
(1952) 09 CAL CK 0019
In the Calcutta High Court

Case No : In the matter of Arbitration in Suit No's. 825 and 3220A of 1951

Nand Kishore

APPELLANT

Vs

International Mercantile Corporation (India) Ltd.

RESPONDENT

Date of Decision : 09-09-1952

Acts Referred:

Arbitration Act, 1940 — Section 2, 21, 23, 28, 30
Contract Act, 1872 — Section 23

Citation : AIR 1953 Cal 415

Hon'ble Judges : Bachawat, J

Bench : Single Bench

Advocate : A.C. Mitra and M. Harsh, for the Appellant; A.G. and A.K. Sen, for the Respondent

Judgement

Bachawat, J.—This is an application to revoke an order of reference in these suits and to set aside and declare invalid an award made by the arbitrator to whom the disputes in these suits were referred for arbitration.

2. The central figures in this litigation are Nanda Kishore Jhajharia and Jagannath Agar-walla. They were directors of and in control of various limited companies including the International Mercantile Corporation (India) Ltd. They also carried on a co-partnership business under the name and style Agarwalla-Jhajharia & Company which had its head office at No. 370 Upper Chitpore Road as exporters, importers and general merchants.

3. There is relationship by marriage between Nandkishore and Karnlaprosad who is son of Jagannath Agarwala. The wives of Nandkishore and Kamalaproshad are sisters.

4. The relationship between Nandkishore and Jagannath is strained since the latter part of 1960. There are serious disputes between them, with regard to various matters. The most serious dispute which precipitated litigation between them relates to a holding of 42200 shares in Ryam Sugar Co., Ltd. Nandkishore

Jhajharia purchased and obtained delivery of these shares from Gaya Sugar Mills Ltd. during the second and third week of January 1950. On or about 21-1-1950, 37,900 shares were registered in the name of International Mercantile Corporation (India) Ltd. (hereinafter referred to as the company). It is said that the balance of 4,300 shares also with blank transfer deeds were delivered to the company by Nandkishore Jhajharia. The case of Nandkishore Jhajharia is that the company was really his benamidar and that the name of the company was utilized by him for his own purposes. The case of the company is that the shares were transferred by Nandkishore Jhajharia to the company for a sum of Rs. 11,39,400/- in part liquidation of a much larger debt due to the company from Nandkishore Jhajharia.

5. On 24-1-1950, 24,000 shares standing in the name of the company were hypothecated with the National Bank of India and the balance 18,200 shares were hypothecated with the National City Bank of New York. By such hypothecations overdrafts were obtained from these Banks in the name of the company. The case of Nandkishore Jhajharia is that he utilized the name of the company for his own purposes whereas the case of the company is that these loans were raised on their own account. In or about May 1950, Nandkishore Jhajharia obtained delivery of 13,200 shares from the National City Bank of New York and 32,000 shares from the National Bank of India. The case of the company is that Nandkishore fraudulently transferred the said shares from the said Banks to his own account in the United Commercial Bank and thereafter wrongfully purported to sell 26100 of the said shares to One M. L. Jhunjhunwala and thereby committed criminal breach of trust and that the company came to know of these underhand dealings by Nandkishore for the first time in December 1950 when it started correspondence with Ryam Sugar Co. and requested the latter not to register the transfer in favour of M. L. Jhunjhunwala, but the transfer of the shares in favour of M. L. Jhunjhunwala was eventually registered. In the meantime on 6-10-1950 the company through Messrs. Jagannath Agarwala & Sons Ltd. obtained delivery of the remaining 12000 shares from the National Bank of India. In early January 1951, Nandkishore wrote to Jagannath Agarwala asking for delivery of the balance 12,000 shares and apparently also gave a notice dissolving the partnership firm of Agarwalla Jhajharia & Co.

6. On 10-1-1951, Mr. P. N. Chatterjee, who is a Director of the company lodged a complaint against Nandkishore Jhajharia and M. L. Jhunjhunwala charging them with offences under Sections 120B 406, 411 and 414. Penal Code, in respect of their dealings with the shares in Ryam Sugar Co. This complaint was registered as Case No. C/86 of 1951 in the Court of the Chief Presidency Magistrate, Calcutta.

7. On 13-1-1951, the board of directors of the company by resolution removed Nandkishore from his office as a Director of the company.

8. On 5-2-1951, Nandkishore Jhajharia launched a petition for winding up of the company and on that obtained an order of appointment of Provisional Liquidator

with power of initialling certain books of the company. On the same date, Nandkishore instituted Suit No. 825 of 1951 against the company and J. Agarwalla & Sons Ltd. claiming a declaration that the shares in Ryam Sugar Co. Ltd. belonged to Nandkishore, decree for delivery of 12000 shares, injunction, damages and consequential reliefs.

9. On the same date viz., on 5-2-1951, Nandkishore Jhajharia filed another suit against Jagannath Agarwalla and Ramkaran Parasurampuriah claiming dissolution of the firm of Agarwalla Jhajharia & Co. and consequential relief. There is a dispute whether Ramkaran had a share in the profits of that firm.

10. On 16-2-1951, the company applied for stay of the winding up petition and obtained from this Court an injunction restraining advertisement of the presentation of the winding up petition. The application for stay of the winding up petition was later on dismissed. An appeal from that order was filed and was pending when the order of reference in these suits was made. In the third week of March 1951, written statements were filed in Suits Nos. 767 of 1951 and 825 of 1951. On 19-3-1951, a consent order was made in Suit No. 767 of 1951 appointing Receiver of certain books.

11. On 16-2-1951 Case C/86 of 1951 was transferred to the Court of Sri K. K. Das Gupta, Additional Chief Presidency Magistrate, for disposal. The case was opened on 3-4-1951. Prosecution witnesses were examined on 4th, 5th, 6th, 7th, 17th, 19th, 20th and 23rd April, 1951. On 4-5-1951, the Magistrate held that there was prima facie evidence for framing charge against Nandkishore u/s 406, Penal Code, and charges against him were framed accordingly. The Magistrate held that there was no sufficient evidence against accused M. L. Jhunjhunwala who was accordingly discharged u/s 253 (1). Criminal P. C. Nandkishore Jhajharia pleaded not guilty to the charge.

12. On 8-5-1951, Jagannath Agarwalla instituted Suit No. 2020 of 1951 against Nandkishore Jhajharia asking for a decree for about Rs. 2,50,000/- in respect of "khata peta" account and for declaration of charges on certain shares. On the same date, the company instituted Suit No. 2307 of 1951 claiming Rs. 1,70,000/- with interest as loan against Gobardhanbhai Amba-lal and in the alternative as damages for conversion and breach of trust against Nandkishore Jhajharia.

13. On 9-5-1951, further witnesses were examined in Criminal Case c/86 of 1951 and on 10-5-1951, the case was adjourned till 10-6-1951 for cross-examination. On 4-6-1951, the case was adjourned till 29-6-1951 and again on 16-6-1951, the case was adjourned till 10-7-1951 on the petition of the accused, the complainant not objecting.

14. In the meantime mutual friends were trying to settle these civil and criminal disputes. At first one Prahlad Churiwala intervened but he could not negotiate an effective settlement. The first effective talk of settlement took place through one Sohanlal Murarka in a marriage procession towards the end of June, and

beginning of July 1951. In the meantime on 10-7-1951 one of the prosecution witnesses was examined and the case was adjourned till 18-7-1951. Simultaneously talks of settlement were going on. On 13-7-1951 Nand-kishore Jhajharia applied for extension of the time for filing written statements in Suits Nos. 2020 of 1951 and 2307 of 1951. It was stated in the petition in support of that application that through the intervention of mutual friends, talks of settlement of all disputes were going on.

15. On 16-7-1951 there was a conference at the residence of the learned Advocate-General. Kamalaproasad gave the 24th July as the date of this conference but I think he was under a misapprehension with regard to the date. The conference was attended by Kamalaproasad and his lawyers Messrs. S. P. Misra, Mahadeb Hazra, Brojen Mitra and his employee Madanlal Purohit and by Nandkishore and his lawyers Messrs. J. P. Mitter and K. P. Khaitan. The brief to the learned Advocate-General was delivered by the lawyers for Kamalaproasad who paid his fees. The advice of the learned Advocate-General was sought with regard to the procedure for dropping the prosecution and also with regard to the validity of the proposed settlement. All disputes civil and criminal were going to be settled and the parties were alive to the danger that the settlement might be invalid on the ground that it stifled criminal proceedings and was against public policy. The learned Advocate-General gave his advice and the conference broke up. No settlement was concluded on that day.

16. On 18-7-1951 there was a consent order in Suits Nos. 2020 of 1951 and 2307 of 1951 extending the time to file written statement up to 6-8-1951. On the same date the complainant and the accused filed a joint petition before the Additional Chief Presidency Magistrate for change of date and the proceedings were adjourned till 23-7-1951. The parties were coming nearer to settlement and by 24-7-1951 a draft of the proposed terms of settlement was made ready by the lawyers of Nandkishore.

17. On the 23rd as also on the 24th July 1951 Kamalaproasad was partly cross-examined by Mr. J. P. Mitter, counsel for Nandkishore. After the hearing on 24-7-1951 was over the parties agreed to meet at the office of Sohanlal Murarka in the afternoon with the object of settling the disputes.

18. Mr. Krishna Khaitan and Mr. N. K. Jhajharia had a lunch at Firpos with Mr. J. P. Mitter and Nandkishore and thence went to the office of Sohanlal Murarka. It was suggested to Kamalaproasad during his cross-examination that he and Madanlal had come in a car for the purpose of fetching Mr. Krishna Khaitan from Firpos. The suggestion cannot wholly be correct because Mr. Krishna Khaitan stated that he found Kamalaproasad at the office of Sohanlal on his arrival there. The recollection of Mr. Krishna Khaitan is that Madanlal Purohit had come for the purpose of taking him and Nandkishore to the office of Sohanlal. This is denied by Madanlal. Whatever the true position might have been on that date Sohanlal, Jagannath Agarwalla, Kamalaproasad Agarwalla, P. N. Chatterjee, Nandkishore Jhajharia, Madanlal Purohit and Krishna Khaitan met at 1953 Gal/53 & 54 the

office of Sohanlal Murarka. Kamalaproasad says that Mr. JJhagabati Prosad Khaitan was also present but this is denied by Mr. Krishna Khaitan.

19. At this meeting Jagannath Agarwala, Nandkishore Jhajharia and P. N. Chatterjee for himself and on behalf of the company signed a document which contains a certain terms of settlement. This document reads as follows: TERMS OF SETTLEMENT

1. The criminal proceedings shall be dropped in a way advised by lawyers of both sides. Mr. Jhajharia will give such undertaking as may be required that he will not take any step for malicious prosecution or for damage by reason of the criminal proceedings.

2. The winding up petition and the appeal will be withdrawn, each party paying its own costs.

3. In the declaratory suit filed by Mr. Jhajharia against International Mercantile Corporation (India) Ltd., and Anr., a declaration will be made that 42,200 shares in the Ryamj Sugar Co. Ltd., are the property of Mr. Jhajharia, but Mr. Sohanlal Murarka will be appointed Receiver and will hold the said shares pending ladjustment of accounts in the matters which would be referred to the arbitration of Mr. Sohanlal Murarka. The Receiver will hand over the shares to Mr. Jhajharia in the event of it being found after accounting that Mr. Jhajharia is not liable to pay anything to the International Mercantile Corporation (India) Ltd., or Jagannath Agarwalla and in the event of any money being found due from Mr. Jhajharia, upon Mr. Jhajharia paying the same. In default the Receiver will be entitled to sell the shares and out of sale proceeds pay the amount so found due and payable to the parties and the balance, if any, to Mr. Jhajharia.

4. The other suits filed in the High Court by the respective parties including the suit for accounts of Agarwala Jhajharia & Co., shall be referred to the arbitration of Mr. Sohanlal Murarka.

5. All other disputes and accounts and interests of N. K. Jhajharia and Jagannath Agarwala and International Mercantile Corporation (India) Ltd., and in respect of any other concern or of any nature whatsoever shall be referred to the arbitration of Mr. Sohanlal Murarka.

6. In case of any difficulty in settling the drafts incorporating the above arrangement, the same will be referred to Mr. Advocate-General whose decision shall be accepted by the parties.

Dated Dated this 24th day of July, 1951. Sd/- J. Agarwalla Sd/- N. K. Jhajharia
International Mercantile Corporation (India) Ltd. Sd/- P. N. Chatterjee, Director,
Sd/- P. N. Chatterjee.

20. The signed terms were left with Sohanlal Murarka.

21. On 25-7-1951 the complainant in Case No. C/86 of 1951 prayed for time to

settle and the Magistrate adjourned the case till 31-7-1951 observing that it was said that the terms had already been settled.

22. On 30-7-1951 Nandkishore Jhajharia apparently wrote a letter to the company stating that he will not take any steps for malicious prosecution or for damages pursuant to Clause (1) of the terms of settlement. On 31-7-1951 the complainant filed a petition in Case No. C/86 of 1951 stating that he did not want to proceed any further with the case and did not tender any further evidence begging leave of the Court to drop the same and adding that the accused joined in the application. This petition is signed by the complainant and Nandkishore and their lawyers. Upon this petition, the learned Magistrate acquitted the accused u/s 258, Criminal P. C., observing that he did not think it necessary in the interest of justice to proceed further.

23. On the same date, namely, on 31-7-1951 the company instituted Suit No. 3220A of 1951 against Nandkishore Jhajharia and Mahadeolal Jhunhunwala claiming a declaration that the company was the owner of the entire block of 42200 shares in Ryam Sugar Co., Ltd. and consequential reliefs as also a decree for the sum of Rs. 10,94,672-3-5 alleged to be due to the company from Nandkishore in respect of certain dealings had between them on the footing that the shares had been sold to the company and in the alternative for the sum of Rs. 2,23,473-3-3 in case it was held that the shares had not been so sold. It was alleged that Mahadeolal Jhunhunwala was merely the nominee of Nandkishore Jhajharia.

On the same date Nandkishore, Jagannath and the company executed an agreement referring all disputes between them other than those which were the subject-matter of the pending suits to the arbitration of Sohanlal. On the same date petitions for reference to arbitration in all the suits and terms of settlement in Suits Nos. 825 & 3220A of 1951 were all affirmed and signed so that they might be filed in Court on the next day. On 1-8-1951 terms of settlement were filed and a compromise decree was passed in Suits Nos. 825 and 3220A of 1951. By these terms, the two suits were consolidated. The suits were withdrawn against J. Agarwala & Sons Ltd. and M. L. Jhunhunwala. It was declared that the 42200 shares in Ryam Sugar Co., Ltd. belong to Nandkishore. Sohanlal Murarka was appointed Receiver of these shares and was to hold them as security for the discharge of the liabilities to be ascertained by him.

Both parties gave suitable undertakings for delivery of the shares to Sohanlal. If on the taking of accounts in respect of all the matters referred to the arbitration of Sohanlal any sum was found due from Nandkishore to the company or to Jagannath Agarwala, Nandkishore would within one month of the final judgment on the award pay the net amount due and in default of payment the Receiver would be entitled to sell the shares and to pay the dues out of the sale proceeds; but in case . Nandkishore paid off the dues or in case no sum was found due and payable by him the Receiver would hand over the shares to him.

24. On the same date a petition was filed in these consolidated suits praying for reference to arbitration and thereupon except as provided in the terms of settlement all other matters in dispute between the parties in both the suits including the question of costs of the suits and of the reference were by an order of the same date referred to the arbitration of Sohanlal Murarka.

25. In suits Nos. 767 of 1951 and 2020 of 1951 also petitions were filed and orders were passed for reference to disputes to the arbitration of Sohanlal Murarka. On the same date Suit No. 2307 of 1951 was withdrawn as against : Goberdhan Bhai Ambalal and the company was directed to pay their costs in the first instance and all matters in difference in the suit including the question of costs of the suit and the reference and the costs to be paid by the company to Goberdhan Bhai Ambalal in the first instance was referred to the arbitration of Sohanlal.

26. The arbitrator commenced his work on. 14-8-1951 on which date he held his first sitting. By common consent all disputes between the parties were taken up and discussed simultaneously. On 28-9-1951 the time to make the award was extended until 30-12-1951 by orders made in the several suits. The arbitrator seems to have carefully gone into the disputes and the minutes record elaborate discussions with regard to accounts. The arbitrator held twenty meetings up to and including 1-12-1951.- " These twenty meetings are admitted by the petitioner and the correctness of the minutes of these meetings are not challenged.

27. It is the case of Nandkishore that formal meetings were also held by the arbitrator on 13th, 14th, 15th and 19th December 1951. It is the case of the petitioner that no meeting was held by the arbitrator after 1-12-1951 and that no notice of the alleged meetings on 13th and 14th, 15th and 19th December was given to the petitioner.

28. The minutes of the arbitration meetings dated 13th, 14th, 15th and 19th have been produced and exhibited. The correctness and genuineness of these minutes are challenged by the applicant.

29. The minutes of the meeting dated 13th December show that the meeting was held at the office of the arbitrator and that Nandkishore Jhajharia, Kamalaproasad Agarwalla, Sewprosad Agarwalla and Madanlal Purohit were present and that amongst other matters the Pakistan joint business matters were discussed and certain statements were exchanged between the parties. The minutes dated 14-12-1951 show that the meeting was held at the office of the arbitrator and that Nandkishore, Kamalaproasad, Sewprosad and Madanlal were present that Jhajharia supplied certain information with regard to several items in the list submitted by Agarwalla. The minutes of the meeting dated 15-12-1951 show that the meeting was held at the office of the arbitrator and that Kamalaproasad, Madanlal. Nandkishore, Ramkaran with a Munim were present, that there was discussion with regard to the joint venture and that the

arbitrations had reached their concluding stage. The minutes of the meeting of 19-12-1851 show that the meeting was held at the office of the arbitrator and that Nandkishore, Ramkaran, Sewprosad, Madanlal were present. The minutes show that there were discussions but no new points were raised and the arbitrator stated that he would make his award by the 30th instant but as a matter of precaution the time should be extended up to 15-1-1952 and the parties agreed to apply for extension up to 15-1-1952.

30. By several orders dated 21-12-1951 the time to make the award in the several suits was extended until 15-1-1952. The orders were made upon petition presented by Nandkishore and consented by the other party stating that the arbitration was proceeding and had not then been completed and was not expected to be finally disposed of by 30-12-1951. On 29-12-1951 the arbitrator made five awards in the several arbitrations and sent the four awards made in the several suits to the Registrar of this Court by registered post. On the same date he sent a formal notice to the parties stating that he had made his award under the agreement dated 31-7-1951. This notice was received by the parties 011 that very date. The arbitrator delivered the shares in the Ryam Sugar Co. Ltd. to Nandkishore on 30-12-1951.

31. There is a dispute between the parties as to the exact happenings on 28th, 29th and 30th December 1951. It is the case of the petitioner that inspection of the accounts between, Nandkishore and the company was going on and had not been completed and that on 28-12-1951 Kamalaproasad went to the office of the arbitrator for inspection whereupon the arbitrator produced before him 6 exercise books said to have been given by Nandkishore Jhajharia and that thereupon inspection was taken until 9 p.m. on that date and it was arranged that further evidence and submission will be placed before the arbitrator on the following day at 9 a.m. All this is denied by the arbitrator. The case of the petitioner is also that on the morning of 29th December at 9 a.m. Nandkishore Jhajharia, Jagannath Agarwalla, Sewprosad and Kamalaproasad called at the resident of the arbitrator and were informed that the arbitrator had gone to the place of one Chiranjanlal and after waiting for half an hour they dispersed. This again is denied by the arbitrator.

32. It is the case of Nandkishore that at an interview at the residence of the arbitrator in the evening of 29-12-1951 the arbitrator communicated to Nandkishore and Jagannath the purport of the several awards and informed them that he was going to return the shares. This interview is denied by Kamalaproasad.

33. The arbitrator sent formal notices of the making of the award in the several suits on 31-12-1951. On the same date the petitioner sent a letter to the arbitrator acknowledging receipt of the notice dated 29-12-1951 stating its version of the happenings on that date and requesting the arbitrator not to communicate the contents of or to supply a copy of the award to any party before sending a reply and added "it is needless to say that you will not part with the Ryam shares which you are holding as a Receiver until further orders of the

Court." Copy of this letter was sent to Nandkishore Jhajharia. Nandkishore Jhajharia did not send any reply but the arbitrator sent one on 3-1-1952. He generally denied the allegations contained in the letter under reply and added "As regards your request re scrips of the Ryam Sugar Mill I regret that there is no occasion to ask for any direction from the Court."

34. On or about 18-1-1952 Messrs. Khaitan & Co. requested the arbitrator to file the award under the agreement dated 31-7-1951. On 24-1-1952 Messrs. Mookerjee & Biswas wrote to the arbitrator requesting him to forward to the Registrar the minutes of the 20 sittings of the arbitration meetings and the exhibits and expressing surprise that they had not been filed so far. They sent another letter to the arbitrator on the same date asking him whether he was still holding the shares of the Ryam Sugar Mills as Receiver or whether he had already made the same over to Nandkishore Jhajharia and if so when. The arbitrator sent replies on 28-1-1952. By one of the letters he stated that by common consent minutes were kept in the private arbitration under the agreement dated 31-7-1951 to be read and treated as evidence in each of the 5 matters submitted for arbitration and that there were altogether 24 and not 20 meetings and that the minutes were being sent by him to the Registrar. By another letter of the same date he stated that he made over the shares to Nandkishore Jhajharia on 30-1-1951 against his receipt. On or about 11-2-1952 the arbitrator sent the minutes and the award under the agreement dated 31-7-1951 to the Registrar.

35. The awards have been impeached on several grounds. I will first of all deal with, the grounds which are peculiar to this case.

36. By the award in this case the arbitrator directed Nandkishore to pay Rs. 56,000/- to the company in full satisfaction of their claim stating that the figure had been arrived by taking into consideration the sum of Rs. 9,76,000/- payable by N. K. Jhajharia and Co. in his firm N. K. Jhajharia & Co. (Pakistan) to the company and several other sums of money.

37. The first ground upon which the award is challenged is that in making this award the arbitrator took into account the sum of Rs. 1,70,000 claimed by the company in Suit No. 2307 of 1951. This objection is not specifically taken in the petition but it is alleged generally that the award purported to include matters which are outside the scope of the suit. The award on the face of it does not show that this sum was taken into consideration by the arbitrator in making this award but that he did so appears from paras. 2(k) and 18 of the affidavit of Nandkishore filed in the connected proceedings in Suit No. 2307 of 1951.

38. (His Lordship considered this objection and held that there was no substance in it. His Lordship then proceeded).

39. The next objection to this award is that in making this award the arbitrator had no jurisdiction to take into account the sum of Rs. 9,76,000/- payable by N. K. Jhajharia & Co. in his firm of N. K. Jhajharia & Co., Pakistan to the company. It

is contended that N. K. Jhajharia & Co., Pakistan is a firm and an entity separate and distinct from N. K. Jha-jharia & Co., and that the claim of the company against N. K. Jhajharia & Co. only was the subject-matter of these consolidated suits. This objection is not specifically taken in the petition. It is not alleged by the petitioner that N. K. Jhajharia & Co. (Pakistan) is a firm and an entity separate and distinct from N. K. Jhajharia & Co. Reliance is placed in sub-para. 2(j) of the affidavit of Nandkishore filed in the proceedings in Suit No. 2307 of 1951 to show that there were outside partners in N. K. Jhajharia & Co. (Pakistan) but the allegations in that sub-paragraph are denied in sub-para. 4(h) of the affidavit of Kamalaproasad affirmed on 18-7-1952 in the said proceedings in answer to the affidavit of Nandkishore. The case of the company, therefore, is that N. K. Jhajharia is the sole proprietor of the business of N. K. Jhajharia & Co., Pakistan. The company alleges in para. 1 of the plaint that N. K. Jhajharia himself carried on business under the name and style of N. K. Jhajharia & Co. in India and Pakistan. There" is, therefore, no foundation for the argument of Mr. Mitra that N. K. Jhajharia & Co., Pakistan, is a firm distinct and separate from N. K. Jhajharia & Co., India. The arbitrator had jurisdiction to deal with the claim of the company against N. K. Jhajharia and carrying on business under the name and style of N. K. Jhajharia & Co. in Pakistan and to decide whether Nandkishore was liable in respect of these dealings.

40. The next ground of attack is that there were mixed sittings of arbitration with regard to the reference in the several suits and under the agreement dated the 31st July. It is contended that the arbitrator wrongfully mixed up and kept one set of minutes for the several arbitrations. This charge, in my judgment, is entirely unfounded. The company at no point of time objected to the keeping of one set of minutes or to the consideration of the subject-matter of the different arbitrations in the same meeting. In the letter dated 28-1-1952, the arbitrator clearly stated that one set of minutes had been kept by common consent to be read and treated as evidence in each of the five matters submitted to arbitration. No reply was sent to this letter and no exception was taken to this statement. The charge that the petitioner never agreed to the keeping of one set of minutes is entirely untrue. No doubt, by the order of reference in the consolidated suits only some of the disputes in these suits had been referred to his arbitration and under that order he could only deal with those disputes. But it was for the arbitrator to regulate the procedure with regard to the arbitration. In order to succeed the company must establish that there were irregularities in procedure amounting to no proper hearing of the matter. Such case js not made out by the company. The company consented to the particular mode of procedure adopted by the arbitrator and cannot now turn round and object to that mode of procedure. Even assuming that the consideration of several matters at the same sitting was irregular, such irregularity was cured by the consent of the parties. "Mt. Amir Begam v. Syed Badruddin" AIR 1914 P C 105.

41. The next charge is that the award in these suits was based on conclusions which were coloured by the view taken by the arbitrator in respect of disputes

which are not the subject-matter of these suits and that the arbitrator has not discriminated between disputes which were in issue in these suits and those which were not and reliance is placed upon the observations of Lord Blanesburg in the well known case of - AIR 1925 293 (Privy Council) . This charge must be established either from the terms of the award or from intrinsic evidence, In my opinion there is nothing in the award or any intrinsic evidence to establish this charge, - Jatindra Nath Bhattacharyya Vs. Manindra Nath Bhattacharyya and Others, . The arbitrator has not in this case as in - AIR 1925 293 (Privy Council) made an award dealing with disputes some of which were the subject-matter of the suit and some of which were not, See - "Raminder v. Mohinder" AIR 1940 Lah 186 affirmed - "Trinidad Lake Asphalt Operating Co. Ltd. y. Commr. of Income Tax for Trinidad and Tabago" AIR 1945 P C 85 . The charge, therefore, fails.

42. The next ground upon which this award is impeached is that contained in paras. 26 and 35 (b) (ii) of the petition. It is said that no meetings were held on the 13th, 14th, 15th and 19th December 1951 and that in any event the petitioner had no notice of the several meetings and that the minutes of those meetings are not correct. The petitioner admits that the parties met in the office of the arbitrator in course of inspection of accounts during this period but the petitioner's case is that no formal meeting was filed.

43-46. (After going through the evidence his Lordship held that the petitioner had notice of all these meetings).

47. It is the case of the petitioner that during the middle or the 3rd week of December 1951 the parties agreed to apply for extension of time to make the award till 15-1-1951. Kamalaproasad swore that the extension was suggested by the arbitrator during inspection in the presence of Kamalaproasad, Nandkishore, Ramkaran and a moonim of Nandkishore. This evidence strongly corroborates the minutes of the meeting of 19-12-1951 which records an agreement to apply for extension in the presence of Kamalaproasad, Madanlal, Nandkishore and Ramkaran. I am satisfied that the parties agreed to apply for extension at the formal meeting dated 19-12-1951. Indeed Madanlal at one stage of his evidence stated that the extension was agreed to at the meeting of 19th December but later on he said that there was a talk with regard to the extension between Nandkishore and Kamalaproasad in the presence of the arbitrator.

48. It was suggested to the arbitrator that he had fabricated the minutes of the disputed meetings. There is no charge of fabrication in the petition. The only charge is that the minutes are not correct. The petitioner had inspection of the disputed minutes before this application was made yet no letter was written to the arbitrator charging him with fabrication. Kamalaproasad is very evasive with regard to the date of this inspection. He caused Messrs. Mukherji & Biswas to write a letter requesting the arbitrator to send the minutes of 20 meetings. The arbitrator distinctly stated in his reply dated 28-1-1951 that there were altogether 24 meetings and that he was sending all the minutes to the Registrar.

To that letter no answer was sent by Messrs. Mukherji & Biswas and it was never suggested that 24 meetings had not been held nor was it suggested that the minutes of the disputed four meetings had been fabricated by the arbitrator.

49. In my view formal meetings were held on the 13th, 14th, 15th and 19th December 1951 and the minutes correctly record what had transpired at those meetings. The arbitrator had indicated on 15-12-1951 that the matter had reached the concluding stage and on 19-12-1951 the arbitration was formally closed.

50. The next charge is contained in paras. 30, 35 (b) (1) and 35 (b) (3) of the petition. The charge is that the arbitrator wrongfully received certain exercise books behind the back of the petitioner and that he wrongfully did not allow the petitioner to give evidence and make submissions although he had made an appointment for that purpose at 9 a. m. on 29-12-1951. The arbitrator denies both these charges and I believe the arbitrator. In my view these charges are unfounded.

51. Mr. Mitra also contended that it was definitely decided that the arbitrator could not make his award on 30-12-1951, that the time to make the award was accordingly extended till 15-1-1952, and that in making the award before that date the arbitrator was colluding with Nandkishore. The true position is recorded in the minutes of the meeting dated 19-12-51 which shows that the arbitrator indicated that he would make his award by 30-12-1951 and that he recommended extension only by way of abundant precaution. Mr. Mitra contended that there was a discrepancy between the minutes of the meeting dated 19-12-1951 and the petition of Nandkishore dated 21-12-1951. I do not find any material discrepancy.

52-53. The next charge is that the arbitrator in making the award colluded with Nandkishore and that such collusion is shown by the fact that the arbitrator parted with the shares to Nandkishore on 30-12-1951. The petitioner contends that the arbitrator did so illegally and behind the back of the petitioner when the petitioner was not even aware of the making of all the awards. It is said that on a true construction of the decree dated 1-8-1951 the arbitrator had no power to deliver the shares until after judgment on the several awards were passed. I refuse to decide the question of construction in these proceedings. The only question is whether the proved facts warrant the conclusion that the arbitrator was actuated by improper motives in making the awards. I am satisfied that no such conclusion can be drawn from the facts on the record.

I am satisfied that the arbitrator in the evening of 29-12-1951 had informed the parties of the general result of the several awards and of his intention to deliver the shares. He acted unwisely in parting with the shares without calling a formal meeting and before sending formal notice of the making of all the awards. But I am satisfied that when the petitioner wrote the letter dated 3-1-1952 it was aware of the making of and of the general result of the several awards and that

such result was adverse to the petitioner. (His Lordship reviewed the evidence and the conduct of the petitioner and proceeded). In my view therefore the charge of fraud and collusion fails.

54. The next charge is that that arbitration agreement and the order of reference are illegal and against public policy. The petitioner's case is that it agreed to withdraw and drop the criminal proceedings against Nandkishore Jha-jharia as part of the consideration for the several "agreements for reference to arbitration and that the agreements were entered into inter alia with the object of stifling the criminal proceedings.

55. There is no doubt that the agreement of reference to arbitration is void if either the consideration or object thereof is the dropping of prosecution for a non-compoundable offence. The relevant principles admit of no doubt and are now settled by the highest judicial authority. Sir Benod Mitter in - Kamini Kumar Basu v. Birendra Nath Basu states the law succinctly as follows: "If it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama, as the case may be, is unlawful."

56. Lord Atkin discussing the matter more elaborately in - AIR 1941 95 (Privy Council) observes thus:

"But the defence remained x x x x that the mortgage bond in question was given as part of the consideration for a promise by the bank to withdraw criminal proceedings against one Kalidas the mortgagor's husband. If established, this would plainly afford a defence u/s 23 of the Indian Contract Act (IX of 1872).

x x x x It is of the essence of the defence that the defendant should establish a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him, either not to taring, or to discontinue, criminal proceedings for some alleged offence. x xx xx Proof that there has actually been a crime committed is obviously unnecessary. But it is also, of course, necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting. In all criminal cases reparation, where possible, is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand, to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts, they have to be inferred from the conduct of the parties after a survey of the whole circumstances."

57. In this case prosecution for an offence u/s 406, Penal Code, was pending against Nandkishore Jhajharia. Nandkishore had been charged with that offence on the complaint of P. N. Chatterji, a director of the petitioner company. An offence u/s 406, I. P. C., is not compoundable by the complainant. The complainant P. N. Chatterji for self and on behalf of the petitioner company then accused Nandkishore as well as Jagannath Agarwala signed a document dated 24-7-1951 recording certain terms of settlement. Clause 1 of these agreed terms is that the criminal proceedings shall be dropped in a way advised by the lawyers. Clauses 4 and 5 of these terms record an agreement to refer all the civil disputes to the arbitration of Sohanlal Murarka. All these terms were agreed to simultaneously as a result of prolonged talks of a settlement of all disputes both civil and criminal. The subsequent petition before the Magistrate asking for leave to drop the prosecution and the subsequent petitions in the pending suits for reference of the disputes to arbitration only incorporate and implement the firm arrangement recorded in the document dated 24-7-1951. The Magistrate was informed of the settlement on 25-7-1951 and on 31-7-1951 the complainant and the accused filed a joint petition for the dropping of the criminal proceedings. On the same date the parties signed petitions of compromise and of reference to arbitration as also the agreement of reference of the other disputes. The petitions are filed in Court the next day. The entire arrangement recorded in the document dated 24-7-1951 was intended to be and was in fact carried out. There was one settlement of all disputes. The settlement of the civil dispute was dependent on the settlement of the criminal proceedings. The document was kept with Sohanlal Murarka with a view to see that all its terms were carried out. The dropping of the prosecution was part of one entire bargain, including the bargain for reference to arbitration. It was well understood that the promise of Nandkishore for reference to arbitration was in part exchange for the promise not to continue the prosecution. There were several considerations for the promise of Nandkishore Jhajharia to refer one of which was the illegal promise to drop the criminal proceedings. The consequence is clearly stated in CHITTY on Contract-23th Edition-p. 469, thus:

"If a contract is made on several considerations, one of which is illegal, the whole contract is unenforceable."

Where there are several considerations the illegality of one of them vitiates the whole contract. Lord Atkin in - AIR 1941 95 (Privy Council) observed at p. 98 (G):

"Their Lordships, therefore, agree with the decision of the High Court, though they do not follow the reasoning of one of the learned Judges that the money consideration to the wife was illusory. It was real enough; but it was not the only consideration. They desire also to point out that the learned Subordinate Judge has attached undue weight to the fact that here there was a debt really due from Kalidas. In this class of case that fact seems irrelevant if the agreement to abandon a prosecution is part of the consideration for payment of the debt." There are similar observations in the judgment of Mr. Justice B. K. Mookerjee in -

Sudhindra Kumar Rai Chaudhuri and Others Vs. Ganesh Chandra Ganguli and Others, .

58. It is true that a motive for a contract is not necessarily one of its considerations. At the same time a consideration of the contract is always a conventional motive or inducement for entering into the contract. "It is of the essence of a consideration that by the terms of the agreement it is given and accepted as the motive or inducement of the promise."

Holmes Common Law page 293. The promise to drop the prosecution was given and accepted here as a conventional inducement for the several promises by Nandkishore and is, there-fore, one of the considerations for the promise to refer to arbitration.

The cases relied upon by the learned Advocate-General, viz., - Dwijendra Nath Mullick and Another Vs. Gopiram Gobindram, (I): - Deb Kumar Ray Choudhury Vs. Anath Bandhu Sen and Others, ; - Shaikh Gafoor Vs. Mt. Hemanta Shashi Debya, ; - "Sukhdeo Dass v. Mangal Chand" AIR 1917 Pat 454 ; - Mat Kumar v. Gaurinath" 20 All 718 (M); - "Tek Chand v. Harjos Rai Arjan Das". AIR 1929 Lah 564 ; - "Harias Rai Arjan Das v. Tekchand" AIR 1927 Lah 465 are distinguishable. In these cases clear proof of a bargain to drop the prosecution was lacking. It was not established in those cases that the impugned promise was given in exchange or part exchange for a promise to discontinue the prosecution. In some of these decisions undue weight was given to the existence of the civil liability of the accused. The existence of such liability is not relevant if it is established that an illegal promise to drop the prosecution is also one of the considerations for the impugned promise. I think that the best explanation of the decision in - Dwijendra Nath Mullick and Another Vs. Gopiram Gobindram, (I)" is that given by the learned editor of Sir D. F. Mulla's Transfer of Property Act, 3rd Edition - p. 75 which is as follows:

"In a Dwijendra Nath Mullick and Another Vs. Gopiram Gobindram, (I)" the relations of a prisoner executed a mortgage in favour of the prisoner's employer for a large part of the employer's money which the prisoner had misappropriated, in consideration of the employer agreeing not to object to the prosecution being withdrawn by the Commissioner of Police. The Court held that the mortgage was valid, but it is clear from the judgment that the mortgage would have been invalid, if the consideration had been that the employer should himself withdraw the prosecution." The parties here also agreed to a declaration that Nandkishore Jhajharia was the owner of the disputed shares. This declaration cuts at the root of the prosecution case. If Nandkishore Jhajharia was the owner of the shares he could not have committed criminal breach of trust. But this declaration itself springs into existence as part of the illegal bargain to discontinue the criminal proceedings. The declaration, no doubt, shows that the prosecutor was anxious to drop the criminal proceedings. The holding of the shares gave the holder the controlling interest in Ryam Sugar Mill and consequently valuable advantages which were not confined merely to earning

dividends on the shares. The prosecutor was forging those valuable advantages. It is possible that the prosecution case was rather weak. But the fact that the evidence would not have established the charge is irrelevant. " Sayamma Dattatraya Narsingrao Vs. Punamchand Raichand Marwadi, (P). In - Birendra Nath Basu Thakur and Another Vs. Basanta Kumar Basu Thakur and Others, Walmsley J. in coming to the conclusion that the impugned agreement was not illegal relied upon the fact that the Magistrate had expressed doubts about the complaint but his judgment was reversed on appeal in - Kamini Kumar Basu v. Birendra Nath Basu and this fact was treated as irrelevant. Proof of the commission of offence is not a necessary part of the defence u/s 23. Contract Act: per Lord Atkin in - AIR 1941 95 (Privy Council) .

59. The principle is that "you shall not take a trade of a felony". Such trading need not necessarily be upon the assumption that the felony is committed. Thus an agreement by the accused to give up all claims for false imprisonment and malicious prosecution in exchange for the promise of the prosecutor not to prosecute is illegal. "Rawlings v. Coal Consumers Asso. Ltd" (1874) 30 L T 469; - "Dalsukhram v. DeBretton" 28 Bom 326 .

60. There is trading on a felony if discontinuance of prosecution is made the subject-matter of private bargain. The prosecutor makes a trade of the felony when he barter his promise not to prosecute. The policy of the law is not to permit any citizen to interfere with the progress of the prosecution by any private arrangement. The effect of such arrangement is to defeat the provisions of law that such offence is not compoundable. Sayamma Dattatraya Narsingrao Vs. Punamchand Raichand Marwadi, (P).

61. The learned Advocate-General relied upon the case of - "Jagadish v. Mt. Kausilla" AIR 1947 All 317 . The Court there by a majority held that the compounding of the non-compoundable offence of dacoity was not illegal having regard to the circumstances of that case. With due respect I prefer the minority judgment of Mathur J. Technically the responsibility of summoning a witness rests upon the Magistrate but for all practical purposes the choice of proceeding with the prosecution or dropping it rests with the complainant. The agreement to drop a non-compoundable offence is illegal because it necessarily interferes with the administration of justice by the Magistrate and also because it is opposed to the policy of the law that such offence is not to be compounded. Where such agreement is part of the consideration for the corresponding bargain that bargain is illegal notwithstanding that there are other lawful, considerations for the bargain. "It is not for the Court to decide on investigation of the facts of each case whether or not the criminal charge is of interest not only to the prosecutor but also to the public at large. The reason is given in the observations of Chanda-warkar J. in - "28 Bom 326" at p. 328 (S) thus: "The legislature has laid down in that Code the test for determining the class of offences which concern individual only as distinguished from those which have reference to the interests of the state; and the Courts of Law cannot go beyond that test and substitute it for one

of their own."

The legislature has ordained that some offences are compoundable and that some are not. Section 345, Criminal P. C., does not permit of the compounding of an offence u/s 406, I. P. C. The agreement for compounding and the corresponding bargain given in exchange or part exchange of that agreement are illegal.

62. The agreement to refer, therefore, is illegal and void and cannot be recognised in any way. It is void for all purposes and not enforceable by and against either party.

63. What then is the effect of the finding that the arbitration agreement was illegal and void at its inception. The learned Advocate-General argued that the agreement was legal and the award was therefore, void. He did not contend that the award was valid if it is found that the arbitration agreement was illegal. He did not contend that the subsequent acquiescence of the petitioner in the arbitration proceedings and the several orders for extension in any way affect the position or validate the award. He said that hardly anything remained if I found that the arbitration agreement was illegal. I must, therefore, consider the effect of the subsequent proceedings and acts without the assistance of argument of learned counsel.

64. The agreement to refer is the very foundation of the order of reference. The Court has no option but to make an order of reference if all parties interested agree to refer and apply to the Court for an order of reference. The order of reference is the creation of the agreement and has no greater validity than the agreement on which it is based. The agreement to refer being illegal and invalid the order of reference based upon that agreement is also invalid. Plainly the Court had no jurisdiction to make an order of reference if the parties did not agree to refer to arbitration. The order is equally without jurisdiction if the agreement is illegal and invalid and, therefore, non-existent.

65. The subsequent acquiescence of the petitioner in the arbitration proceedings cannot validate the invalid agreement and order of reference. A void act cannot be ratified. Subsequent consent cannot confer jurisdiction which the Court did not originally possess.

66. The subsequent applications and orders for reference to arbitration also do not validate the originally invalid agreement and order of reference. They do not amount to a fresh submission or a fresh order of reference. In - "Lord v. Lee". (1868) 3 Q B 404 Blackburn J. observed thus:

"It was argued for the defendants that such an enlargement of the time amounted only to the making of a fresh submission; but that is not so; the act having been done under the proposed authority of the previous submission the enlargement of the time is "ratification in the shape" of the continuation of the original authority xxx x The effect of the enlargement of the time under the

statute would be the same as at common Law. that is it makes it as if the extended time had been originally inserted in the submission. x x x x It must have the same effect as enlargement by consent, namely, amounts to ratification."

Similarly, the effect of orders for extension of time u/s 28, Arbitration Act, is that the extended time is inserted in the original order of reference. They do not amount to fresh submissions or fresh orders of reference. They could continue the original authority if there was one. They cannot establish a new authority where authority was originally lacking.

67. As there is no valid reference the award is a nullity: - "Chhabbalal v. Kallu Lal" AIR 1940 P C 72 . The reference being tainted with illegality at the root subsequent consent does not cure the defect. I, therefore, declare and adjudge that the award is invalid and a nullity. I also declare and adjudge that the order of reference was and is invalid and a nullity and I revoke it.

68. The petitioner wins not because it has superior moral principles but because its technical points are better than its morals. The petitioner voluntarily entered into and on the strength of that bargain allowed the arbitrator and the opposite party to continue the arbitration proceedings and at no stage raised any objection that the agreement or the order of reference was illegal. Now that the petitioner is disgruntled with the award it has thought fit to shelter behind the plea of illegality. On the materials on record I have been constrained to give effect to its legal contentions but I have no doubt that in view of all circumstance it should be made liable to pay the costs of these proceedings. The petitioner has lost on the other issues. In the exercise of my discretion I order that the petitioner must pay the entire costs of these proceedings which will be as of a hearing. Certified for two counsel.

69. There will be no judgment upon award. Each party will pay and bear his or its own costs of the proceedings for judgment on award