HARISCHANDRA PEIRIS

v.

HEMACHANDRA PEIRIS

SUPREME COURT.
BANDARANAYAKE, J.
PERERA, J. AND
WIJETUNGA, J.
S.C APPEAL NO. 41/92.
C.A. LA NO. 1602/1990.
D.C. KALUTARA NO. 3714/SPL.
DECEMBER 08, 1993.

Agreement for Judge to act qua arbitrator in case – Validity.

Where both sides entered into a deliberate agreement and requested the District Judge to decide the matter and undertook to abide by the decision of the Judge, and the District Judge accepted and acted on this request, he was not acting judicially but *qua* arbitrator.

The fact that issues were raised and evidence was led does not in any way vitiate the agreement entered into by the parties to abide by the decision of the District Judge on the matter of the agreement which was to determine the assets of the third respondent company.

Cases referred to:

1. *Mudalihamy v. Appuhamy* 39 CLW 103.
2. *Thangarajasingham, v. Iyampillai* 64 NLR 569.
3. *William Peris v. Lucia Peris* Brown's Reports 420, 421.

APPEAL from judgment of the Court of Appeal.

Faiz Musthapha P.C. with *Manohara de Silva* for appellant.
S. Sivarasa P.C. with *S. Mahenthiran* and *Sampath Welgampola* for respondents.

Cur. adv. vult.

March 24, 1994.
PERERA, J.

This is an appeal from the order of the Court of Appeal dated 24.01.92 holding that the Petitioner had no right of appeal to that Court as the judgment of the District Court in DC Kalutara Case No. 3714/Spl. (P2) clearly showed that the parties had agreed to the matter being decided by the Learned District Judge as an Arbitrator. (Vide P7).

The Supreme Court in the present case granted Special Leave to the Petitioner on the following question namely – Whether the Court of Appeal erred in holding that the order appealed against was an order made by the District Judge *qua* arbitrator.

The facts relevant to this matter are briefly as follows:

The First and Fourth Respondents to this application filed papers in the District Court of Kalutara under the provisions of the Companies Ordinance (Chapter 145) and prayed that the Third Respondent company be wound up compulsorily.

The Petitioner filed objections to this application and stated *inter alia* that the properties from which income was forthcoming (being the subject matter of District Court Kalutara Case No. 115/MR) were held in trust by the Third Respondent Company for and on behalf of the father of the petitioner and the other two Respondents.

This matter came up for inquiry before the Learned District Judge on 02.06.82. On this date the parties arrived at a settlement which was recorded as follows:

(1) The Petitioner and the Respondent shall each forward a list with a complete description of the movable and immovable

properties and the income of the said Third Respondent company. If any objection is raised by one party against the list provided by the other, the District Judge shall hold an inquiry and make an order thereon, and the parties signified their consent and agreed to abide by the said order.

(2) Once a final decision is made in regard to the matters set out in paragraph (1) the total income and value of the property shall be divided into four parts which will be given to L. D. H. Peiris, L. H. R. Peiris, L. C. H. Peiris and L. R. H. Peiris, respectively.

(3) The Court shall then grant permission to the Petitioner to wind up the Third Respondent Company without any objection from the other parties. (Vide proceedings dated 02.06.82 marked P1)

Accordingly the Petitioner and the Respondent filed the affidavits in terms of the above settlement. However as a dispute had arisen between the parties on the matters set out in paragraph (1) of P1 the District Judge was called upon to resolve this dispute after inquiry as agreed upon between the parties.

At the inquiry held into this matter by the District Judge the following issues were raised:

(i) Are the immovable properties mentioned in schedule A to the petitioner's affidavit absolutely owned by the company?

(ii) Are the movable properties mentioned in Schedule B to the Petitioner's affidavit owned by the company?

(iii) Were the incomes mentioned in schedules C, D, E, F and G of the affidavit of L. D. H. Peiris derived by the company from the above properties?

(iv) Struck off

(v) Struck off

(vi) (a) Whether deed P2 is a valid deed as the properties mentioned in that deed have not been transferred to L. J. Peiris and Company Limited.

(b) and/or had the real receiver accepted it in the correct manner.

(vii) Are the properties as claimed by the petitioner in the affidavit held by the company as constructive trustees of the late L. John Peiris.

(viii) If the answer to the above issues is in the negative, can the company claim ownership of these properties?

At the conclusion of the inquiry the learned District Judge delivered judgment on the 8th of September 1989 and answered the above issues as follows:

(1) Issues 1 to 3 and 6(a) and (b) in the affirmative.

(2) Issue 7 in the negative.

(3) Issue 8 title with the company (Vide order dated 8th September 1989 marked P2)

The Petitioner then sought Leave to Appeal to the Court of Appeal against the order of the Learned District Judge. The Court of Appeal dismissed his application holding that the Petitioner had no right of Appeal to that Court.

In the present application Counsel for the petitioner sought special Leave to Appeal against the said order on two matters namely,

(1) the correctness of the decisions which have held that there is no right of Appeal where parties agree that the dispute in a case may be fairly and finally left to the decision of the Judge acting as an arbitrator and;

(2) whether the Court of Appeal erred in holding that the order appealed against was an order made by the District Judge qua arbitrator.

The Supreme Court has refused Leave to Appeal on the first question and granted leave only in respect of the second matter.

The sole question therefore which this court is now called upon to determine is whether the Court of Appeal erred in holding that the order appealed against was an order made by the District Judge *qua* arbitrator.

Mr. Faiz Musthapha on behalf of the Petitioner contended that the judgment of the Court of Appeal in the present case is erroneous and that the Petitioner was indeed entitled to file an appeal against the judgment of the District Court in this case. It was his contention that issues 6, 7 and 8 were issues of law and/or mixed questions of law and fact which were clearly outside the scope of the settlement P1. It was his submission that the District Court has in the present case gone beyond the scope of the settlement for instance to determine the validity of a deed (Vide issue 6) and a creation of a constructive trust (Vide issue 7). Counsel also urged that the settlement P1 related only to the determination of the assets of the company by the District Judge and that any inquiry as an arbitrator by the District Judge on other issues is therefore invalid and/or of no force or avail in law.

In support of this submission Counsel relied upon the decision of the Supreme Court in *Mudalihamy v. Appuhamy*[1]. In this case the plaintiff sued the defendants who were co-owners for recovery of damages on the ground that the plaintiff had been deprived of his share of the crop. The defendant denied this claim. At the trial the parties agreed to "refer all matters in dispute to the final arbitration of the Court and the Court was to make its order after inspection of the place". After the inspection the Court ordered the plaintiff to be placed in possession of a portion of the field cultivated by one of the defendant's. The 2nd defendant complained against that order on the ground that the Learned Judge had decided an issue which was not in dispute between the parties and that he had exceeded his authority. In the course of the order Basnayake, J. (as he then was) stated thus "I have not been able to find nor has Learned Counsel been able to refer me to any provision of the Civil Procedure Code under which a Judge may step aside from the office of judge and assume the Role of arbitrator." Counsel also referred to the case of *Thangarajasingham v. Iyampillai* [2] where Thambiah, J. citing with approval the decision in *Mudalihamy v. Appuhamy* held that the provision of the Civil Procedure Code did not permit a judge to

combine the role of an arbitrator appointed under the Code with his judicial functions.

Mr. Mahenthiran contended however, that it is now well settled Law that where the parties nominate the judge as the sole arbitrator on any question there is no right of appeal from such an order. It was Counsel's submission that the order of the District Judge of 08.09.89 in the present case is one in respect of which there is no right of appeal as the parties by their specific consent had given a character of finality to that order. Counsel urged that it is apparent on a perusal of the settlement P1 that the parties to this action agreed to a total resolution of all disputes between them relating to the assets of the 3rd respondent company, on the basis of an order made by the District Judge after due inquiry and agreed further to abide by such decision. Counsel relied on a series of decisions of this Court in support of the proposition that no appeal lies where the parties have agreed to be bound by the order of the judge sought to be appealed from.

This however is not the issue that has to be decided in the present appeal and the cases cited by both Counsel do not have a direct bearing on the matter upon which leave has been granted. If I may reiterate, the question which this Court is called upon to determine is whether the Court of Appeal has erred in holding that the Learned District Judge in the present case has acted *qua* arbitrator.

The issue then is, having regard to the facts of the present case was there a deliberate agreement by both sides and a request to the Learned District Judge to act in a particular way and has the District Judge acceded to such request? If he has, the Judge was not acting judicially but was acting *qua* arbitrator.

There is support for this view in the case of *William Peris v. Lucia Peris* [3].

In the present case on a perusal of the agreement P1 it is very clear that the parties had agreed to abide by the order of the Learned District Judge made after due inquiry on any dispute relating to the assets of the Third Respondent Company. It is also clear that the issues raised at the inquiry were within the ambit of the

authority given by the parties to the Learned District Judge. The record bears out that the Learned District Judge has not exceeded the authority given to him by the parties and has confined himself to the main issue in dispute.

On this question it would be helpful to reproduce a passage from the order of a Learned District Judge made at the conclusion of the inquiry –"A settlement was entered into between the parties on 06.02.82 and in terms of clause (1) there of each party had to submit a list of assets and in the event of any party objecting to the other's list the Court had to inquire into same and decide – "This decision" the parties agreed to abide by." Admittedly this inquiry was therefore necessitated because of the dispute that has arisen consequent upon the respondent (the Appellant in the present appeal) filing objections challenging the list filed by the First Petitioner in the Winding Up application. It was alleged in the objections that the properties referred to in paragraphs 3 and 5 of the Petitioner's affidavit did not belong to the Third respondent Company but to the estate of the late L. J. Peiries. It was manifestly clear therefore that all the issues at the commencement of this inquiry were raised by the parties in order to assist the Learned District Judge to resolve the dispute that had arisen on the matter referred to in paragraph 1 of the settlement P1.

I am firmly of the view that the parties have framed the issues at the inquiry having regard to and in terms of the agreement recorded in the District Court on the 2nd of June 1982. The fact that the Court has not gone out side the scope of the terms of the settlement is abundantly clear on a perusal of the issues raised.

In deciding the issues raised by the parties the Learned District Judge had necessarily to determine the validity of a deed (issue 6) and the creation of a constructive trust (issue 7). These matters had to be clarified in order to decide the main issue namely the assets of the Third Respondent Company.

Having regard to the facts of this case, I have no doubt that the parties to this action and the Judge understood the purpose for which this inquiry was being held. Neither the Judge nor the parties contemplated that they were acting outside the scope of the settlement P1 and more importantly that the Judge was to hear it

otherwise than as a Judge and that it was not to go on subject to all the incidents of a cause regularly heard in Court of which an appeal was one of the most important. The Judge and the parties clearly understood this arrangement at the stage the agreement P1 was recorded.

This Court would be most unwilling to uphold the agreement P1 at all if there was any doubt that such agreement was opposed to the intention of the parties.

I regret I am unable to agree having regard to the circumstances in this case with the submissions of Counsel for the petitioner that as issues 6, 7, 8 are issues of Law and/or mixed questions of law or fact that these issues were outside the scope of the settlement.

As I observed earlier in terms of the agreement P1 the parties called upon the Court to determine the assets of the Third Respondent company and agreed to abide by the decision of the Court on this matter. It is admittedly in order to decide this question that the subsequent inquiry was held as the Court was authorised to do in terms of the agreement. In my view the fact that issues were raised and that evidence was led at this inquiry does not in any way vitiate the agreement entered into by the parties to abide by the decision of the Learned Judge on this question. There is no material whatsoever to show that the parties resiled from this agreement before the inquiry. There can be no doubt that in terms of clause 1 of the agreement P1 both sides practically agreed to leave the decision of the question in issue– "the determination of the assets of the third respondent company" to the sole arbitrement of the District Judge. There was indeed a deliberate agreement by both sides and a request was made to the Learned District Judge to decide this matter and the parties undertook to abide by such decision. I hold therefore that when the District Judge accepted and acted on this request he was not acting judicially but *qua* arbitrator.

The present appeal is accordingly dismissed with costs.

BANDARANAYAKE, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.