

(1973) 04 CAL CK 0006
In the Calcutta High Court
Case No : A.F.O.D. No. 117 of 1967

Kripa Sindhu Biswas

APPELLANT

Vs

Sudha Sindhu Biswas and Others

RESPONDENT

Date of Decision : 06-04-1973

Acts Referred:

Arbitration Act, 1940 — Section 14(2), 30, 32
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Stamp Act, 1899 — Section 2(15)

Citation : AIR 1973 Cal 496 : 77 CWN 760 : (1974) 1 ILR (Cal) 263

Hon'ble Judges : K.J. Sengupta, J; C.N. Laik, J

Bench : Division Bench

Advocate : B. Das, Sakti Nath Mukherjee, B. Ghosh and Haridas Chatterjee, for the Appellant; Apurba Dhan Mukherjee and Murari Mohan Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Laik, J.—In this important case there is some useful discussion on the law of arbitration. I have to plough through several authorities. Doctrines are laid down which would not be likely to introduce some further uncertainty into this branch of law. I did not enter at length into the technical arguments that were addressed to us, as any observation made on the same, might open the way to easy defeat of the provisions of the Arbitration Act, 1940 (hereinafter referred to as the Act). The time has long gone by since this Court showed any disposition to sit as a Court of Appeal on awards in respect of matters of fact.

2. The case has a chameleon-like history. It has greatly protracted the hearing and added to the costs. In this unfortunate litigation the disputants are own brothers.

The defendant No. 1 appellant is a legal practitioner in the Howrah Court The plaintiff respondent No. 1 is a medical man.

3. This appeal is presented from a judgment and decree passed in part, in a suit for partition in the preliminary form. The plaintiff's 1/3rd share was declared. There was a direction by the Trial Court that the mother of the fighting brothers (Sm. Dakshabala, Defendant No. 4 and Respondent No. 5 in the appeal) is to be given one-fourth share at the time of the final allotment in lieu of maintenance. The plaintiffs prayer for accounts and for setting aside the documents of sales are dismissed. Though the plaint sought the general account and partition, the suit is avowedly one to set aside the award which the Respondent contended, was not binding on him.

4. For the purpose of duly considering the decree appealed against, it will be necessary to take a short view of the circumstances which gave rise to the dispute and which led to the making up of an award by the arbitrators. It is shaped in the following way.

5. The suit properties are admittedly joint between the plaintiff and the defendants Nos. 1 to 3. The properties originally belonged to Mahendranath. Jatindranath was his only son but he predeceased his father in the year 1923, leaving behind him, his second wife the said Sm. Dakshabala. Mahendranath died in the year 1927 leaving behind him, three grandsons viz., Amarendra, Kripasindhu (defendant No. 1 and appellant in this appeal) and Sudhasindhu (plaintiff and respondent No. I in the appeal). Amarendra, the only son of Jatindra's first wife, died in the year 1955 leaving behind him two sons Manas and Manoj, defendants Nos. 2 and 3 and respondents Nos. 2 and 3 in this appeal respectively.

6. Now for the case of the plaintiff. The appellant Kripasindhu, was the Karta of the joint family. In 1357 B. S. corresponding to 1950-51, the three brothers separated in mess. Under an arrangement, the parties began to possess certain properties separately while the rest of the properties remained joint. As joint possession was felt inconvenient, the three brothers appointed Dr. Premtosh Basu, a medical man of repute and two Pleaders of the Howrah Court viz., Sri Manmatha Ghosh and Sri Jiban Krishna Chatterjee, as arbitrators to effect partition of their joint properties. All the parties to the arbitration signed the agreement on February 2, 1954 in token of their consent to it. During the pendency of the arbitration proceedings, Dr. Basu died on July 21, 1956. The plaintiff alleged that the defendants Nos. 1 and 2 viz., Kripasindhu, the appellant, and Amarendranath the deceased father of defendants 2 and 3, influenced the other two arbitrators and obtained a collusive and illegal award on 31st July, 1956.

7. The plaintiff respondent No. 1 attempted to draw back from his agreement He filed an application u/s 33 of the Act on April 3, 1958 for setting aside the award in the Trial Court. The existence and validity of the arbitration agreement and the award were challenged on various grounds giving rise to miscellaneous case No. 23 of 1958 which was allowed on September 23, 1959.

8. An appeal was preferred therefrom to this Court by the present appellant (F. M. A. No. 135 of 1960), which was allowed on September 4, 1964. The Misc. Case was dismissed, principally on the ground that the actual filing of the award in the Court was necessary for maintaining an application u/s 33 of the Act.

9. The plaintiff asked the principal defendants to partition the properties of which he has one-third share, the defendant No. 1 one-third and Amarendranath the remaining one-third which has now devolved on his said two sons Manas and Manoj. On April 25, 1960 the defendants refused. The allegation against the defendant No. 1 appellant was that he had been misappropriating income and usufructs of the properties and had not been maintaining proper accounts, that the defendants allowed certain joint properties to be sold for arrears of rent and the properties were purchased by them in the names of Sm. Kalyani and Rekharani (defendants Nos. 5 and 6 in the suit and Respondents Nos. 4 and 6 in the appeal) being the wives of Defendants Nos. 1 and 2 respectively.

10. The defendant No. 1 appellant contested the suit. He denied the material allegations of the plaint. He admits separation since 1357 B. S. and some of the material facts about the arbitration. It was pleaded by the said defendant that the period of the agreement of arbitration dated 2nd February, 1954 was extended till July 1956 by a second Ekrarnama dated. 28th April, 1955, as it was not possible to prepare the award within the aforesaid time. The second agreement clearly provided that if one of the arbitrators become incapable of acting, the unanimous award by the remaining two arbitrators would be binding on the parties. During the pendency of the arbitration proceedings, Amarendranath died and his sons accepted the second Ekrarnama. They participated in the proceedings and agreed to have the properties partitioned. The arbitrators concluded the arbitration proceedings and arrived at a decision, but just before the award was passed, Dr. Basu, one of the arbitrators died. Accordingly, the other two arbitrators made the award on July 31, 1956. The award was thereafter registered on 24th August, 1956 after notices were served by the arbitrators on all the parties including the plaintiff respondent No. 1.

11. Before the Trial Court, two substantial defences were taken by the Defendant No. 1 appellant, firstly that the suit is not maintainable because of the aforesaid award, secondly as all the parties including the plaintiff respondent took part in the arbitration proceedings, accepted the award and acted upon it, the suit should be dismissed. As the respective parties began to possess the properties in accordance with the directions given in the award and as the properties were effectively partitioned by the award, no further suit for the same relief could be entertained.

12. No other defendant did appear in the suit.

13. A vast amount of evidence was adduced. Both the plaintiff and the Defendant No. 1 deposed. There were other witnesses on behalf of the defendants.

14. The cause was tried by the learned Subordinate Judge. Third Court, Howrah.

It is meant, however, to apply our attention, before we proceed further, to the findings arrived at by him.

15. The learned Subordinate Judge on the said second point inter alia held that the award which was not filed in the Court, could not operate as an instrument of partition. He followed two decisions, cited on behalf of the plaintiff respondent, of the Andhra Pradesh High Court viz., the case of Sait Pamandass Sugnaram Vs. T.S. Manikyam Pillai and Others, and the case of Seth Pamandas Sugharam (died) by Hardevi and Others Vs. T.S. Manikyam Pillai and Another, . He also discussed and distinguished three cases, cited on behalf of the Defendant appellant viz. the case of Lala Kanhai Lal v. Lala Brij Lal reported in 28 Cal LJ 394: (AIR 1918 PC 70) and the Division Bench decision of this Court in the case of Ananta Lal Pakrasi Vs. Jnanada Sundari Debya and Others, and the Supreme Court case of (1931) L.R. 58 I.A. 254 (Privy Council) .

16. On the first point the learned Subordinate Judge inter alia held that the award was not a valid one, principally on the ground that the award was passed only by two of the arbitrators, out of three. In this connection he considered the first and second arbitration agreement (Exhibits 4 and B respectively) and the Award (Ext. H). He observed that towards the end of the second Agreement a clause to the effect that if one of the arbitrators fails to act as such, the remaining two would be in a position to give the award, seemed to him to be interpolated. Assuming that it is not so, the learned Subordinate Judge proceeded to hold, that it did not follow that only two arbitrators were free to pass the award in the absence of the other one.

17. The Court below held that the provisions of Section 2(15) of the Stamp Act cannot give life to the award.

18. The learned Subordinate Judge however accepted the defence argument on the principle of law to the effect that if the parties do accept even the invalid award of partition and take advantage of the same and act upon it and do divide the properties between themselves, they, cannot thereafter resile from that position and claim fresh partition.

19. On this point however the learned Subordinate Judge ultimately found that the award was not acted upon by all the parties. The plaintiff at least always repudiated it. That being the position, the plea that there was a previous partition on the basis of the Award, could not be accepted by him. In this connection he referred to the oral evidence of the defendants and found that the witnesses examined for the defendant have not satisfied the Court that the parties began to possess the properties in accordance with the award. He further referred to Exts. 1, 2 and 3 and found that the plaintiff's present separate possession of the properties, is referable to the arrangement of 1357 B. S. (1950-51). The learned Subordinate Judge referred to six transfers (Ext. 9 series) made on the basis of the Award and held that they were made during the pendency of the suit and therefore cannot affect the position. The trial Court was

also of the opinion that simply because certain co-sharers transferred certain properties out of the joint properties, that cannot lead to the conclusion that there was a partition. When it was pointed out to the Court below that by Ext. 1 the plaintiff himself took action and filed a suit for ejectment against certain persons on the basis of the award, the Court below expressed the opinion that the defendants cannot make capital of this fact because admittedly the plaintiff was in possession of certain rooms on the basis of an amicable arrangement. The learned Subordinate Judge, having himself noticed that the mutation of the names of the different parties was effected in respect of the properties allotted by the award, was still of the view that even if there was a mutation, the plaintiff could not be made responsible for that, unless it shows that he himself took an active part.

20. As stated earlier, the suit was decreed in part for partition in the preliminary form. The plaintiff's 1/3rd share was declared. There were other directions. The plaintiff's prayer for accounts and for setting aside the documents of sales are dismissed.

21. The defendant No. 1 now carries the complaint to this Court upon several grounds. There is no cross-complaint by the plaintiff respondent No. 1.

22. We had the very full assistance of the learned Advocate Mr. Sakti Nath Mukherjee for the appellant. He cleared the nettle out of our path and helped to dispose of the points. We are sorry to record that the subtlety and nicety of the arguments advanced by the learned Advocate Mr. Apurba Dhan Mukherjee for the plaintiff Respondent No. 1 in big cases such as this, would no longer be heard and we record our gratefulness with condolence.

23. We have stated the facts and circumstances, though somewhat involved, in a summary form for the purpose of our judgment.

24. Many problems have been touched on in the course of the argument but I would approach to deal with the case with a view to giving it practical and realistic application of the principles of the law of arbitration to the facts in the present case. Stripped of its inessentials, the fundamental submissions of the learned Advocate for the appellant out of many are (1) whether in law the award has any binding effect on the parties and (2) Whether the award in fact has been acted upon by the parties. Other legal, subsidiary and technical arguments would also be noticed as we proceed.

25. Our attention has been drawn to the several provisions of the Indian Arbitration Act 1899 (Central Act IX of 1889). Comparison was also made between Sections 11 and 15 of the said Act and Section 32 of the Arbitration Act of 1940. Paragraphs 10, 16, 20 (old Section 525) and 21 (old S. 526) of the Second Schedule of the CPC (1908) were also placed. Several provisions of Chapters II to V, particularly sub-clauses (1) and (2) of S. 14, S. 17, S. 20(5), S. 25, S. 26 and Ss. 30 to 32 were placed before us. Article 119 of the Limitation Act 1963 and Arts. 158 and 178 of the Limitation Act 1908 were also discussed

before us. The decision of the Judicial Committee of the Privy Council in the case of Muhammed Nawaz Khan v. Alam Khan, (1891) 18 IA 73: ILR 18 Cal 414 (PC), the Division Bench decision of the Madras High Court in the case of Krishna Panda v. Balaram Panda ILR (1896) Mad 290 and a Division Bench decision of this Court in the case of Bhajahari Saha Banikya v. Behary Lal Basak (1906) ILR 33 Cal 881 were also placed.

26. The law regarding such types of cases as the present one after the award was made, is not plenty. I do not think it helpful to examine in detail the other types of cases. There are special features in them and some judicial statements were clearly coloured by such features. In the examination of the questions involved in such types of cases as the instant one we are of opinion that whilst we are always willing to pay due deference to the law and to discourage mere technical objections which affects not the merits of the case, it is also our duty to look to the broad principles of justice and equity.

27. To start with, the following basic principles and the law relevant for the decision, on the point as to whether non-filing of the Award in the Court was a nullity or not, are:

(i) Award is equivalent to a final judgment, though not enforced.

(ii) Award though not filed in Court would not, on that account, be invalid.

(iii) The Arbitration Act 1940 does not alter the above position from the earlier statutes viz, Arbitration Act of 1899 and second Schedule of the Civil P. C. of 1908. When dealing with legislations the best one can do, is to follow as faithfully as one can, all the relevant provisions of the Acts without seeking for purposes of construction to rank them in a hierarchy.

(iv) As the cause of action merges in the award, a valid award constitutes a bar to any action on the original demand.

(v) The principle laid down in the case of Sardool Singh v. Hari Singh in AIR 1968 P&H 204 (211) to the effect that the award without a rule of Court becomes a nullity, is not good law being expressly overruled by the Supreme Court in the case of Satish Kumar and Others Vs. Surinder Kumar and Others, .

(vi) Consequently the decision laid down by the Andhra Pradesh High Court in the Full Bench decision of Sait Pamandass Sugnaram Vs. T.S. Manikyam Pillai and Others, which was strongly relied on by the Trial Court and on which the Punjab and Haryana High Court based its said decision, has been impliedly overruled by the said Supreme Court decision. This case was bedevilled by research and academic discussion when it really admits of a relatively simple solution. If the ratio decidendi of the decision by the Andhra Pradesh High Court would have been a correct one, it was not necessary for the Supreme Court to keep the question open in the case of Kashinathsa Yamosa Kabadi, etc. Vs. Narsinga Bhaskarsa Kabadi, etc., . With respect we are unable to agree with the other decision of the Andhra Pradesh High Court reported in Seth Pamandas Sugharam

(died) by Hardevi and Others Vs. T.S. Manikyam Pillai and Another, . It should also not be forgotten that the principles laid down in (1906) ILR 33 Cal 881 (887) though decided on the provisions of the CPC 1882, have found acceptance in the Supreme Court in Satish Kumar and Others Vs. Surinder Kumar and Others, . The whole judgment is of value. It represents a sound and rational development of the law which should be endorsed. The principles laid down by the Andhra Pradesh High Court in Sait Pamandass Sugnaram Vs. T.S. Manikyam Pillai and Others, holding contrary to the principles in (1906) ILR 33 Cal 881 cannot therefore be accepted.

(vii) The ruling of the Patna High Court in the case of Sheo Narayan v. Prabhu Chand ATR 1958 Pat 252 to the effect that the award requires to be filed, is not also accepted by the Supreme Court. I think that the Patna case should no longer be regarded as an authority.

(viii) There is no warrant for the argument of the Respondent that the observations made by the Supreme Court in Satish Kumar and Others Vs. Surinder Kumar and Others, were made in the context of the effect and validity of the registration of the award, and that it would have no bearing on the present question in issue. I do not hesitate to say that the suggestion is to me as hopeless, as it seems to my learned brother.

28. I do not think anything said in any other decision conflicts with these principles with what I have just said.

29. In our opinion it is not possible to accept the view expressed by the Court below. It is not difficult to say that there would be a risk of undermining the principle of finality, which, subject to certain recognised exceptions, has long been established as a settled principle in arbitration proceedings and on which their value largely depends. It is better to add here the principle of not allowing the award to be set aside for mistake, and not to open a door for enquiry into the merits, as this might lead to such an enquiry in almost in every case.

30. The result is that the plaintiffs respondents failed to make good their objections on this part of the argument advanced by Mr. Sakti Nath Mukherjee, the learned Advocate on behalf of the appellant. We accept his submission that the award though not filed in Court is not a nullity and reverse the findings of the Trial Court to the effect that such an award could not operate as an instrument of partition. The grounds set forth by the Trial Court in support of the said findings are at variance with the function of a Judge.

31. Before we determine to confine the argument to the other two questions I must deal with a subsidiary point raised by Mr. Apurba Dhan Mukherjee that the arbitrators misconducted themselves in making the award. The factual misconduct of the arbitrators, says the respondent, has not been upset in the appeal presented from the Misc. Case. This point is not susceptible of elaborate treatment, there being no evidence in support of the said contentions. The allegations in paragraph 4 of the plaint have not been proved. The arbitrators

were appointed to settle, allocate etc., the rights of the parties. They are now charged with misconduct without letting it to be visible on the face of the award. The arbitrators were gentlemen of position in the neighbourhood and apparently must have been well competent to make a partition between the three brothers. It is the very best tribunal to which a dispute of this kind could be referred. On the face of the award these gentlemen appeared to have entered into the enquiry which had to be enquired into. They thereafter made and published the award. The general tenure of the award was the recognition of three shares and partition of all the properties. In our view there does not appear to be any good ground for the same that they misconducted themselves or made any mistake in conducting the enquiry. There is no independent cause or testimony to sustain or to give colour to such a charge of misconduct. Criticisms alone could not amount to any proof of misconduct. The arbitrators appeared to have acted on the broad view giving effect to the intentions of the parties. They were selected by reason of their knowledge and the circumstances of the fact. The arbitrators may be right or wrong in the conclusion they arrived at, but we find no warranty for the inference that they were in any way actuated by the dishonest motive.

32. If a charge of misconduct could have been established it would be difficult in our opinion not to set aside the whole award as infected in all its findings. The argument of the learned Advocate for the plaintiff respondent was not an accurate summary of the whole proceedings of the arbitration upto the date of the making of the award. No argument was advanced before the Trial Court and there is no discussion of this point in the judgment appealed against. We see no ground for imputing misconduct to the arbitrators. In any case we are unable to infer such a grave charge of misconduct against the arbitrators in the absence of much stronger evidence. It is just to the arbitrators to say that in our view the charge of misconduct has entirely failed.

33. No doubt any objection going to the root of the award such as that the arbitrator had no jurisdiction or that the matter was tainted with fraud could be pleaded in the suit but objection on the ground of irregularity not appearing on the face of the award is excluded by the law by which both parties had agreed to be bound.

34. In the present case, as already stated, there is no miscarriage on the part of the arbitrators. We attempt to be sensible on the one hand of the extreme impolicy of allowing parties to get out of the award upon objections which really do not affect the substantial justice of the case and on the other hand we feel the necessity of not allowing arbitrators to act without jurisdiction by doing that which the terms of the submission to arbitration do not entitle them to do.

35. It was competent to the parties when they were before the arbitrators to waive the condition and to adopt a new condition for their convenience. This is exactly what the parties did by the Second Ekrarnama (Ext. B) which we carefully examined. It is plain from the evidence on the record that it was an agreed variation. We set aside the Trial Court's finding that the award (Ext. H)

was invalid being made by only two of the arbitrators,

36. The finding of interpolation in the second Ekrarnama which remained in the Trial Court's region of conjecture, is baseless enough and should be struck down. I underline that this objection should have been made or thought of in waking hours, and one should not attempt foreclosure of the basic line of thought. There must not be excess of irrelevance before a Court. The two arbitrators, in our view, were free to publish the award in the absence of the third. They took a comprehensive view of the family situation and made the award, which doubtless they regarded as just on the whole. We unhesitatingly acquit the arbitrators of charges of misconduct, corruption or fraud in this matter. The award was not wrong in law. The jurisdiction of the arbitrators had not terminated.

37. It would seem odd, to say the least, that the Plaintiff Respondent did submit to take his chances of the arbitration and that he cannot now on the general rule, upon which all Courts act with respect to awards be allowed, having taken his chances of the arbitration, to set aside the award upon the ground of the objection taken. It is too late for him, after the award is made, to insist on these objections.

38. The next argument made by the appellant was that the award has been acted upon by the parties. There are both oral and documentary evidence in support of the said arguments. The award was made on July 31, 1956. The suit was filed in May, 1960.

39. We first come to the documentary evidence of the respondents 2 and 3 (defendants 2 and 3) viz., Manas and Manoj. They transferred certain properties on July 1, 1957 in favour of Sm. Prasadi Bala (Ext. E) allotted to them in the award. The next document by the said defendants is a Sale Deed of September 9, 1957 in favour of Yar Ali Mallick. These properties were exclusively allotted to the said defendants by the award. Two other Sale Deeds were executed by them on November, 17 and 19, 1960 (Exhibits 9 (a) and 9) in favour of Prosad Sen in respect of the properties allotted in their favour by the award. Another Sale Deed was executed by the said two respondents on December 23, 1964 in favour of Abhoy Nandi and others (Ext. 9c) in respect of the properties allotted to them under the award.

40. The appellant also acted upon the said award. On March 26, 1958 a Deed of surrender was executed in favour of the appellant alone by Tinkori (Ext J) in respect of the properties which were allotted to him under the award. The appellant sold out certain allotted properties on December 23, 1960 to Lakhan (Ext. 9b). On July 16, 1962 two Sale Deeds were executed by the appellant in favour of Nemai and Santosh (Exhibits 9c and 9d respectively) which were allotted to them under the award.

41-46. Now the documents, showing that the plaintiff respondent acted upon the award. (After discussing these documents his Lordship proceeded):

47. On behalf of the appellant applications under Order 41, Rule 27 read with u/s 151 of the CPC were filed for reception of additional evidence of certain Sale Deeds executed by the plaintiff respondent in favour of third parties very recently. It appears that the plaintiff respondent executed two Sale Deeds on January 15, 1970 in favour of Sm. Rekha Rani Kheto and her husband. The third one is a similar Deed of Sale executed by the plaintiff respondent on December 10, 1970 in favour of Kesto Pada Ghosh.

48. It further appears that on August 2, 1970 i. e. just before the commencement of the argument in this appeal, the plaintiff respondent executed two other documents of Sale in favour of Harekrishna Bag. Further three items of properties were sold by the plaintiff in favour of Prosad Mete and another. In all these five documents the plaintiff sold out the properties which were allotted to him exclusively by the award. In each of the documents the plaintiff declared that he was the sole owner of the sold out properties and in khas possession of the same. It was further declared that there are no other co-sharers. In the last document in favour of Prosad Mete there was another important declaration to the effect that, the "award" being one of the documents of Title could not be handed over to the purchaser because it contained various other properties besides the sold out one. The plaintiff received a total sum of more than Rs. 20,000/- (twenty thousand) as a consideration of all these documents.

49. We allow the said applications under Order 41, Rule 27 and accept the above documents as additional evidence. They are of material probative value in support of the appellant's claim. The appellant only subsequently came to know about the plaintiff's execution of the said Deeds of Sale, The said documents are required to shorten the litigation and to do complete justice between the parties. I reject the argument of the learned Advocate for the respondent that the documents executed after the filing of the suit have got no evidentiary value. I do not intend to give birth to such a proposition and to the further proposition that the said documents should have been put to the plaintiff in evidence, particularly when there is no denial of any statement, of fact made by the plaintiff respondent in the aforesaid applications under Order 41, Rule 27, Civil P. C. For pronouncing a proper judgment we take into consideration all the aforesaid documents for ends of justice.

50. The following decisions about the reception of additional evidence were placed before us from the Bar on both sides: Kessowji Issur v. Great Indian Peninsula Railway (1907) 34 Ind App 115, Mohomed Khaleel Shirazi and Sons v. Les Tanneries Lyonnaises, 53 Ind App 84 (88) = (AIR 1926 PC 34; Parsotim v. Lal Mohar, 1931] L.R. 58 I.A. 254 , AIR 1941 5 (Federal Court) , Surinder Kumar and Others Vs. Gian Chand and Others, , Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, , K. Venkataramiah Vs. A. Seetharama Reddy and Others, , Jayanta Mohan Chatterjee Vs. Jagat Mohan Chatterjee and Others, and also four decisions all reported in (1907) 6 Cal LJ. They are Ram Ratan Sahu v. Mohant Sahu, (1907) 6 Cal LJ 74; Hazari Mull v. Janaki Prosad (1907) 6 Cal LJ

92; Ramyad Sahu v. Bindeswari Kumar Upadhyaya (1907) 6 Cal LJ 102 and Udit Chobey v. Rashika Prasad Upadhyaya (1907) 6 Cal LJ 662.

51. So with the citation of authorities I ask myself: whether the provisions of Order 41, Rule 27 of the CPC should be applied with caution? The answer is yes. I again ask myself is there any reason to adopt, in preference to the established line of authority of the Federal Court and the Supreme Court to the effect that it was the duty of the Trial Court to note the subsequent events and changes in law, the new argument sought to be made on behalf of the Respondent? I can see none. I find that there is abundance in the aforesaid decisions for holding that the view which we have taken in accepting the documents as additional evidence is correct. I have given anxious consideration during the course of the argument and thereafter. I have found so clear an opinion on the principle laid down by the aforesaid decisions that I deem it unnecessary to state in detail. I have felt bound to consider that this could be well brought within the principle of those authorities which establish that applications under Order 41, Rule 27 should be allowed in such circumstances, present in the instant appeal and the Court should take note of the subsequent events for the proper decision of the appeal.

52. If any doubt could possibly be said to have existed on the documents filed before the Trial Court, the subsequent history and the other transactions viz., the plaintiff's Deeds of Sale would prove beyond any uncertainty that the plaintiff respondent had acted and had been still acting upon the said award. It seems to us that the respective Sale Deeds by the plaintiff respondent are the strong evidence of an assertion of his title based on the award, which could hardly have been made if he had not accepted and acted upon the award and if he had really been out of possession from the time of the award.

53-54. (After discussing the oral evidence on the point His Lordship concluded as follows):

55. We, therefore, see no answer to the submission of the Advocate for the appellant and express a concluded opinion that all the above acts by all the parties afford ample and trustworthy material to hold that the award has been acted upon by all the parties. The singular consequence that my first impression remains as my second impression after long and due consideration. There is overwhelming emphasis of the same throughout the case. I have got no hesitation to find that the parties ratified the segments made in the award on all the points, upon which they had agreed, fell to be made by the Tribunal of Arbitration to which the parties had consented to it

56. We have also felt bound to consider that the case could be brought well within the principle of those authorities which establish that any irregularity or defect, if any, in the making the award may be cured by the waiver implied from the act of the party in going in before the arbitrators and taking his chance of a favourable decision and thereafter acting on the said decision to the injustice of

the other side. Otherwise it would have involved a compromise of the strict legal rights of the parties.

57. The Trial Court cited no good law, no custom and no principle for arriving at a contrary conclusion. It is perhaps hardly necessary to add that we have neither the right nor the duty to enquire into the merits of the award made by the arbitrators.

58. Even if for argument's sake it be held that the plaintiff had not acted upon the award, a question might still arise whether a suit would lie on the original cause of action which was discharged by accord and satisfaction. The Madras High Court in a Full Bench decision reported in *O. Mohamed Yusuf Levai Saheb Vs. S. Hajee Mohammed Hussain Rowther (died) and Others*, , *O. Mohamed Yusuf v. S. Hajee Mohammed Hussain* discusses the principle. We deem it unnecessary to rest our judgment on any general proposition such as this. The further proposition that the provisions of Section 2(15) of the Stamp Act cannot give life to the award is based upon a confusion of thought. This has only to be stated to be rejected. Any fruitless expenditure of time and money, should, if possible, be avoided.

59. There is another insurmountable difficulty in allowing the suit to be decreed when in fact all the parties including the plaintiff respondent had for many years enjoyed the fruits of the award and when it is impossible to restore the parties to the position they were in, even if all the acts of the arbitrators including the making of the award were to be considered null and void. It must not be forgotten that the plaintiff respondent could not be allowed to gain on both grounds. The plaintiff declared in the documents of sale that there was no co-sharer in the sold out properties. The result would be that the defendant appellant would not be able to pre-empt. If the plaintiff is allowed to get the decree the defendant appellant had to suffer on both grounds. We cannot allow that. The plaintiff must now accept the consequences of his action. It is seen that the protests and the appeals of the plaintiff respondent were not frequent and visible. He must be deemed to have accepted the award even in the midst of protest and in self-defence. We think that he took his chance of a favourable decision in going before the arbitrators and the matter in dispute was finally determined by the chosen nominees. It is patently clear that the plaintiff's entire grievance against the award was that he was not satisfied with the allotment and the procedure (see his evidence at page 56).

60. There are, however, further matters which find grounds of defence to the suit and the support of the appeal.

61. It is said for the appellant that even null awards require to be set aside by suits. The judgment of P. B. Mukharji, J. (as his Lordship then was) in the case of *Pushraj Puranmal Vs. Clive Mills Co. Ltd.*, was relied on. According to the appellant, the respondent should have come to the Court u/s 14(2) of the Act to strike the award down but as the respondent's right is no longer alive the suit is

not maintainable. The present suit though on the surface appears to be alright is not maintainable, as in fact it challenges the award as nullity.

62. To appreciate the true nature and reach of the decision upon this point strong reliance was made on the dictum of Chief Justice Chakravartti laid down in paragraphs 11, 13, 20, 24 and 25 in the Full Bench decision in the case of Saha and Co. Vs. Ishar Singh Kripal Singh and Co., .

63. Then it is submitted for the respondent that the majority view in the said Full Bench decision (Bench is also comprised of Chakravartti, C. J., Lahiri, S. R. Dasgupta, P. B. Mukharji and Bachawat, JJ.) is otherwise. We find that the scope of Ss. 30 and 33 of the Arbitration Act 1940 was elaborately discussed in the said decision. It is also said on behalf of the respondent that the onus of previous partition by the award i" on the defendant appellant which has not been discharged in the present case.

64. In reply the appellant referred to us a Bench decision of the Nagpur High Court in the case of AIR 1952 65 (Nagpur) in which a single Bench decision of this Court of Das, J. in the case of Manick Lal Memani v. Shiva Jute Bailing Ltd reported in (1948) 52 Cal WN 389 had inter alia held that a person not a party to an award can file a suit

65. Here Mr. Sakti Nath Mukherjee for the appellant urges the next point that the enforcement of an award by a suit is not barred. Our attention was drawn that the suit was a suit for partition and all the parties are in a sense the plaintiffs. The principle laid down by the Supreme Court in the case of Satish Kumar and Others Vs. Surinder Kumar and Others, that the original cause of action namely the agreement between the parties revives. A decision of this Court in the case of Munshilal and Sons v. Modi Bros. reported in (1947) 51 Cal WN 563 (574 and 575) : ILR (1948) 1 Cal 81 was placed before us.

66. For the respondent the reply was that the existence or otherwise of the Arbitration Agreement may be set up as a defence u/s 34 of the Arbitration Act but no such case has been made by the defendant appellant.

67. Some time has been taken, by both sides in efforts to persuade us to decide these points but all these propositions are narrow and academic. They need not be assumed for the purpose of the present decision and should not detain us further. The very object of acceding to an arbitration was to adopt an alternative by which the question of the dispute might be settled and recourse to the Civil Courts avoided,

68. Inasmuch as we hold that the award has the binding effect on the parties and has been acted upon, it would be a work of supererogation to discuss the above points raised. In order to prevent misconception the more desirable course for us would be to abstain from expressing any opinion whatever upon these questions.

69. I want to say that from the lawful agreement the parties should not be

allowed to retire unless the scope and object of the same cannot be executed or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract. I am of opinion that it is not in the power of the respondent simply at his mere will and pleasure to revoke the authority of the arbitrators in whose appointment he has concurred or to ignore the award passed by them.

70. Upon the whole matter we are Unable to come to any other conclusion; rather it is our duty not to agree with the findings of the Court below. We find that the properties were joint and were partitioned or were directed to be partitioned by the award in the way in which the instrument declares them to be allotted. We declare that the award is valid and ought to be sustained and the decree of the Court below ought to be reversed being inconsistent with the maintenance of the award.

71. The logical result of the view which we have first expressed would be to allow the appeal. The Trial Court allowed the suit to stand. We would dismiss the same in its entirety as the case of the plaintiff respondent fails. The judgment and the decree of the Trial Court are accordingly set aside. The plaintiff respondent No. 1 should be condemned in all the costs incurred in this litigation upto this Court, hearing fee being assessed at ten gold mohurs however much we regret the necessity of passing such an order. Would all go well we should only hope that there would be no further litigation between the brothers.

Sengupta, J.

72. I agree.