
(1967) 08 PAT CK 0011
In the Patna High Court
Case No : Civil Revision No. 757 of 1966

Bokaro and Ramgur Ltd.

APPELLANT

Vs

Dr. Prasun Kumar Banerjee

RESPONDENT

Date of Decision : 25-08-1967

Acts Referred:

Arbitration Act, 1940 — Section 28(2), 3, 30

Citation : AIR 1968 Patna 150 : (1968) 16 BLJR 240

Hon'ble Judges : R.L. Narasimham, C.J;U.N. Sinha, J;N.L. Untwalia, J

Bench : Full Bench

Advocate : Lal Narain Sinha, Sushil Kumar Jha and Madan Mohan Prasad, for the Appellant; S.N. Dutta and B.K. Bose. Advs., for the Respondent

Final Decision : Dismissed

Judgement

Untwalia, J.—Dr. T. N. Banerjee, Chairman, Banerjee Trust, leased out a portion of a house, situated within the limits of Patna Municipal Corporation near the Gandhi Maidan, to a Company known as Bokaro and Ramgur Ltd. by a written agreement dated the 13th September, 1960. Under the terms of the lease the company had agreed that on its failure to pay rent for two consecutive months to the lessor, it would be liable to be evicted from the demised premises. The rent which was fixed by way of consolidated charges was to be paid by the company to the lessor by the 7th day of each month. According to the case of the lessor, the lessee failed to pay the rent for the months of June, July, August and September, 1961, in spite of repeated demands and so the former served a notice dated the 11th of September, 1961 on the latter terminating the lease and requesting it to vacate the house forthwith or latest by the 30th of September, 1961. Disputes arose between the parties in connection with the matter aforesaid, and they agreed to refer them to arbitration in accordance with the arbitration agreement incorporated in the deed of lease. Eventually, Shri Ayodhya Pd. Sinha, a retired subordinate Judge, was appointed as the sole Arbitrator to decide and determine the disputes between the parties.

2. The contentious question which fell for determination before the Arbitrator was whether the lessee had defaulted in payment of rent and was liable to be evicted from the demised premises. The arbitrator, after hearing the parties and taking evidence in the matter, came to the conclusion that there has been forfeiture of the lease because the rent for more than two consecutive months had not been paid by the lessee to the lessor. He, therefore, held that the former was liable to be evicted and made an award accordingly on the 6th of May, 1962.

3. The award was filed in court by the Arbitrator on the 20th of August, 1962, whereupon miscellaneous case No. 64 of 1962 was registered and started. Notice of the filing of the award was given to each party. On the 10th of September, 1962 a petition was filed on behalf of the 1st party, namely, the lessor accepting the award. The 2nd party, namely, the lessee-Bokaro and Ramgur Ltd. filed its first objection to the award on the 10th of November, 1962, within 30 days of the service of the notice of the filing of the award. By an order of the court dated the 21st of December, 1962, the miscellaneous case was directed to be converted into a title suit; eventually it was registered as title suit No. 3 of 1963. In the title suit Bokaro and Ramgur Ltd. which figured as the defendant filed a supplementary written statement on the 15th of January, 1963 taking many more objections to the award and to its being made a rule of the court. The learned Additional subordinate Judge, to whom the case was transferred for disposal, overruled all the objections raised by the lessee and passed a decree on the basis of the award. The company went up in appeal u/s 39 of the Arbitration Act, 1940 (Central Act 10 of 1940) hereinafter called the Act--from the order of the learned Additional Subordinate Judge refusing to set aside the award. Only two objections to the award were pressed in the court of appeal below; the other objections were not pressed. The two points pressed there are:-

(i) That the Arbitrator made his award beyond the period of 4 months after entering on the reference; such an award being invalid could not be made a rule of the court.

(ii) That in view of the provision of law contained in Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act 3 of 1947) the arbitrator had no jurisdiction to pass an order of eviction from the house as an order or decree to that effect could be made by a competent court only.

4. The learned Additional District Judge who heard the appeal overruled both the objections and dismissed it. The company came in revision to this court u/s 115 of the Code of Civil Procedure. Dr T. N. Banerjee died during the pendency of the proceeding and his successor Dr. Prasun Kumar Banerjee, Chairman of the Banerjee Trust, is the sole opposite party in the civil revision

5. The civil revision came up for hearing before a Bench of this court consisting of Tarkeshwar Nath and Anwar Ahmad, JJ. The only two points which had been pressed in the court of appeal below were urged before the Bench also. On the facts and in the circumstances of the case, which will be more fully dealt with

hereafter in my judgment, in regard to the first point there appeared to be a conflict between the views taken in two Bench decisions of this court in *Patto Kumari v. Upendra Nath Ghosh*, 4 P LJ 265 : (AIR 1919 Pat 93) and *Lakhmir Singh Vs. Union of India (UOI) and Another*, . The second point appeared to be of considerable importance, and their Lordships were pleased to direct by their order dated 15th of March, 1967, that the records of this case be placed before my Lord the Chief Justice for referring it to a Full Bench. The Division Bench formulated the following two points for reference to the Full Bench:

" (1) Whether a party who has participated in the proceeding before the arbitrator even after the expiry of the time for the submission of the award has waived its right and is estopped by its conduct from challenging the validity of the award on the ground that it was filed out of time, and

(2) Whether the decree of a court u/s 17 of the Arbitration Act in terms of the award holding that a tenant was liable to eviction on account of default in the payment of rent for two months consecutively was a decree of the "court" as envisaged by Section 11 read with Section 2(bb) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 "

Since the points for reference arose in a civil revision, under Rule 4 of Chapter V of Part II of the Patna High Court Rules, the civil revision itself was placed before the Full Bench for decision.

6. Mr. Lal Narain Sinha appearing on behalf of the company did not press the second point before us. Obviously the point had no substance as the award, if not invalid or set aside, is made the rule of the court which proceeds to pronounce judgment according to the award u/s 17 of the Act and upon the judgment so pronounced a decree follows. The decree for eviction, which has followed in this case, has become a decree of the court within the meaning of Section 11 of the Bihar Act 3 of 1947.

7. In order to decide the first and the only point pressed before us, it is necessary to state some more facts.

8. The Arbitrator received a letter with enclosures from Dr. T. N. Banerjee requesting him to agree to act as an Arbitrator in dispute between him as Chairman of Banerjee Trust and Messrs. Bokaro and Ramgur Ltd. Upon receipt of this letter on 11-11-1961, he started an order sheet, the whole of which was filed along with the award and other papers in the court below. Order nos. 2 and 3 dated 16-11-1961 and 17-11-1961 respectively show that the Arbitrator had not till then received any letter from the company. He directed the writing of a letter to it. On receipt of the letter from the company, order No. 4 dated 23-11-1961 was recorded thus:--

"Received a letter from the said company in which they write that they have nominated me to work as an arbitrator in the aforesaid dispute. Write letters to both the parties".

The letters (or their office copies) which are in the records of this case, as they had been filed by the Arbitrator along with the award, show that they were actually written to the parties on 4-12-1961 on which date order No. 5 was recorded in these terms:--

"Wrote letters to both parties intimating them that I have accepted to act as an arbitrator. Fix 26-12-1961 at 5 p.m. at my residence for understanding the dispute and for settlement of issues and procedure to Be accepted".

On 26-12-1961 Shri B. K. Bose, Advocate, appeared on behalf of Dr. T. N. Banerjee but none appeared on behalf of the Company. The proceeding was adjourned to 8-1-1962 at 5 p.m. and a letter accordingly was directed to be written to the company. On 8-1-1962 Shri B. K. Bose appeared on behalf of the 1st party and Shri R. S. Rao, advocate, as mentioned in the order of that date, appeared on behalf of the 2nd party. Some preliminaries were done on 8-1-1962 and 9-1-1962. On the next date 20-1-1962. Shri B. K. Bose appeared for the 1st party but nobody appeared on behalf of the 2nd party. The date for settlement of issues was postponed to 3-2-1962. On this date again Shri B. K. Bose was present but a Law Agent of the company filed a petition for time on behalf of the 2nd party on the ground that Shri Rao, Advocate for that party, was unable to leave Calcutta to attend the arbitration proceeding. With the consent of the parties, the proceeding was adjourned to 27-2-1962 for the settlement of issues. On this date against Shri B. K. Bose was present but nobody appeared on behalf of the 2nd party. The date for settlement of issues in the proceeding was fixed as 13-3-1962. On this date Shri B. K. Bose on behalf of the 1st party and Thakur B. P. Sinha on behalf of the 2nd party were present. Both were heard on the point of issues and they were settled. Both the parties were requested to file their documents and list of witnesses whom they proposed to examine in support of their respective contentions. It was decided by the Arbitrator by his order dated 13-3-1962 that the 1st party would examine his witnesses on 26-3-1962 and the 2nd party will examine its witnesses on 27-3-1962. On 26-3-1962 Shri B. K. Bose was present on behalf of the 1st party and one K. N. Ojha, a clerk of Bokarao and Ramgur Ltd. appeared on behalf of the 2nd party on whose behalf a petition for time was filed. It was opposed by the 1st party. The case was, however, adjourned for hearing to 1-4-1962 at 4 p.m. for the evidence of the 1st party and 2-4-1962 was fixed for the evidence of the 2nd party. On 1-4-1962 Shri B. K. Bose, Advocate, was present on behalf of the 1st party and Sarvashri Rao, advocate, Zulumdhari Singh and Thakur B. P. Sinha were present on behalf of the 2nd party. The evidence on behalf of the 1st party was finished on 1-4-1962 On 2-4-1962 the date fixed for the evidence of the 2nd party, a witness was examined on its behalf. Since Shri Rao had to go to Calcutta, the proceeding was adjourned to 10-4-1962 "with the consent of both parties". On 10-4-1962 in presence of Sarvashri B. K. Bose for the 1st party, R. S. Rao and Zulumdhari Singh for the 2nd party, 2 witnesses were examined on behalf of the latter, and certain documents were marked. On prayer being made for local inspection of the building in question, it was held and 12-4-1962 was fixed as the date for

hearing the argument. Sarvashri R. S. Rao, advocate, Zulumdhari Singh and K. N. Ojha were present on behalf of the 2nd party, and Shri B. K. Bose was present on behalf of the 1st party, on 12-4-1962 when arguments on behalf of the former were heard and arguments on behalf of the latter were heard on 13-4-1962 in presence of the representatives aforesaid of the 2nd party. Making of the award was reserved, and it was stated in the order dated 13-4-1962 that both parties would be given notice when the award would be ready. Accordingly, as stated in the order dated 30-4-1962, both parties were noticed to appear on 5-5-1962 on which date the award would be delivered. On 5-5-1962 when Shri B K, Bose appeared on behalf of the 1st party and Sarvashri Zulumdhari Singh and K N. Ojha appeared on behalf of the 2nd party the former filed a verified petition on behalf of the 2nd party asking the Arbitrator to decide one more point of dispute raised in the petition. The Arbitrator adjourned the case to 6-5-1962 on which date the award was signed and pronounced and representatives of both the parties took true carbon copies of the award from the Arbitrator,

9. In the first objection petition filed by the petitioner Company on the 10th of November, 1962 no facts were stated nor any ground was taken in respect of the alleged invalidity of the award as having been made out of time But in the supplementary written statement filed on January 15, 1963 the point was indicated in paragraph 3 in these terms:--

"That, the arbitrator had no jurisdiction to give any award or sign any award on 6-5-1962 or on any other date".

10. Eventually the point of the award being invalid as having been made beyond 4 months after the Arbitrator had entered on the reference taken late and in an imperfect form, as stated above, was allowed to be developed at the time of the argument in the first court and pressed as such in the lower appellate court and in the High Court. I shall discuss the point by tracing briefly the relevant history of the Law of Arbitration in England and India and referring to some of the decided cases having a bearing on the point.

11. It was provided in the 15th section of the Common Law Procedure Act. 1854 (17 and 18 Vic. C 125) :--

"The arbitrator acting under any such document or compulsory order or reference as aforesaid, or under any order referring the award back, shall make his award under his hand and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed and shall have entered on the reierence, or shall have been called upto to act by a notice in writing from any party but the parties may by consent in writing enlarge the term for making the award; and it shall be lawful for the Superior Court of which such submission, document or order is or may be made a rule or order, of any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated, for the enlargement it shall be deemed to be

an enlargement for one month; and in any case where an umpire shall have been appointed it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered any party or to the umpire notice in writing stating they cannot agree"

Prior, to that, the law of arbitration in England was contained in two other Acts, reference to which is not necessary. The law was amended and replaced by an amending and consolidating Act--the English Arbitration Act, 1889--(52 and 53 Vict, c 49). According to Section 2 of this Act, a "submission" meaning u/s 27 a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not", shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission". Clause (C) of the First Schedule provided:

"The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award."

The law was further amended by the Arbitration Act, 1934 (24 and 25 Geo. 5, c. 14). And, Clause (c) of First Schedule of 1889 Act was dropped; that is to say, the restriction of time limit for the making of the award by implied agreement of parties was removed. The two Arbitration Acts of 1889 and 1934 were repealed and replaced by a consolidating Act, namely, the Arbitration Act, 1950 (24 p. 11 Geo. 6, c. 27) Sub-sections (1) and (2) of Section 13 of the 1950 Act provide:

"(1) subject to the provisions of Sub-section (2) of section twenty-two of this Act, and anything to the contrary, in the arbitration agreement, an arbitrator or umpire shall have power to make an award at any time.

(2) The time, if any, limited for making an award, whether under this Act, or otherwise, may from time to time be enlarged by order of the High Court or a Judge thereof, whether that time has expired or not."

12. In India under the Civil Procedure Code, 1859 (Act VIII of 1859) the law of reference to arbitration was provided in Sections 312 to 327. It only provided for reference to arbitration in a suit on application of the parties. In the order of reference, the time for delivery of the award was to be specified u/s 315. It could be extended from time to time u/s 318. On enactment of the Civil Procedure Code, 1882 (Act XIV of 1882) the law came to be provided in Sections 506 to 526 of that Act. Again it was confined to reference to arbitration in suits. In Section 521 grounds for setting aside award were mentioned in Clauses (a) to (c) and thereafter it was expressly provided that "No award shall be valid unless made within the period allowed by the Court". Then came the Code of Civil Procedure, 1908 (Act V of 1908), u/s 89 of that Code:

"(1) Save insofar as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all reference to arbitration whether by an order in suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule."

It may be stated that the Indian Arbitration Act 1899 had been enacted and made applicable to the Presidency towns only more or less, on the lines of the British Act of 1889 including the law of time limit as mentioned in Clause (c) of the First Schedule. Under the second Schedule of the CPC 1908 Paras 1 to 16 provided for reference to arbitration in suits. The time limit specified for making the award in the order of reference made under paragraph 3 could be extended under Para 8 by the Court, Para 15 stated the grounds for setting aside the award, one of which under Clause (c) of sub-para (1) could be that the award had been made "after the expiration of the period allowed by the Court" The procedure for an order of reference on agreement to refer was provided in Paras 17 to 19 and the law as to arbitration without the intervention of the Court was engrafted in Paras 20 to 23. The entire law of arbitration in India was amended, consolidated and incorporated in the Arbitration Act. 1940 (Act X of 1940), u/s 3 of this Act :

"An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference."

Clause (3) of the First Schedule reads thus:

"The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow".

Section 28 which applies both to arbitration through the intervention of the Court or without it says:

" (1) Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect"

No section of the Act declares that an award made beyond time either fixed by the Court or by an express or implied term of the agreement between the parties will be invalid. Grounds for setting aside the award mentioned in Section 30 of the Act do not include in express terms a contingency of the award being liable to be set aside as having been made out of time.

13. It would be noticed, therefore, that in England the law from 1854 to 1889 as

to the time for making the award was that the award was to be made within three months after the arbitrator was appointed and entered on the reference or was called upon to act by a notice in writing from any party. But the parties by consent in writing could enlarge the time for making the award or the court could enlarge it; the arbitrator had no such power. Under 1889 Act the time for making an award could be extended by court u/s 9 or the arbitrator himself could extend it. After 1934 and even under the 1950 Act the award could be made at any time subject to the time limit fixed by agreement in writing by the parties or by the court and subject to extension in a similar manner. In India in the Code of Civil Procedure, 1882, it was specifically provided that the award made beyond time fixed by the court would be invalid. In the Code of 1908 that provision was deleted, and it was made a ground for setting aside the award. Neither of the two provisions in express language was incorporated in the Act of 1940, that follows?. In my opinion, under the Act an award made beyond time can never be held to be invalid or void merely on that account. The Court has power u/s 28 of the Act to extend the time even after the making of the award. The arbitrator has no such power and even the parties in view of the provision of law contained in Sub-section (2) of Section 28, cannot confer such power on the arbitrator alone. The parties however, in a case of arbitration without the intervention of the Court have still got a right to enlarge the time for making the award by their fresh written agreement. If, therefore, an award is made beyond the time fixed or extended by the Court or by the parties and in spite of the fact that one of the parties objected to the proceeding before the arbitrator going beyond the time fixed or took part in it under protest the award may be liable to be set aside u/s 30 of the Act under Clause (a) of the section on the ground that the arbitrator misconducted himself or the proceeding or under Clause (c) on the ground that the award is otherwise invalid.

14. In Halsbury's Laws of England, Vol. 2, 3rd Edition at page 42, Article 95, there is a passage based upon several decisions of the Courts of England, and it runs as follows:

"The parties to an arbitration agreement may by their conduct be precluded from objecting to the award on the ground that it was made out of time. Although they have given no express consent to the time for making the award being enlarged"

Out of several I will refer to only 3 decisions. In *Hawksworth v. Brammall*. (1840) 5 M & C. 281 =41 ER 477 the Lord Chancellor said at page 383:

"As to the objection that the award was not made within the prescribed time, the answer is this that there is positive evidence of the parties having mutually abandoned that provision. The time fixed was the 1st of August. The substituted arbitrator was not appointed till the 31st of July. After the 1st of August, both parties concerned in the prosecution of the reference both were present at the appraiser's valuation on the 14th of August, and after the award had been made on the 15th, the Defendant expressed his ap-probation of the conduct of the

arbitrators. After such acquiescence this court will not permit a party to escape from the result of the reference because it proves to be contrary to his expectations."

That was a case which was decided prior to the enactment of the Common Law Procedure Act, 1854. But the same principle was applied with reference to the provision contained in the said Act in *Tyerman v. Smith*, (1856) 6 E & B 719 : 119 ER 1033, Applying the principle of estoppel by conduct where there was no written consent for enlarging the time for making the award under the 15th Section of the 1854 Act Lord Campbell. C J said at page 1034:

"I proceeded on the ground that the plaintiff is estopped by his conduct from objecting that there was no written consent for enlarging the time. It is admitted that the award would be good if there were such consent: but it is contended that for want of it, the statutable authority does not exist. But I think that the plaintiff is estopped from saying that there was not such a written consent as was essential to the statutable authority."

Coleridge and Erle, JJ. concurred in that view. In *Palmer v. Metropolitan Rly. Co.*, (1862) 31 LJQB 259 it was argued before Mellor J., that the award was made after the time for making it had expired and therefore, it was a nullity and that the objection could not be cured by consent of parties. This argument was repelled on the ground;

"The arbitration clauses being introduced for the benefit of the parties, they are at liberty to renounce at their pleasure the advantage which those clauses afford."

15. The law as to time for the making of an award incorporated in the Indian Arbitration Act, 1940, is almost the same as was contained in the 15th section of the British Statute of 1854. If there is an express term for the making of the award in the arbitration agreement under the Act, that term prevails In absence of such a term Clause (3) of the First Schedule becomes a term of the agreement in accordance with Section 3 of the Act Nonetheless, it is a term of the agreement. Doctrine of estoppel has been applied even in cases where the time was fixed by the Court at the time of making the reference to arbitration, in which case it could be extended by the Court alone. In my opinion it is easier to apply this principle when the time for making the award is specified in the arbitration agreement expressly or by necessary implication under the law.

16. The learned Advocate General drew our attention to the decision of the Privy Council in *Raja Har Narain Singh v. Chaudharain Bhagwant Kuer*, (1891) 18 Ind App 55 (PC) where the award was made after an order referring a suit was passed by the Civil Court u/s 508 of the Civil Procedure Code, 1882. It was made beyond the time fixed by the court. Because of the express provision contained in Section 521 of that Code, it was held that the award not having been made within the period allowed by the Court was invalid. Learned Counsel persuaded us to hold that, even though there is no such express provision in the Act as the one contained in Section 521 of the 1882 Code, an award made beyond the

period allowed by the Court or fixed expressly or impliedly by the arbitration agreement is void. I do not accept this contention as sound and reject it.

17. In Patto Kumari's case, 4 P LJ 265 = (AIR 1919 Pat 93) the parties agreed on the 26th of February, 1918 to submit their differences in the suit to arbitration. The Court referred the dispute in accordance with law contained in the Second Schedule of the CPC 1908 on the same date. The 25th March, 1918, was fixed as the date within which the arbitrators should make their award. By another order of the Court, the time for making the award was extended to the 25th of June, 1918. The award, however, was not made within that time. It was actually made on the 10th of July, 1918 and filed in the Court on the 12th of July, 1918. It was contended before the Bench of this Court consisting of Atkinson and Das, JJ. that inasmuch as the arbitrators failed to make their award within time, the Court had no jurisdiction or option under the rules of CPC save and except to set aside the award which was made out of time. Their Lordships observed that if the case stood alone on those facts there might be some force in the contention presented on behalf of the petitioner but repelled the argument by pointing out that:

"Whereas the old Code, by Section 521, expressly made an award out of time a nullity, the existing rule varies the old section of the prior Code, by providing that if an award is made out of time it only affords a ground or reason for setting aside the award if the parties so desire to assert the right;"

They further said:

"Rule 15, therefore, does not render an award made out of time per se a nullity; it is merely voidable."

In Patto Kumari's case, 4 P LJ 265 : (AIR 1919 Pat 93) while admitting that the court was the proper authority to extend the time within which an award could be made by the arbitrator if a regular method of procedure was pursued, their Lordships have said at page 273 (of Pat LJ) = (at p. 97 of AIR):

".....there is a rule well recognized and established in the nature of an estoppel, that if the parties to an arbitration proceeding by their conduct lead arbitrators to think and believe, that even though the time for making their award has in fact expired that they (the arbitrators) should continue the proceedings and to which course, the parties must be deemed to have assented, by acquiescing in taking part in such proceedings, that then, though the time for making the award may have expired, the jurisdiction of the arbitrators would be deemed to continue to validate and give effect to the award"

In support of the above proposition many English authorities were referred to including the well known case of (1856) 6 E1 and B1 719 alluded to by me above.

17A. In relation to the arbitration under the Act of 1940, the principle can well be applied with greater force and specially to awards having made out of time fixed expressly or impliedly by the arbitration agreement. In Lakhmir Singh Vs. Union

of India (UOI) and Another, the reference to arbitration was without the intervention of the Court. One of the points canvassed in that case was that the award was bad in law and was liable to be set aside because it was made more than 4 months after the arbitrator entered on the reference. The court below decided this point also against the plaintiff who came up in appeal to this Court. The award had been made beyond the period of 4 months after the arbitrator had entered on the reference. The four months had expired on the 8th May, 1947, and on the 9th May, 1947 the claim of the appellant had been permitted to be amended before the arbitrator. The argument of the respondent therefore, was that the former was estopped by his own conduct from challenging the award. This contention of the respondent was repelled on the ground that there was no estoppel against the Statute. By relying upon a passage from the decision of the Allahabad High Court in Kamta Pd. Nigam Vs. Ram Dayal and Others, Mustaq Ahmad, J. who delivered the said judgment on behalf of the Bench under a similar situation repelled the argument put forward on behalf of the other side that the publishers having participated in the proceedings before the arbitrators, even after their refusal to record oral evidence were estopped from challenging the award, by saying in paragraph 16 at page 713:

"But this would be an argument in favour of a plea of estoppel by statute. This is not permissible, as there can in law be no such estoppel."

On the point of the award having been made out of the time Patto Kumari's case, 4 P LJ 265 : 50 Ind Cas 52 = (AIR 1919 Pat 93) cited before the Bench of the Allahabad High Court was distinguished in Paragraph 17 on the ground that:

"In the first place, this ruling was based on the provisions of Schedule 2, Civil P. C. which had no provisions analogous to Para 3, Schedule 1 to the Arbitration Act. In the second place, we have already pointed out that the materials on the record fall short of making out a case of participation by the publishers in the proceedings before the arbitrators "

If I may say so with respect, the first ground of distinction was not correct. Clause 3 of the First Schedule of the Act merely imports a term of time in the agreement. For the application of the doctrine of estoppel, it cannot be on a better footing than the time fixed by the Court, itself in the order of reference as was done in the case of Patto Kumari. 4 PLJ 265 : (AIR 1919 Pat 93).

18. What is meant by "estoppel against Statute" has been tersely stated in Article 345 at page 176 of Halsbury's Laws of England. 3rd Edition. Vol. 15 in these terms:

"The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has on the grounds of general public policy enacted shall be invalid..... Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind the person charged with the performance of this duty cannot by estoppel be prevented from exercising his statutory powers."

One of the cases noted in the foot note in support of the second part of the passage extracted above is the case of AIR 1937 114 (Privy Council) on which reliance was placed by the learned Advocate General for the petitioner. Lord Maugham delivering the judgment of the Board has quoted with approval at page 117, a passage from Lord Atkin's judgment in "In re A Bankruptcy Notice" (1924) 2 Ch 76. I may also quote with advantage only a few lines from that passage which say:

"It seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has on grounds of general public policy, enacted shall be invalid."

This is a species for the application of the principle that there cannot be any estoppel against Statute which is wholly inapplicable here To my mind, and I say so with respect, such a principle was wrongly applied in the Allahabad case and so in Lakhmir Singh Vs. Union of India (UOI) and Another, . On the application of the principle of estoppel, Patto Kumari's case, 4 P LJ 265 : ((AIR 1919 Pat 93) was rightly decided and must be respectfully approved

19. Principles of waiver and acquiescence can also be pressed into service in support of the view taken above. In Article 1175 at page 637 of Halsbury's Laws of England. 3rd Edition. Vol. 14, it is stated:

"Waiver is the abandonment of a right, and is express or implied from conduct. A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it. and allow the contract or transaction to proceed as though the stipulation or provision did not exist."

The petitioner Company in this case was entitled to put a stop to the Arbitrator proceeding in the matter on the expiry of 4 months after he entered on the reference because of the stipulation in the arbitration agreement imported under the Act but it waived it and allowed the proceeding to proceed as though the stipulation did not exist. In my opinion, it waived its right. In the same Volume in Article 1177 at page 638, the term "acquiescence" has been stated to imply in its proper legal sense that a person abstains from interfering while a violation of his legal rights is in progress. The next Article says that acquiescence operates by way of estoppel and is an instance of estoppel by words or conduct. Of course, for the application of the principles of waiver and acquiescence and also to a certain extent for the application of the doctrine of estoppel by conduct knowledge of one's legal rights or true facts must be there. On the facts of the instant case as narrated above, I have no doubt that it was there.

20. In the instant case, the Arbitrator entered on the reference either on 23-11-61 as was argued on behalf of the petitioner when he not only accepted the reference but also directed the writing of Utters to both the parties by his order recorded on that date, or on 4-12-61 when actually the letters were written, as was argued on behalf of the opposite party Lawyers and law agents

on behalf of both the parties were appearing before the Arbitrator. Issues were settled on 13-3-62. 26th and 27th March, 1962 were fixed for evidence. At the instance of the Company the proceeding was adjourned for hearing to 1-4-62 when the evidence commenced. The evidence on behalf of the Company was finished on 10-4-62 beyond the period of 4 months starting from 23-11-61 or 4-12-61 Arguments were thereafter advanced, and the award was eventually made on 6-5-62. It must be presumed on the facts and in the circumstances of this case that both the parties were conscious that the proceeding before the Arbitrator could not be finished and the award made within the period of 4 months after the Arbitrator had entered on the reference. The first party, even after the making of the award, could have applied to the court u/s 28 of the Act and since many adjournments had been taken in the proceeding by the second party, the court would have readily agreed to extend the time. The first party, however, failed to make any formal prayer in the courts below for extending the time and no formal order extending it was made at any stage. Nonetheless, it must be held that the Company cannot challenge the award on the ground that it was made beyond time because, to quote a few words from the decision of the Privy Council in *Chowdhri Mur-taza Hossein v. Mussummat Bibi Bechun-nissa*. (1376) 3 IA 209 at p. 220 (PC) the petitioner:

"Having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself and that it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award"

here, from being made a rule of the Court.

21. A similar view under somewhat different circumstances has been expressed by a Bench of the Calcutta High Court in *Union of India (UOI) Vs. K.P. Mandal*, . I am tempted to quote a few lines quoted by Chakravarti, C J., in the Calcutta case from the speech of Lord Chancellor Campbell in *Cairncross v. Lorimer*, (1960) 3 Macq 827. The principle is that--

""If a man, either by words or by conduct, has intimated that he consents to an act which has been done and that he will offer no opposition to it. although it could not have been lawfully done without his consent, and he thereby induces other to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct I am of opinion that, generally speaking, if a party has an interest to prevent an act being done and acquiesce in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license."

The observations are quite apposite in the present case as they were in the case of Union of India (UOI) Vs. K.P. Mandal, before Calcutta High Court although under different circumstances.

22. Learned Advocate General conceded that if the award delivered beyond time would be voidable only under the Act, as under certain circumstances indicated by me above, it would be, doctrine of estoppel would apply But he contended that the award made beyond time under the Act will be void an argument which could not be supported by any decided case under the Indian Law or the English law except the decision of the Privy Council in (1891) 18 IA 55 (PC) given with reference to the express language of Section 521 of Civil Procedure Code, 1882. I am firmly of the view that the award made beyond time under the Act is not void.

23. Learned counsel for the petitioner, however, vehemently argued on the authority of the Supreme Court in Hari Shankar Lal Vs. Shambhunath Prasad and Others, that such an award would be void. The material facts of the case before the Supreme Court were that on August 17, 1948 the appellant and respondents 1 and 2 and their mother by a registered deed of agreement referred their dispute regarding the partition of two houses to two arbitrators. Within 10 days of the reference, the arbitrators gave notice to the parties and began to take evidence, i.e., they entered on the reference. On July 25, 1949 the mother died and the arbitrators did not proceed with the enquiry. On August 31, 1950, i.e. more than one year after the death of the mother the appellant gave a notice to the arbitrators requesting them to proceed with the reference and give an award at an early date. On October 1, 1950, i.e., 4 months from the date of the notice, the arbitrators made an award. It is not clear from the facts stated either in the judgment of the Supreme Court or in that of the Allahabad High Court Shambhu Nath Vs. Hari Shankar Lal and Others, from which the appeal to the Supreme Court had been taken whether within the period August 31 and October 1, 1950-- the respondents had taken part in the proceeding before the arbitrators. When the appellant wanted the first court to make the award a rule of the court, the respondents objected to it on several grounds one of which was that the award was not given within the time fixed by law. The learned Civil Judge rejected the objections and made a decree in terms of the award. On appeal the High Court came to the conclusion that the award was made after the expiry of the period of limitation and on that finding set aside the decree of the Civil Judge.

24. The question before the Supreme Court was whether the award had been made on the expiry of the period of 4 months within the meaning of Clause (3) of the First Schedule of the Act. The argument on behalf of the appellant was that the said clause provided for alternative period within which the arbitrators have to make their award and under the second alternative an award could be made within 4 months from the date of notice issued by a party calling upon the arbitrator to act. In that case, the notice to act was given by the appellant to the arbitrators on August 31 and the award was made within 4 months of that hence

it was contended it was not a nullity. This argument was repelled by all the 4 learned Judges constituting the Bench which heard the appeal in the Supreme Court but for slightly different reasons. Subba Rao. J., as he then was, delivering the majority judgment on his own behalf as well as on behalf of B. P Sinha, C J., and Mudholkar J., formulated the legal position thus at page 82 :

"(a) A notice to act may be given before or after the arbitrators entered upon the reference.

(b) If notice to act is given before they entered upon the reference the four months would be computed from the date they entered upon the reference.

(c) If a party give notice to act within 4 months after the arbitrators entered upon the reference, the arbitrators can make an award within 4 months from the date of such notice.

(d) in that event, after the expiry of the said 4 months the arbitrators become functus office, unless the period is extended by court u/s 28 of the Act, such period may also be extended by the court, though the award has been factually made."

Raghubar Dayal, J., opined--

"If the arbitrators have entered upon the reference, the period of four months begins to run from the date they entered on the reference. Any notice subsequently given to them calling upon them to act will not make the period of four months start afresh from the date of the service of the notice. Such a notice would be ineffective for the purposes of determining the period of four months within which the arbitrators had to make the award."

Thus the point which fell for decision before the Supreme Court and was decided was that a notice to act given in that case after the expiry of four months from the date the arbitrators entered on the reference could not give a fresh starting point for computation of the period of 4 months under Clause 3 of the First Schedule to the Act. While stating the reasons for that view Subba Rao, J., stated at page 81, on which great reliance was placed--

"To put it differently if time was not extended by court the document described as an award would be treated as non est."

The term "non est" was used in the sense that even if the award may be factually made beyond the period of 4 months, until the time is extended, it remains non est and by legal fiction becomes an award made within time if time is extended by court u/s 28 of the Act. In the same sense it was said by his Lordship that after the expiry of the period of 4 months "the arbitrators become functus officio unless the period is extended by court u/s 28 of the Act." In my opinion, an award made beyond the period of 4 months in a proceeding in which any of the parties has not by his conduct consented to take part or has expressly objected to it would be treated as non est until the time is extended u/s 28 of

the Act It will be an award by an arbitrator who had become functus officio and therefore as I have said above the award will be liable to be set aside on the ground that the Arbitrator misconducted himself or the proceeding or the award obtained was otherwise invalid within the meaning of Clause (a) or (c) of Section 30 of the Act. The point which falls for our derision in this case as to what would be the effect of a party taking part in the proceeding before the arbitrator after the expiry of four months did neither fall for decision in the Supreme Court nor was it canvassed or derided

25. Learned Advocate General placed reliance upon an observation of Lord Romer in the case of AIR 1938 284 (Privy Council) that--

"There can in truth be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality."

(vide page 289 column 2).

The said principle was deduced after referring to the case of Spackman v. Evans, (1868) 3 HL 171 wherein Lord Chelmsford had said at page 234--

"To render valid an act of the directors of a company which is ultra vires, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, viz the acquiescence of each and every member of the company. Of course, this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining share-holders."

For application of the principle of estoppel, waiver or acquiescence, on the facts of the instant case two points of distinction must be noticed First taking part in the proceeding before the Arbitrator after the expiry of 4 months was not acquiescing in any illegal act or transaction. Secondly, it had not the effect of extending the time by consent of parties as such a consent in the form of a valid agreement could be given only in writing and not by conduct. Here, the principle applied is a different one. The company having taken a willing part in the deliberations before the Arbitrator after the expiry of 4 months without any objection, protest or the like, is estopped from challenging the validity of the award on the ground of its having been made after the expiry of the period or it waived its right to put a stop to the proceeding going ahead on the expiry of that period--rather acquiesced in it.

26. In the end, I may also refer to the decision of Dhavan, J., in Seth Shambhu Nath Vs. Sm. Surja Devi and Others, where under similar circumstances identical views have been taken.

27. In the result, the application in revision fails and is dismissed with costs; hearing fee Rs. 100.

Narasimham, C.J.

28. I agree.

U.N. Sinha, J.

29. I agree.