. 455.
(2) (1801) 6 Ves. Jun. 70.
(3) (1844) 6 Q. B. 637.
(4) [1922] 1 K. B. 640.
(5) (1899) 3 Cal. W. N. 361.

happened there was that the defendant had not been given fair notice of the proceedings held *ex parte* against him, and the Court thought that the arbitrator's conduct had been hasty and improper. Finally, there is the case of *Anderson* v. *Wallace*.[1] Here one of the parties was asked whether he admitted or disputed certain items, and a valuer was consulted. These are the cases relied on by Mr. Setalvad for the appellant.

Mr. Thakor, who appeared for the respondent, has made out a case of what may be called "ministerial acts". His contention was that the incident of calling in the plaintiff and employing him to sort the papers and to find exhibits amounted to no more than using him for the purpose of what may be called ministerial as distinguished from judicial acts, and that this principle covers the case.

The first authority relied on by Mr. Thakor was *Bignall* v. *Gale*.[2] The irregularity in that case was lack of notice to one of the parties, but it was held that since that person had had repeated notice, there was a fair inference that he had given up the whole business, and it was held that the continuation of the proceedings in his absence was not an irregularity. In *Rolland* v. *Cassidy*[3] a point of law which arose out of the proceedings was decided in the absence of the parties. In *Buta* v. *Municipal Committee of Lahore*[4] the arbitrator obtained the opinion of the lawyer who had drafted the agreement as to the meaning of certain clauses, and this action was held not to be legal misconduct. The next case relied on, which is not in the official reports, is *Manindra* v. *Mahananda*.[5] It was held that the reception of the written statement put in by one party in the absence of the other is not a judicial act.

These are the cases we have been referred to in the course of the arguments as to the limits of the doctrine of legal

(1) (1835) 3 Cl. & F. 26.
(2) (1841) 9 Dow. 631.
(3) (1888) 13 App. Cas. 770.
(4) (1902) 29 Cal. 854.
(5) (1911) 15 Cal. L. J. 360.

1934

MUNICIPALITY OF AHMEDABAD v. RAVJIBHAI BHAILAL

Murphy J.

misconduct. The principle underlying them seems to be that where there has been an opportunity afforded to one side to get an advantage with the arbitrator over the other, either by lack of notice, or by the absence of the other side, and there is even a remote possibility that the advantage so obtained may have unconsciously influenced the mind of the arbitrator, the proceedings are vitiated by a breach of the principles of natural justice, and whether this is so or not must depend on questions of fact.

In the present case, we have accepted completely Mr. Shivdasani's explanation that when he sent for the plaintiff, it was only for the purpose of getting the disordered records sorted out, and certain exhibits traced and that throughout the three interviews there was no question of the plaintiff stating his case or pressing his contentions before Mr. Shivdasani. We think on the merits that all that the plaintiff did was what Mr. Shivdasani says he did, and that so much is covered by the ruling relied on by Mr. Thakor for the respondent, for in all the cases cited by the other side, it seems to us there was an element of misconduct beyond the mere ministerial acts which are spoken of as having happened in the present case.

The next point raised by Mr. Thakor was that even if there was a technical irregularity, it would not be a ground good enough to set aside the award, since in fact it has been waived by the appellant. The waiver is worked out from the report made by Mr. Bhagat, which I have already referred to, to the Municipality urging them not to grant a further extension of time. Mr. Thakor also stated that Mr. Bhagat himself had waived the irregularity, for it seems he was aware of the sorting of the papers from the first day of the proceedings, and continued to attend without protest until December 18. We are not sure that Mr. Bhagat's waiver of the irregularity would really have the effect of binding the Municipality, but there is no

doubt that the fact of this irregularity, if it was one, was brought forcibly to the notice of the Municipality by Mr. Bhagat on the 18th, that they considered it at a meeting held on the same day, and that they chose to disregard what he said and to grant further time to the arbitrator.

On this point Mr. Thakor has relied on the case of *Cursetji Jehangir Khambatta* v. *W. Crowder*,[1] where a party aggrieved by an irregularity knew of it, but did nothing by way of protest; and on *Ardesar Hormusji Wadia* v. *The Secretary of State for India in Council*,[2] where one arbitrator was absent throughout the proceedings before the Mamlatdar acting as Land Acquisition Officer, and his absence was never objected to, it was held that the Government could not have the award set aside on this ground as their representative the Mamlatdar had acquiesced in the absence of the third arbitrator; also on *Chowdhry Murtaza Hossein* v. *Mussumat Bibi Bechunnissa*,[3] where the principle enunciated is that a party having taken his choice cannot afterwards be allowed to have the award set aside when he should have objected at the time. The point is put clearly in Russell on Arbitration and Award, 12th edition, at p. 436, where the learned author observes :—

"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.

"The other alternative is to submit to the irregularity, and forego any rights he may have to object to the award on that ground when it is made, for he cannot lie by and then object to the award if it is against him."

Mr. Setalvad has argued that this doctrine is modified by another passage at p. 443, where it is stated :—

"There is a marked distinction between an irregularity passed over when all parties are present and an irregularity committed when the parties are not present. The latter may be incapable of being set right except by agreement of the party injured."

[1] (1894) 18 Bom. 299.

[2] (1872) 9 Bom. H. C. 177, at pp. 187-8.

[3] (1876) 26 W. R. 10.

1934

MUNICIPALITY OF AHMEDABAD v. RAVJIBHAI BHAILAL

Murphy J.

We think, on considering these cases, that in fact the Municipality did waive this right to protest and to have the award set aside on this ground. But as our finding is that what happened does not amount to legal misconduct, a decision on this point is not necessary to the present appeal.

We think that the learned Subordinate Judge was correct in ordering the award to be filed and a decree to be drawn up in its terms, and we confirm his decree and dismiss this appeal with costs.

MACKLIN J. I agree and have nothing to add.

Appeal dismissed.

J. G. R.

ORIGINAL CIVIL.

Before Mr. Justice Blackwell and Mr. Justice Broomfield.

1934
April 20

MUNCHERJI CURSETJI KHAMBATTA (ORIGINAL RESPONDENT), APPELLANT *v.* JESSIE GRANT KHAMBATTA (ORIGINAL PETITIONER), RESPONDENT.*

*Divorce—Marriage—Marriage between a Mahomedan domiciled in India and a Scotch woman—Marriage in Scotland—Wife embracing Mahomedanism—*Talak *or divorce by husband according to Mahomedan law—Validity of—Specific Relief Act (I of 1877), section 42—Declaration under, not judgment* in rem.

A Mahomedan domiciled in India, who marries in Scotland, in accordance with the ceremonies there requisite for the celebration of a valid marriage, a Scotch woman, domiciled in Scotland and who professes the Christian religion, can, on his return to India if the woman embraces the Muslim faith, divorce her by pronouncing a *talak* in accordance with the provisions of the Mahomedan law. Such divorce will be recognised in India as legally dissolving the marriage celebrated in Scotland.

Rex v. *Hammersmith, Superintendent Registrar of Marriages: Mir-Anwaruddin, Ex-parte*,[1] distinguished.

A declaration by a Court in India in a suit under section 42 of the Specific Relief Act, 1877, that the plaintiff is not the spouse of the defendant does not operate as a judgment *in rem*.

Decision of Beaumont, C. J., affirmed.

*O.C.J. Appeal No. 54 of 1933: Suit No. 814 of 1933.

[1] [1917] 1 K. B. 634.