

(1963) 11 MP CK 0003

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 88 of 1962

Maganlal Gangaram Rathor and Another

APPELLANT

Vs

Ramaji Bondarji and Others

RESPONDENT

Date of Decision : 04-11-1963

Acts Referred:

Arbitration Act, 1940 — Section 10(2), 10(3), 25, 8, 9

Citation : AIR 1966 MP 177 : (1966) ILR (MP) 282 : (1966) JLJ 573 : (1966) 11 MPLJ 1176

Hon'ble Judges : V.R. Newaskar, J; S.B. Sen, J

Bench : Division Bench

Advocate : S.L. Garg, for the Appellant; R.G. Waghmare, for the Respondent

Final Decision : Dismissed

Judgement

Sen, J.

A very short point is involved in this appeal and there is no doubt that the appeal must fail.

The appellant Maganlal and Mishirlal brought a suit against the respondents Ramaji and others for dissolution of partnership and rendition of accounts. While the proceedings were going on before the lower Court, an application was made on 7th November 1960 jointly by both the parties for referring the matter in dispute to arbitrators. The parties themselves mentioned the names of the following persons as arbitrators, 1 Chainsingh, 2 Laxrainarayan 3 Pannalal and 4 Bhurmal. They also mentioned the name of the umpire.

The Court allowed the application and the disputes were referred to the arbitrators on 7th November 1960. The arbitrators started proceedings but in the end one of the arbitrators Bhurmal gave a notice expressing his disapproval of the other arbitrators to act on the ground that there were money lending transactions between the other arbitrators and the plaintiff. Bhurmal, therefore, refused to join in the arbitration proceedings any further. He also asked them not

to act in the arbitration proceedings and to inform the Court accordingly.

The three arbitrators however, did not act according to this notice which was received by them on 24th October 1961. On 25th October 1961, these three arbitrators gave the award and filed the same before the Court. The respondents filed objections about the validity of the award. The Court after hearing the parties passed an order superseding the award. It is against this order that the plaintiffs have filed this appeal.

The grounds on which the award has been superseded are, the incompetency of the remaining arbitrators to act and also on the ground of misconduct.

The first contention raised by the counsel for the appellants is that the notice of Bhurmal, one of the arbitrators only amounts to a note of dissent to the arbitration proceedings and, therefore, the award of the arbitrators should be considered to be an award of majority which is quite valid u/s 10(3) of the Arbitration Act.

We are unable to agree with this contention. According to us Section 10(3) does not at all apply. We reproduce below the said sub-section :--

" Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinion, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail. "

This Sub-section presupposes the award of the majority. What it means is there must be an award. If the arbitrators do not agree, there will be two awards; and in such a case the award of the majority shall prevail. In the instant case there is no award of Bhurmal. Not only that, he has expressed his unwillingness to continue the arbitration proceedings. Therefore, there cannot be any question of any award by him. If there is no award either agreeing or disagreeing with the award of the others, there cannot be an application of Section 10(3) of the Act.

The contents of the notice Ex. D-7 does not support the contention of the appellants, that he is disagreeing with the conclusions of the rest of the arbitrators. The notice is clear. It says that he is not willing to act. It says that the other arbitrators also should not act. It also says that the matter should be brought to the notice of the Court. The notice, therefore, cannot be read as a note of dissent to the majority award which did not at all exist at the time the notice was issued.

No doubt, the award given on 25th October 1961 as Ex. P-8 mentions that Bhurmal was consulted and, therefore, it is argued that if he did not sign, it amounted to a note of dissent. But the facts and circumstances indicate that the award was not at all shown to him. On 24th all the three arbitrators received a notice with a definite request to approach the Court. On 25th without approaching the Court the three arbitrators gave the award. It has also come in evidence that this award was made in haste.

In the award made by the three arbitrators there are allegations against Bhurmal who refused to act. They have said that Bhurmal is a partner in business with the respondents and, therefore, he had refused to sign, though he had taken part in the proceedings. These allegations are out of place in the award and show an attempt to cover up the illegality. What reasons induced Bhurmal not to join the arbitration proceedings are not necessary to be given in the award. If, the three arbitrators who posed to be very honest wanted to give the award, they could have simply said that Bhurmal was not willing to sign. Instead, allegations were made which would disentitle Bhurmal to act as an arbitrator. Curiously enough a similar allegation was made by Bhurmal in his notice D/7 dated 24th October 1961. Whether the allegations were justified or not is a different matter; but the way the award has been presented to the Court would indicate that the three arbitrators would not wait for a decision from the Court.

Section 8(1)(b) of the Arbitration Act says :--

"If any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy."

The proviso to Section 25 of the Act says that in such circumstances of filling up the vacancy or making the appointment, the Court may make an order superseding the arbitration and proceed with the suit.

We have already indicated that there were allegations and counter-allegations against the arbitrators themselves. The Court has discretion to supersede the arbitration agreement. In view of the aspersions and counter aspersions by the arbitrators, it is eminently a fit case for supersession. The arbitrators have not even produced the proceedings they had taken. Though it is not essential that the proceedings should be filed, but that would have indicated the way the arbitrators had proceeded. There is also further allegation that the three arbitrators while giving the award took the help of some third party. This was not provided in the arbitration agreement.

Once it is found, as we have found, that this is not a case of arbitration by majority the provisions of Section 8 read with Section 25 would apply.

The learned counsel for the appellants referred to a decision reported in *Amar Nath Vs. Uggur Sen and Others*, , in which a Division Bench of the Allahabad High Court was of the view that where the arbitration agreement provides that the decision of the arbitrators would be by majority, the award is not invalidated on account of the refusal of one of the arbitrators to take part in the preparation of the award or to sign the award of the majority of the arbitrators at the instance of one of the parties. According to their Lordships this would at most be, a mere irregularity which does not vitiate the award of the majority.

These observations are no doubt based on Section 14 and the facts of the instant case are absolutely different. It is not a case where one of the arbitrators has refused to take part in the preparation of the award or to sign the award of the majority of the arbitrators. In the instant case, one of the arbitrators Bhurmal wanted that on account of bias or certain relationship the other arbitrators should not act and he also refused to act. It may be that for some time there were proceedings and the objecting arbitrator did not raise the objection, but before a final decision could be reached he had refused to take part. It is not merely a case of refusal to prepare an award. Preparation of the award is subsequent to the decision. After discussions and deliberation the arbitrators come to a conclusion and it is after the conclusion has been reached that the question of preparation of award comes. Before the stage had arrived one of the arbitrators objected. Therefore, this cannot be a case of refusal to take part in the preparation of award.

Section 14 of the Act mentions that when the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the other matters. The signing is the last act in the arbitration proceedings. The other acts are discussions and deliberation. The authority cited by the counsel for the appellants therefore, would not apply to the facts of the present case.

In AIR 1938 Nag 492, *Ramdhar v. Santadhar*, it has been observed that if one of the arbitrators was not present in all the sittings that would affect the validity of the award. Though the observations were to some extent obiter we respectfully agree with the view.

In a very old case reported in ILR 7 All 523, *Nandram v. Fakirchand* one of the arbitrators withdrew from arbitration after the first sitting and refused to take any part in it. The award was held to be invalid. It was observed in that case by Mahmood, J.

"When a case has been referred to arbitration the presence of all the arbitrators at all meetings, and above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award."

A decision reported in *Raghubir Pandey and Another Vs. Kaulesar Pandey and Others*, has no application to the facts of the instant case. In that case all arbitrators took part in the deliberation and agreed in the decision. One of the arbitrators did not sign, it was held that the award was not invalid.

Similarly the observations made in *Y.L. Paul Vs. G.C. Joseph and Another*, also will not help the appellants. In that case there were 15 arbitrators and the award was signed by 14. It was held that the award is valid and binding inasmuch as it is signed by the majority of the arbitrators.

We have already stated that in the instant case the arbitrator Bhurmal refused to act and when there was a refusal to act, the Court may appoint a substitute u/s

8(1)(b) or may supersede the arbitration u/s 25 of the Act. The award cannot be given by the rest and cannot be said to be a valid award u/s 10(3) of the Act. When the arbitrator refuses to act, Section 10(3) has no application.

We respectfully agree with the view expressed by the Rajasthan High Court in Kanhyalal and Others Vs. Ramkumar and Others, wherein their Lordships have observed :

"Where in arbitration in suits, one of the arbitrators expressed his unwillingness to act as an arbitrator, under the proviso to Section 25 the Court is perfectly competent to supersede the arbitration and proceed with the suit itself. "

That is what has been done in the instant case and the lower Court has rightly exercised its power looking to the allegations and counter allegations between the parties.

We need not go into the other allegations of the misconduct on which also the learned trial Court has superseded the arbitration agreement, as we find that when one of the arbitrators refused to act, the award cannot be said to be a valid award.

The appeal is therefore dismissed with costs. Counsel fee according to scale, if certified.

Newaskar, J.

I agree with the conclusions reached by my brother Sen J., but would like to give my own reasons.

This appeal arises out of proceedings of Arbitration in a suit filed by the appellants Maganlal and Mishrilal against the defendants Ramaji, Mishrilal and Onkarlal for dissolution of partnership and for accounts.

After the issues were framed on the pleadings of the parties the case was fixed for evidence on 7-11-60. On that day a joint petition was submitted by the parties requesting the Court to refer the dispute in the suit to the arbitration of arbitrators Chensingh, Laxminarain, Pannalal. Bhurmal and Kanhaiyalal the last mentioned arbitrator being styled as the Umpire. It was agreed that the decision which the four named arbitrators and the umpire Kanhaiyalal would give, would be binding upon both the parties. The Court thereupon referred the dispute in the suit to the above-named arbitrators asking them to give their award within one month. The arbitrators sought extension of time from time to time. The proceedings of arbitration do not appear to have been maintained. However on 21-10-1961 one of the arbitrators Bhurmal gave notice to the remaining arbitrators accusing them of acting behind his back and siding with the plaintiffs. He alleged that the arbitrators Chensingh and Laxminarain were Sahukars of plaintiff Mishrilal, and arbitrator Chensingh was a Sahukar of defendant Onkarlal. For these reasons he was unable to cooperate with them in the arbitration proceedings. He therefore required them not to proceed with the arbitration

proceedings and to inform the Court about his refusal to work as an arbitrator. Any further move in the matter, according to him, would be considered as not having done with himself as an arbitrator. This notice was admittedly served upon the arbitrator Pannalal on 24-10-1961 it having been brought to him by Jayantilal.

An application was also submitted in Court on 25-10-1961 intimating his refusal to act as an arbitrator due to certain reasons given in the application. However Pannalal, Laxminarain and Chensingh gave the award under their signatures. The award mentioned that the arbitrator Bhurmal being a partner of defendants No. 1 and 2 in the cinema business had not joined in the award and had refused to sign it although he had taken part in the sittings of the arbitrators several times. It was further stated in the award that the umpire Kanhaiylal also had agreed with the award of the three arbitrators Chensingh Pannalal and Laxminarain although he had not put his signature thereto as he had then been out. This award was filed in the Court by the three arbitrators. The defendants thereupon submitted an application seeking to set it aside on the grounds that

(1) One of the arbitrators Bhurmal had not participated in the arbitration proceedings and had intimated his unwillingness, to continue as an arbitrator, to the other members. He also had not joined in giving the award or signing it. The award was consequently null and void.

(2) The arbitrators misconducted themselves and the proceedings as they did not fix any date of hearing nor did they examine any accounts which they were bound to do.

(3) The arbitrators Laxminarain, Pannalal and Kanhaiylal had colluded with the plaintiffs and defendant No. 3 Onkarlal. There were other objections to the award which are either overlapping or are no longer material.

These objections were replied to by the plaintiffs who asserted that the award was legally valid and binding.

The trial Judge proceeded to consider the question of legal validity of the award dated 25-10-1961 in light of these objections. He recorded evidence adduced by the parties and heard arguments.

By his order, which is the subject-matter of this appeal, he held that the award in this case had been given only by three out of the four arbitrators when under the terms of reference the parties had agreed to abide by the decision given by the four arbitrators and one umpire. Umpire Kanhaiylal had gone out when the award was given and had not signed it. Moreover arbitrator Bhurmal, according to the learned Judge, had expressed his unwillingness to participate in the proceedings of the arbitration and had given intimation of that fact on 24-10-1961. In spite of such intimation the award was given by the three Arbitrators on 25-10-1961. It was incumbent under these circumstances for the parties and the Arbitrators to take steps as indicated in Sections 8 and 25 of the Arbitration Act. The

suggestion made on behalf of the plaintiffs on the basis of Section 10(3) of the Arbitration Act as to the binding character of the award given by the majority was rejected by the learned Judge as inapplicable to a situation where the entire body of arbitrators had not participated right upto the stage of making the award. According to the learned Judge, had all of them participated right up to the point of making the award and had differed in their conclusions, Section 10(3) would have been attracted and the award given by the majority would have prevailed. But where, as in the present case, only three out of five had acted, one having expressed his unwillingness to participate and the other having gone out of station there was really no award as contemplated by the parties or even according to law.

Another ground on which the award was held to be vitiated was that it granted a relief to the defendants 1 and 2 against a third party namely "Rathod Samaj" when in fact all the partners having given their consent for making some construction in the cinema building ought to have been held responsible for the expenses incurred therefor.

It was also held that the arbitrators Chensingh and Pannalal were proved to have dealings with plaintiffs Maganlal Gangaram and Mishrilal Dhannalal. Arbitrator Bhurmal was also accused of being a partner with the defendants Nos. 1 and 2 in a cinema concern at Alirajpur.

Lastly it was held that the draft of the award was prepared at the dictation of Vasantsingh, the son of one of the arbitrators Chensingh. No proceedings of the arbitration were recorded anywhere nor any notings made as to accounts seen by them.

For all these reasons he held that the award was legally invalid and liable to be set aside.

He accordingly set it aside and proceeded to hear the case himself from the stage at which it was when the reference was made.

This appeal is now preferred by the plaintiffs contending that the award was valid and binding and ought not to have been set aside.

Principal point pressed at the hearing by Mr. Garg for the appellants is that the evidence in the case disclosed that the recalcitrant arbitrator Bhurmal had participated in the conduct of the arbitration proceedings and its deliberations right up to the stage of preparation of the award and when he found as a result of deliberations that the majority favoured the award, as it is now formulated and given, he created trouble by giving notice to the remaining arbitrators only one of whom was served with it on 24-10-1961. It is preeminently to such a case that Section 10(3) of the Arbitration Act applied. It was not at all necessary in a case like this that the dissenting arbitrator should sign the award. He could if he liked have given his dissenting note but that was not indispensable. Such an award is valid. Reliance was placed mainly upon the decisions reported in Amar

Nath Vs. Uggar Sen and Others, and Raghubir Pandey and Another Vs. Kaulesar Pandey and Others, .

On the other hand it was contended on behalf of the respondents that the agreement of reference specifically provided that the award given by the four arbitrators (Panchas) and Umpire (Sar-panch) would bind both the parties. Where consequently only three of the arbitrators drew up the award, the two having failed to participate in the final deliberations meant for reaching their definite and concrete conclusions it was really no award at all. Section 10(3) of the Arbitration Act it is urged did not apply to such a situation. This was, according to the learned counsel, a case of refusal by one of the arbitrators to act and failure of yet another to participate. The only appropriate course, in such a case, was to proceed under Sections 8 and 25 of the Act. It was also urged that the award was bad due to misconduct of the arbitrators as found by the trial Court.

Two principal questions which consequently arise for consideration are-

- (1) Is the award good on the ground that it is given and signed by three out of five arbitrators under the circumstances of the case?
- (2) Is the award not vitiated due to misconduct of the arbitrators as found by the trial Court?

Before proceeding to consider these questions it will be necessary to ascertain the legal position of Kanhaiylaj who is called "Umpire" in the application for reference to arbitration and whom parties in their statements, application and even in the award called "Sarpanch." The term "Umpire" truly means a third person who is to decide a controversy or question submitted to arbitrators in case of their disagreement, vide AIR 1948 162 (Nagpur) .

It however appears from the contents of the application jointly submitted by the parties dated 7th November 1960, on the basis of which the reference was made, as also by the conduct of the parties with reference to his position that he was nothing else than a fifth arbitrator. The application runs as follows "that the parties agree that the following persons should be appointed as their arbitrators and one of them as shown below be umpire to decide the dispute." Did the parties mean by this to appoint Kanhaiylal as "Umpire" in its true sense or they intended to appoint him as "Sarpanch" i.e., Chairman of the committee of arbitrators. The parties, own statements, their conduct and the contents of the award indicate that Kanhaiyalal was a Sarpanch. The award mentions that the conclusions were reached after there was deliberation between the three Panchas Pannalal, Laxminarain and Chensingh and Sarpanch Kanhaiyalal, and that he was a consenting party to the final conclusion. If his position was purely that of an umpire then his participation as indicated on the face of the award in order to mould the decision of the arbitrators would amount to an illegality and would vitiate the award. If his position was not that of an umpire but was that of a Sarpanch as the parties understood it then the reference itself would be defective

as it describes him as an "Umpire" vide AIR 1955 Nag 126 Chouthmal v. Ramchandra, at pages 135-136. Moreover even if we ignore the mistaken use of the word "Umpire" and treat him as Sarpanch then the award would be bad because he absented himself from several sittings and also when the award was prepared as will be discussed hereafter.

It is beyond dispute that Sarpanch Kanhaiyalal sent intimation to other arbitrators as to his inability to participate any further and had attributed interest to some of the arbitrators in the plaintiff as their Sahukar. This intimation reached at least one of the arbitrators Pannalal on 24-10-1961 i.e., one day before the award was signed by the arbitrators and submitted in the Court. We will have to see in these circumstances whether Section 10(3) of the Arbitration Act can properly apply to such a case. In the second place the arbitrators while deciding the matter instead of determining the rights and liabilities as between the parties themselves required the defendants Ramaji and Mishrilal to recover the building expenses from a third party although admittedly they formed part of the partnership expenses. This is not what they were required to do. The effect of this as appearing on the face of the award will also be considered.

As regards applicability of Section 10(3) of the Arbitration Act for supporting the validity of the award it is provided therein:

"Section 10(3).

"Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or of the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail."

Before the enactment of Section 10(3) the trend of authorities was not to assume existence of clause regarding binding character of the award of the majority by implication in an arbitration agreement and opinion of Beaman, J. : Mahomedali Adamji Peerbhoy Vs. The Secretary of State for India in Council, to that effect was not approved by Madras and Allahabad High Courts and Oudh Chief Court, vide Lachhmi Lal Vs. Khairati Miyan, (1) Lachhmi Lal v. Khairati Mian 38 Mad LJ 145 : (AIR 1920 Mad 130), Ayyasami Mudaliar v. Appandai Nynanandi? Ind Cas320 (Oudh) Lala v. Abdus Samad. Due to inclusion of Section 10 (2) and (3) as they now stand the position in law is as envisaged by the Bombay decision and the controversy no longer exists. But what does this provision mean. Does it mean that it is enough that majority of arbitrators should participate at the sittings and deliberations and make the award or does it mean that all the arbitrators must act throughout its proceedings and participate in the final deliberations although all of them may not concur in the final conclusions.

In Russell on Arbitration at page 138 (16th edition) it is observed:

"As they (arbitrators) must all act, so they must all act together. They must each be present at every meeting; and the witnesses and the parties must be

examined in the presence of them all."

In (1938) 1 All E.R. 135 *British Metal Corporation v. Ludlow*, the facts were, there were, three arbitrators one of whom had been absent from the hearings and all the three executed the award. It was held on these facts that the award was incurably invalid notwithstanding that it would have been good if signed by two instead of three. It was emphasised in that case that the absence of an arbitrator from the hearing is a matter not of pure form but of substance.

In ILR 7 All 523, it was observed by Mahmood, J., at page 528 :

"What the parties to a reference to arbitration intended is that the persons to whom the reference is made should meet and discuss together all the matters referred, and that the award should be the result of their united deliberations. This conference and deliberation in the presence of all the arbitrators is the very essence of the arbitration, and the sole reason why the award is made binding."

Similar view was taken by the Madras High Court in ILR Mad 113 *Thammiraju v. Bapiraju*.

In ILR 7 Rang 715 : AIR 1930 Rang 136, *Sin Ma v. Ma Pu*, Baguley, J., followed the above two decisions as well as that in AIR 1924 Rang 153, *Abdulla v. M.V.R.S. Firm*. In the last mentioned case the parties had referred their dispute to five arbitrators and it was expressly provided in the agreement of reference that the parties would abide by the award of majority of them. The award was made by only three out of the five in the absence of the other two who took no part in the arbitration proceedings. It was held that the award could not be held as a valid award.

In AIR 1936 Nag 291, *Badrilal v. Lakshya*, Pollock, J., approved and followed the aforesaid decisions in ILR All 523, ILR Mad 113 and ILR 7 Rang 715 : (AIR 1930 Rang136).

In AIR 1938 Nag 492, similar view was taken.

In *Khelut Chunder Ghose v. Tara-chand Koondoo* (1866) 6 SWR 269, it is said:

"As they (arbitrators) must all act, so must they all act together. They must each be present at every meeting; and the witness and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceeding brought to bear on the minds of his fellow Judges, so that, by conference, they shall mutually assist each other in arriving at a just decision."

In (1740) 125 E.R. 1138, *Dalling v. Matchett*, it was observed:

"It has often been said that if that one had been present, that is, the arbitrator who did not attend, he could not by his vote have turned the majority the other way, when all the rest were unanimous; yet it has always been received this answer that every one has a right to argue and debate as well as to give his vote

and it is possible at least that the person absent may, if he had been present at the meeting, have made use of such arguments as may have brought over the majority of the rest to be of his opinion.""

In (1835) 42 R.R. 376, In the matter of Pering, Lord Denman observed:

"Any two, under such submission as this, that is a submission which provides for a valid award by the majority, may make a Rood award. But then it must be after discussion with the other arbitrator. If after discussion, it appears that there is no chance of agreement with one of the arbitrators; the other may indeed proceed without him.

Coleridge, J., added:

"The parties have not got what they stipulated for. They stipulated that two at least should make the award; but no two could make it till each arbitrator had been consulted."

It is thus clear on these authorities that even where either the agreement of reference expressly provides or it following by implication by reason of Section 10 Sub-sections (2) and (3) that the award of majority is binding it is all the same incumbent upon all the arbitrators to participate in the arbitration proceedings particularly where the reference is to named arbitrators and not to a fluctuating corporate body which is governed by its own rules under which it is constituted.

Absence from and indifference to the proceedings by any one of the arbitrators has the effect of rendering the award invalid. It is essential that all the arbitrators must be present at each meeting of the arbitrators and must hear the parties and other evidence produced together. They must further all be present at final deliberation though all may not agree as to the final conclusion. It is only when they act together throughout the proceedings that the award of the majority would be a valid one. In the present case the evidence of both the sides makes it clear that Sarpanch Kanhaiyalal did not attend the proceedings except perhaps in two or three of its sittings out of 10 or 12 and that too with gaps. He had gone to Indore when the final draft was prepared. His mere saying that award might be made by the rest cannot make the award valid.

Besides this defect there is another defect in this award. One of the arbitrators namely Bhurmal had refused to take part in the arbitration proceedings at the final stage and had intimated his unwillingness to act to at least one of the arbitrators Pannalal on 24-10-1961. In spite of this the award was made on 25-10-1961 when neither he nor the Sarpanch Kanhaiyalal had signed it and was submitted in Court. When such intimation regarding refusal to participate was given it was incumbent upon the arbitrators to inform the Court of that fact. Bhurmal had also submitted an application to the Court on 25-10-1961 intimating the fact of his refusal to act and his reasons therefor. The question is could the award have been validly given in spite of all this by three of them ?

Section 8 of the Arbitration Act provides :

(1) In any of the following cases-

(a)

(b) If any appointed arbitrator or umpire neglects or refuses to act or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c), any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators, or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

Section 25 makes the provisions of other Chapters applicable to arbitrators. Under Chapter IV which deals with arbitration in suits subject to the provision that in the circumstances mentioned in Section 8 etc. the court instead of filling up the vacancy or making the appointment is given power to supersede the arbitration and proceed with the suit.

In face of these provisions it is clear that when Bhurmal refused to participate in the deliberations of the arbitrators and had expressed his unwillingness to act the arbitrators were clearly in error in proceeding with the arbitration and making the award.

In *Kanhyaalal and Others Vs. Ramkumar and Others*, it was held that where in a suit a reference to arbitration was, made and one of the arbitrators refused to act the Court had full power under Sections 8 and 25 of the Arbitration Act to supersede the arbitration.

It is contended by Mr. Garg that Bhurmal refused to participate because he did not agree with the final conclusions. It however seems from the materials on record that he had not joined the final deliberation and had fallen out from at least three of the arbitrators, Sarpanch-Kanhaiyalal having hardly participated.

Besides this there were mutual accusations by Bhurmal and the other arbitrators except Kanhaiyalal that they had some kind of interest with one or the other of the parties. It was alleged against Bhurmal that he was a partner in business with defendants and 2 whereas it was alleged against Chensingh and Laxminarain that they had money-dealings with plaintiff Mishrilal and Chensingh had money-dealings with defendant No. 3 Onkarlal.

In face of these mutual accusations and refusal of Bhurmal to act, the trial Court was perfectly justified in proceeding with the suit after superseding the arbitration.

As regards the decisions relied upon on behalf of the appellants namely Amar Nath Vs. Uggur Sen and Others, and Raghubir Pandey and Another Vs. Kaulesar Pandey and Others, , we shall presently see how far they are applicable.

In Amar Nath Vs. Uggur Sen and Others, , it appears to have been laid down that where one of the arbitrators who was nominee of one of the parties refused to take part in some of the sitting in spite of intimation to him of the time and place of the sitting due to improper motive the award prepared and signed by the remaining arbitrators constituting the majority was valid. The learned Judges dealing with the decisions which are discussed above such as ILR AH 523 (Supra) etc. observed:

"These rulings laid down the broad proposition of law based upon the general principle that all the arbitrators to whom.. .. a matter has been referred for decision must take part in the deliberations and sign the award made by them. The principle has also been incorporated in Section 14, Arbitration Act. There may, however, be cases where it may become impossible to apply this general principle."

These observations do not take sufficient account of the principle laid down in these cases. The departure suggested as justified, in my opinion, is not correct and if accepted may cut at the root of that principle.

As regards decision in Y.L. Paul Vs. G.C. Joseph and Another, there the only objection to the validity of the award was that only 14 out of 15 arbitrators had signed the award. Evidently in that event Section 10(3) directly applied. The facts in the report do not indicate that the fifteenth arbitrator was not present at the sittings of the arbitrators to hear the case.

In Raghubir Pandey and Another Vs. Kaulesar Pandey and Others, all the arbitrators had joined in the deliberations and pronounced their unanimous award.

In these circumstances failure of one of them to sign the award was held to be not fatal to the award. These decisions relied upon by the appellants therefore cannot help them.

Thus the authorities upon which learned counsel for the appellants relied have no application.

It is therefore clear that the award given under the signatures of only three out of five arbitrators when one of them namely Kanhaiyalal did not attend most of the meetings and also the meeting when the final act of preparing the award was made and when Bhurmal, before the final act of preparation of the award by mutual deliberation was done had expressed his refusal to participate, is clearly

invalid. The trial Court under these circumstances had sufficient power to supersede the arbitration.

It is said that Bhurmal did this due to improper motive namely that he did not want that the award should go against the defendants Nos. 1 and 2 and when he found which way the wind was blowing he decided to obstruct the course of the proceedings.

Even if that be so the appropriate course would have been to proceed u/s 8 and secure an appointment of another arbitrator in his place through court. Had he participated in the final deliberations and disagreed then absence of his signature on the award would not have rendered the award invalid if it had been otherwise good.

This takes us to the last question regarding misconduct of the arbitrators.

The agreement of reference contained a provision that the arbitrators will decide the matter after looking into relevant accounts and hearing parties and their witnesses. Now it was an accepted position on both sides and is clear from Ex. D/4 that the partnership was responsible for putting the theatre in a proper state of repair so as to be workable as a cinema. The Panchas who were to determine the mutual rights and liabilities of the partners from the relevant accounts directed that whatever amount was shown in the accounts as expenses of construction and repairs should be recovered by defendants Nos. 1 and 2 from the Rathor Panchas. In so directing the Panchas had acted beyond the scope of their reference. They were to determine mutual and reciprocal rights and obligations of the partners with reference to the business of partnership and not to suggest that the partner spending money should recover it from the third party. Such direction involved an error apparent on the face of the award and amounted to legal misconduct of the arbitrators and vitiated the award, This follows from the decision of their Lordships of the Privy Council in AIR 1923 PC 66 Champsey Bhara & Co. v. Jivraj Bailoo Spinning and Weaving Co. In that case the Privy Council quoted with approval the following observations of Williams J., in *Hodgkinson v. Kerner* (1857) 3 C.B.N.S. 189:

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact.. .. The only exception to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly established viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted. I think it may be considered as established"

It is not necessary to consider the other charges of misconduct as the considerations set out above are sufficient to uphold the decision of the Court below.

The appeal is therefore without force and is dismissed with costs.