23

IN THE SEYCHELLES COURT OF APPEAL

KANNAN PADAYACHY **APPELLANT**

VERSUS

MURIELLE BEDIER **RESPONDENT**

Civil Appeal No: 2 of 2001

[Before: Ayoola, P., Pillay & Matadeen, JJ.A]

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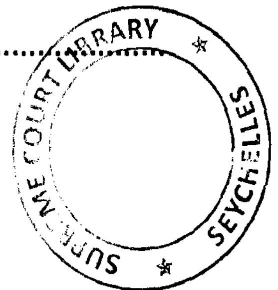
Mr. R. Valabhji for the Appellant
Mr. F. Bonte for the Respondent



JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

In this appeal from the decision of the Supreme Court (Juddoo J) the two issues for determination are: first, whether the proceedings are vitiated by the fact that the learned judge had struck out the two applications and had discountenanced the appellant's reply to the respondent's application on grounds which he had raised suo motu without according the parties an opportunity of being heard on those grounds and, secondly, whether the Supreme Court could review the chief arbitrator's report on its merits, the parties having agreed that the report should be final and binding.

To put these issues in proper perspective it is expedient to state the background facts. On the 13th April 1998 the respondent obtained judgment against the appellant at the Supreme Court in the sum of SR197,520.33 with interest at the commercial rate upon her claim in the sum of SR654,000, being claim made on an alleged breach of partnership, agreement between the parties. In the suit the appellant alleged a dissolution of the partnership on 13th February 1995 and claimed that upon the dissolution of the

partnership, after balancing all debts and credits, there was a balance of about SR50,000 to be distributed between the parties. There was placed before the Supreme Court in that suit two reports: one by an accountant, Mr. Ramani, engaged by the appellant, and the other by Mr. Sinon, on behalf of the respondent. The two reports were in conflict as to the amount the parties were entitled to on the dissolution of the partnership.

Mr. Ramani was of the opinion, at first, that the respondent was entitled to the sum of SR28,346.69 and, in a second opinion, that she was entitled to SR9,533.47. Mr. Sinon, on the other hand, was of the opinion that the respondent was entitled to SR309,520.33. The Chief Justice who tried the suit, accepted Mr Sinon's opinion. He rejected the respondent's claim for moral damages and after deducting the sum of SR130,000 which the respondent had received by way of loan from the partnership, entered judgment for the respondent, as earlier stated.

The appellant appealed to this court. At the hearing of the appeal on 27th November 1998 the parties filed a consent judgment signed by both counsel, in the following terms:

> "*1. Judgment by consent be made Judgment of the Supreme Court.*
>
> *2. That the Judgment of the Supreme Court be set aside.*
>
> *3. The matter be referred to Mr. Bernard Pool, Chartered Accountant, as Chief Arbitrator assisted*

> *by Mr. Paul Sinon and Mr. Ramani to determine the amount that the Appellant should legally pay to the respondent on the dissolution of the partnership as per Accounts filed on record. The Chief Arbitrator shall file his report on the findings which shall be final and binding on the parties.*"

Pursuant to the consent judgment the Chief Arbitrator mentioned therein filed his report. By his motion dated 24th November 1999 counsel, on behalf of the respondent, moved the court for an order declaring the report to be final and binding on the parties.

For his part, counsel on behalf of the appellant filed an objection dated 2nd November 1999 to the report of Mr Bernard Pool dated the 27th September 1999 and received on the 25th October 1999 on grounds stated as follows:

> "*(a) Lack of jurisdiction and competence for want of a hearing.*
>
> *(a) Complete absence of evidence.*
>
> *(b) The wrongful adoption of a method of valuation rejected by the Court of Appeal.*
>
> *(c) Miscarriage of justice and*
>
> *(d) Wrongful award.*"

There was filed, also on behalf of the appellant, an application for leave to apply for an order of certiorari by which the appellant sought relief on the same grounds as those stated in the objection to the report.

Finally, counsel on behalf of the appellant filed an application described as being "by way of reply to the motion dated 24th November 1999 filed on behalf of the plaintiff" for the setting aside of the award of the arbitrators.

When the matter came before Juddoo, J., Mr Valabhji, counsel for the appellant, proceeding on the footing that the supervisory jurisdiction of the court could not be ousted by the words that the "Chief Arbitrator shall file his report on the findings which shall be final and binding on the parties", made submissions in regard to the grounds which were common to all the applications he filed. He questioned the findings and conclusions of the Chief Arbitrator and the reasons for those conclusions.

Juddoo, J., struck out the application filed by the appellant titled objections to the report of Mr Bernard Pool and the application for leave to apply for an order of certiorari on the grounds, in regard to the latter, that it was filed out of time as it had not been brought within the time prescribed by Rule 4 of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, 1995 (SI 40 of 1995) and not in consonance with the form prescribed by Rule 2 (I) of the said Rules; and, in regard to the former, on the ground that it was not in proper form, it not having been made in form of a motion accompanied by an

affidavit of facts pursuant to sections 121 and 122 of the Code of Civil Procedure. He purported to discountenance the reply filed to the motion whereby the respondent had sought an order of the court below declaring the Chief Arbitrator's report as final and binding, on the ground that the reply was not in form of an affidavit in reply filed pursuant to Section 125 of the Seychelles Code of Civil Procedure.

Notwithstanding that he has struck out the applications and discountenanced the reply filed by the appellant, the learned judge, nevertheless, considered the respondent's application as if it had been opposed, adverting to and considering the grounds of opposition contained in the full address of Learned counsel for the appellant. Having done so, he came to the following main conclusions:

1. *The only requirement which needed to be satisfied at that stage was whether the said report filed was in compliance with the order issued by this court upon the agreement of both parties.*

2. *There was nothing in the consent judgment stipulating that a "unanimous report" of the Chief Arbitrator and the assessors were to be filed, but rather what the consent judgment prescribed was that the Chief Arbitrator should file "his report".*

3. *The Supreme Court was not empowered to interfere with the findings of the Chief Arbitrator, which was in consonance with the reference order.*

In the result, the Learned Judge entered judgment for the respondent in the sum of SR142,843.50, being the sum found payable by the appellant to the respondent by the Chief Arbitrator.

In this appeal from that decision the grounds of appeal raised were as follows:

> "(a) *Failure to determine at the outset whether one partner is legally and personally liable to another partner for any amount on the dissolution of the partnership between them.*
>
> (b) *Wrongful dismissal of the application for certiorari and of the objection to the report of Mr. Bernard Pool.*
>
> (c) *Wrongful valuation of the net assets to be distributed between the parties.*
>
> (d) *Absence of hearing.*
>
> (e) *Absence of any pleading or arguments that relate to the reasons for dismissal of defendants (sic) three applications.*"

At the hearing of the appeal learned Counsel for the appellant submitted that the learned trial Judge *suo motu* raised the grounds on which he struck out the appellant's application and discountenanced the reply filed on his behalf and did not hear arguments of counsel on the grounds.

In his written submission learned Counsel for the respondent sought to show that the learned judge was right in the steps he took. However, it is

evident that the question is not whether the judge had been right in his decision to strike out the applications and to discountenance the appellant's reply but, rather, whether he was right in raising those issues by himself and having done so, in pronouncing on them without hearing the parties. We feel no hesitation in holding that he was wrong. Although in certain circumstances a court can raise issues *suo motu* without appearing to have descended into the arena, where, in appropriate cases, a Judge so raises an issue, it is obligatory on him to invite counsel to address him on the point before he comes to a decision on the issue. Failure of a judge to give a party an opportunity to be heard on a material issue, whether raised by him or by any of the parties, is contrary to the principle of fair hearing.

The question is whether by striking out the appellant's applications and reply without giving him a hearing, the proceedings are vitiated. The right that a party has to an opportunity to be heard is not based on technicality but on the demands of fundamental justice. In most cases a denial of hearing on an issue will vitiate the proceedings. However, there may be circumstances in which, in substance, it cannot be said that the party claiming to be aggrieved has sustained any significant detriment. This case falls into that category. Although the learned Judge had struck out the applications and reply by which the appellant had raised grounds in opposition to the chief arbitrator's report and by which he had sought to have it set aside, the judge did not do so *in limine* but in the course of his judgment, after hearing counsel for the parties on the grounds of the appellant's applications and reply. Notwithstanding that in the course of his judgment he had raised the issue of the regularity of the forms of the applications and of the reply and had struck them out, he nevertheless

considered the address of counsel for the appellant on the substance of the grounds of his objection to the report as contained in the applications and reply and in the addresses of counsel before he came to a decision in the matter.

The learned judge regarded as the core issue in the case whether the report filed by the chief arbitrator was in compliance with the consent order issued by this court. He found that the report complied with the order. The term of the consent order was that Mr. Bernard Pool, as chief arbitrator assisted by Mr. Paul Sinon and Mr. Ramani should determine the amount that the appellant should legally pay to the respondent on the dissolution of the partnership as per accounts filed on record. It was thus clear that the Chief Arbitrator was to work from and upon "accounts filed on record" and not upon any fresh evidence to be adduced. It is evident that by holding that the report was in compliance with the consent order, the learned Judge did not agree with the contention raised by counsel for the appellant in his address that there ought to have been a "hearing" by the Chief Arbitrator. Rather, he agreed with counsel for the respondent that the Chief Arbitrator was supposed to work from the documents on record. The learned Judge disposed of the matters of merit raised both in the applications and reply filed in opposition to the award by holding that it was misconceived to urge the Supreme Court to review the report on its merits as the Court was not empowered to interfere with the merits.

From these views which the Judge had expressed on the grounds of the objection to the report after hearing counsel for the parties, it is clear that no significant detriment had been occasioned to the appellant by the striking

out of his applications and reply. Issues that would have been addressed had the applications and reply not been struck out, were, in fact, addressed and pronounced upon by the learned judge after both counsel had addressed him on them. In the circumstances we hold that the proceedings were not vitiated by the striking out of the applicant's applications and reply to the respondent's application.

The second issue is whether the learned Judge was right in refusing to review the chief arbitrator's report on its merits. That the Court will not review an award on its merits has been put in several ways. In Russell on Arbitration (12th Edn) at p. 402 it was stated thus:-

> *"The decision to which the arbitrator really comes, as soon as he expresses it in his award, is final both as to law and fact. No decision therefore, at which he arrives, if properly expressed in the award, can be a mistake or affect the finality of his award on that ground"*

On the same page, further down, it was stated:-

> "... *if the arbitrator's decision were allowed to be reviewed, the award of the arbitrator would be capable of being impeached, and to that proposition the courts have never assented.*" (emphasis ours).

Some old decisions of the Supreme Court of Mauritius support the same proposition. Thus in Dumaine v Jerome & Co (1862) MR43 it was held that the Supreme Court cannot review the judgment of duly appointed arbitrators on the mere allegation that in their judgment, they have come to

an erroneous conclusion. Also in Pastor v Bolger 1864 MR 72 it was held that when an arbitrator is empowered finally to decide the matter at issue between parties, the Court cannot review his decision unless it is shown that the arbitrator has exceeded the limits of his powers.

On the terms on which the parties had asked the Court to enter a consent judgment, the parties have chosen an order that a named Chief Arbitrator with specific mandate be appointed. It would appear that in so far as reference to arbitration thereby ordered could be said to be under section 205 by the Seychelles Code of Civil Procedure (Cap 213), the award of the arbitrator could be objected to and set aside only on the grounds of corruption or misconduct of the arbitrator or of concealment of either party of any matter which ought to have been disclosed or willfully misleading or deceiving the arbitrator, as provided for in Section 207 of Cap 213.

It was stated in the proviso to section 207 of Cap 213 that *"an award may be modified by the Court after hearing both parties, if it has left undetermined any of the matters referred to arbitration or if it has determined any matter not referred to arbitration, or if the award contains some obvious error; or, in any such case, the Court may send the award back to the arbitrator or umpire to be modified"*. We venture to think that an *"obvious error"* would be an error on the face of the award and no such error existed in this case.

Learned Counsel for the appellant relying on Czarnikov v Roth Schmidt & Co [1922] KB 478 had argued that a final *"arbitral award is not always final"*. The case of Czarnikov being a decision on the question

whether parties can by agreement oust the jurisdiction of the court is not apposite to the question whether the Court can reopen for scrutiny a dispute submitted to arbitration by reviewing an award on its merits. The principle that when an award is final and binding the court will set it aside or remit it on ground which do not include a reconsideration of merits of the award is a principle of law not imposed by parties in ouster of the jurisdiction of the Courts. While the parties cannot wholly exclude access to the Courts merely by making the decision of the arbitrator final, the Courts themselves, barring statutory provisions, have defined and delimited the scope of their intervention.

The word *'final'* in general only means *"without appeal"*. (See Russell (op.cit) at page 347). In the final analysis, the question was, as put by the learned Judge, in his characteristically succinct and lucid manner: was the report in compliance with the consent order? We share his rejection of the appellant's counsel's argument that it was not. The Chief Arbitrator was mandated to determine *"the amount that the appellant should legally pay to the respondent ... as per the Accounts filed on record"*. The Chief Arbitrator had assessed such amount, using the accounts filed on record. The conclusions of the trial judge rejecting the argument that the report must be a unanimous opinion of the Chief Arbitrator and the two persons directed to assist him, and that the argument that the appellant had nothing to pay personally was misconceived at that stage of the proceedings, have not been successfully questioned on this appeal. We agree with the conclusions.

For the reasons we have stated, we reject the arguments of learned counsel that would involve us in an examination of what counsel described