

(1975) 06 KL CK 0019
In the High Court Of Kerala
Case No : A.S. No. 631 of 1972

P. Mulji and Sons, Africa

APPELLANT

Vs

Kerala Produce Exporting Co. and Another

RESPONDENT

Date of Decision : 17-06-1975

Acts Referred:

Arbitration Act, 1940 — Section 17, 39(1), 9

Citation : AIR 1976 Ker 3

Hon'ble Judges : K. Bhaskaran, J;G. Viswanatha Iyer, J

Bench : Division Bench

Advocate : Menon and Pai, for the Appellant;

Final Decision : Dismissed

Judgement

Viswanatha Iyer, J.—This is an appeal by the 2nd counter-petitioner in Arbitration Act Petition No. 1 of 1955 on the file of the Quilon

District Court. Under Ext. D3 agreement entered into between the 1st and 2nd counter-petitioners the 2nd counter-petitioner supplied cashewnuts

to the 1st counter petitioner. The same was delivered at Quilon on 17-2-1964. Under the agreement any dispute regarding the quality of the goods

has to be referred to an arbitration and the Arbitration Rules which govern the parties provide for appointment of Arbitrators, the time within which

that should be done and the procedure which should be followed by Arbitrators. Complaining that the quality of the goods supplied was inferior

the 1st counter-petitioner requested the 2nd counter-petitioner to appoint an Arbitrator. There was some attempt at settling the matter otherwise

and when that failed the 1st counter-petitioner pressed for a reference to Arbitration. He informed the Secretary, Indian Cashew Exporters"

Association and requested him to arrange for the arbitration. He also nominated

his Arbitrator. The said Association contacted the appellants and requested them to nominate their Arbitrator. Since that was not done the Arbitrator appointed by the 1st counter-petitioner acted as a sole Arbitrator and proceeded with the arbitration. He made an award to the effect that the appellant should pay Rs. 17,932.33 to be 1st counter-petitioner. This award was filed into court by the petitioner-Arbitrator and notice of it was given to counter-petitioners 1 and 2. Counter-petitioner No. 1 moved for passing a decree in terms of the award. But, the appellant applied to set aside the award and also filed objection to the passing of the judgment on the award. The application to set aside the award was filed out of time and so it was rejected. But, the lower court considered the objections on the merits and finding that there are no grounds to set aside the award suo motu passed a decree in terms of the award. The appeal is filed by the 2nd counter-petitioner in these circumstances,

2. A preliminary objection is taken to the maintainability of the appeal. Section 39 of the Arbitration Act, 1940 provides for an appeal against certain orders passed by the court in Arbitration proceedings. Section 39, Clause (vi) provides for an appeal against an order refusing to set aside or setting aside an award. The appellant's counsel relies on this provision to sustain the appeal. No doubt, the application to set aside the award was dismissed on the ground of Limitation and the decision under appeal was rendered u/s 17 of the Arbitration Act. Section 17 requires the Court to be satisfied that there are no grounds to set aside the award, and if so satisfied, to pass a decree. It is not necessary that the order refusing to set aside the award must be an order on the application to set aside the award. Such an order can as well be contained in the order passed u/s 17 of the Act. The lower court has stated in the order u/s 17 that there are no grounds to set aside the award and that comes within the scope of Section 39(vi) of the Act. Therefore, the preliminary objection is repelled.

3. The award Ext. D1 filed by the Arbitrator may be challenged by the appellant as invalid. But, if the challenge is based on any of the grounds mentioned in Section 30 of the Act it has to be made by an application u/s 33 and that should be filed within a particular time, namely 30 days of the receipt of the notice of the filing of the award (see Article 119 of the

Limitation Act). The appellant admittedly filed an application, but it was out of time and so was rightly rejected. The objection filed against accepting the award was also filed beyond the time limit prescribed under the said Article. So, it is not open to the appellant to challenge the award on any of the grounds mentioned in Section 30 of the Arbitration Act (see *Madan Lal Vs. Sunderlal and Another*, . But, there are certain decisions which take the view that the court exercising the powers u/s 17 can suo motu consider whether the award is liable to be set aside on other grounds. Reliance is placed by the counsel for the appellant on *Deep Narain Singh and Others Vs. Mt. Dhaneshwari and Others*, in support of the contention that the court can suo motu set aside an award on the ground of invalidity of reference. At page 206 the law is stated thus: where, therefore, the award is found to be a nullity because of invalidity of the arbitration agreement or, for any other reason or the award is prima facie illegal and not fit to be maintained, the Court has power u/s 17 of the Act to set it aside without waiting for an objection to the award being tiled or without considering any application for setting it aside, if there be any, These are matters which really go to the root of the award itself and irrespective of any objection by the parties, a duty is cast upon the Court to decide these matters before a decree can be passed on the basis of the award. Therefore, the mere fact that an objection is not filed by any of the parties to the award within the period of limitation does not altogether absolve the Court from its responsibility of deciding whether there was a competent reference or whether the award was a valid award on the face of it. It is obvious that in such a situation the question of limitation is of no materiality. The award has to be set aside because of this inherent infirmity. This view finds ample support from the decision of this Court in *Deo Narain Singh and Others Vs. Siabar Singh and Others*, and a Bench decision of the Bombay High Court in *Hastimal Dalichand Bora and Others Vs. Hiralal Motichand Mutha*, , with the reasonings of which I respectfully agree".

The decision of the Bombay High Court referred to in the above quotation contains the following observation:--

If the award directs a party to do an act which is prohibited by law or if it is otherwise patently illegal or void it would be open to the Court to

consider this patent defect in the award suo motu, and when the Court acts suo motu no question of limitation prescribed by Article 158 can arise".

This latter observation was taken note of by the Supreme Court in Madan Lal Vs. Sunderlal and Another, at p. 1236, paragraph 10, and

apparently approved it as correct. The provisions of Section 30 are very wide and every possible kind of objection may possibly come under

clause (c) of the said Section. The expression "otherwise invalid" in Section 30(c) is interpreted in some cases to take in a case of invalidity arising

out of an invalid reference. But, in the light of the decision in Chhabba Lal v. Kallu Lal AIR 1646 PC 72 it has to be taken that invalidity arising out

of an invalid reference does not come under that clause. If so it may be considered on an application u/s 33 or in exercising the powers suo motu

u/s 17 of the Act. But, the suo motu power of the court to invalidate the award can be exercised only if there is any patent illegality or voidness or

the award directs a party to do an act which is prohibited by law. If this illegality is not patent and requires an enquiry to find that out the Court

may not be justified in exercising its suo motu jurisdiction. That is the position in this case. The attack on the award is based on the alleged failure to

observe the rules in the matter of appointment of an Arbitrator. As stated earlier, to the contract Ext. D3 is appended the Arbitration Rules which

would govern the arbitration proceedings under the contract. Clause 5 of the Arbitration Rules provides for a written notice desiring arbitration to

be given to the other party not later than 4 days after the goods under the contract have been completely landed. That such a notice was given by

the 1st respondent is evident from Ext. D20, a copy of a letter sent to the appellant by 1st respondent. That refers to the telegram sent by the 1st

respondent within 3 days of the landing of the goods desiring an arbitration. That telegram is not disputed. Clause 5 in the Arbitration Rules also

requires other formalities to be complied with, namely, forwarding by the party desiring arbitration a copy of the written notice desiring arbitration

to the Association and also forwarding to it the consent letter of its Arbitrator. The other party who is served with this notice is also required by the

said clause to submit to the nearest Association the consent letter of his Arbitrator within a particular time. Thereafter, as per the rules, it is the

function of the Associations to contact the respective parties and arbitrators and take the necessary steps to proceed with the arbitration It is not

stated in the rules that the party serving the notice should communicate to the opposite party the name of his Arbitrator within the stipulated time of

4 days Even if that is required, it is seen from the telegram referred to in Ext. D20 that the 1st respondent had suggested the name of one

Shamsuddin as Arbitrator. Ext D11, the letter issued by the Indian Cashew Exporters' Association to the appellant, mentions that the 1st

respondent has appointed the 2nd respondent as the Arbitrator. The argument of the appellant's counsel is that this change amounts to an invalid

appointment and as such the reference to him was invalid. Section 9 of the Arbitration Act allows a party to substitute another person as arbitrator

if the one appointed previously is unwilling to act. That has what happened in this case. The rules do not prohibit the substitution of another and

hence there is no invalidity. In this view there is no patent illegality in the appointment of the Arbitrator by the 1st respondent and therefore it is not

possible to hold that the reference was invalid and as such that the court should set it aside suo motu.

4. The other objections to the award namely the alleged failure of the Arbitrator to issue notice to the appellant and regarding the manner in which

he found that the quality of the goods supplied was inferior and that the damages payable to the 1st respondent will be so much are all objections

which come within one or other of the grounds in Section 30 of the Act. The validity of these objections cannot be gone into by the court suo

motu; and the application to set aside the award on these grounds has been rejected as out of time. Hence, those objections do not deserve any

consideration.

5. In the result, there is no merit in this appeal. It is dismissed with costs to the 1st respondent.