

(2010) 03 KL CK 0015

In the High Court Of Kerala

Case No : Arbitration Appeal No's. 12, 13, 14, 16, 18, and 19 of 2003

Kallathil Sekharan and Others

APPELLANT

Vs

Kallathil Sreedharan and Others

RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Arbitration Act, 1940 — Section 14(2), 15, 16, 30, 33
Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3
Kerala Arbitration Rules, 1977 — Rule 14
Kerala Civil Rules of Practice, 1971 — Rule 29

Citation : (2011) 1 ILR (Ker) 25 : (2011) 1 KLJ 316

Hon'ble Judges : P.Q. Barkath Ali, J; A.K. Basheer, J

Bench : Division Bench

Advocate : K.P. Dandapani, for the Appellant; Sajeev Kumar K. Gopal, Binoy Vasudevan, T.M. Sreedharan, V.P. Narayanan and Sreelal N. Warriar, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Basheer, J.—These six appeals which have been filed u/s 39 of the Arbitration Act, 1940 (for short "the Act"), are being disposed of by this common judgment since the parties and the issue involved in them are the same.

2. The question that arises for consideration in these cases can be posed thus:

Is not an Arbitrator appointed under the Act entitled and empowered to pass an award recording the terms of settlement reported by the parties and their respective counsel before him, orally?

To put it differently;

Is an Arbitrator bound to insist on the parties to file a formal petition for compromise as provided under Rule 3 of Order XXIII of the Code of CPC in order to make his award valid and legally binding on the parties?

OR

Are the powers of an Arbitrator circumscribed by the provisions contained in Order XXIII of the Code of Civil Procedure?

3. Before we deal with the above issue, relevant facts may be briefly noticed.

4. These appeals arise from a common order passed, by the, Subordinate Judge's Court, Thalassery in a batch of Interlocutory Applications in three original suits, which were instituted for dissolution of partnership-, rendition of accounts and other allied reliefs. The applications were filed under Sections 15 and 33 of the Act by some of the Defendants in the suits to modify the award passed by the Arbitrator after conducting an enquiry regarding its validity. One of the Defendants, who was apparently happy with the award, prayed in his applications that a decree may be passed in terms of the award. The court below refused to interfere with the award and held that it was not liable to be modified or set aside. On the contrary, the Court ordered that the award be made rule of the Court. Hence, these appeals.

5. The suits were instituted by one of the four brothers who had built up a small business empire in Kannur District and in parts of Karnataka State. It appears that "inevitable discord" developed after some time and one of the brothers, namely Sreedharan, instituted the three suits referred to above before the Subordinate Judge's Court, Thalassery in O.S. Nos. :516/1994, 177/1995 and 178/1995. The Defendants were the other two brothers, namely Sekharan and Narayanan, and the widow and children of deceased brother Lakshmanan.

6. The primary prayer in the three suits which related to three partnership concerns, namely M/s Cannanore Central Oil Mills, M/s K. Sreedharan and brothers and M/s Ramananda Textiles, was for dissolution of partnership and rendition of accounts.

7. To cut a long story short, when one of the orders passed in the suits came up for consideration before the Apex Court, the Court appointed Mr. Justice K.P. Radhakrishna Menon, a retired Judge of this Court, as the sole Arbitrator. The learned Arbitrator passed an award on 28th November, 2001, effecting partition of the three items of immovable property referred to hereunder:

(i) Property where the Cannanore Central Oil Mills is situated and the Cannanore Central Oil Mills;

(ii) Property where the Ramananda Textiles is situated and the Ramananda Textiles(the property lies both in the Kannur Municipality and Puzhathi Panchayat); and

(iii) Talap property.

It may at once be noticed that there is no dispute that these were the only three items which were agreed to be partitioned among the parties.

8. For the sake of convenience, the operative portion of the award is extracted below:

It is agreed that the first item shown above is allotted to the share of Party No. 4(Sreedharan); the property shown above as Item No. 2 is allotted to Party No. 2(Narayanan); and Item No. 3 shown above is allotted jointly to the share of Parties 1 & 3 who are having equal shares. It is also agreed that for equalisation of shares Party No. 4 shall pay ` 10 lakhs to Party No. 3, who represents the heirs of deceased Lakshmanan. Similarly, Party No. 2 shall pay to Party No. 1 ` 10 lakhs. The equalisation amounts shall be paid by the respective parties at the time of passing the final decree for partition in terms of this Award.

The liabilities of the firms, if any, will be borne by the parties who have taken over them.

The Schedule and the Plan which the parties have agreed to produce before the Court, will form part of this Award.

9. Mr. Sekharan, who is the common Defendant No. 1 in the three suits, and party No. 1 referred to in the award, took exception to the division and allotment of the properties made by the Arbitrator. According to him, the division and allotment were not in terms of the consensus arrived at by the parties before the Arbitrator and were totally inequitable, arbitrary and heavily loaded in favour of Defendant No. 2 (Narayanan), who was shown as party No. 2 in the award.

10. Therefore, Mr. Sekharan filed three applications (one each in the three suits) with a common prayer to modify the award as provided under Sections 15 and 33 of the Act. Similar applications were filed by Defendant Nos. 3 to 6(widow and children of deceased Lakshmanan) with identical prayers as made by Mr. Sekharan. These Defendants made a further prayer to conduct further enquiry regarding the validity of the award and to set aside or modify the same. Mr. Sreedharan, the common Plaintiff in the three suits, apparently seemed satisfied with the allotment made in his favour and, therefore, did not file any application as had been done by Mr. Sekharan or the legal heirs of Lakshmanan.

11. Defendant No. 2, Mr. Narayanan, came up with a prayer before the Subordinate Judge to pass a decree in terms of the award of the Arbitrator. Thus, all the nine applications in the three suits came up for consideration before the court below.

12. The learned Subordinate Judge, after considering the rival contentions of the parties, held that no ground had been made out either to modify or set aside the award. It was further held that no further enquiry need be held in the arbitration proceedings. Consequently, the learned Judge allowed the prayer made by Mr. Narayanan to pass a decree and judgment in terms of the award.

13. In this context, it may be noticed that an application for passing a final decree is pending consideration before the court below. The Advocate Commissioner appointed by the court has already submitted his report, share list, valuation account, plan, etc. But, no final decree has been passed in view of the order of stay passed by this Court in these appeals.

14. We have heard learned Counsel for the parties at length and perused the entire materials available on record, including the proceeding papers of the learned Arbitrator which form part of the record.

15. As indicated earlier, the main grievance of the Appellants, who are Defendant Nos. 1 and 3 to 6 in the three suits, is that the Arbitrator had proceeded to pass the award as though the parties had agreed among themselves to divide and allot the properties on the terms as referred to or indicated in the award. According to the Appellants, the parties had in fact agreed upon certain other terms in the matter of division and allotment; but those terms have not been incorporated in the award at all.

16. For instance, the Appellants point out that it was agreed among the parties that item No. 2 be divided into two shares and one such share along with the factory building of Ramananda Textiles and the appurtenant land having an extent of 47 cents with the running business, be allotted to Defendant No. 2. The remaining 40 cents of land which falls within the limits of Puzhathi Panchayat was agreed to be allotted to the share of Defendant Nos. 1 and 3 to 6 jointly. The Appellants have a further case that the parties had further agreed that item No. 3 be allotted jointly to the share of Defendant Nos. 1 and 3 to 6.

17. In this context, it may be pertinent to notice that the Arbitrator allotted item No. 2 in its entirety to the share of Defendant No. 2. In other words, Defendant Nos. 1 and 3 to 6 have been denied any share in item No. 2 though the specific case of the Appellants is that it was agreed by all concerned that 40 cents of land in item No. 2, with the old dilapidated building therein, would be allotted to them. It is also pointed out by the Appellants that contrary to the agreement among the parties, item No. 3 was divided into two, one share being allotted to Defendant No. 1 and the remaining portion to Defendant Nos. 3 to 6, though the agreement was that the said item (item No. 3) would be allotted to the share of Defendant Nos. 1 and 3 to 6 jointly without division.

18. Learned Counsel submits that the Appellants do not intend to make an issue out of the allotment of item No. 3 at this stage. But, it is vehemently contended by the learned Counsel that the allotment of entire item No. 2 to the share of Defendant No. 2 is wholly arbitrary, inequitable and illegal. While trying to highlight the inequity in the allotment of the above item, learned Counsel for Defendant No. 1 has raised his primary contention based on Rule 3 of Order XXIII of the Code of Civil Procedure. He has also advanced arguments seeking support from Sections 15, 16, 30, 33 and 41 of Act, 1940. We will deal with the above contentions a little later.

19. The short question that arises for consideration is whether the Arbitrator had proceeded to pass the impugned award contrary to the terms reported before him by the parties and their counsel. The other question for consideration is whether the Arbitrator had acted with bias, or shown any favouritism to one sharer or the other.

20. Before we deal with those aspects, it will be profitable to take a glance at the award itself.

21. The award starts with the statement that the parties to the proceedings had agreed that the Firms, of which dissolution and accounting were sought for, can be ordered to be dissolved. They further agreed to effect partition of the immovable properties into four equal shares, without insisting for settling the accounts. The Arbitrator further stated that there was unanimity with regard to the three items of properties, which were agreed to be partitioned. The parties undertook to produce the plan before the court, in case they failed to produce the same before the Arbitrator on or before 11th December, 2001.

22. It was thereafter that the learned Arbitrator incorporated the description of the three items of property in the award, which, according to him, was intended only to make it abundantly clear that there was no ambiguity with regard to the identity of the properties. Thereafter, the learned Arbitrator indicated as to how the three items of property were to be divided among the four sharers (the operative portion has already been extracted in the earlier part of the judgment).

23. It may be noticed that the dispute or bone of contention is only in respect of item No. 2. The Appellants have not raised any demur or protest as regards the allotment made in favour of the Plaintiff. Similarly, they have no objection with regard to the allotment of item No. 3 to their joint share. Further, the Appellants seem to be happy about the payment of ` 10 lakhs to be made to each of them (party Nos. 1 and 3). According to the Appellants, the only mistake committed by the Arbitrator is that he ignored the terms of settlement arrived at among the parties in respect of item No. 2.

24. In this context, Appellants place strong reliance on the valuation account prepared by the Advocate Commissioner in the final decree proceedings. According to the Appellants, item No. 2 is a very valuable property worth approximately ` 1,60,00,000 (Rupees one crore sixty lakhs), whereas item No. 3, going by the valuation made by the Advocate Commissioner, is worth only about ` 71 lakhs. Learned Counsel would submit that the Appellants had never bargained for such an inequitable division and they had not agreed that item No. 2 be allotted to the share of Defendant No. 2 exclusively. It is also contended by them that the learned Arbitrator ought to have given an opportunity to the parties to reduce the terms of compromise into writing so that there would not have been room for any confusion or misunderstanding at a later stage. This omission on the part of the Arbitrator is cited as a misconduct.

25. In this context, learned Counsel for the Appellants has invited our attention to Section 41 of the Act which deals with procedure and powers of court in arbitral matters. The provisions contained in Section 41 postulate that subject to the provisions of the Act and the Rules made thereunder, the provisions of the Code of CPC shall apply to all proceedings before the Court and to all appeals, under the Act. Learned Counsel contends that if Section 41 is read along with

Section 47, it will be abundantly clear that the proceedings before the arbitrator are governed by the provisions of the Code.

26. In this context, learned Counsel also invites our attention to Rule 14 of the Kerala Arbitration Rules 1977. These rules which have been framed by the High Court of Kerala in exercise of powers vested in it u/s 44 of the Act deal with the procedure to be followed in court in the matter of presentation and registration of application, issue of notice and other procedural aspects. Rule 10 deals with the manner in which an arbitrator or Umpire has to file the award before the court. The above rule postulates that an arbitrator or umpire causing the award or a signed copy thereof to be filed in court u/s 14(2) of the Act shall do so in the manner prescribed by Rule 29 of the Kerala Civil Rules of Practice.

27. The thrust of the argument of the learned Counsel is based on Rule 14 which provides that in cases not provided for in the foregoing Rules the provisions of the Code of Civil Procedure, 1908, the Kerala Civil Rules of Practice, 1971 and the Circulars/Orders issued by the High Court of Kerala from time to time shall *mutatis mutandis* apply to all proceedings before the court. It is contended by the learned Counsel that the provisions of the Code are applicable to all proceedings before the Arbitrator also. He submits that the above statutory provisions in the Act and the Rules will make it abundantly clear that the arbitrator ought to have followed the procedure prescribed under the Act while recording the so called consensus arrived at among the parties. In short the contention of the Appellants is that the arbitrator ought to have insisted on the parties to file a formal application incorporating the terms of settlement or agreement. According to the Appellants, the failure of the arbitrator in following this procedure would amount to misconduct also.

28. We are afraid, the above contentions are too far fetched and untenable.

Rule 3 of Order XXIII Code of CPC reads thus:

3. Compromise of suit.--Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the Defendant satisfied the Plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject -matter of the suit.

29. Rule 3 postulates that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the Defendant satisfied the Plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith. The words "in writing and signed by the parties" in the above Rule were introduced by Amendment Act

104/1976 with effect from February 1, 1977.

30. The argument that the Arbitrator was not bound to act on the basis of the oral submissions made before him by the parties cannot be countenanced at all. Going by the Scheme of the Act itself, it is evident that the Arbitrator is vested with abundant powers to resolve the dispute among the parties. The provision contained in the Act and the Rules do not put any fetters on the powers of the Arbitrator. The Arbitrator will be entitled to act on the basis of the submissions made before him by the parties or their authorised representatives. Rule 14 of the Rules does not have any application to the proceedings pending before the Arbitrator.

31. Section 41, as has been noticed already, deals with procedure and powers of court in arbitral matters. The Kerala Arbitration Rules framed by the High Court in exercise of the power vested in it by virtue of Section 44 are also for the purpose of regulating the proceedings in court. On that short ground alone, the above contention raised by the Appellants is liable to be rejected. We do so. It is held that the power of the Arbitrator to record compromise reported by parties is not circumscribed or curtailed by the provisions contained in Order XXIII of the Code of Civil Procedure.

32. In *Byram Pestonji Gariwala Vs. Union Bank of India and others*, it has been held by the Apex Court that the counsel representing the parties would be competent to sign the compromise even on implied authority of the parties. The Court reiterated that introduction of the words "in writing and signed by the parties" in Rule 3 cannot mean to have watered down the authority of the counsel or recognised agent. But the Court cautioned that it would be prudent for the counsel not to act on implied authority, except when warranted by exigency of circumstances.

33. As has been noticed already, the bone of contention in these appeals is only as regards item No. 2. Appellants would contend that the agreement among the parties was to divide the said item into two portions and allot one such portion/share to the Appellants in these appeals. Arbitrator has recorded in the award in no uncertain terms that the parties agreed before him that the firms, of which dissolution and accounting were sought for, can be ordered to be dissolved. They further agreed before the arbitrator that the three items of properties referred to in the award be partitioned in lieu of settlement of the accounts of the firms.

34. After recording the above statements made by the parties who were admittedly represented by their respective counsel, the arbitrator proceeded to set out the manner in which the parties had agreed to divide the three items of properties. The Arbitrator also directed, as agreed by the parties, that Plaintiff shall pay ` 10,00,000 to Defendant Nos. 3 to 6 and Defendant No. 2 shall pay ` 10,00,000 to Defendant No. 1. Even at the risk of repetition, we may state that Appellants have no grouse or complaint about allotment of item No. 1 to the share of Plaintiff. Similarly, they have no complaint with regard to the allotment

of item No. 3 jointly to their share. Appellants have also not raised any demur or protest about the direction to the Plaintiff and Defendant No. 2 to pay ` 10,00,000 each to both of them. Their grouse appears to be only with regard to item No. 2 which has been ordered to be divided. Appellants contend that the parties had agreed and decided to divide item No. 2 as well in a manner as indicated in the earlier part of the judgment.

35. We find it difficult to accept the above contention, particularly, since the Appellants do not have a case that the arbitrator was actuated by any ill motive, bias or prejudice against them. The Appellants have not made any such allegation at all against the arbitrator. What they have indicated in the course of arguments is that such an error or mistake might have crept in because of hurry, since the arbitrator had taken up another engagement on that day.

36. Yet again we are not persuaded to countenance such an argument or contention. We do not propose to assign our own reasons or rationale to the decision taken by the arbitrator in the matter of division and allotment of the properties. Evidently, the arbitrator had completed the exercise in terms of the agreement arrived at among the parties. In the absence of any material to indicate otherwise, we do not find any reason to interfere with the award. In our view, the court below has adverted to the above aspect in its right perspective.

37. Coming to the question whether the arbitrator was bound to insist on the parties to reduce the terms of agreement into writing, our answer is in the negative. It is unnecessary to delve deep into the amplitude of the powers of an arbitrator appointed under the Arbitration Act, both old and new. The scope of interference with the award of an Arbitrator is very well delineated in the Act and Rules. It has also been settled through a catena of decisions over the years as under what all circumstances the court can interfere with the award passed by an arbitrator. Learned Counsel on either side, have, referred to a large number of decisions in support of their respective contentions. In *Kwality Manufacturing Corporation Vs. Central Warehousing Corporation*, , it has been reiterated by Their Lordships of the Supreme Court that the scope of interference by courts in regard to arbitral awards is limited. Their Lordships went on to observe thus:

A court considering an application u/s 30 or 33 of the Arbitration Act, 1940 does not sit in appeal over the findings and decision of the arbitrator. Nor can it reassess or reappraise evidence or examine the sufficiency or otherwise of the evidence. The award of the arbitrator is final and the only grounds on which it can be challenged are those mentioned in Sections 30 and 33 of the 1940 Act.

38. Yet again in *M.P. Housing Board Vs. Progressive Writers and Publishers*, , the apex court after referring to a catena of earlier decisions in *M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro*, , *M/s. Arosan Enterprises Ltd. Vs. Union of India and Another*, etc. held that "the court as a matter of fact, cannot substitute its evaluation and Come to the conclusion that the arbitrator had acted contrary to

the bargain between the parties". While agreeing with the observation made by the apex court in Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., the court observed that "the court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out, whether or not the arbitrator has committed an error of law".

39. Coming to the question of alleged misconduct on the part of the arbitrator for his failure to ask the parties to file a formal petition reducing the terms of agreement into writing, we have no hesitation to hold that the arbitrator is not bound by any such procedural niceties or formalities. An arbitrator is well within his powers to follow his own procedure so long as he does not transgress the well-settled principles of equity and good conscience and does not travel beyond the four corners of the mandate given to him. The parties to arbitration have to be necessarily given equal opportunity to be heard. The materials that are placed for consideration ought to be considered by the arbitrator. His actions and decisions must be based on principles of fairness and natural justice. We are only trying to restate the rudimentary principles which govern arbitral process that have been settled through a catena of decisions rendered by various High Courts and the Apex Court.

40. Having carefully perused the entire materials available on record and also the proceedings papers of the arbitrator, we have not found any circumstance to indicate that the arbitrator had deviated from the terms of agreement. When it came to the question of division and allotment of item No. 2 alone, the Appellants, in hindsight, might have felt that they have been denied a chunk of a valuable property. But the fact remains that the award was passed way back in the year 2001. The Advocate Commissioner had valued the property much later. Land value has been sky-rocketing over the last few years. Therefore, there is no rhyme or reason to try to fall back upon the valuation shown by the Advocate Commissioner in his report and valuation statement. It may also be remembered that while allotting item No. 1 to the share of Plaintiff, he was asked to pay a sum of ` 10 lakhs to Defendant Nos. 3 to 6. Similarly, Defendant No. 2 was directed to pay ` 10 lakhs to Defendant No. 1 while allotting item No. 2 to the former. Therefore, it cannot be said that the arbitrator had not considered all pros and cons and advantages and disadvantages of the division and allotment of the properties among the parties.

Having regard to the entire facts and circumstances of the case, we do not find any reason to interfere with the impugned order passed by the court below. The appeals fail and they are accordingly dismissed. But in the peculiar facts and circumstances of the case, we direct the parties to suffer their respective costs.