APPELLATE CIVIL

Before Gurdev Singh, J.

HARISH CHANDRA SAKSENA,—*Appellant.*

versus

THE UNION OF INDIA,—*Respondent.*

F.A.O. 66-D of 1957.

1965

January, 11th

Arbitration Act (X of 1940)—Schedule I clause 3—Entering on the reference—When does an arbitrator enter on the reference—Award made more than four months after entering on the reference—Whether a nullity.

Held, that an arbitrator enters on the reference when he takes upon himself the office of the arbitrator and exercises some functions as arbitrator. When the arbitrator fixes the date of hearing and issues directions as to pleadings, he exercises the functions of an arbitrator and from that date he should be treated as having entered on the reference. It is not necessary that both the parties must be before him or that there must be some previous peremptory order compelling the arbitrator to conclude the hearing *ex parte*. Issuing mandatory direction for pleadings or for particulars or for interrogatories or fixing peremptory dates for hearing can only be done by the arbitrator when he has begun his work as such and taken upon himself the functions of an arbitrator.

Held, that an award made by an arbitrator beyond the period of four months after entering on the reference is a nullity unless the period is extended by the Court.

First Appeal (under section 39, Arbitration Act, 1940) from the order of Shri Jagmohan Lal Tandon, Sub-Judge, 1st Class, Delhi, dated the 11th day of April, 1957, making the award the rule of the court, and directing that a decree sheet be prepared in terms of the award and leaving the parties to bear their own costs.

V. D. MAHAJAN, ADVOCATE, for the Petitioner.

S. N. SHANKER, GOVT. ADVOCATE, for the Respondent.

ORDER

Gurdev Singh, J. GURDEV SINGH, J.—This first appeal is directed against the order of Shri Jagmohan Lal Tandon, Subordinate Judge, dated 11th April, 1957 whereby he rejected the objections preferred under sections 30 and 33 of the Indian Arbitration Act, by the appellant Harish Chandra Saksena and making the award of the arbitrator dated 14th July, 1955 rule of the court directed that a decree be prepared in accordance with it.

Tenders had been invited by the Union of India for executing certain repair works. On the 11th December, 1951, the appellant Harish Chandra Saksena submitted his tender in which he quoted rates 149 per cent above those given in the Schedule 'A' of the tender. This tender was accepted by the C.W.E. Delhi Area, Lieut.-Col. Ghumman, on the 17th December, 1951. It appears that in the meantime on 16th December, 1951 the appellant realised that there had been a mistake in the filling up the tender inasmuch as in quoting rates he had wrongly put down 149 instead of 249 per cent above the rates given in the Schedule 'A'. Accordingly, on the 16th December, 1951, the appellant sent a letter of revocation, Exhibit P. 2, to the authorities under the certificate of posting Exhibit P. 3. This letter, according to the records of the respondent, however, reached the authorities concerned on the 24th December, 1951, but, as has been noticed earlier, prior to the 17th December, 1951, the appellant's tender had been accepted by Lieut.-Col., G. S. Ghumman. A dispute having thus arisen between the parties, on 9th February, 1955, the Union of India referred it for adjudication to Lt.-Col. G. S. Ghumman as sole arbitrator in accordance with the terms and conditions of the contract in dispute.

On the 15th February, 1955, the arbitrator sent letters to the parties wherein, after stating that he had accepted his nomination to act as arbitrator, he called upon them to submit their respective pleadings to him. The claimant was directed to put in a detailed statement of claim along with a copy of the pleadings by the 2nd March, 1955. The opposite party was asked to furnish a written statement and pleadings by the 14th March, 1955. After the parties had complied with these directions, on the 2nd June, 1955, the arbitrator issued a formal notice to the parties to appear

before him on the 15th June, 1955, warning them that if any of the parties absented himself he shall be proceeded against *ex parte*, if so requested by the other party to the reference. On the 15th June, 1955, the appellant absented himself and after taking the necessary proceedings *ex parte*, on the 14th July, 1955, the arbitrator gave his award under which the appellant Harish Chandra Saksena was directed to pay Rs. 7,176 to the Union of India. On the 7th November, 1955, an application under section 17 of the Arbitration Act for filing the award was made by the Union of India. Thereafter, on the 17th February, 1956, the appellant Harish Chandra Saksena filed an objection petition under sections 30 and 33 of the Indian Arbitration Act assailing the validity of the arbitration proceedings and the award. Besides pleading that there was no valid contract between the parties nor any agreement to refer the matter to arbitration, a number of objections were raised to the validity of the award and the conduct of the proceedings by the arbitrator, one of which was that the award, having not been made by the arbitrator within four months of the day he entered upon the reference, was null and void. Being of the opinion that there was no defect in the award, the learned Subordinate Judge dismissed the appellant's objections and directed that a decree in accordance with the award shall issue.

In assailing the order of the Subordinate Judge the appellant's learned counsel has contended:

(1) that the award is a nullity having been made beyond the prescribed period of four months from the date on which the arbitrator entered on the reference;

(2) that the reference being unilateral and not with the consent of the appellant was invalid;

(3) that there was no lawful contract between the parties as no valid contract was executed between the parties in accordance with the provisions of Article 299 of the Constitution; and

(4) that Lt.-Col. G. S. Ghumman who, according to the applicant's case, had accepted the appellant's tender, was not the authority competent to accept it.

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This last objection, however, does not find any place in the grounds of appeal and I see no justification for allowing it to be urged at the hearing before me. After hearing the parties' Counsel I am of the opinion that the first objection to the validity of the award is well-founded and must prevail, and once it is found that the award has been made beyond the period of limitation, it will not be necessary to deal with the other objections.

It is not disputed that unless the time was extended—and this has not been done in the case before us—the arbitrator was bound to make his award within four months of his entering upon the reference. In returning the finding that the award was made within the prescribed period of four months, the learned Subordinate Judge has held that this period of four months has to be counted from 15th of June, 1955, which according to him, has the day on which the arbitrator entered upon the reference. The appellant's learned counsel seriously challenged this later premises and has, on the other hand, maintained that the arbitrator entered upon the reference much earlier, on the 15th of February, 1955, and accordingly the award made on 14th of July, 1955, was beyond the prescribed time. Thus the short question that needs considerations is: "When did the arbitrator enter upon the reference?"

For proper appreciation of the matter, it is necesary to turn to the relevant facts. The reference was made to Lt.-Col. G. S. Ghumman as sole arbitrator on 9th of February, 1955. It was on 15th of February, 1955 that the arbitrator sent letters to the parties wherein, after informing them that he had accepted his appointment as sole arbitrator, he called upon them to submit their respective pleadings to him. The claimant was required to furnish a detailed statement of his claim along with a copy of his pleadings by the 2nd of March, 1955, while the opposite party was directed to furnish the written statement and his pleadings by the 14th of March, 1955. The parties duly complied with these directions and, thereafter, on 2nd of June, 1955, the arbitrator issued a formal notice to the parties to appear before him on 15th of June, 1955, making it clear to them that, if any of them failed to appear *ex parte* proceedings would be taken. On the 15th of June,

1955, the appellant absented himself. Proceedings were taken *ex-parte* against him and on 14th of July, 1955, the arbitrator gave his award.

In returning the finding that it was only on 15th of June, 1955, that the arbitrator entered upon the reference, the learned trial Judge observed as under:—

> "After hearing the arguments of the learned counsel for the parties and after looking into the reference on the file, I feel inclined to hold that the arbitrator entered into the reference on 15th June, 1955. If the parties had not appeared before him on 15th June, 1955, the arbitrator was entitled to proceed *ex-parte*. Previous to that whatever letters were issued by the arbitrator to the parties, they were of preliminary nature. For instance in the letter which he sent to the parties on 15th February, 1955, he informed the parties that the date, place of the hearing shall be notified later on. After that he wrote another letter suggesting the date as 15th April, 1955 and sought the consent of the parties if that date would suit them. These two communications will not justify an inference that the arbitrator had entered upon the reference on any of those two dates. I, therefore, hold that the period of four months shall be calculated from 15th June, 1955 and as the award was made on 14th July, 1955, it is to be taken as within time".

In coming to this finding the learned Subordinate Judge relied upon *Baker* v. *Stephens* (1), where it was held that an arbitrator enters upon a reference, not when he accepts the office or takes upon himself the functions of arbitrator by giving notice of his intention to proceed, but when he enters into the matter of the reference, either with both parties before him or under a peremptory appointment enabling him to proceed *ex parte*. The appellant's learned counsel has contended that this is no longer good law and the authority of this decision has been shaken by a recent decision of the House of Lords in

(1) (1867), 2 Q.B. 523.

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Lossifoglu v. *Coumanteros* (2). He has also urged that it is the rule laid down in the later decision which has been followed by the various High Courts in this country. Particularly reliance is placed upon the following observations of Scott, L.J., in *Lossifoglu's case*:—

> "The question raised by the appeal really resolves itself into this: when can arbitrators be said to enter upon a reference? In my view they enter upon it as soon as they have accepted their appointment and communicated with each other about the reference."

Both the English authorities, referred to above, came up for consideration before a Bench of the Calcutta High Court in *Messrs Bajrangal Laduram* v. *Ganesh Commercial Co.* (3). Harries, C.J., who delivered the judgment of the Court, after quoting at length from these authorities and referring to some other English decisions, observed as follows:—

> "The English Courts have quite clearly changed their view as to the meaning of the term 'entering upon a reference' and the most recent decision in *Lossifoglu* v. *Coumantaros* (2), cannot possibly be reconciled with the case of *Baker* v. *Stephens* (1), * * * * *
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> From the report it would appear that the case of *Baker* v. *Stephens* (1), * * was not cited either to the Divisional Court or to the Court of Appeal, But the decision of the Court of Appeal is an emphatic one."

Thereafter the learned Chief Justice relied upon the observations of Scott. L.J., which have been reproduced earlier. The decisions in *Sardar Mal Hardat Rai* v. *Sheo Baksh Rai Sri Narain* (4), *Nanda Kishore* v. *Bally Co-operative Credit Society Ltd.* (5), and *Ranganathan* v. *Knrishanayya* (6),

(2) (1941) 1 K. B. 396.
(3) A.I.R. 1951 Cal. 78.
(4) A.I.R. 1922 All. 106.
(5) A.I.R. 1943 Cal. 255.
(6) A.I.R. 1946 Mad. 504.

were considered. The learned Chief Justice did not approve of the view taken in them. On a consideration of the various authorities the learned Chief Justice summed up his conclusions in these words:—

> "It is clear that the attitude of the English Courts towards arbitrators had changed very materially. In earlier decisions such as in *Baker* v. *Stephens* (1), * * the tendency was to deny jurisdiction to the arbitrators in any case where such a view was possible. This view has changed materially in later years and now the tendency of the Courts is to uphold the jurisdiction of arbitrators whenever such a view is possible. That change in attitude does in my view probably account for the conflicting decisions in *Lossifoglu* v. *Coumantaros* (2), and *Baker* v. *Stephens* (1). This later view of the English Courts accords with my own view and with the view of Sinha, J., and I think must be accepted in India."

Being of this opinion, the learned Chief Justice ruled that the arbitrators had entered upon the reference when they had both decided to accept their appointment and had taken steps in concert to obtain from the parties the necessary statements and papers to enable them to decide the matter and make the award. The learned Chief Justice did not accept the dictum in *Sardar Mal's* case, (4) that an arbitrator entered upon the matter of reference not when he accepted the office or took upon himself the duty, but when the parties were before him, or under some peremptory order compelling him to conclude the hearing *ex parte*. Chatterjee, J., agreeing with the learned Chief Justice said:—

> "In my view, the arbitrators enter upon reference when they take upon themselves the office of arbitrators and exercise some functions as arbitrators. If they meet and determine the date of hearing and issue directions as to pleadings they exercise the functions of arbitrators and, therefore, they should be treated as having entered on the reference."

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Dealing further with the same question, the learned Judge observed:

> "The arbitrators enter upon reference when they actually begin to discharge the functions of arbitrators and that does not connote that both the parties must be before the arbitrators or that there must be some previous peremptory order compelling the arbitrators to conclude the hearing *ex-parte*. Issuing mandatory direction for pleadings or for particulars or for interrogatories or fixing peremptory dates for hearing can only be done by the arbitrators when they have begun their work as such and taken upon themselves the functions of arbitrators."

With respect, I find myself in complete agreement with the view taken by Harries, C.J., and Chatterjee, J., in *Messrs Bajranglal Laduram* v. *Ganesh Commercial Co. Ltd.*. (3), referred to above. In the instant case when the arbitrator sent the letters to the parties on the 15th of February, 1955, he not only acquainted them with the fact that he had accepted his appointment as arbitrator but also called upon them to furnish their respective pleadings by a certain date. These directions could not have been issued by him unless he had commenced functioning as the sole arbitrator. The decisions of the various High Courts of this country subsequent to *Messrs Bajranglal Laduram's* case also favour this view. In *Dr. V. Mehta* v. *P. P. Joshi* (7). Tendolkar, J., while agreeing with the contention that an arbitrator does not enter upon a reference the moment he accepts his appointment but must also take upon himself and exercise the functions of an arbitrator, observed that the exercise of a function does not necessarily mean hearing the matter on merits and held that where an arbitrator held preliminary meeting and gave directions to the parties as to the progress of the arbitration proceedings before him, he did exercise the functions of an arbitrator and must, therefore, be taken to have entered upon the reference. The rule laid down in *Lossifoglu's* case was followed.

In *Soneylal Thakur* v. *Lachhminarain Thakur* (8), a Division Bench of that Court held that an arbitrator enters

(7) A.I.R. 1956 Bom. 146.
(8) A.I.R. 1957 Pat. 395.

upon a reference when after accepting the reference, he applies his mind and does something in furtherance, in execution of the work of arbitration. The view taken by the Calcutta High Court in *Messrs Bajranglal Laduram's* case was approved.

I, thus, find that Lt.-Col. G. S. Ghumman had entered upon the reference on the 15th of February, 1955, and since the award was given by him beyond the period of four months thereafter, on the 14th of July, 1955, it was a nullity. Of course, the time for giving the award can be extended by the Court, but no such prayer seems to have been made to the learned Subordinate Judge. Even in the course of hearing of this appeal, no application for extending the time (assuming that such an application was competent at the appeal stage) has been moved. The award being a nullity could not be made a rule of the Court. I, accordingly, accept the appeal, and set aside the order of the trial court and the arbitrator's award dated 14th of July, 1955. The appellant shall be entitled to the costs of this appeal.

B.R.T.

LETTERS PATENT APPEAL

Before D. Falshaw, C. J., and Mehar Singh, J.

UMRAO SINGH,—*Appellant.*

versus

NIKKU MAL GUPTA,—*Respondent.*

L.P.A. No. 45-D of 1962.

1965

March, 2nd.

Code of Civil Procedure (V of 1908)—S. 60(1)(ccc)—Proviso—Whether in conflict with S. 60(3)—Sub-section (3)—Whether renders the Proviso inoperative—Proviso to clause (ccc)—"Any other law"—Meaning of — "Debts sought to be recovered"—Meaning and scope of — Whether include "judgment debt" or "decretal debt"—Residential house of judgment-debtor attached in execution of a money decree—Judgment-debtor by compromise with decree-holder creating charge on that house—Such charge—Whether can be enforced by decree-holder—Registration Act (XVI of 1908)—S. 17—Deed of compromise creating charge on immovable property of more than Rs. 100 presented to Court—Whether requires registration.