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Present: Lascelles C.J. and Wood Renton J.

CRONING *v.* THE ATTORNEY-GENERAL.

191—D. C. Badulla, 2,420.

Arbitration—Legal misconduct—Agreement between parties to refer matters in dispute to specified arbitrators—Compulsory reference to arbitration by Court—Arbitrator's fee.

Plaintiff sued the defendant on a contract made between plaintiff and the Provincial Engineer of Uva, whereby it was agreed, *inter alia*, that any matter in dispute should be referred to the arbitration of the Director of Public Works. The Court ordered the matters in dispute to be referred to the Director in terms of the agreement. The plaintiff, after the award was filed, moved to have it set aside on the ground that the arbitrator was guilty of legal misconduct, inasmuch as he had approved of a letter written by the Provincial Engineer offering to plaintiff a specified sum in settlement of his claim.

Held, that the fact that the letter was written with the authority of the arbitrator (Director of Public Works) did not amount to misconduct.

LASCELLES C.J.—The objection is thus to the qualification of the arbitrator, and, if raised at all, should have been made before the conclusion of the arbitration.

WOOD RENTON J.—An arbitrator, under such a clause of compulsory reference as the appellant's contract contains, is not disqualified merely because he has already a full knowledge of, and must to some extent have formed an opinion upon, the facts of the case. His appointment cannot be objected to on the ground that the contract makes him in some measure judge in his own cause. It can be challenged only on the ground that there is some reason to suspect that, at the arbitration itself, he will act unfairly, or will not be ready to revise in the light of argument or evidence any opinion that he may previously have formed.

The fact that the arbitrator was a public officer was held not to have disentitled him to his fee.

Where a submission to arbitration does not express a contrary intention, the arbitrator may include the amount of his remuneration in the award.

THE facts are stated in *14 N. L. R. 142*.

H. J. C. Pereira (with him *Guruswamy*), for plaintiff, appellant.

Garvin, Acting S.-G. (with him *Akbar, C.C.*), for defendant, respondent.

Cur. adv. vult.

April 24, 1913. LASCELLES C.J.—

The circumstances in which this action was brought have already been set out more than once in the course of the action, and it is not now necessary to refer to them in detail. The plaintiff contracted with the Provincial Engineer to construct a portion of the Bandarawela-Welimada road, and subsequently brought the present action against the Attorney-General, claiming damages for the wrongful determination of the contract by the Provincial Engineer and for other relief.

Under a clause in the contract, which provided that disputes which might arise with regard to the execution of the contract should be decided by the Director of Public Works, the Court ordered the matters in dispute to be referred to the Director of Public Works. Against this order the plaintiff appealed unsuccessfully. Then the Director of Public Works entered on the arbitration and published an award, which contains a specific finding on each of the issues framed by the Court for the trial of the action. The present appeal is from an order of the District Court refusing to set the award aside on the ground of legal misconduct on the part of the arbitrator.

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The objection by the Attorney-General that the application to set aside the award was not brought within the time limited by section 27 of the Arbitration Ordinance, 1866, was not pressed. But I am of opinion that the objection could not have succeeded, inasmuch as, although the award was read in Court in the presence of the proctors on August 7, notice was served on the plaintiff to attend on the 19th and take notice of the award. The latter date, I think, should be taken as that on which the award was "notified to the parties."

The plaintiff endeavoured, in the first place, to establish legal misconduct on the part of the arbitrator by means of the letter E written by the Provincial Engineer of Uva to the plaintiff on January 30, 1911. This letter, which was admittedly written with the knowledge of the Director of Public Works, contains an offer to pay the plaintiff the sum of Rs. 983.86 in settlement of all the plaintiff's claims. This sum, as explained in the letter and in the account which was filed with the letter, represents the saving to Government which was effected by taking the work out of the plaintiff's hands. The Provincial Engineer has been able to complete the work at a lower rate than that stipulated for in the contract, with the result that the Government saved Rs. 983.86 on the transaction. This sum was offered in full settlement of the claim at a date when the Director of Public Works had not been formally appointed, but was aware that he would be appointed. The offer, as is shown by the Attorney-General's letter of November 22, was made "without prejudice." How can the making of this offer amount to legal misconduct? As I understand the plaintiff's argument, it was contended that the letter proves that the arbitrator, before entering on the award, had made himself familiar with the accounts, and had come to a more or less definite conclusion on a matter connected with the reference.

The objection is thus to the qualification of the arbitrator, and, if raised at all, should have been made before the conclusion of the arbitration. The fact that the letter E was written with the authority of the Director of Public Works clearly does not amount to legal misconduct on his part, and no authority has been cited to us which gives any countenance to such a proposition.

It is well settled that in contracts of this nature the parties have no right to expect that the engineer to whom they have agreed to refer their disputes should come to the arbitration with a mind entirely clear from preconceived opinions. The contractor in such cases is well aware that the engineer, by reason of his position, is conversant with the subject-matter of the dispute, and, being human, he may have formed or expressed opinions as to the merits of the dispute; what the contractor has a right to expect is that the engineer should give a fair consideration to the facts and arguments and give a fair decision on them; that he should not have made up

his mind so as not to be open to change it on argument. In *Jackson v. Barry Railway Company*,[1] the engineer, both before and after the dispute was referred to him, had expressed a decided view with regard to the matter in dispute, yet the Court, on the principle which I have endeavoured to state, refused to stay the Company from proceeding with the arbitration. Thus, even if the letter E can be regarded as an expression of opinion with regard to a matter in dispute in the arbitration, which certainly is not the case, it would not be fatal to the validity of the award.

The other ground of legal misconduct suggested is the arbitrator's omission to notice an admission, which is stated in the plaintiff's affidavit of February 20, 1913, to have been made by Crown Counsel Akbar to the effect that the sum of Rs. 710, which is claimed by the defendant as a penalty, was not rightly imposed, and ought to be remitted. Mr. Akbar has explained what actually occurred with regard to this sum, and I entirely accept his explanation. The question was one of cumulative penalties, and Mr. Akbar's statement was to the effect that if the two sums of Rs. 1,100 and Rs. 3,098.86 were forfeited, it was immaterial whether the further penalty of Rs. 710 was wrongly claimed. It is clear that no question of legal misconduct arises in respect of this matter, and it is not suggested that the award should be remitted to the arbitrator for further adjudication in this respect.

With regard to the arbitrator's fee, it is not contended that the amount is otherwise than reasonable, but it is contended that, inasmuch as the arbitrator is a public officer, it was his duty to give his services as arbitrator in contracts of this nature without charge. I see no reason for departing from the general rule that, where the submission does not express a contrary intention, the arbitrator may include the amount of his remuneration in the award.

The appeal, therefore, entirely fails and should be dismissed, and I do not understand the Crown to press for the costs of the appeal.

WOOD RENTON J.—

A preliminary objection to the hearing of this appeal was raised by the Acting Solicitor-General. He contended that the appellant's application to set aside the award had not been made, as required by section 27 of the Arbitration Ordinance, 1866 (No. 15 of 1866), within ten days after it had been submitted to the Court and notified to the parties. This objection is, in my opinion, untenable, and the Solicitor-General abandoned it in argument. The journal entries show that while the award was read in open Court in the presence of the parties on both sides on August 7, the proctors and the Court itself considered that notification to the plaintiff-appellant

[1] *(1893) 1 Chan. 238.*

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was necessary. The appellant was, in fact, notified to appear in Court and hear the award on August 28. The application to set aside the award was made on August 20. It is not necessary to decide whether, under section 27 of Ordinance No. 15 of 1866, communication of an award to the proctor of a party is sufficient. The appellant here was entitled to assume from the action of the Court itself that he would have ten days from the date of the notification for August 28 to consider whether or not the award should be impeached.

The merits of the present appeal may be dealt with very briefly. We are not here concerned with the question whether the award of the arbitrator is right on the evidence. The only point for determination is whether he has been guilty of " misconduct " in the sense in which the term is used in the law of arbitration. The appellant relies on two grounds of alleged " misconduct ": first, that by sanctioning the offer contained in Mr. Emerson's letter E, the arbitrator had prejudiced the appellant's case to such an extent as to disqualify himself for conducting the arbitration; and in the next place, that he had not given judgment in the appellant's favour for the sum of Rs. 983.36, which it was alleged had been admitted in the letter E to be due to him, and the further sum of Rs. 710, which Mr. Akbar, who appeared as counsel for the Crown at the hearing of the arbitration, had considered ought not to have been charged as liquidated damages.

No authority was cited to us, nor am I aware of any, which would entitle us to hold that the subject-matter of these allegations, even if established as facts, would amount to " misconduct " in the eye of the law. If the arbitrator had displayed such a bias as would incapacitate him from acting, the appellant should have moved the Court to revoke the order of reference. If he failed to deal in his award with matters falling within its scope, there ought to have been a motion to the Court to refer the award to him for further consideration. But the evidence does not, in my opinion, substantiate either of the allegations in question as matter of fact. The arbitrator in the present case is the Director of Public Works. Letter E was not written by him personally. It was a letter by Mr. Emerson, the Provincial Engineer. The District Judge stated that it was authorized by the Director of Public Works. But there is nothing in the evidence to show that he conducted any personal examination into the state of the accounts as between the Government and the appellant, or did more than sanction an offer of compromise made by his subordinate. Moreover, at the time the letter E was written, while the District Court and the Supreme Court in appeal had decided that there must be a reference under the contract to the Director of Public Works, the latter had not in fact been appointed arbitrator by the Court. There was nothing illegal or improper in his approving of an offer of compromise which, if accepted,

would have rendered the arbitration unnecessary. The position of arbitrators under contracts of this character has been well settled by a series of decisions, of which one of the latest and the most interesting is *Ives & Barker v. Williams*.[1] The principle was there in effect laid down that an arbitrator, under such a clause of compulsory reference as the appellant's contract contains, is not disqualified merely because he has already a full knowledge of, and must to some extent have formed an opinion upon, the facts of the case. His appointment cannot be objected to on the ground that the contract makes him in some measure judge in his own cause. It can be challenged only on the ground that there is some reason to suspect that, at the arbitration itself, he will act unfairly, or will not be ready to revise in the light of argument or evidence any opinion that he may previously have formed. In *Ives & Barker v. Williams* [1] Lindley L.J. thus explains the grounds on which contractors submit to be bound by such stringent provisions of compulsory reference, as we find in this case, to an engineer or other officer of the party with whom the contract is made:—

> The explanation of it is to be found in two circumstances. First of all, competition for this kind of work is very keen, and contractors compete with each other; and in the second place, it has been ascertained by long experience that engineers of the highest character may be trusted, and, when a contractor enters into such a very stringent provision as this, he knows the man he has to deal with..... If he had not confidence, he would not submit to it; but knowing the engineers he does submit to it, because he has confidence in them, and knows that they can be trusted, even although it is their duty to look after the work of the contractor, to deal fairly with him in case of a dispute which is in substance, although not in form, a dispute between the contractor and themselves.

It is obvious that the appellant cannot draw from letter E any suggestion of bias which would amount to disqualification within the meaning of the law as I have just endeavoured to explain it.

The subsequent correspondence between the parties, coupled with the statement made to us by Mr. Akbar from the Bar as to what his own attitude had been to the question of the allowance of the sums of Rs. 983.36 and Rs. 710 at the hearing, and with the issues accepted by both sides and founded on the appellant's plaint, shows beyond all doubt that the defendant-respondent did not waive the contention of the Crown that the appellant had forfeited, by the non-fulfilment of his contract, sufficient amounts in the way of security money and retention money to absorb these allowances. Letter E was clearly written, and was understood by the appellant to have been written, as an offer without prejudice. The arbitrator was therefore in no way bound, nor indeed was he entitled, in view of the course which the case took at the hearing before him, to allow these items in the appellant's favour, and the issues themselves

[1] *(1894) 2 Ch. 478.*

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compel him to deal with the question whether the security and the retention money had been forfeited. Even if, therefore, an improper failure to deal with such matters would have amounted to "misconduct," the evidence is wholly insufficient to show that any such failure took place. The objection to the arbitrator's fee was scarcely pressed, and is untenable.

The appeal must, in my opinion, be dismissed. I would dismiss it without costs, for which I understand that the Crown does not press.

Appeal dismissed.