(1993) 06 AP CK 0020

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 2250 of 1989 and C.M.A. No. 1859 of 1989

N. Khadervali Saheb and Another APPELLANT

Vs

N. Gudu Sahib and Others RESPONDENT

Date of Decision : 29-06-1993

Acts Referred:

Arbitration Act, 1940 — Section 14, 17, 30
Registration Act, 1908 — Section 17, 49

Citation : AIR 1994 AP 126

Hon'ble Judges : Syed Shah Mohammad Quadri, J

Bench : Single Bench

Advocate : N. Ramamohan Rao, for the Appellant; Addapalli Suryanarayana, for the Respondent

Judgement

This Judgment has been overruled by : N. Khadervali Saheb (Dead) by LRs. and Another Vs. N. Gudu Sahib (Dead) and Others, AIR 2003 SC 1524 : (2003) 1 ARBLR 647 : (2003) 1 CTC 496 : (2003) 1 JT 640 : (2003) 1 SCALE 642 : (2003) 3 SCC 229 : (2003) 1 SCR 868 : (2003) 2 UJ 826 : (2003) AIRSCW 881 : (2003) 1 Supreme 921

Syed Shah Mohd. Quadri, J.—The Civil Revision Petition and the Civil Miscellaneous Appeal arise out of the common judgment dated March 29, 1989 of the learned Principal Subordinate Judge, Ananthapur, in O.S. No. 3/73 and O.P. No. 38/74 on the file of his court. The petitioners in the C.R.P. are the appellant in the CMA.

2. To appreciate the controversy in these cases it would be useful to notice the relevant fact. Two brothers and one son of each of them entered into a partnership and started a business under the name and style of "Sri Baba Fakruddin Oil Mills". In the course of business disputes arose between the parties. They made reference of the disputes to the arbitrators. The arbitrators passed an award on 2.10.1972. Petitioners 1 and 2 in O.P. No. 38/74 filed that O.P. u/s 30 of the Arbitration Act to set aside the award dated 2.10.1972 and

respondents 1 and 2 in the said O.P. filed O.S. No. 3/1973 under Sections 14 and 17 of the Arbitration Act praying the court to direct one of the arbitrators J. Gundappa Rao (respondent No. 5 therein) to produce the original award dated 2.10.1972 into court and to make the award rule of the court. The parties will be referred to as they are arrayed in the O.P. The 1st petitioner is the brother of the 1st respondent. The 2nd petitioner is the son of the 1st respondent and the 2nd respondent is the son of the respondent. During the pendency of the proceedings in the trial court, the 1st petitioner died and the 3rd petitioner was brought on record as his legal representative; the 1st respondent died and the 9th respondent was brought on record as his legal representative. Petitioners 1 and 2 nominated respondents 3 and 4 as the arbitrators and respondents 1 and 2 nominated respondents 5 and 6 as the arbitrators. The said arbitrators (respondent 3 to 6) nominated the 7th respondent as the umpire. The award was challenged by the petitioners on various grounds, including the ground of misconduct by the arbitrators and non-registration of the award. The respondents denied the allegation of misconduct and took plea that the award is not registrable u/s 17 of the Registration Act. In support of their contentions the parties led oral and documentary evidence P.W. 1 was examined on behalf of the petitioners and Exs. A1 to A16 were marked by them. The contesting respondents examined R.W. 1 and marked Exs. B1 to B39. On consideration of oral and documentary evidence on record, the trial court came to the conclusion that the arbitrators were guilty of misconduct and that the award Ex. B22 was a compulsorily registrable document, but was not registered, therefore it was inadmissible in evidence. It view of those findings the trial court allowed the O.P. and dismissed the suit by its common judgment on 29.3.1989. C.R.P. No. 2250/89 is filed against the common judgment and decree in O.S. No. 3/73 and C.M.A. No. 1859/89 is filed against the said common judgment and decree in O.P. No. 38/74.

3. Mr. N. Ramamohan Rao, the learned counsel appearing for the petitioners and the appellants, contends that the misconduct alleged against the arbitrators is legal misconduct in not giving a second notice to the parties, that the arbitrators passed an ex party award and in view of the authoritative pronouncements of various High Courts the conclusion arrived by the trial court is unsustainable in law. Mr. J. V. Suryanarayana, the learned counsel appearing for the respondents in these two cases contends that the arbitrators have proceeded in the matter in undue haste and that by itself is a misconduct, as such the trial court has rightly recorded the finding that the arbitrators were guilty of misconduct.

4. Now the short question is whether the arbitrators are guilty of misconduct in this case ?

5. Admittedly the parties nominated the arbitrators, as stated above, on 10.6.1972. The arbitrators entered upon the reference on 15.6.1972. On 4.9.1972 the arbitrators issued notice to the parties directing them to be present on 11-9-1972 making it clear that in their absence they will proceed ex parte and

pass the award. However on that date no ex parte award was passed. On 22.9.1972 the petitioners issued the notice Ex. B9 to the arbitrators not to proceed with the matter. Under Ex. B10 dated 25.9.1972 the arbitrators replied to produce the accounts at the residence of Mr. Obireddy. On 26.9.1972 the arbitrators issued the notice Ex. B37 asking the parties to appear on 30.9.1972 at 10 a.m.; venue was fixed as Mr. Obireddi''s house. On that date they considered the matter and decided among themselves to pronounce the award on 2.10.1972. From the chronology of events noted above it is seen that one notice was given to the parties intimating that in default of appearance by them the matter will be proceeded ex parte. The contention now raised is that before proceedings ex parte the arbitrators should have issued a further notice to the parties and failure to do so amounts to their misconduct. I am unable to accept this contention. No statutory rules dealing with the procedure before the arbitrator have been brought to my notice to show any procedural illegality. Admittedly it is not a case of violation of statutory rules. It cannot also be said that there has been violation of principles of natural justice inasmuch as the arbitrators issued a notice of hearing and a further notice that in defualt of appearance and production of records the case will be proceeded with ex parte. The case was adjourned on the date specified in the notice. Thereafter also the parties were informed under Ex. B37 that the case was finally adjourned though it was not indicated therein that non-appearance will result in ex parte hearing. In my view once a notice is given to a party to appear on a noted date it implies consequence of non-appearance, that is, ex parte hearing will follow and absence of specific mention of consequence of non-appearance would not debar the arbitrators from proceeding ex parte in the absence of appearance of any party in spite of service of notice. On these facts it is impossible to hold that the arbitrators are guilty of any legal misconduct.

6. Here it would be appropriate to refer to the cases cited at the bar.

7. In Udaichand Panna Lall v. Debibux Jewanram (AIR 1920 Cal 853), Mookherjee, J. speaking for a Division Bench of Calcutta High Court held that Section 11 of the Arbitration Act contemplates notices by the arbitrator to the parties at two stages, namely, first, notice of making and signing the award, and secondly, notice of the filing of the award in court. The learned Judge observed that there was no statutory rule however that if an arbitrator proceeds ex parte without giving notice of his intention to proceed in that manner, the award made by him must be set aside and that in the absence of such an inflexible statutory provision, the procedure commended in Gladwin v. Chilcote (1841) 61 RR 825 , could be regarded only as a rule of prudence and convenience. The learned Judge further observed that there was obvious good sense in the view that notice that arbitrator will proceed with the reference on a certain day is notice that he will then proceed ex parte if one of the parties absents himself without sufficient reason. This view was followed by a Division Bench of Allahabad High Court in Dori Lal Vs. Lal Sheo, . In that case it was pointed out that an arbitrator, who has given due notice of the proceeding to the party, is entitled to proceed ex parte if

one party did not choose to appear. The learned Judges point out that there was no provision in the Arbitration Act requiring the arbitrator to give a second notice of his intention to proceed ex parte against a person who was absent from service of notice and therefore the fact, that the arbitrator did not give a second notice of his intention to proceed ex parte could not amount to a legal misconduct. To the same effect is the opinion of a learned single Judge of the Orissa High Court in P.S. Oberoi Vs. The Orissa Forest Corporation Ltd., , who considered the two judgments referred to above.

8. From the above discussion it follows that to comply with the principles of natural justice it is necessary for the arbitrator to give notice to the parties that he would proceed on the date notified by him in the matter. That notice implies that the parties or any one of them, if choose to remain absent without a valid reason, the arbitrator is entitled to proceed ex parte and pass the award. In the instant case as noticed above, the arbitrator gave more than one notice to the parties. Indeed the arbitrators also emphasised in the notice, Ex. B37, that by granting final adjournment, the case was posted on 30.6.1972 at 10 a.m. Therefore neither on principle nor on authority could it be said that by not giving a second notice to the parties stating that in the event of their non-appearance, the arbitrators would proceed ex parte, they were guilty of legal misconduct. For the above reasons, the finding of the trial Court on this aspect cannot be sustained.

9. The next contention of Mr. N. Ramamohan Rao that the award does not require registration cannot be accepted. For purposes of application of Section 49 of the Registration Act, the award must be compulsorily registrable u/s 17 of the Registration Act. Section 17 of the Registration Act reads as follows :

"17. Documents of which registration a compulsory :

(1) The following documents shall be registered, if property to which they relate is situate in a district in which, and if they have been executed on or after the date of which, Act No. XVI of 1864, or The Indian Registration Act, 1866, or the Indian Registration Act, 1871 or the Indian Registration Act, 1877 or this Act came or comes into force, namely :

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upward, to or in immovable property."

10. It is not in dispute that the value of the immovable property which is the subject matter of the award is more than Rs. 100/-. It is now well settled that where an instrument creates any right, title or interest in immovable property of the value of Rs. 100/- or more, the instrument is compulsorily registerable. But an instrument in respect of an immovable property of a value less than Rs. 100/-

or of value of Rs. 100/- or more merely referring to in earlier transaction without creating any right, interest or title thereunder in it, does not require registration. Whether a particular incument or instrument creates title or interest in immovable property of Rs. 100/- and more, is a question of fact which has to be determined on the facts of each case. Now the only dispute is whether the award, Ex. B22, relates any right, title or interest in the immovable property. The award, Ex. B22, of which an English translation is furnished by the learned counsel for the appellants himself, inter alia reads as follows :

"The 3rd and 4th partners are entitled to the struck in trade available in Huller Mill towards their share from the 1st and 2nd partners. apart from the partners 3 and 4 are authorised to give credit in a sum of Rs. 60,000/- towards the value of the factory and the remaining balance can be recovered from partners 1 and 2 in cash. The 1st and 2nd partners shall have to handover the stock and factory to the 3rd and 4th partners i.e., Sri N. Khader Wali Saheb and Sri N. Khader Sahib within 10 days from the date of this award and within receipt therefor".

11. The copy of the English translation of the said document furnished by the learned counsel for the respondents reads as follows :

"This apart for the remaining total dues parties 3 and 4 shall take factory huller ruling at Rs. 60,000/- and after crediting the time and empowering 3, 4 parties to recover the remaining balance in cash from parties 1 and 2. Parties 1 and 2 shall handover possession of mill and stocks to parties 3 and 4 i.e., to N. Khader Wali Sab and Khader Sab within 10 days from the award and shall obtain receipt. In case if it is not done parties 3 and 4 can take action".

12. Though there is some difference in the phraseology, yet it is not difficult to find from the recitals, above extracted, that by the award a right is created in favour of partners No. 3 and 4 in the stock and the factory which was valued at Rs. 60,000/-. Therefore the award is compulsorily registerable. Consequently having regard to the provisions of Section 49 of the Registration Act, the trial Court was right in not making the award rule of Court as it is inadmissible in evidence. In view of the above discussion the finding of the trial Court on this issue, is confirmed.

13. In the result, C.R.P. and the C.M.A. fail and they are accordingly dismissed, but in the circumstances of the cases, the parties are directed to bear their own costs.

14. Petition dismissed.

