IN THE MATTER OF THE ARBITRATION ACT, R.S.O. 1950, c. 20

1954

*June 1
*June 22, 23
*Nov. 1

STEVEN SZILARD (*Applicant*) .....APPELLANT;

AND

RALPH SZASZ (*Respondent*) .....RESPONDENT.

Arbitration and award—Arbitrator—Possible bias ground for disqualification.

Each party to an arbitration, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs. Where there is a basis for a reasonable apprehension of an arbitrator not acting in an entirely impartial manner, a finding made by him may be set aside. Here when it was established that one of the arbitrators was jointly engaged in a real estate speculation with one of the parties, unknown to the other party —the award was set aside. *Kemp* v. *Rose* 1 Giff. 258; *Walker* v. *Frobisher* 6 Ves. Jr. 70 followed.

APPEAL by the Applicant from an order of the Court of Appeal for Ontario (1) whereby an order of Aylen J. setting aside an award of arbitrators, was set aside.

The appeal came on for argument before this Court on June 1, 1954, when it appearing that the then counsel for the appellant had made an affidavit and had been cross-examined thereon in the course of the proceedings below, the Court announced that it could not continue to hear him and an adjournment was granted to permit the securing of new counsel. On resumption of the hearing Mr. W. B. Williston appeared as counsel for the appellant.

W. B. Williston for the appellant.

S. M. Harris for the respondent.

The judgment of the Court was delivered by:

RAND J.:—The substantial question here is whether one of the arbitrators, Sommer, was disqualified by reason of his business relations with the respondent Szasz. Both the parties to the appeal and the arbitrators are Hungarians, not long in this country. On the representation of Szasz that Sommer was an entirely disinterested person, the

*PRESENT: Kerwin C.J., and Rand, Kellock, Estey and Cartwright JJ.

(1) [1953] O.W.N. 907.

1955
SZILARD
v.
SZASZ
Rand J.

appellant Szilard accepted him as one of two named in the submission. It subsequently transpired that Szasz and wife (as joint tenants) with Sommer and wife (as joint tenants) had six months before purchased jointly a large property consisting of three store buildings with dwelling quarters in upper storeys, having all told nine tenancies. The price was approximately $80,000, part of which was secured by a mortgage and the balance paid equally by Szasz and Sommer. The property was purchased as an investment, and as can be seen, would call for some degree of continuing management and consultation. We have no particulars of the mortgage, but the evidence indicates that its obligations are joint on the part of the purchasers. Is that association, with its inevitable personal intimacy, and the mutual interests involved, sufficient to the disqualification claimed?

From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to. This principle has found expression in innumerable cases, and a reference to a few of them seems desirable.

In *Kemp* v. *Rose* (1), the Vice-Chancellor remarked:

> A perfectly even and unbiased mind is essential to the validity of every judicial proceeding.
>
> Therefore, where it turns out that, unknown to one or both of the persons who submit to be bound by the decision of another, there was some circumstance in the situation of him to whom the decision was intrusted which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of this Court.

In *Walker* v. *Frobisher,* (2) Lord Eldon used this language:

> But the arbitrator swears, it (hearing further persons) had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that, which I cannot reconcile to general principles. A Judge may not take upon himself to say, whether

(1) (1858) 1 Giff. 258 at 264. (2) (1801) 6 Ves. Jr. 70.

evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice but upon general principles it cannot be supported.

In *Sumner et al* v. *Barnhill* (1), an award was set aside on the ground that one of the arbitrators was disqualified by the fact of having been regularly retained as solicitor of the estate of which the defendant was the executor, although he had not been engaged as counsel or attorney in the matter referred, and did not concur in the award.

In *Race* v. *Anderson* (2), after the evidence had been closed, the matter argued, and one of the arbitrators had written out his view in accordance with which he subsequently made his award, one of the parties who had been examined as a witness sent to him by mail an affidavit explaining some portion of the evidence given. The arbitrator's statement that he was not influenced by this communication was accepted as true, but in setting aside the award Hagarty C.J., speaking for the court, quoted the words of Lord Eldon already mentioned.

In *Conmee* v. *Canadian Pacific Railway Company* (3), the fact that pending the reference and before the finding, one of the arbitrators had received an intimation that the solicitorship of the defendant's company would be offered him and after the finding the offer was made and accepted, was, likewise, held fatal. The authorities were thoroughly reviewed by Rose J. and at p. 654 he quotes from Redman's Law of Awards:

> It cannot be too strongly impressed upon arbitrators that the first great requisite in persons occupying that post is judicial impartiality and freedom from bias.

And from the same work quoting Lord Hardwicke:

> In a matter of so tender a nature, even the appearance of evil is to be avoided.

In *Vineberg* v. *The Guardian Fire Assurance Co.* (4), where one of the arbitrators was a canvassing agent for an agent of the defendants, the award was invalidated.

In *Township of Burford* v. *Chambers* (5), a barrister had acted as counsel for the husband of one of the parties indicted for obstructing an alleged highway claimed by his

(1) (1879) 12 N.S.R. 501.
(2) (1886) 14 O.A.R. 213.
(3) (1888) 16 O.R. 639.
(4) (1892) 19 O.A.R. 293.
(5) (1894) 25 O.R. 663.

1955

SZILARD v. SZASZ

Rand J.

wife to be her property and had written a letter concerning the matter as solicitor for both husband and wife. In an arbitration between the wife and the municipal corporation in which the highway was situated, the barrister was held incompetent.

In *Eckersley* v. *The Mersey Docks and Harbour Board* (1), Lord Esher M.R. at p. 671 said:

> But that cannot be the case here, because both parties have agreed that the engineer, though he might be so suspected (of being biased in favour of the party whose servant he was) shall be the arbitrator. A stronger case than that must, therefore, be shewn. It must, in my opinion, be shewn, if not that he would be biassed, that at least there is a probability that he would be biassed.

In the case of *Albert* v. *Spiegelberg* (2), the Supreme Court held an attorney at law who was an office associate of a party to a submission to be ineligible to act.

In *In re Haig and the L. & N. & G.W. Ry Co.* (3), Wright J. concluded by saying:

> I do feel, however, that it is very desirable that persons who are asked to act as umpires in such cases should inform the parties or their arbitrators of any facts which might prevent their assenting to their acting as umpires.

In *Proctor* v. *Williams* (4), 8 C.B. (N.S.) 386, Erle C.J. said:

> It is of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal.

Finally, in *R. and A. Clout and Metropolitan Ry Co.* (5), Stephen J. at p. 143 had this to say:

> I do not for one moment say that Mr. Whichcord did anything that was wrong (he had acted as a witness pending the arbitration for one of the parties in other cases of expropriation) and I wish particularly to guard myself against saying anything that might convey that idea, but I think it is unfortunate that his position was not made known. I think Mr. Young would not then have agreed to him as umpire, and I think he would have been quite right.

These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment,

(1) (1894) 2 Q.B. 667.
(2) (1932) 146 (N.Y.) Misc. 811.
(3) [1896] 1 Q.B. 649.
(4) (1860) 8 C.B. (N.S.) 385 at 388.
(5) (1882) 46 L.T.R. (N.S.) 141.

unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

Especially so is this the case where he has agreed to the person selected. The Court of Appeal took the view that "from that circumstance alone" (the joint ownership of the property) "it is not to be inferred that the arbitrator would not act in an entirely impartial manner, and there is no evidence before us that he did not in fact act in an impartial manner." But as the facts show, it is not merely a case of joint ownership. Nor is it that we must be able to infer that the arbitrator "would not act in an entirely impartial manner"; it is sufficient if there is the basis for a reasonable apprehension of so acting. I think it most probable, if not indubitable, that had the facts been disclosed to Szilard, he would have refused, and justifiably, to accept Sommer.

It is contended that he waived his right to do so by continuing the arbitration after learning of the association, but the evidence does not support this. He had heard a rumour of land dealing between Szasz and Somner but it was vague and quite insufficient to justify repudiation of the proceedings; and he did not learn the actual facts until after the award.

It is likewise impossible to place on Szilard the responsibility for the non-disclosure. He had been assured in effect that Sommer was free from factors that might influence his judgment or cause Szilard to reject him, and it would be asking too much to require him to catechize either Szasz or Sommer in order to verify that assurance. The details of the relationship should have been volunteered by Szasz.

I would, therefore, allow the appeal and restore the judgment of Aylen J. with costs in this Court: the respondent will have his costs of the day on the adjournment of the hearing.

Appeal allowed with costs.

Solicitor for the appellant: *E. J. Isaac.*

Solicitors for the respondent: *Harris & Rubenstein.*