

(2018) 05 CAL CK 0002
In the Calcutta High Court
Case No : GA 4030 of 2017, APO 568 of 2017

JAGAT SINGH CHOPRA & ANR.

APPELLANT

Vs

RAJ SINGH CHOPRA
RAJ SINGH CHOPRA

RESPONDENT

Date of Decision : 04-05-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 4, 17, 18, 19, 33, 37
Companies Act, 2013 — Section 7(7), 166, 213(b)(i), 447, 448
Limitation Act, 1963 — Article 116(a)

Citation : (2018) 05 CAL CK 0002

Hon'ble Judges : ASHIS KUMAR CHAKRABORTY J

Bench : Single Bench

Advocate : S.N. Mitra, Debnath Ghosh, Sukrit Mukherjee, Anirban Pramanick, Jayanta Mitra, Abhrajit Mitra, Sarvapriya Mukherjee, Arik Banerjee, Rajib Mullick, Rakesh Sarkar

Final Decision : Disposed Off

Judgement

The Court : This appeal under Section 37 of the Arbitration and Conciliation Act, 1996, as amended by Act 3 of 2016 (in short, "the Act of

1996") is directed against the order dated November 11, 2017 passed by the arbitral tribunal under Section 17 of the Act. The brief facts which

are relevant to be considered for deciding the appeal are that the appellant no.1 is the father of the appellant no.2 and the respondent. The parties

herein jointly control various companies and also own an immovable property at A-123, Lake Gardens, Kolkata " 700045 (hereinafter referred to as

the "Lake Gardens Property") and other movable assets including gold ornaments and jewellerys and raw silver and silver utensils.

The Lake Gardens property is the residential house of the parties. Certain disputes arose between the parties relating to their respective rights in

respect of the joint family companies, the Lake Gardens property and the other movables mentioned above. By an agreement dated January 22, 2016

they agreed to appoint three arbitrators to adjudicate the said disputes pertaining to distribution of joint properties and the companies. Thus, the arbitral

tribunal comprising three arbitrators entered upon reference. The arbitral proceeding was held on January 22, 2016 itself when a consent award, duly

signed by all the parties, was passed by the arbitral tribunal. Although, the said consent award dated January 22, 2016 (hereinafter referred to as

the consent award) dealt with various matters between the parties but for the purpose of deciding the present appeal we are concerned with

only three issues firstly, the Lake Gardens property; secondly, the gold ornaments, jewellery, raw silver and silver utensils; and, thirdly, the cash

balance lying in the hands of the respective parties. The consent award is in Hindi language and English translated copy of the same has been

disclosed in this application.

As per the consent award the present respondent would relinquish his 1/3rd share in the Lake Gardens property in favour of the present appellants for

consideration. It is the amount of consideration receivable by the present respondent from the appellants for relinquishing his 1/3rd share in the Lake

Gardens property which is clarified by the arbitral tribunal by the impugned order is challenged before this Court. Clause 5 of the consent award

provided that the 1.850 kg. of gold metal lying with the appellant no. 1 plus, raw silver and the silver utensils and all jewellery lying with the respondent

herein will be equally shared by the respective parties, that is, each party would have 1/3rd share. Clause 6 of the consent award stated that after

meeting all expenses the balance cash of Rs. 1,62,800/- shall equally be divided between the parties, that is, each party would have 1/3rd share in the

cash amount. The consent award also provided that in case any error is found in the partition then the same would be settled after contacting the

aforesaid three persons. Till the month of June, 2016, none of the parties took any step to execute the consent award passed by the arbitral tribunal.

However, on July 6, 2016 the parties once again approached the arbitral tribunal when the arbitral tribunal held a meeting on July 6, 2016 itself and on

July 8, 2016 passed certain directions for the steps to be taken by the respective parties for execution of the consent award. A copy of the said

direction passed by the arbitral tribunal on July 8, 2016 has also been disclosed in this application. With respect to the respective rights of the parties

relating to the said Lake Gardens property and the gold ornaments, jewellery, raw silver and silver utensils the arbitral tribunal directed the appellant

no.1, described in the said direction dated July 8, 2016 as "JSC", to do the following acts:

"Actions to be done by JSC HANDING OVER OF ALL PERSONAL AND COMPANY/ TRUST DOCUMENTS OF NSS. ALL

DOCUMENTS OF NSS TO BE DEPOSITED WITH ARBITRATORS 3 DAYS PRIOR TO COMMENCEMENT OF STAGE 3.

ALL GIFT DEEDS/RELEVANT DOCUMENTATIONS PERTAINING TO TRANSFER OF SHARES OF 123 LAKE GARDEN AND

REGISTRATION FORMALITIES TO BE ORGANISED BY JSC.

Family settlement deed to be executed and signed by RSC & Family. ALL PAPERS PERTAINING TO THE SAME TO BE PREPARED BY JSC.

Completion of Partition of M L Chopra HUF & J S Chopra HUF " To start with start of Audit. Payment of 1/3rd share to RSC to be adjusted in

Lieu of 123, L. Gardens consideration. Proper documents to be executed SIGNING OF DOCUMENTS OF PARTITION WILL BE DONE BY

RSC ONLY AT THE TIME OF SETTLEMENT OF ACCOUNT PERTAINING TO 123 LAKE GARDENS.

Payment of Consideration of 123 Lake Gardens- To deposit with Arbitrators 3 days prior to Vacation of 123 Lake Gardens with adjustment of

receivable/payables. Distribution of Jewellery/Cash in hand/Metals/Silver Utensils " To be deposited with Arbitrators 3 days prior to Vacation of

123, L.Gardens. While drawing the accounts for the same Diamond Buttonos [4 Pcs] and Photo Albums kept with RSC to be handed over to the

arbitrators 3 days prior to Vacation of 123, L. Gardens."

After passing of the above directions by the arbitral tribunal on July 08,2017 the present appellants filed an application, Company Petition No. 5 of

2017, against the present respondent and others, under Sections 7(7), 166, 213(b)(i), 447 and 448 of the Companies Act, 2013, before the National

Company Law Tribunal (hereinafter referred to as "the NCLT") complaining about the alleged illegalities committed by the present respondent in

the affairs of the joint family companies. In the said application, the present

respondent filed his reply affidavit disclosing therein an English translated copy of the consent award made by the arbitral tribunal recording that he is to receive Rs. 1,83,334/- from the present appellants for relinquishing his 1/3rd share in the said Lake Gardens property in their favour.

On November 1, 2017 the present respondent filed an application, under section 17 of the Act of 1996, before the arbitral tribunal, praying for various relief including appointment of a Receiver to take possession from the appellant no. 1 the raw gold, raw silver, silver jewellery and the cash fund of Rs. 1,62,80,000/- from the respondent no.1. He also prayed for an order of injunction restraining the appellants herein from creating any disturbance of his peaceful possession in respect of the Lake Gardens property. In the said application the present respondent, as the applicant alleged that as per the consent award he was to get Rs.18,33,34,100/- for relinquishment of his 1/3rd share in the said Lake Gardens property from the present appellants.

He further alleged that during the arbitral proceeding all the family jewellery, after an inventory, was kept in his safe custody and as required by the consent award he submitted all such jewellery with the arbitrators for distribution and division in three equal shares amongst the parties and the arbitral tribunal after holding a meeting with all the parties, made over the same to the appellant no.1. The present respondent, as the applicant before the arbitral tribunal, further alleged that as per the consent award there was a cash balance of Rs.1,62,80,000/- to be distributor between the parties in equal share of 1/3rd each. The respondent asserted that in view of the conduct of the present appellant no.1 a Receiver should be appointed to take possession of the jewellery and the cash balance of Rs.1,62,80,000/- from the present appellant.

A copy of the said application filed before the arbitral tribunal was received by the present appellants on November 5, 2017. On November 10, 2017 the present appellants filed an application, being EC No.281 of 2017 before this Court for execution of the consent award. On November 11, 2017 the arbitral tribunal took up the said application of the present respondent for hearing when the advocate appearing for the present appellants, as the respondents in the application made submission about the filing of the execution application before this Court on November 9, 2017 and sought for time to file affidavit against the said petition. The advocate for the present appellants

further submitted before the arbitral tribunal that the amount mentioned by the present respondent to be receivable from the present appellants for relinquishing his 1/3rd share of the said Lake Gardens property is contrary to the amount mentioned in the consent award. It was further submitted that the respondents before the arbitral tribunal had not received any jewellery as alleged by the petitioner in the said application, the respondent herein. All the said submissions made on behalf of the present appellants have been recorded by the arbitral tribunal in the impugned order.

By the impugned order, the arbitral tribunal held that on perusal of the record it is found that the respondent nos. 1 and 2 in the said application (the appellants herein), made false statement by submitting that they have not received any jewellery. The arbitral tribunal further held that it is a fact that the petitioner in the said application had handed over the jewellery which was in his possession to one of the arbitrators which was subsequently handed over to the respondent no.1 (the present appellant no.1) with the knowledge and consent of the other arbitrators and the same cannot either be disputed or denied. According to the arbitral tribunal, on perusal of the consent award it is found that the petitioner in the said application (the respondent herein) is entitled to receive Rs.1,83,33,400/- for relinquishing his 1/3rd right in residential premises, that is, the Lake Gardens property.

According to the arbitral tribunal on perusal of the consent award it is found that the petitioner (the respondent herein) is entitled to receive

Rs.54,26,666/- for his 1/3rd share in the cash balance of Rs.1,62,80,000/-. The arbitral tribunal clarified that amount reflected in the award was written

in abbreviation as per the request of both the parties and it has no hesitation to conclude that both the parties have taken undue advantage of their

requests and concluded that the figures clarified by the said order is correct and is true on which the consent award was passed. By the impugned

order the arbitral tribunal further directed the appellant no.1 in this appeal, to hand over all the jewellery as received to one of the arbitrators in

presence within 24 hours of receiving the order.

The arbitral tribunal also passed an ad-interim order of injunction restraining the present appellants from creating any third party right in respect of the

movable assets of the Chopra family and the companies including the office premises mentioned in prayer (a) of the application and from disturbing

the peaceful possession of the present respondent in the said Lake Gardens property. It is the said order dated November 11, 2017, which has been challenged by the appellants in this appeal. In the appeal the appellants have also filed an application, GA No. 4030 of 2017 praying for, inter alia, condonation of delay, if any in preferring the appeal and stay of operation of the impugned order. After passing of the impugned order by a letter dated November 14, 2017 the appellant no. 1 informed the arbitral tribunal that there is no jewellery in his possession and the same was never handed over to him by anyone. Further, by an order dated November 21, 2017 passed in the execution application filed by the present appellants, EC No. 2 of 2017 a learned Single Judge of this Court directed the parties herein to maintain status quo with regard to the business, properties and assets in their possession, the said application is being contested by the present respondent. Recently, even the present respondent has also filed an application, E.C.146 of 2018 before this Court claiming execution of the consent decree. Mr. S.N. Mitra, learned senior counsel appearing in support of the appeal, assailed the impugned order on various grounds. He first contended that when the present appellants had already filed the application for execution of the consent award before this Court on November 9, 2011, the arbitral tribunal lacked the jurisdiction to pass the impugned order, under Section 17 of the Act of 1996, on November 9, 2011. The learned counsel for the appellants produced a case status report downloaded from the website of this Court recording that the execution application, EC No. 281 of 2017 was filed by the present appellants before this Court on November 10, 2017. He further submitted that the present respondent has been served with a copy of the execution application and in the present case he could not dispute the date of filing of the said execution application before this Court. It was submitted that in any event, when the learned advocate representing the present appellants before the arbitral tribunal made a submission about the filing of the application for execution of the consent award before this Court, the arbitral tribunal ought to have at least, adjourned the hearing of the said application by directing the present appellants to produce a copy of such execution application and satisfy itself whether in fact such execution application was filed or not.

The next ground stressed on behalf of the present appellants was that even if it

be accepted for the sake of argument, that the arbitral tribunal had the jurisdiction to entertain the application under Section 17 of the Act of 1996, in that event also while dealing with the said application the arbitral tribunal did not have the jurisdiction to modify either the amount mentioned in the consent decree receivable by the present respondent for relinquishing his 1/3rd share in the Lake Gardens property in favour of the present appellants or the total amount of cash deposit lying with the parties to be distributed between the parties in equal share, which could only be done only under section 33 of the Act of 1996 that too, within the time stipulated by the said section.

Mr. Mitra further submitted that the consent award expressly records that the present respondent is entitled to receive Rs.1,83,334/- for relinquishing his 1/3rd right in the said Lake Gardens property and the cash balance of Rs. 1,62,800/- shall be divided between in 1/3rd share each. By referring to the English translated copy of the consent award as had been relied upon by the present respondent himself in his Reply Affidavit filed before the

NCLT in Company Petition No. 5 of 2017, the learned counsel for the appellant pointed out that until filing of the application under Section 17 of the

Act of 1996 it was also the case of the present respondent that as per consent award he was to receive Rs. 1,83,334/- from the present appellants for

relinquishing his 1/3rd share in the Lake Gardens property and the cash balance amount of Rs. 1,62,800/- is to be distributed between the parties to the

extent of 1/3rd share. Therefore, according to the appellants, the finding of the arbitral tribunal that on perusal of the consent award it is found that the

petitioner (the respondent herein) is entitled to receive Rs. 1,83,33,400/- (Rupees One Crore Eighty Three Lakh Thirty Three Thousand Four Hundred

only) for relinquishing his 1/3rd right in the residential premises and that the petitioner (the respondent herein) is entitled to receive 1/3rd share in the

cash balance of Rs. 1,62,80,000/- (Rupees One Crore Sixty Two Lakh Eighty Thousand only)are all vitiated by perversity.

It was strenuously contended that when neither the present respondent could specify in his application, nor the arbitral tribunal could mention the exact

date and venue of the alleged handing over possession of jewellery by the present respondent to one of the arbitrators, even the finding of the arbitral

tribunal that on perusal of the record it is found that the respondent nos.1 and 2

(the present appellants) have given false statement by submitting that they have not received any jewellery is also vitiated by perversity. Similarly, the arbitral tribunal could not mention the date or venue when they handed over any jewellery to the present appellant no. 1. The tribunal could not even disclose any document to prove the alleged delivery of any jewellery by them to the appellant no. 1. Urging all the above grounds, learned Senior Counsel for the appellants strenuously pressed for setting aside of the impugned order passed by the arbitral tribunal.

On the other hand, Mr. Jayanta Mitra, learned senior counsel appearing for the respondent in this appeal, strenuously contended that the impugned order passed by the arbitral tribunal is not vitiated by any error of law calling for any interference by this Court. He submitted that the parties themselves appointed three arbitrators comprising the arbitral tribunal with the knowledge that they are not trained in law and they are only the well-wishers of the parties and their respective families. The present appellants all along admitted the reference of their disputes with respondent to the arbitral tribunal also appointed by themselves. It was argued that the original consent award is in Hindi language, which is disclosed in this application.

By referring to page 2 of the original award passed by the arbitral tribunal in Hindi, Mr. Mitra stressed that it is clear that the amount receivable by the present respondent from the present appellants for relinquishing his 1/3rd share in the said Lake Gardens property was fixed by the arbitral tribunal at Rs.1,83,33,400/- and not Rs.1,83,334/as alleged by the present appellants. It was further submitted that the concluding portion of the consent award expressly provided that in future if any error is found in the partition, then the parties would be entitled to settle the same after contacting the arbitral tribunal. Therefore, according to the respondent, the arbitral tribunal was competent to pass the impugned order clarifying/correcting the various amounts reflected in the consent award and the impugned order does not suffer from any infirmity.

It was argued for the respondent that the directions passed by the arbitral tribunal on July 8, 2016 regarding the actions to be done by the present appellant no. 1 clearly mentions that all jewellery/cash in hand/metals/silver utensils were lying with the latter and, as such, it is preposterous on the part of the appellant no. 1 to allege that he had not received the jewellery or that

the jewellery is not lying with him. Mr. Jayanta Mitra contended that the Act of 1996 has been enacted with the sole object to adjudicate the disputes between the parties by avoiding the rigours of Court proceedings and this Court while dealing with this appeal should not entertain the technical points urged by the present appellants. It was submitted that in spite of an opportunity being granted to the present appellants by the impugned order to file their affidavit in opposition to the application of the present respondent under Section 17 of the Act of 1996, the appellants have intentionally chosen not to file any affidavit till this date. This is because the appellant no.1 cannot deny or dispute the factum of receipt of the jewellery from the present respondents through the arbitrators. It was submitted that the letter dated November 14, 2017 issued by the first appellant is devoid of any merit. It was further argued for the respondent that Section 18 of the Act of 1996 requires the arbitral tribunal to mete out equal treatment to the parties and in the present case it cannot be contended by any party that the arbitral tribunal has acted in violation of the said provision. He further submitted that as per Section 19 of the Act of 1996 the arbitral tribunal is free to fix the procedure to be followed in the arbitral proceedings in any manner it considers appropriate. Therefore, according to the respondent, in the present case when the arbitral tribunal entertained the application of the present respondent under Section 17 of the Act of 1996 and clarified certain figures mentioned in the consent award, the same cannot be faulted with. It was argued for the respondent that in view of the provisions of section 4 of the Act of 1996 when the appellants accepted the direction passed by the arbitral tribunal dated July 08, 2016 laying down the steps of execution of the consent award dated January 22, 2016 they cannot raise any objection to the maintainability of the section 17 application filed by the respondent before the arbitral tribunal. Citing the decision of the Supreme Court in the case of Raja Shri Sailendra Narayan Bhanja Deovs-State of Orissa reported in AIR 1956 SC 346, it was submitted by the respondent that it is well settled law that a consent award / consent decree operates as an estoppel against the parties to such award / decree and, as such, the present appellants cannot commit any act to render the consent award dated January 22, 2016 infructuous.

I have considered the materials on record as well as the arguments advanced by

the learned Senior Counsel appearing for the respective parties.

The impugned order under Section 17 of the Act of 1996 was passed by the arbitral tribunal on November 11, 2017 and the present appeal was filed

before this Court on January 4, 2018, that is, after 43 days. As per Section 37 of the Act of 1997 the appeal against the said order shall be treated as

an appeal from original decree of the Court passing the order. Under Article 116(a) of the Limitation Act, 1963, the period of limitation for filing such

appeal before this Court is 90 days from the date of the order. Therefore, there is no delay in filing this appeal by the present appellants.

Indisputably, the impugned order has been passed by the arbitral tribunal in an application under Section 17 of the Act of 1996 filed by the respondent

herein. A bare reading of Section 17 of the Act of 1996 makes it clear that an arbitral tribunal can pass any order under the said section till the award

by it in the arbitral proceeding is not put into execution before the Court. Once the arbitral award is put into execution by any party before a court, the

arbitral tribunal ceases to have any jurisdiction to entertain any application under Section 17 of the Act of 1996 or to pass any order in exercise of

power under the said section. In the present case, although the learned advocate representing the present appellants before the arbitral tribunal could

not produce copy of the execution application being EC No.281 of 2017 filed before this Court and a copy of the said application was also not served

upon the respondent till that date but a positive statement was made on behalf of the petitioner before the arbitral tribunal about the filing of the said

application. The records produced before this Court also substantiate the statement made by the present appellants about the filing of the said

execution application on November 10, 2017. The arbitral tribunal, however, instead of adjourning the hearing of the application filed by the respondent

and without directing the present appellants to produce a copy of the execution application, passed the impugned order on November 11, 2017. After

perusal of the case status report obtained by the appellants from the website of this Court, a copy whereof was made over to the learned Counsel

appearing for the respondent, there is no dispute that, in fact, the execution case being EC No.281 of 2017 was filed in the Original Side of this Court

on November 10, 2017. E

ven otherwise also, the present respondent is contesting EC No.281 of 2017

before a learned Single Judge of this Court and it is not his case that the said execution application was not filed before the Court on November 10, 2017. In these facts, I find that the appellants are justified in their contention that the arbitral tribunal committed a patent illegality in entertaining the application filed by the respondent under Section 17 of the Act of 1996 and passed the impugned order without ascertaining that the submission made on behalf of the present appellants about the filing of the execution application to be incorrect. When the execution application, EC No.281 of 2017 had already been filed by the appellants before this Court, the entirety of the impugned order passed by the arbitral tribunal is nothing but an order without jurisdiction and a nullity. Therefore, I do not find any merit in the arguments advanced on behalf of the respondent on the basis of Section 4 or Section 18 or Section 19 of the Act of 1996. Even it were to be held that the application filed by the present respondent under Section 17 of the Act of 1996 was maintainable before the arbitral tribunal, in that event also when the appellants are already proceeding with the execution application, EC No. 281 of 2017 before this Court and in view of the said order dated November 21, 2017 passed by a learned Single Judge of this Court in the said execution application, the respondent's said application before the arbitral tribunal has become infructuous and the fact that the present appellants have not filed their affidavit-in-opposition to the said application is of no consequence. Even the respondent has also filed an application to execute the consent decree. In the facts of the present case as discussed above, the submissions made by the respondent on the basis of the directions passed by the arbitral tribunal on July 8, 2016 do not render any credence to the allegations made by the respondent that the appellant no.1 received the jewellery from him through the arbitrators. Even otherwise also, the power of an arbitral tribunal to correct any computation error or any clerical or typographical error or any other error occurring in the award can be exercised only under section 33 of the Act of 1996, that too within the time stipulated under the said section. In the present case, even the respondent admitted to have filed the said application before the arbitral tribunal only under section 17 of the Act of 1996 and it was stressed that the respondent had not made any prayer in the said application for correction of any error in the original consent decree.

Therefore, the decision of the arbitral tribunal to correct/clarify the figures mentioned in the consent decree towards the payment receivable by the respondent for relinquishing his share in the Lake Gardens property and the amount of cash to be distributed between the parties are also without jurisdiction. Further, the respondent himself in his reply affidavit filed in Company Petition No. 5 of 2017, before the NCLT, relied upon the English translated copy of the consent award recording that he is to receive Rs. 1,83,334.00/- from the appellants for relinquishing his 1/3rd share in the Lake Gardens property and the cash balance of Rs. 1,62,800.00/- is to be distributed between the parties to the extent of 1/3rd each. Thus, the findings of the arbitral tribunal in the impugned order that on perusal of the consent award it is found that the petitioner is entitled to receive Rs.1,83,33,400 for relinquishing his 1/3rd share in the Lake Gardens property and Rs.54,26,666 for his share in the cash balance of Rs.1,62,80,000 are also vitiated by perversity.

The present respondent in his application before the arbitral tribunal could not specify the date and venue of his making over the jewellery to any of the arbitrators of the arbitral tribunal and even the arbitrators could specify, in the impugned order, as to when and where they received such jewellery from the present respondent or made over the same to the appellant no. 1, I find the findings of the arbitral tribunal in paragraph 6 of the impugned order that the present appellants had given false statement by submitting that they have not received any jewellery and it is a fact that the present respondent had handed over the jewellery which was in his possession to one of the arbitrators, who in turn, handed over the same to the present appellant no.1 with the knowledge and consent of the other arbitrators is also vitiated by perversity. In any event, the direction passed by the arbitral tribunal in the impugned order directing the present appellant no. 1 to hand over all the jewellery to one of the arbitrators, as well as the order of injunction passed against the present appellants based on the above perverse findings are vitiated by patent illegality and the same cannot be sustained.

The decision of the Supreme Court in the case of Raja Sri Sailendra Narayan Bhanja Deo (supra) cited by the respondent has no application in the present case.

In view of that above findings that the aforementioned impugned order dated

November 11, 2017 passed by the arbitral tribunal is without jurisdiction and in any event, the same is vitiated by perversity this appeal is allowed and the aforementioned impugned order is set aside. Since the appeal itself is allowed, the stay application, G.A.No.4030 of 2017 also stands disposed of without any order. It is, however, clarified that as the respondent was not called upon to file in affidavit the allegations made against him in the stay application shall be deemed not to have been admitted. There shall, however, be no order as to costs. Urgent certified copy of this judgment, if applied for, be made available to the parties subject to compliance with all requisite formalities.