
(1989) 07 CAL CK 0001

In the Calcutta High Court

Case No : A.F.O.O. No. 233 of 1986; Award Case No. 72 of 1985

Indian Iron and Steel Co. Ltd.

APPELLANT

Vs

The Sautna Stone and Lime Co. Ltd.

RESPONDENT

Date of Decision : 25-07-1989

Acts Referred:

Arbitration Act, 1940 — Section 14(2), 30, 33
Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6C, Order 9 Rule 13
Constitution of India, 1950 — Article 133, 134A, 14, 226
Limitation Act, 1963 — Section 5

Citation : AIR 1991 Cal 3

Hon'ble Judges : Bimal Chandra Basak, J; Abani Mohan Sinha, J

Bench : Division Bench

Judgement

Bimal Chandra Basak, J.—This appeal is directed against an order passed by learned trial Judge whereby the application made by the appellant herein for setting aside the award passed by the Tribunal of Arbitration of the Bengal Chamber of Commerce and Industry was dismissed.

FACTS

2. The brief facts of this case are as follows:

There was an agreement between the appellant and the respondent whereby the respondent agreed to sell to the appellant lime stone from the existing mines of the respondent at Satna Siding at Satna in Madhya Pradesh.

3. Clause 19 of the said agreement provided an arbitration clause which is as follows:--

"19 Arbitration, should any dispute or difference arise between the parties in regard to the construction, effect or meaning of anything in this agreement, such difference will be referred to the Tribunal of Arbitration of the Bengal Chamber of Commerce and the decision of such Tribunal shall be binding on the parties and the provisions of the Indian Arbitration Act will govern such Arbitration."

4. Dispute and differences arose between the appellant and the respondent. By a letter dated 26th December, 1983 the respondents herein requested the Bengal Chamber to form a Tribunal of Arbitration to enter into the reference and to arbitrate over the disputes between the parties regarding the escalation in price of limestone supplied to M/s. Indian Iron and Steel Co. Ltd. during the year 1980 and 1981 and its payment. By a letter dated 4th January, 1984 the Tribunal of Arbitration of the Bengal Chamber informed the respondent to submit the statement of claim along with other papers and documents referred to herein.

5. It appears that the Tribunal wrote a letter on the 1st February, 1984. Thereafter by a letter dated 15th February, 1984 the Registrar of Bengal Chamber requested the respondent to submit their statement of claim and/or papers and documents at an early date. On 14th March, 1984 the respondent submitted in duplicate their petition of claim along with Annexures to arbitration in dispute. By a letter dated 26th March, 1984 the Registrar informed the appellant herein about the application for arbitration made by the respondent and that the Court has been constituted on 24th March, 1984. They were called upon to submit their statement on or before the 6th April, 1984. By a letter dated 4th April, 1984 the Advocates of the appellants prayed for extension of time to file counter-statement of fact. By a letter dated 15th April, 1984 the time for the appellants to file counter-statement of fact was extended till 16th April, 1984. The appellants again applied before the Tribunal for extension of time to file counter-statement till the end of April, 1984. Similar prayer was made on 18th April, 1984. Ultimately the time to file counter statement was extended till 16th May, 1984. On 12th May, 1984, the appellant filed counter-statement of facts before the Tribunal of Arbitration. On 15th May, 1984, the Tribunal of Arbitration forwarded the counter-statement of facts filed by the appellant to the respondent and liberty was given to the latter to file rejoinder, if any, on or before 25th May, 1984. On 19th May, 1984, the respondent applied to the Tribunal of Arbitration for a legible copy of the counter-statement of the appellant to enable them to file their rejoinder. On 22nd May, 1984 the Registrar, Tribunal of Arbitration requested the appellant to submit at an early date a fresh and legible copy of the statement in defence so that the same could be forwarded to the respondent for submission of their rejoinder. On 28th May, 1984, the Registrar, Tribunal of Arbitration, forwarded to the respondent a fresh copy of the appellant's counter-statement of facts and granted the respondent time till 7th June, 1984, to file their rejoinder. On 4th June, 1984, the respondent applied to the Registrar, Tribunal of Arbitration for execution of time to file the rejoinder. On 7th June, 1984, the Registrar, Tribunal of Arbitration extended time till 18th June, 1984, to enable the respondent to file rejoinder. On 14th June, 1984, the respondent filed before the Tribunal of Arbitration a rejoinder to the counter-statement of facts filed by the appellant. On 18th June, 1984, there was a letter from the Tribunal of Arbitration to the appellant forwarding a copy of the rejoinder filed by the respondent granting time to file the rejoinder thereto till 28th June, 1984. On 27th June, 1984, the respondent filed supplementary

rejoinder before the Tribunal of Arbitration without there being any direction to that effect. On 28th June, 1984, the Registrar, Tribunal of Arbitration forwarded to the appellant a copy of the respondent's supplementary rejoinder and granted time till 9th July, 1984, to the appellant to make comments thereon if they so desire. On 3rd August, 1984, a notice from the Registrar, Tribunal of Arbitration, was given fixing 27th August, 1984, as the date of hearing. Parties were requested to be present with all relevant evidence in support of their case and to bring any books and/ or documents which they may wish to submit for inspection of the Court and to produce any person or persons whose evidence they may wish to tender. Paragraph 4 of the said notice indicates that it was a peremptory notice. On 6th August, 1984, the Registrar, Tribunal of Arbitration issued a notice to the parties advancing the date of hearing to 23rd August, 1984, cancelling the sitting fixed for 27-8-84. On 8th August, 1984, the respondent applied for adjournment of the sitting till the end of September, 1984, on the ground that its Director who would be representing the company at the Arbitration Tribunal was down with typhoid. On 9th August, 1984, a letter from the Registrar was issued to the respondent adjourning the sitting till 5th September, 1984, copy of which was forwarded to the appellant. On 9th August, 1984, a notice was issued from the Tribunal of Arbitration to the appellant informing that the arbitration sitting had been postponed till 5th September, 1984. The appellant was requested to be present in terms of paragraphs 2 and 3 of the letter dated 3-8-84. On 27th August, 1984, the respondent again applied for adjournment of the sitting fixed for 5th September, 1984, till 20th September, 1984 on the ground of illness of its Director. On 3rd September, 1984, there was a letter from the Registrar of Arbitration to the appellant informing that the Arbitration sitting had been postponed till 22nd September, 1984. Paragraphs indicates that it was a peremptory notice. Parties were requested to be present in terms of paragraphs 2 and 3 of the letter dated 3-8-84. On 3rd September, 1984, there was also a letter from the respondent to the Tribunal of Arbitration requesting permission to be allowed to be represented by the Lawyers at the hearing in view of the complexity of the matter. On 12th September, 1984, there was a letter dated 3-8-84 which was received by the claimant. On 5th/17th September, 1984, a letter was issued from the Registrar, Tribunal of Arbitration, to the respondent rejecting their prayer to be represented by a counsel at the hearing as follows:--

"I am directed to inform you that as under R. 1(8) of the Rules of the Tribunal neither party can be represented by a Counsel, Attorney, Advocate or other Lawyer or Adviser at a hearing before the Bengal Chamber, your prayer aforesaid cannot be allowed".

6. On 17th September, 1984, there was a letter from the Registrar, Tribunal of Arbitration to M/ s. Flower & Co., informing that the Arbitration Court has refused permission to the respondent to be represented by lawyer at the hearing, copies of which were forwarded to the appellant and the respondent. On 19th September, 1984, the respondent made an application purporting to be under O. VIII, R. 6C of the CPC before the Tribunal of Arbitration praying for execution of

the Counter-Claim filed by the appellant. On 21st September, 1984, the appellant received a copy of the letter dated 20-9-84 addressed to the respondent by the Registrar, Tribunal of Arbitration, stating that the Court cannot take into cognizance of the respondent's application under O. VIII, R. 6C of the CPC and informing that the application would be decided upon at the hearing. Along with the said copy of the letter the petition dated 19th September, 1984 of the respondent was forwarded to the Appellant. On 20th September, 1984 an intimation was sent from the Burnpur Office of the appellant to the Legal Adviser of the appellant at Calcutta that Mr. P.K. Gupta, who was to represent the appellant at the hearing would not be able to attend the Tribunal of Arbitration, as he has to attend on 21st September, 1984, a meeting convened by SAIL Corporation Office regarding supply of Iron Ore and Manganese Ore by M.M.T.C. This message was received by the office of the appellant's Legal Adviser, Calcutta, on 21st September, 1984. On 21st September, 1984 the Tribunal of Arbitration, Bengal Chamber of Commerce and Industry held the Sitting in Arbitration ex parte in the absence of the appellant and the award was made and published on the said date. On 14th February, 1985 a notice under S. 14(2) of the Arbitration Act, 1940 was served upon the appellant.

7. Against the said award on 13th of March, 1985 an application was moved on behalf of the appellant herein for setting aside the award. Upon completion of affidavits this application was heard and dismissed by the learned trial Judge on 29th of July, 1985 holding, inter alia, that there was no substance in this application. Being aggrieved by the same, this appeal has been preferred.

ARGUMENTS:

8. In support of the appeal it has been contended by Mr. Jayanta Mitra, learned Advocate appearing for the appellant that the learned Judge has erred in dismissing the application. He has not disputed the proposition that the Arbitrators have jurisdiction to pass the ex parte award if the notice was given, but he has submitted that it is not an absolute power conferred on the Arbitration and that in spite of such power, they must act fairly and properly. In the facts and circumstances of the case, the Arbitrators should not have come to the conclusion that the absence or non-attendance was deliberate and intentional on the part of the party in default. He has further submitted that the subject matter of arbitration in the present case was not merely the claim of the award holder but also the counter-claim by the appellant herein. Therefore, there is more the reason why it should not have been disposed of so abruptly without waiting for some time. He has further pointed out that there was an application under O.8 of the CPC and the application for engagement of the lawyer. It would have been fair and reasonable on the part of the Arbitrators to wait for some time before hearing the main matter, after these matters are finished. He has further submitted that the action on the part of his client in not appearing on the particular date was neither intentional nor deliberate as would appear from the facts stated in their petition and reply which are set out hereinbelow:

PETITION

"It will appear from the facts stated hereinabove that though your petitioner had been all along ready to proceed with the said arbitration sitting and to represent its case at the hearing in the said Reference, the matter was being adjourned by the said Tribunal at the instance of the respondent. It is significant that your petitioner did not apply for any adjournment of the said reference on any ground whatsoever." (Para 21)

"On or about 21st September, 1984 your petitioner received a copy of a letter dated 20th September, 1984 from the Bengal Chamber of commerce and Industry, Tribunal of Arbitration, addressed to the respondent above named, informing the respondent that the submissions contained in a petition stated to have been filed before the Tribunal have been given due consideration and would be decided upon at the time of hearing. Along with the said letter a copy of a petition of the respondent purported to have been verified on 19th September, 1984 was enclosed." (Para 22)

"Your petitioner states that no copy of the said application of the respondent was forwarded to your petitioner by the respondent. Your petitioner had no opportunity of dealing with the allegations contained in the said application. Your petitioner was forwarded with a copy of the said petition on the 21st September, 1984, when the meeting in the said Reference was fixed by the said Tribunal. No opportunity was given to your petitioner to controvert the allegations in the said petition. It appeared that the said petition of the respondent was accepted on record and considered by the said Tribunal without giving any opportunity to your petitioner to controvert the allegations contained therein and/or make any submission thereon." (Para 23)

"Your petitioner states that disputes between the parties in the said reference pertain to your petitioner's office at Burnpur. The said matter of your petitioner was being handled and looked after by Sri P.K. Gupta, Manager (P) (RM&C). The said Sri Gupta was to attend on behalf of the petitioner at the said hearing and was instructed accordingly. In fact, the said Sri Gupta was ready with the matter and in due course would have attended the said meeting. On receipt of the said letter dated 3rd September, 1984 from the respondent wherein the respondent has prayed for permission to have the matter handled by a lawyer. Your petitioner decided that if such permission was granted, the said Sri Gupta would also be accompanied by a lawyer and/or legal adviser of the company at the said hearing. Your petitioner reasonably assumed that in the meeting fixed by the said Tribunal on 21st September, 1984 for hearing of the said Reference, it would be decided by the said Tribunal as to whether reference should be allowed to appear on behalf of the parties as prayed for by the respondent and that if such permission was granted the matter would be adjourned till a future date to enable the parties to appear through lawyers. However, your petitioner duly intimated its Burnpur Office to send the said Sri P.K. Gupta to attend the meeting before the said Tribunal on 21st September, 1984." (Para 24)

"It appears that a meeting was convened by the SAIL Corporate Office on 21st September, 1984 regarding supply of iron ore and manganese ore by MMTC. Your petitioner's legal adviser Sri A.K. Dutta at Calcutta was not aware of the said meeting until 21st September, 1984. It appears that on 20th September, 1984 intimation was sent by Burnpur Office of your petitioner informing the Calcutta Office of the petitioner that the said P.K. Gupta would be required to attend the said meeting convened by SAIL Corporate Office on 21st September, 1984 and as such he would not be able to attend the said Tribunal of Arbitration at 3 p.m. on 21st September, 1984. The memo containing such information was forwarded to your petitioner's legal adviser at Calcutta on 21st September, 1984". (Para 25)

"Unfortunately for your petitioner, on 21st September, 1984 when the said Memo was delivered to the office of Mr. A.K. Dutta, the legal Adviser of the petitioner at Calcutta and was placed on his table, the said Mr. Dutta had already gone out of his office to attend some Court matters. As a result, the said Memo was lying on the table of the said Mr. Dutta on 21st September, 1984 unattended until the said Mr. Dutta came back to his office at about 3.30 p.m. By the time the said Mr. Dutta was aware of the information that Mr. P.K. Gupta of Burnpur would not be in a position to attend the meeting in the said Arbitration Reference fixed before the said Tribunal of Arbitration at 3 p.m. On that date, already the time for the said meeting had elapsed. By reason of the aforesaid circumstances, the Legal Adviser of your petitioner at Calcutta could not even depute any representative of your petitioner to attend the said meeting and pray for an adjournment". (Para 26)

"Your petitioner states that though the said meeting could not be attended by your petitioner's representative from Burnpur, your petitioner was not unduly worried inasmuch as your petitioner presumed that in the meeting fixed on 21st September, 1984 by the said Tribunal of Arbitration, the application of the respondent by a lawyer at the time of hearing would be taken up first, and if the application of the respondent would have been granted, naturally the sitting in the said Reference would be adjourned till a future date. Furthermore, the application dated 19th September, 1984 of the respondent to exclude the counter-claim filed by your petitioner referred to in paragraph 23 here- in above was also pending before the said Tribunal of Arbitration. Your petitioner reasonably proceeded on the basis and/or presumed that without disposing of the said application of the respondent the said Tribunal would not enter into the merits of the controversies between the parties. In any event, your petitioner having all along contested the said purported claim of the respondent before the said Tribunal of Arbitration and not having obtained a single adjournment, your petitioner could never imagine that the said Tribunal would hear the matter ex parte in the absence of your petitioner and would pass an Award against your petitioner as in fact your petitioner came to know subsequently as stated hereinafter." (Para 27)

REPLY

"..... I reiterate that the petitioner was ready to attend the said meeting on 22nd August, 1984, which however was adjourned at the instance of the respondent and without the consent of the petitioner. I deny that there was no question of the petitioner being ready to attend the said meeting. It will appear from the records that the respondent went on obtaining adjournment after adjournment on some pretext or other, though the petitioner was ready to proceed with the said arbitration. I had no knowledge that the Tribunal had turned down the request of the respondent to engage a lawyer at the hearing of the said Reference by its alleged letter dated 5th September, 1984. I deny that the petitioner has received the said letter. I say that no communication was received by the petitioner dated 5th September, 1984 informing that the respondents requests to engage a lawyer was turned down by the Tribunal. I do not admit that the respondent could not have proceeded with the hearing of the said Reference, if the deponent did not attend the said meeting. I reiterate that no adjournment was asked for on behalf of the petitioner of the hearing of the said Reference, though extension was prayed for and obtained on its behalf for filing of the counter-statement of facts, before the said Tribunal." (Para 8)

"..... It will appear from the said letter dated 20th September, 1984 that the Tribunal left the decision on the application under O. VIII, R. 6 of the CPC of the respondent to be taken at the hearing of the said Reference. I deny that the statement contained in the first sentence of paragraph 23 of the petition are false and misconceived and/or distracted and/or have been made to mislead this Hon"ble Court as alleged or at all. It appears that the respondent and/or deponent has totally failed to appreciate the contention made by the petitioner in the said paragraph. For the first time the petitioner was forwarded with a copy of the said application of the respondent was on 20th September, 1984. If according to the respondent the Tribunal had taken a decision on the said application of the respondent on 20th September, 1984, it is a submission of the petitioner that the Tribunal ought to have forwarded a copy of the said application before any decision was taken thereof, so as to enable the petitioner to deal with the allegations contained therein. I deny that the petitioner lost all interest in the matter and was not taking any steps as falsely alleged by the deponent. The said allegations are misleading and malicious. There is no question of filing any objection to the said application, as according to the respondent on 20th September, 1984 itself a decision had already been taken by the said Tribunal, which was alleged to have been communicated by the said letter dated 20th September, 1984. I deny that the petitioner chose to remain absent at the proceeding, save and except the single solitary hearing alleged to have been held on 21st September, 1984. Save as aforesaid and save as are matters of record, I specifically deny each and every allegation contained in the said paragraph." (Para 9)

"With reference to paragraph 22 of the said affidavit, save as will appear from paragraph 24 of the petition. I specifically deny each and every allegation contained therein. In particular I deny that the contents in paragraph 24 of the

petition are false and/or fabricated and/or distorted and/or misleading, as alleged or at all." "..... I say that I was otherwise ready to attend the said hearing, but for the meeting convened by SAIL Corporate Office on 21st September, 1984, which was fixed earlier. Presumably my name was not submitted before the Tribunal as the representative of the petitioner entitled to attend the said hearing because of my inability to attend the same due to my preoccupation with the said meeting convened by the SAIL Corporate Office on 21st September, 1984, which was convened earlier. It is denied that there was any question of abandoning the proceedings and/or deliberately allowing the matter to proceed ex parte, as alleged or at all. The wild insinuations of the respondent are wholly un-meritorious and have been deliberately made in order to mislead and/or prejudice this Hon"ble Court against the petitioner. I deny that the charge of misconduct against the Arbitrators is an insinuation by the petitioner, as alleged or at all. The petitioner had no knowledge that the application of the respondent praying for permission of the parties to be represented by lawyers was disposed of earlier and/or communicated by the Arbitrators by a letter dated 5/17th September, 1984, as alleged or otherwise, as no such communication was received by the petitioner. I deny that there was no rule to assume that the claim of the respondent would be allowed. Considering the nature of the dispute, which involved questions of law, it was reasonable to presume that the claim of the respondent to be allowed by a lawyer at the hearing would be allowed. I deny that the petitioner was not interested in proceeding with the matter, as alleged or at all. It is denied that non-submission of the name of the representative can by any stretch of imagination disentitle a party to appear before the Tribunal to contest the claim of the claimant. Save as aforesaid and save as will appear from records, I specifically deny each and every allegation contained in the said paragraph." (Para 10)

"I deny that I was not definite of the said meeting convened by the Said Corporate Office on 21st September, 1984, as alleged. In fact because of the said meeting I could not attend the said Reference before the said Tribunal at Calcutta on 21 September, 1984. The meeting in the SAIL Corporate Office is relating to the internal business dealings of the petitioner and the petitioner has been advised not to disclose the same in the instant proceedings to the respondent. I deny that there is any mala fide of the petitioner, as alleged or at all. I deny that the petitioner was no longer interested to pursue the matter and/or had become negligent in proceeding therewith, as alleged or otherwise. I deny that the Tribunal was within it right to hear the said matter ex parte on 21st September, 1984. The Tribunal misconducted itself and/or the said proceedings in proceeding ex parte on 21st September, 1984 and/or to pass the Award against the petitioner, I deny that the said R. XX has any application in the facts of this case, since the petitioner had admittedly filed Counter-statement/Written statement in the said Reference. Save as aforesaid and save as are members of record, I specifically deny each and every allegation contained in the said paragraph", (Para 11)

"I deny the insinuation that I am not a responsible officer of the petitioner capable of handling the said case. I was deputed by the Company to represent the petitioner in the said Reference, and it was not necessary to send any other person to look after the matter. The rest of the allegations contained in the said paragraph are of argumentable character, and the petitioner reserved its right to deal with the same at the hearing of this application. I deny that there was any lack of bona fide on the part of the petitioner in not submitting the name of the representative, who would attend the said Reference, earlier. I have been handling the said matter throughout, and naturally I would have attended the said meeting. In this regard I crave leave to refer to and/or rely upon an affidavit of Shri A.K. Dutta, Legal Advisor of the petitioner Company, at the hearing of this application." (Para 12)

"..... I deny that the petitioner had no ground for presuming that the respondent's application for permission to be represented by a lawyer would be taken up first, particularly in view of the fact that the petitioner did not receive any communication from the Tribunal that the permission to be represented by a lawyer had been rejected by the said Tribunal. Furthermore, the petitioner was misled by the last paragraph of the letter dated 20th September, 1984 of the said Tribunal, being Annexure "K" at page 122 of the petition wherein it has been clearly stated that the said application of the respondent purporting to be under O. VIII, R. 6 of the CPC would be decided upon at the hearing. I reiterate that the petitioner's case was made out in the Counter-Statement of Facts and merely by filing rejoinder to the rejoinder of the respondent or making comment on the purported supplementary rejoinder of the respondent would lead to multiplicity of proceedings without effective disposal of the matter. The case of the petitioner was depending upon the interpretation of the said clause, which is purely a question of law. The documents already on record before the said Tribunal were sufficient for the purpose of the case and/or to support the contentions of the petitioner. Peremptory notices were issued, as alleged by the respondent in the said paragraph, in view of the numerous adjournments obtained by and/or on behalf of the respondent of the sittings of the said Reference. The reason why the petitioner could not attend the said meeting had been clearly stated in the petition, which makes out sufficient case for the petitioner's non-appearance on 21st September, 1984, when the said Reference was taken up ex parte by the said Tribunal of Arbitration. I state and submit that there was nothing on record from which the Tribunal could have come to any reasonable conclusion that the petitioner was abandoning the said proceedings and/or was not interested in participating therein, and therefore ought not to have proceeded ex parte on the said date. I deny that R. XV of the said Tribunal has any application in the facts of this case. I deny that the said Tribunal acted fairly and/or equitable in hearing the said matter in the absence of any representative of the petitioner on 21st September, 1984. Save as aforesaid each and every allegation contained in the said paragraph is specifically denied." (Para 13)

9. In support of his contention Mr. Mitra has relied on the following. Juggilal Kamlatpat Vs. General Fibre Dealers Ltd., ; Premchand Manickchand Vs. Fort Gloster Jute Manufacturing Co. Ltd. (Oil Mill), ; Dipti Bikash Sen and Another Vs. India Automobiles (1960) Ltd., Lohia Jute Press P. Ltd. and Others Vs. The New India Assurance Co. Ltd. and Others, Food Corporation of India Vs. Joginderpal Mohinderpal,

10. Mr. Tagore, learned Advocate appearing on behalf of the respondent award holder, has submitted that in this case the appellant was guilty of negligence. They should have taken appropriate steps for appearance on the date of hearing. They could have taken steps for an adjournment which they did not. In this case, the Arbitrators had acted in accordance with the Rules of the Chamber of Commerce and Industry. Further, in view of the notice given, they were entitled to pass such an ex parte award because of non-appearance on the date of hearing. He has further submitted that the question of principle of natural justice cannot arise when the parties have agreed to be bound by the particular Rules.

CASES CITED

11. Before we deal with the respective submissions made by the learned Advocate we shall deal with the decisions relied upon before us. In the case of Juggilal Kamlatpat Vs. General Fibre Dealers Ltd., a Division Bench of this Court presided over by Chakravarti, C. J., as he then was, considered the scope and effect of an ex parte award in detail. It is interesting to note that in that case the date fixed for hearing was 15th April, 1952 on which date the applicant did not appear and, subsequently, letters were given explaining the delay but the ex parte award was passed on 17th April, 1952. The learned trial Judge allowed that application for setting aside the award and held that there was denial of justice to the respondents and that it constituted legal misconduct. Being aggrieved, the award holder preferred an appeal. In its judgment the Division Bench observed as follows (at Pp. 358-59 of AIR):

"The procedural rule applicable to arbitration proceedings is more tolerant than the rule followed in Courts of Law. If a party to an arbitration agreement fails to appear at one of the sittings, the Arbitrator cannot or, at least, ought not to proceed ex parte against him at that sitting. When in such a case it does not appear that the non-appearance was anything but accidental or casual the Arbitrator ought ordinarily to proceed in the ordinary way, fixing another date of hearing and awaiting the future behaviour of the defaulting party.

If, on the other hand, it appears that the defaulting party had absented himself with a view to preventing justice or defeating the object of the reference, the Arbitrator should issue a notice that he intends at a specified time and place to proceed with the reference and that if the party concerned does not attend he will proceed in his absence. But if after making such a peremptory appointment and issuing such a notice, the Arbitrator does not in fact proceed ex parte on the day fixed, but fixes another subsequent date, he cannot proceed ex parte on

such subsequent date unless he issues a similar notice in respect of that date as well.

If he issues a similar notice and the party concerned does not appear, an award made ex parte will be in order. But if he does not issue such a notice on the second occasion, but nevertheless proceeds ex parte, the award will be liable to be set aside in spite of a notice of a peremptory hearing having been given in respect of the earlier date, subject however, to the condition that prejudice was caused to the party against whom the ex parte order was made. But this duty to give notice of an intention to proceed ex parte is not an absolute duty.

If it appears from the circumstances of the case that a particular party is determined not to appear before the Arbitrators in any event, as when he has openly repudiated either the reference itself of the particular Arbitrators and has shown no desire to recent, the Arbitrators are not required to issue a notice of an intention to proceed ex parte against such a recusant person and may proceed ex parte and make a valid award without issuing a notice. The better course, however, even in such a case is to issue a notice and give the party concerned a chance to change his mind.

The above is what the Arbitrators are required on their part to do. Where the question arises after an ex parte award has, in fact, been made and it appears that no notice of an intention to proceed ex parte had been given, the principle to be applied is that the award will not be upheld, unless it is shown or it appears that the omission to give a notice has not caused any prejudice to the party against whom the ex parte award was made, because he has made it abundantly clear that he would not appear before the Arbitrators in any circumstances. When there has been an omission to give a notice, there will, however, always be a presumption that prejudice has been caused. But the presumption can be rebutted by the other party or can be seen to be rebutted by circumstances appearing on the face of the record, The principle to be borne in mind in such cases is that the failure to attend is not required to be explained on satisfactory grounds in order to dislodge the ex parte award, but the ex parte award requires to be defended by establishing that the omission to issue a notice of an intention to proceed ex parte has not caused any prejudice".

12. In the case of Premchand Manickchand Vs. Fort Gloster Jute Manufacturing Co. Ltd. (Oil Mill), the Court observed that Arbitrators are not bound to give the kind of notice if they are satisfied that a particular party does not intend to appear and is deliberately keeping away. The learned Judge also found that the excuse given was a false one and that their conduct amounted to refusal to attend. The appeal preferred against the same was dismissed.

13. In the case of Dipti Bikash Sen and Another Vs. India Automobiles (1960) Ltd., the learned trial Judge held as follows (at p. 456 of AIR):

"The principles governing the arbitrators" right to proceed ex parte were: (1) If a party to an arbitration agreement had failed to appear at one of the sittings, the

arbitrator could not or, at least ought not to, proceed ex parte against him at that sitting. (2) Where non-appearance was accidental or casual, the arbitrator should ordinarily proceed in the ordinary way, fixing another date of hearing and awaiting the future behaviour of the defaulting party. (3) If, on the other hand, it appears that the defaulting party had absented himself for defending the object of the reference, the arbitrator should issue a notice that he intended at specified time and place to proceed with the reference and that if the party concerned did not attend he would proceed in his absence. (4) But if after making such peremptory appointment issuing such a notice the arbitrator did not in fact proceed ex parte on the day fixed, but fixed another subsequent date, he could not proceed ex parte on such subsequent date, unless he issued a similar notice in respect of that date as well. (5) If he issued a similar notice and the party concerned did not appear, an award made ex parte would be in order. But, if he did not issue such notice on the second occasion but nevertheless proceeded ex parte, the award would be liable to be set aside in spite of a notice of peremptory hearing having been given in respect of the earlier date, subject, however to the condition that prejudice was caused to the party against whom the ex parte order was made."

14. It has been further pointed out by the learned Judge that this duty to give notice of the intention to proceed ex parte was not an absolute one. Where a party by its conduct had made his position clear that he would not attend in any event, then the formality need not be followed. The learned Judge held that the arbitrator in not following the rule of prudence enjoined by the Courts and in not giving the peremptory notice had acted in such a manner in which there was a possibility of miscarriage of justice and prejudice being caused to the petitioner.

15. In the case of *Lohia Jute Press P. Ltd. and Others Vs. The New India Assurance Co. Ltd. and Others*, a Division Bench of this Court held as follows (at Pp. 182-83 of AIR):

"Sabyasachi Mukharji, J. (as he then was) in the case of *Dipti Bikash Sen and Another Vs. India Automobiles (1960) Ltd.*, had considered earlier reported decisions including those of Sri Asutosh Mookerjee, J. in the case of *Udaichand v. Debibux* AIR 1920 Cal 853 : ILR 47 Cal 951, and the judgment of Phani Bhusan Chakraborty, C.J. in the case of *Juggilal Kamlatpat Vs. General Fibre Dealers Ltd.*, and in paragraph(3) of his judgment Sabyasachi Mukharji, J. had summed up the principles governing the arbitrator's right to proceed ex parte referred to above."

"Sir Asutosh Mookerjee, J. (as he then was) in the case of *Udaychand v. Debibux* AIR 1920 Cal 853, had recognised that giving of such peremptory notices prior to proceeding ex parte was a requirement not of law but of prudence. Therefore, in a particular circumstance where a party was determined not to appear before the arbitrator, in any event, or he had openly repudiated the reference, the arbitrators are not required to issue a notice of an intention to proceed ex parte"

16. In the case of Food Corporation of India Vs. Joginderpal Mohinderpal, it was held as follows (at pp. 1266-67 of AIR):

"When power came to the East India Company, they framed Regulations in exercise of the power vested in them by the British Government. Some of these Regulations were touching arbitration. Bachawat gives description of the evolution of the Arbitration Act, 1940. Therefore, arbitration as a mode for settlement of disputes between the parties, has a tradition in India. It has a social purpose to fulfil today. It has a great urgency today when there has been an explosion of litigation in the courts of law established by the Sovereign power, New rights created, or awareness of these rights the erosion of faith in the intrinsic sense of fairness of men, intolerant and uncompromising attitude are all the factors which block our courts. The Courts are full of litigations, which are pending for long time. Therefore, it should be the endeavour of those who are interested in the administration of justice to help settlement by arbitration, if possible. It has also a social efficacy being the decision by the consent of the parties. It has greater scope of acceptance today when there is a certain erosion of faith in view of the failure to appreciate the functions of the courts of law. It has also the advantage of not only quickness of decision but of simplicity of procedure. But in proceedings of arbitration there must be adherence to justice, equity, law and fairplay in actions. However, the proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure which will lead to a proper resolution of the dispute and create confidence of the people for whose benefit these processes are resorted to. It is, therefore the function of courts of law to oversee that the arbitrators act within the norms of justice. Once they do so and the award is clear, just and fair, the courts should, as far as possible, give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of correction by the court of an award made by the arbitrator. We should make the law of arbitration simple, less technical and more responsive to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done. Sections 30 and 33 of the Act provide for the grounds on which an award of the arbitrator can be set aside. These were mainly, until recent changes made by statutory laws in England, in consonance with the English principles of Common Law as adopted in India. So far as the material of the present purpose is concerned, an award of the arbitrator can only be interfered with or set aside or modified within the four corners of the procedure provided by the Act. It is necessary to find whether the arbitrator has misconducted himself or the proceedings legally in the sense whether the arbitrator has gone contrary to the terms of reference between the parties or whether the arbitrator has committed any error of law apparent on the face of the award. It is necessary to emphasize that these are grounds for setting

aside the award but these are separate and distinct grounds. Halsbury's Laws of England, Vol. 2, 4th edn., para 623 reiterates that an arbitrator's award may be set aside for error of law appearing on the face of it. Though this jurisdiction is not to be lightly exercised. The award can also be set aside if, inter alia, the arbitrator has misconducted himself or the proceedings. It is difficult to give an exhaustive definition what may amount to a misconduct on the part of the arbitrator. This is discussed in Halsbury's Laws of England (supra). It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law, and whether or not his findings of fact are supported by evidence. See the observations of Russell on Arbitration, 20th edn., page 422." (Para 7)

17. The observations of Russell on Arbitration, 20th Edn., pages 262-264, are as follows:

"Proceeding ex parte

Every arbitrator is authorised by the nature of his office, to proceed ex parte for good cause. It is unnecessary, though not unusual, to give him power in express terms in the submission. No application to the Court is necessary to warrant his so proceeding, but the arbitrator is to judge for himself of the discretion of exercising his power."

"Party neglecting to attend

In cases of references under order of the Court, Brett M.R. said: "It is a necessary implication of the powers of a referee, whether official or special, and whether he has to try the matter or to report, that he has power, subject to the control of the Court, to give a peremptory appointment for the hearing of the reference, and in case of default of appearance by either party, to proceed with the reference in his absence". It would seem that a similar implication arises in the case of an arbitration under a submission, because, otherwise, either party, by refusing to attend, could render the arbitration abortive, and in effect revoke the authority of the arbitrator.

If, therefore, one of the parties, after having been duly summoned, neglects to attend before the arbitrator and the latter is of opinion, from the circumstances which are brought to his notice, that the party is absenting himself with a view to prevent justice and defeat the object of the reference, it is the arbitrator's duty to give due notice to the absent party that he intends, at a specified time and place, to proceed with the reference, whether the said party shall attend or not, If this notice is in effectual to secure his attendance, and he does not allege some excuse satisfactory to the arbitrator, the latter not only may, but ought, to proceed ex parte.

Party attempting to revoke

When a party has ineffectually attempted to revoke the submission, and refused to attend a meeting on the ground that the arbitrator has no authority, the

arbitrator may proceed ex parte at once.

Notice of intention to proceed ex parte

In general, the arbitrator is not justified in proceeding ex parte without giving the party absenting himself due notice. It is advisable to give the notice in writing to each of the parties or their solicitors. It should express the arbitrator's intention clearly. Otherwise the award may be set aside. An ordinary appointment for a meeting with the addition of the word "peremptory" marked on it is, however, sufficient.

If the arbitrator declines to proceed on the first failure to attend a peremptory appointment, and gives another appointment, he is not authorised to proceed ex parte at the second meeting unless the appointment for it was also marked "peremptory" or contained a similar intimation of his intention.

Where in an action against a tenant for dilapidations which was referred, the arbitrator appointed a meeting for a view and "to go into the reference", and the defendant having attended the view and withdrawn without saying anything, the arbitrator thereupon proceeded ex parte and made his award, the Court refused to set the award aside: *Trayer v. Shaw* (1858) 27 LJ Ex 320.

Notice of intention must be full enough to cover whole dispute

An arbitrator announced his intention of proceeding ex parte and this intention was challenged by neither the complainant company nor their solicitors. In fact the complainant company's Director was gravely ill but the arbitrator was not informed of this. Held by Forbes, J. that the arbitrator was not guilty of misconduct in proceeding ex parte. However the awards were excessive because of the inclusion of items specifically reserved for assessment at a later stage. This was a departure from the terms of reference and constituted an alteration of the basis upon which the parties had agreed to go to arbitration. It was not that the arbitrator had no power whatever to deal with these reserved items, but simply that he should have given notice of his intention to the company. By not communicating his intention he had deprived the company of an opportunity of dealing with certain matters. It was the company's fault that they were not at the hearing but the arbitrator had no right to dispense with the duty of making certain that each party had a chance to deal with a changed situation. The whole award was set aside because the award was not itemised: *Beckett v. South Devon Homes (Teignmouth) Ltd. and Weston v. Same* (1971) 220 EG 33.

Whether notice requisite when authority denied

If a party says "I will not attend, because you (the arbitrator) are receiving illegal evidence and no award which you can make will be good", the arbitrator may go on with the reference in his absence; and it seems that it is not necessary in such a case to give the recusant any notice of the subsequent meeting. But though it may not always be necessary, it is certainly advisable that notice of every meeting should be given to the party who absents himself, so that he may

have the opportunity of changing his mind, and of being present if he pleases.

18. In the case of D.L. Miller and Co. Ltd. Vs. Daluram Goganmull, , a learned single Judge of this Court held as follows (at pp. 364-65 of AIR):

"The doctrine of arbitrator legal misconduct has been so over-worked in recent years that across the whole branch of case law on this point one finds the blazing trail of principles of natural justice. They are discussed and agitated in an atmosphere of complete unreality and divorced from the facts of each case.

Somehow the obvious point is missed in most of such cases that when the parties agree to go to arbitration they stipulate not so much for vague principles of natural justice as for concrete principles of contractual justice according to the contracts of the parties and their specific stipulations. Where the contract of arbitration itself prescribes a private procedure of its own, then so long as such agreed private procedure is not against the laws and the statutes of the land, then such agreed procedure must prevail over the notions and principles of natural justice.

If the origin of the application of the principles of natural justice to arbitration procedure is remembered, then this confusion is easily avoided. When a contract or agreement for arbitration itself does not lay down any particular procedure for the conduct of the arbitration, the Courts have said that the arbitrators must follow the principles of natural justice which are no other than common sense standards of fairness and impartiality such as no party should be condemned unheard or without representation. It was necessary to do that because the arbitrators are not strictly courts of law guided by the CPC and Evidence Act laying down massive details of procedure.

In the absence of any procedure, prescribed either by statute or by contract, the arbitrators must follow the principles of natural justice, or else there is nothing for the arbitrators to fall back upon to ensure fair adjudication. It will therefore be contrary to its origin and *raison d'être* to apply natural justice where an available procedure is prescribed by contract or Statute. Parties are forced to depart from natural justice by Statute and similarly parties can agree to depart from natural justice. In fact they very often do for avoiding delay, expense and formality. In the case before me they have done so in unmistakable terms."

19. In the case of Banwarilal Garodia Vs. Joylal Hargulal, it was held that when the arbitrators give clear notice that they would not grant any further adjournment and if a party does not choose to appear on the final date, they would proceed *ex parte*, then the party who does not attend in spite of such notice absents himself at his risk.

20. In our opinion, in the facts and circumstances of this case, apart from the question of violation of the principles of natural justice, the arbitrators did not act fairly or reasonably or prudently. His action also amounts to legal misconduct. The day the award was made was the first date of effective hearing as such. This

is not a case where the ex parte award was passed after several days of hearing. After the parties filed their respective pleadings and after two interlocutory applications were made, on the first date of effective hearing, the hearing was concluded and the award was passed ex parte even though the time to make the award was not going to expire.

21. In our opinion, the arbitrators can arbitrate but they cannot act arbitrarily. In all cases it is their bounden duty to act according to the principle of prudence and fair play. They should act according to the principles of natural justice and in a manner which would repose confidence of the general public in the arbitration proceedings. Arbitration does not mean highhandedness. The power in respect of hearing ex parte should be exercised in a very careful manner. It is not an inflexible rule of law that the arbitrators shall hear and make award ex parte merely because a notice to that effect is given, even if he is not satisfied that the absence of the party concerned is deliberate or intentional; otherwise this would lead to loss of confidence in the machinery of arbitration. We do not think that we would be doing justice to adjudication proceedings which is essential and important in commercial world, if we hold such an inflexible view. Take a case where in the first sitting of the arbitration in the City of Calcutta, a party is late by half an hour for an undisputed good reason e.g. traffic jams caused due to a procession of which the Court may take judicial notice. In that event, allowing the arbitrator to proceed ex parte without giving an opportunity to the defaulting party would cause immense hardship.

22. In our opinion, it is the duty of the arbitrators to act in a responsible fashion before they proceed to dispose of a matter ex parte. The arbitrators have no doubt the authority to pass an award ex parte in the facts and circumstances of a given case. They may have such power in a given case even if there is no prior notice given that the matter would be heard ex parte if there is no appearance. However, in our opinion, even if such a notice is given, the arbitrator is not only not bound to but he is not even entitled to make an ex parte award as a matter of course without consideration of anything else. He is not entitled to pass an ex parte award in each and every case merely because a notice has been given stating that he would proceed ex parte if no appearance is made. It is the duty of the arbitrator to apply his mind in the facts and circumstances of each case and not proceed ex parte automatically merely because such notice is given. They must act in a proper and reasonable fashion. If on the basis of materials before him, the arbitrator is of the opinion that absence of a party is deliberate with the intention to avoid or delay the proceedings, the arbitrator is certainly entitled to proceed ex parte. Take a case where on a series of previous occasions also the party concerned had not appeared without any excuse or reason; then it is certainly open to the arbitrator to proceed with the hearing and to pass an award ex parte. This he is entitled to do under such circumstances, even if no such notice to proceed ex parte had been given. However, merely giving notice to proceed ex parte in case of non appearance is not conclusive in the matter. The fact which is to be taken into consideration by the arbitrator is the attitude or

conduct of the party concerned. If the arbitrator comes to a conclusion taking into consideration the records of the proceedings " before him that the party concerned has no intention to allow the arbitration proceedings to continue in a proper and regular manner or that they are intentionally delaying the matter, only in such a case he can proceed ex parte and can pass the award ex parte. There are arbitrations where not only the citizens or undertakings of a particular country is involved but also cases where persons or organizations belonging to some foreign countries are also involved. The arbitrators have enormous powers. They do not have to give any reason in passing their awards. Grounds for challenging an award are confined by S. 30 of the Arbitration Act. To find out error of law apparent, within the meaning of S. 30, a party is not entitled to travel beyond the award until and unless any other document is relied upon or incorporated by way of reference in the award. Against an award no appeal lies. Moreover, in a Court case in the case of an ex parte decree, an application can be made for setting aside the same under O.9, R. 13 of Code of Civil Procedure. No such opportunity is available in the case of an ex parte award because as soon as the award is made and published, the arbitrator becomes functus officio. There is no appeal as such against the award as it is in respect of an ex parte decree passed in a Court of law. No review or revision lies in such a case. Under these circumstances, the powers of the Arbitrators have to be very carefully exercised.

23. As pointed out by Sabyasachi Mukharji, J. in the judgment of the Supreme Court, the importance of arbitration proceedings cannot but be undermined. In various cases instead of proceeding to the regular Court for seeking redress for the purpose of expedition and expenses involved, arbitration proceedings are resorted to. In this case from the Minutes of 21st September, 1984 before us, nothing is recorded which would indicate any negligence on the part of the claimant. As already stated, that was the first date of hearing and in the past a number of adjournments had been granted. The statement of claim was filed on 14th March, 1984. The time to file their counter statement was extended. The claimant, applied for extension of time to file their rejoinder which was given. Such rejoinder was filed in June, 1984. This rejoinder was sent by the Tribunal to the appellants and in turn they were given time to file their rejoinder till 28th June, 1984. There is no rule for the same. Moreover the respondents were allowed to file their supplementary rejoinder though there is no direction to that effect. This was forwarded to the claimant and they were asked to make their comments. By their letter dated 3rd August, 1984, the Tribunal fixed 27th August, 1984 as the date of hearing. This date was advanced to 23rd August, 1984. It was the claimant who applied for extension to the end of September, 1984. The sitting was adjourned till 5th September, 1984. Their respondents again applied for adjournment till 20th September, 1984. By a letter dated 3rd September, 1984, 24th September, 1984 was fixed as the date of hearing. Therefore, it is quite clear that in the past the Tribunal by its order showed more than enough indulgence in granting extension of time fixed by themselves. It is unfair that under these circumstances on the adjourned date when one of the

parties had not appeared, which party is not merely defending its claim but had also filed its counter claim, the arbitrator decided to proceed ex parte and make the award ex parte without even giving the "guilty" party an opportunity to explain its "crime" of being absent on the particular date. As we have already pointed out, it is nobody's case that the time to file the award was due to expire when the hearing took place ex parte and the award was made ex parte.

24. There is another aspect of the matter. The applicants have given an explanation as to why they could not attend the proceeding on that particular date. It may be that they could have been more careful in the matter. But we can always take into consideration the fact that this is a Government Undertaking and they do not enjoy the reputation of being prompt and diligent about the conduct of their litigations like it is expected in the case of a private concern. The Supreme Court itself has noticed, in respect of condonation of delay under S. 5 of Limitation Act, that the Court must take notice of the fact that the Government proceeds slowly. In this connection reference may be made to a Supreme Court decision in the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, wherein it was held as follows (at p. 1354 of AIR):

"The doctrine of equality before law demands that all litigants including the State as litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step motherly treatment when the State is the applicant praying for condonation of delay. In fact on account of an impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing on the buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant non grata status. So also the approach of the Courts must be to do even-handed justice on merits in preference to the approach which scuttles a decision on merits."

25. There is another aspect of the matter. We find that there is not merely a claim by the claimant but also a counter-claim by the opposite party. We also find that there was an application under O.8, R. 6D of the Code by the claimant which, it may be said, was not finally disposed of by the arbitrators. There was also an application to be represented through lawyers. Regarding this application, we find that the Registrar sent certain communications. We do not find from the records that this matter was at all brought before one considered by the Tribunal of Arbitration. At least no record to that effect has been shown to us. Under these circumstances if one of the parties does not get the impression that the date fixed for hearing for which such notice is given is not for the purpose of hearing the parties on merits fully and finally but also to pass the award, the party concerned cannot be blamed.

26. In this context, it may be pointed out that on 20th September, 1984, after receipt of the respondent's application dated 19th September, 1984, under O.

VIII, R. 6D of the CPC the Registrar, Bengal Chamber of Commerce under the directions of the Tribunal informed the respondent as follows:--

"With reference to your petition dated 19th September, 1984, I am directed to inform you that as the CPC does not apply to any reference before this Tribunal the Court cannot take into cognizance of your application under O. VIII, R. 6D of the said Code. However, I am directed to add that the statements contained in your said petition have been given due consideration and would be decided upon at the hearing."

27. This would indicate that the application of the claimant was not finally disposed of and that was also the subject matter of hearing. Under these circumstances, the appellants cannot be blamed if they thought that the application would be disposed of first. In this context we may point out that we have not found anything from the records which has been sent by the Registrar, Bengal Chamber of Commerce that any such direction was given by the Tribunal or that any such matter was considered by the Tribunal itself.

28. In the facts and circumstances of the case we are of the opinion that the Tribunal of Arbitration, Bengal Chamber of Commerce and Industry, have acted in an arbitrary and high-handed fashion. Their action in the particular case not only amounts to violation of principle of natural justice but also amounts to legal misconduct. They have acted arbitrarily in violation of rules of prudence, propriety and fairness. Accordingly in the facts and circumstances of the case, in our opinion, the arbitrators did not act in accordance with law in passing the award ex parte on 21st September, 1984 as they did.

29. Accordingly, we allow this appeal and set aside the judgment and order of the learned trial Judge dismissing the application for setting aside the award. We allow the application for setting aside the award. The award is set aside. Judgment upon award matter is set aside. However, we do not pass any order as to costs.

30. An oral prayer is made for a certificate under S. 134A of the Constitution of India read with Art. 133 of the Constitution of India for leave to appeal to the Supreme Court. In our opinion we have only applied the laws already laid down not only by this High Court but also by the Supreme Court. We have merely applied the principles already laid down in the facts and circumstances of the case. Accordingly, following the well known decisions of the Supreme Court starting with State of Jammu and Kashmir and Others Vs. Thakur Ganga Singh for self and on behalf of other shareholders of Jammu and Kashmir Mechanics and Transport Workers Co-operative Society Limited and Another, for self and other subsequent cases, we reject this prayer. In our opinion, this is not a fit and proper case which involves any question of law which, in our opinion, should be decided by the Supreme Court.

Abani Mohan Sinha, J.

31. I agree.

32. Appeal allowed.