

(1958) 04 AP CK 0015

In the Andhra Pradesh High Court

Case No : A.A.O. No. 500 of 1952, Transferred A.A.O. No's. 162 and 163 of 1954, Civil Revision Petition No. 1844 of 1952 and Civil Miscellaneous Petition No's. 259 and 260 of 1957

Natha Subrahmanyam Chetty

APPELLANT

Vs

Menta Subramaiah and Sons and Others

RESPONDENT

Date of Decision : 08-04-1958

Acts Referred:

Arbitration Act, 1940 — Section 14, 14(2), 16, 30

Citation : AIR 1959 AP 199

Hon'ble Judges : Kumarayya, J;Jaganmohan Reddy, J

Bench : Division Bench

Advocate : N.C.V. Ramanuja Chari, for the Appellant; N. Rajeswara Rao and Y. Rami Reddi, for the Respondent

Judgement

Kumarayya, J.—By an order dated 31-12-1951, the Additional Subordinate Judge, Nellore dismissed three objection petitions made by Natha Subrahmanyam, the appellant before us, refusing to set aside the award or remit the same to the arbitrator for re-consideration. That award was made on 12-11-1951 by Sri K. Rama Rao a senior advocate of Nellore on a reference made by the Additional Subordinate Judge at the request of the parties to O.S. Nos. 202 of 1946 and 4 of 1947 and O.P. No. 73 of 1946 who sought to abide by the decision of the said arbitrator in all the three above matters.

The circumstances under which these three matters arose, and an award and a decree in terms of the award followed may be briefly stated:--The appellant, Natha Subrahmanyam and the respondents, Mehta Subbaramayya and his son, Venkatachalapathi, are the merchants residing at Nellore. The latter who are the members of a Hindu joint family, brought a money suit against the former for a sum of Rs. 6,206-0-3 on the basis of their khata account.

Their contention was that the defendant Natha Subrahmanyam, had money dealings with them and that he had borrowed amounts on several occasions

making some payments from time to time towards them. These dealings started on 3-10-1944 and continued till 4-9-1946. As per the agreement, interest at the rate of 6 p.c, per annum was chargeable on the amounts thus borrowed.

The entries of the borrowings and payments were regularly made in respective account books of the plaintiffs and the defendant. They were compared from time to time and it is said in token of correctness, the plaintiff used to obtain the signatures of Natha Subrahmanyam in their ledgers.

On 4-9-1946 a sum of Rs. 3,643-1-1 was found due and the defendant made his signature acknowledging his indebtedness to that extent in the account Books of the plaintiffs. It is on this basis that the plaintiffs brought a suit against the defendant for a sum of Rs. 6,206-0-3 inclusive of interest up to 21-11-1946. They also applied for attachment before judgment and obtained orders accordingly.

2. The defendant Natha Subrahmanyam while admitting his signature under the entry in the account book for Rs. 3,643-1-1 denied that this was in respect of the borrowings made by him. According to him, this amount constituted balance of capital advanced by the plaintiffs for the partnership run by the plaintiffs and the defendant under the name and style of Natha Subrahmanyam and that this partnership business continued up to 30-11-1945 on which date the stocks were divided between the parties though the accounts were not settled and the profit and loss was not ascertained.

Later on it was discovered that the joint business had incurred a loss to the tune of Rs. 20,000/- and that the 2nd plaintiff had to give proper explanation and account for several deficits in stocks in several khatas. The plaintiffs, it is said, sought to evade explanation and the defendant was therefore intent on bringing a suit for dissolution of the partnership and accounts. But before he could do so the plaintiffs themselves brought their suit on a false basis and obtained attachment orders.

The defendant took exception to the conduct of the plaintiffs in making a petition for attachment before judgment and sought remedy u/s 95 C.P.C. by making an application O.P. 73/46 claiming damages of Rs. 5,000/-. Then he filed his own suit O.S. No 4 of 1947 for dissolution of partnership and rendition of accounts against the said persons. Menta Subbaramayya and Venkatachalapathi in reply denied that there was any partnership at will between Natha Subrahmanyam and themselves.

Their case is that as Menta Subbaramayya had a son and his son required some training in kosta business for a short time it was agreed between his son and Natha Subrahmanyam that they will purchase a few commodities at suitable prices and sell them for profit at places where they were in demand. The terms were that Venkatachalapathy would advance Rs. 5,000/- for this business and Natha Subrahmanyam would pay the balance required and that they would share the profits equally. This arrangement was only for two months.

There was no separate shop for it and when they saw it was resulting in loss the partnership was dissolved, the stocks on hand were valued and the accounts were settled on 12-11-1944. Thereafter none of them had a joint business. Menta Subbaramayya had nothing to do with this business. Similarly Natha Subbrannanyam was in no way concerned with the joint family business of Menta Subbaramayya and Venkatachelapathi. Thus they pleaded that the suit of Natha Subrahmanyam is liable to dismissal.

All these proceedings were pending when on 23-10-1951 the parties filed a petition for reference agreeing to abide by the arbitration of Sri K. Rama Rao. Accordingly, the Court passed the order of reference. The copy of the order of reference has not been filed in the proceedings before us. As can be gathered from the impugned order of the learned Subordinate Judge, the terms of reference were general and provided inter alia that the arbitrator should make such enquiry as he considered fit including scrutiny of the accounts and other records and examination of the parties and witnesses and pass his award.

The reference did not require the arbitrator to record separate findings on various points at issue. The parties in terms had made themselves bound by the award to be passed by the arbitrator. There were altogether seven issues and the fate of the proceedings rested mainly on the finding whether the dealings between the parties were on the footing of debtor and creditor as alleged by the respondents, or, those of partners whose partnership is still undissolved as alleged by the appellant. The arbitrator in his award set out the issues framed in each of the suits, then mentioned that he scrutinised the documents filed on either side and recorded the statements of the parties and the witnesses examined by him.

He further stated that after careful consideration of the oral and documentary evidence and a thorough scrutiny of several accounts, he came to the conclusion that O.P. No. 73 of 1946 should be dismissed as no attachment was effected, and the parties should bear their own costs, that O.S. No. 202 of 1946 should be decreed for a sum of Rs. 3,643-1-1 with interest at 6 per cent per annum from the date of decree and proportionate costs on that amount, and that the suit O.S. No. 4 of 1947 shall stand dismissed, the plaintiff however will be entitled to institution fee and pleader's fee only on that amount at which he valued the suit.

The award did not contain the reasons for the conclusion. Along with the award were the records of the proceedings submitted by the arbitrator. These however contained inter alia the recorded impressions of the arbitrator.

3. After the award was thus received in the Court, the parties filed their objections in accordance with law. Menta Subbaramayya and Venkatachelapathi raised demur that their claim for interest from the date of the acknowledgment was unjustly negatived. Natha Subrahmanyam filed I.A. No. 854 of 1951 in O.S. No. 202 of 1946 I.A. No 853 of 1951 in O.S. No. 4 of 1947 and I.A. No. 855 of 1951 in O.P. No. 73 of 1946 disputing the validity of the award.

His grievance was that the award was erroneous on the face of it in point of law and of fact and that the arbitrator was also guilty of legal misconduct. The respondents resisted the claim of the appellant that the impressions of the arbitrator jotted at random could be looked into to find out whether there was any error on the face of the award and contended further that even assuming that they can be looked into no case of error in law can be made out on that basis and further the allegation of misconduct is ill-founded.

This argument found favour with the learned Additional Subordinate Judge who dismissed all the three petitions of Natha Subrahmanyam. Aggrieved by this order, Natha Subrahmanyam Sled (1) CMA No. 162 of 1954, (2) CMA No. 500 of 1952 together with CRP No. 1844 of 1952, in the alternative and (3) CMA No. 163 of 1954. He has also applied for receiving Exs. A-I to A-9 in CMA No. 162 of 1954 as fresh evidence and prayed that the printing of these documents be dispensed -with.

In all these appeals, the same contentions which have been unsuccessfully raised before the Additional Subordinate Judge have been advanced before us. A further point which bears no reference in his previous applications or affidavits has been raised to the effect that the arbitrator did not care to look into the account books, which he had submitted as a result of which he is guilty of misconduct.

4. Before we examine the points raised in detail, it is expedient to refer to the following provisions of the Arbitration Act which are relevant for our purpose:--

"Section 14(1) x x

Section 14(2): The Arbitrators or umpire shall at the request of any party to the arbitration agree ment or any person claiming under such party or if so directed by Court and upon payment for the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court and the Court shall thereupon give notice to the parties of the filing of the award.

(3) x x x

16(1). The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit.

(a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) Where the award is so indefinite as to be insapable of execution; or

(c) Where an objection to the legality of the award is apparent upon the face of it.

(2) x x x

(3) x x x

(30) An award shall not be set aside except on one or more of the following grounds, namely:--

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35;

(c) that an award has been improperly procured or is otherwise invalid."

While Section 14(2) requires inter alia that the particular document should be submitted along with the award Section 16 refers to cases where remission of award is permissible and Section 30 enumerates grounds on which the award may be set aside. When a matter in difference is referred to an arbitrator, the Jurisdiction of the ordinary Court is ousted save for purposes of controlling the arbitrator, preventing misconduct and regulating procedure after the award. The arbitrator becomes the sole judge of law and fact in that matter and his award cannot therefore be reviewed or interfered with by the Court except in the manner expressly provided for by the Arbitration Act.

The parties too having made themselves bound by the decision of the forum of their choice cannot complain if they get something which may not appear to them just unless they make out the stringent grounds on which the award in law may be remitted or set aside. The main ground on which the award is attacked by a party in this case is that the arbitrator has gone wrong in the point of law and that the error of law appears on the face of the award. That no doubt can be a good ground only if it is established. The award as we have pointed out is a short one. Albeit it is complete in itself and capable of execution, it does not as it need not having regard to the terms of reference, state the grounds on which the conclusions are based.

There is apparently nothing in the award suggesting that the arbitrator has gone wrong on a point of law which forms the basis of the award We are asked to look into the impressions of the arbitrator as though they form part of the award to find out whether there is any error apparent. Section 16(1)(c) lays down that an objection to the legality of the award should be apparent upon the face of it. Certainly the award must be taken at its face value. It is not open to the Court to read into the award words which are not there and then draw inferences therefrom.

Further, it is the duty of the Court so far as it may be to look at the award in the way most favourable to its preservation. The learned counsel! argues that though it was not necessary for the arbitrator to give reasons for the award and he has in fact not given any in the body of the award yet, inasmuch as the award is

accompanied by a note or his impressions it becomes a speaking award and may therefore be criticised, condemned, remitted or set aside on the story that it tells or the reasoning that it gives in the accompanying note.

Reliance has been placed on the observations of Lord Goddard C.J. in *Rex v. Northumberland Compensation Appeal Tribunal, Ex Parte Shaw*, (1951) 1 K.B. 711 at pp. 714 and 722, We have also been referred to certain passages in Russel "on Arbitration" (14th edition, pages 273 to 275) for the propositions that a contemporaneous document may be looked into if it contains the reasons or is a document accompanying or forming part of the award. The law on the subject has been clearly stated by Williams, J. in *Hodgkinson v. Fernie* (1857) 3 CB. 189 (202) in the following terms:--

"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, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law or fact The only exception to that rule are cases when the award is the result of corruption or fraud, and one another, which though it is to be regretted, is now, I think fairly 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 well established."

5. The phrase "error of law on the face of the award" has come up for judicial interpretation in *Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Co. Ltd.*, AIR 1923 PC 66 at p. 69. In the words of their Lordships :

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend" to see if the contention is sound."

It is significant that in this view of the matter, their Lordships did not agree with the dictum in *Landauer v. Asser* (1905) 2 K.B. 184 wherein the Court of appeal looked at the contract to come to the conclusion that the award was erroneous in law. In *Haji Ebrahim Kassam Cochinwalla Vs. Northern Indian Oil Industries Ltd.*, , Mukherjea, J. at page 234 rejected the plea advanced on the basis that since the arbitrator specifically mentions that he read and carefully considered the papers of the case and the contract No. 1184, the said papers and contract are essentially incorporated by reference in award and the Court therefore can scrutinise them in order to discover error on the face of the award.

The learned Judge refers to the decision of the House of Lords in *Government of Kelantan v. Duff Development Co. Ltd* ` at pp. 409, 410 where Viscount Cave

Lord Chancellor said that unless it can be shown by something appearing on the face of the award that the arbitrator has proceeded illegally his award must stand and also to the decisions of the Privy Council in AIR 1923 P.C. 66, Saleh Mahomed v. Nathoomal AIR 1927 P.C. 104 and AIR 1949 334 (Privy Council)

We do not think it necessary to discuss these authorities at length. It is clear that a document cannot be said to be incorporated by a mere reference in the award. It is necessary that having regard to the language of the arbitrator it was incorporated in the award- Otherwise it is not permissible to look into that document to find out the error of law.

6. The learned counsel has invited our attention to Kent v. Elstob, (1802) 3 East 18 wherein the arbitrator delivered a certain paper along with the award containing observations on the evidence adduced and his reasons for making the award. Leblanc, J. observed that inasmuch as the paper was delivered together with the award as containing the arbitrator's reason for coming to the conclusion at which he arrived the Court should take the reasons as such as though they were inserted in the award itself and judge the validity of those reasons.

In the opinion of the learned Judge the reasons assigned were bad and the award therefore could not be supported. This judgment which takes the view to its extremes has not been followed in that spirit in the subsequent decisions. In Leggo v. Young (1855) 16 C.B, 626 at p. 634 where the umpire made an award in favour of the defendants, the award was accompanied by a letter of the umpire and was addressed to the plaintiff and it stated that if the reference had empowered him to award costs then he would have ordered the defendants to pay costs to the plaintiff. The learned Judge refused to consider this letter as it did not form part of the award.

Holgate v. Killick (1861) 126 R. R. 492 again is a case where contemporaneously with the award the arbitrator wrote a letter to the defendant's attorney and gave it to the plaintiff's attorney to deliver it to the addressee. The letter disclosed the ground on which the decision in the award was given. It is clear therefore whether a document is actually incorporated in the award and forms part of it is always a question of fact and has to be determined by the circumstances of each case.

7. In the instant case, it was not obligatory on the arbitrator having regard to the provisions of Section 14(2) of the Arbitration Act to send his impressions that he jotted down in the register. They were his private notes to be used in the analysis and understanding of the case in certain aspects. They cannot be deemed to be exhaustive as obviously the arbitrator has availed of the other documents and material on record. They were not intended to be closely reasoned arguments for the conclusions arrived at. If they were recorded on a separate paper they might not have been sent to the Court at all.

But since these impressions noted for his purpose were not on a separate paper and as all the requisite papers were in the register itself and this note could not

be detached from the register while sending the register these too were sent along with the same. In these circumstances as a closely reasoned argument which obviously they do not constitute or as a document forming part of the award as it was not so intended by the arbitrator, the impressions cannot be looked into for purposes of Section 16 or Section 30 of the Arbitration Act.

It is significant that in this, the arbitrator makes a note of the point for determination but these notes do not show at any stage his conclusion, thereon whether according to him the relationship between the parties was one of the debtor and creditor or that of partners. Of course, at some stage he had noted that the explanation given by Mentas is not satisfactory and further he has also used the word capital in relation to the amount in question, but this word alone does not lead us to the inevitable conclusion that he meant thereby that there was some partnership relationship,

As already, observed, it is not open to the Court to draw an inference as to the finding of the arbitrator. Nor are We justified in drawing inferences from a line of argument which is not complete by itself. Learned counsel for the respondents refers us to a passage in Russel on Arbitration (14th edition at page 306) where it was said that the notes made by the arbitrator at the hearing of the arbitration cannot be referred to. Nevertheless, the learned counsel for the appellant argues that since the arbitrator has sent this document as containing the impressions that he recorded on the same date as the award itself and as this document is helpful in finding out some line of reasoning for the award it can be considered as a document forming part of the award.

There is no doubt if it was exhaustive and a closely reasoned out argument, intended to be so by the arbitrator, its admissibility would have been indisputable but it is evident that it does not contain all the points on which the award is based. They are mere private notes for the help and guidance of the arbitrator at the time of passing the award. It would appear from the award that the arbitrator says that he scrutinised the documents produced by the parties, recorded statements of the parties and witnesses, obtained clarification of controversial matters and then passed his award.

Thus his conclusions are based not merely on the notes that he made but also on other material on record- Obviously enough, merely because he made a reference to all these documents, they cannot be deemed to form part of the award for purposes of Section 16 or 30 of the Arbitration Act. Judged from this point of view the impressions recorded cannot be deemed to be part and parcel of the award, so that they may be taken into consideration in ascertaining whether there is any error apparent on the face of the award.

8. Assuming that the note appended is exhaustive and closely reasoned out argument for the conclusions arrived at in the award and thus intrinsically forming part of the same, the question is whether there appears any error of law or a justifying ground for directing the remission or setting aside the award. The

provisions of Sections 16 and 30 of the Arbitration Act are statutory and discretionary. Even if some or any of the grounds mentioned therein are made out, the Court may, in exercise of its discretion, having regard to the circumstances of each case, refuse to remit the award on the ground that substantial justice has been done or the error has not resulted in failure of justice.

The argument of the learned counsel is that having regard to the impressions recorded by the arbitrator, the advances made by the Mentas may be deemed to be in the nature of capital advances to the partnership and therefore, though it may be that Natha Subrahmanyam had signed in Menta Subbaramayya's account on 4-9-1946 acknowledging his liability of Rs. 3,643-1-1 agreeing to pay interest thereon as though it was his personal loan, it should be deemed that it is part of the capital contributed by Menta Subbaramayya and Venkatacha-Japathi to the partnership run in the name of Natha Subrahmanyam and thus O.S. No. 202 of 1946 filed on the basis of relationship of debtor and creditor must have been dismissed.

It is further argued that while considering the Income Tax returns, a sum of Rs. 2,490/- was taken as the sum of losses by the arbitrator in his note of impression even though so far as partnership business was concerned the loss to be taken into consideration ought to have been Rs. 5,707/-. Thus there is a mistake of fact obviously on the face of the award. In our opinion, both these pleas do not bear scrutiny. According to his pleadings, the partnership between Venkatachalapathi and Natha Subrahmanyam lasted only for three months in the year 1944.

The impressions of the arbitrator do not reveal that there was any partnership business between Natha Subrahmanyam, and Venkatachalapathi and his father. Further even according to Natha Subrahmanyam's own showing the business of the firm was closed on 30-11-1945 and the stocks too were divided. It is admitted on all hands that on 4-9-1946 when a balance of Rs. 3,643-1-1 was struck out, Natha Subrahmanyam made his signature and agreed to pay interest thereupon. The other party too made a signature in the account book of Natha Subrahmanyam in token of correctness of this.

If the partnership accounts were not settled even after 30-11-1945 it could not have been possible for Natha Subrahmanyam to sign in that manner acknowledging his liability and undertaking to pay interest. The recitals are clear and inconsistent with the argument that that amount was to be treated as an asset of the partnership to be settled at a future date. Similarly, the argument advanced in relation to the reference of arbitration to the loss in his award too does not bear scrutiny. As already pointed out, it is not an agreed matter that there was partnership between the parties.

No written agreement of partnership has been filed. Entries in the account books signed by Natha Subrahmanyam do not show any partnership. Income Tax

returns were not submitted on behalf of the partnership firm. Though it is said that the business of the partnership firm extended even to controlled goods for which the licences used to be obtained, there seems to be no mention therein of such partnership between Natha Subrahmanyam and Menta Subbaramayya and Venkatachalapathi. The petitioner cannot rely merely on Income Tax returns and take advantage of his self-serving statement therein.

The order of the Income Tax Officer would show that these returns were furnished by Natha's representative. There was no occasion for the Income Tax Officer to scrutinise these returns. As there was loss and the firm was not registered, there was no need to take the same into account. As a matter of fact the arbitrator did not take the same (i.e.) the alleged loss in partnership business, into account.

Thus, even having regard to the impressions which do not solely form the basis of the award, for evidently there are other reasons which the arbitrator had in view while passing the award, it cannot be said that there is any error or any objection to the legality of the award apparent on the face of the award within the meaning of section 16 warranting the remission of the award.

9. That apart the objection fails on another ground also. As already stated, it is well settled that the powers u/s 16 being discretionary, it is not every error that would necessitate the remission of the award. As observed in *Rathakrishnamurthy v. Balasubramania and Co.* (1948) 2 Mad L.J. 601: (AIR 1949 Mad 559) to justify the remission of an award on the ground of illegality apparent on its face, it must be one of such a nature as to permit of no argument and be patent on its face and if permitted to pass unrectified would do substantial injustice in both law and equity to the parties concerned.

The argument of the learned advocate has been that inasmuch as the impressions of the arbitrator would suggest that there was no partnership O.S. No. 202 of 1946 filed on that basis ought to have been dismissed and accounts in O.S. No. 4 of 1947 ought to have been taken. His complaint is that instead of dismissing O.S. No. 202 of 1946, O.S. No. 4 of 1947 has been dismissed and though the costs in part were ordered to be paid to the plaintiff in O.S. No. 4 of 1947, in O.S. No. 202 of 1946 a decree has been given to the respondents.

As we have already discussed the impressions recorded do not lead to the inevitable inference that there was undissolved partnership between the parties. Even if that were so, when the arbitrator had examined all the account books, he could pass a decree for the amount due to any party. There was no necessity for further accounting or drawing a preliminary decree. In case of partnership, or course, such a decree could rightly be passed in O.S. No. 4 of 1947 but when all the matters are being considered together, it is the substance rather than the form that is material.

It is not necessary that the award should be in strict accord with every provision of law. It has to be seen whether in substance actual justice has been done to

the parties or not. Procedural defects or defects akin to it which have not resulted in failure of justice are of no significance, and the provisions of Sections 16 and 30 are not attracted on that account. The law is clear on the point--see Penukonda Rathakrishnamurthy Vs. Balasubramania and Co. and Others, and Raj Kumar and Another Vs. Shiva Prasad Gupta and Others, Thus both the pleas taken by the learned counsel are untenable.

10. There is yet another charge of legal misconduct. It is argued that the arbitrator has not gone into the accounts and given careful consideration to the material on record. The award clearly shows that the arbitrator has scrutinised the accounts, given careful consideration to the statements of the parties, witnesses and the clarifications that were made. We do not think that the allegation of the party against the statement of the arbitrator can prevail. This plea therefore fails.

11. There are two other applications with regard to the reception of fresh evidence. The learned counsel has filed certain papers showing the payment of certain amounts in execution of certain decrees and he alleges that they were payments made towards partnership business. Apart from the fact that when the partnership is not admitted these documents can have no significance, he has failed to convince us either from the documents or from the cases in which these payments were made that they unquestionably related to the partnership business.

These are the payments made subsequent to the award. In these circumstances, these documents cannot be permitted to be adduced at this stage. So far as account books are concerned, they have been already considered. Petition is therefore rejected. As a result the other petition too stands dismissed.

12. For the reasons shown above, the appeals and the Civil Revision Petition are dismissed with costs and the order of the Court below is upheld.