

(1960) 06 CAL CK 0003
In the Calcutta High Court

Case No : A.F.O.O. No. 12 of 1959 and Award Case No. 266 of 1955

Pannalal Paul and Others

APPELLANT

Vs

Sm. Padmabati Paul and Others

RESPONDENT

Date of Decision : 15-06-1960

Acts Referred:

Arbitration Act, 1940 — Section 30
Partnership Act, 1932 — Section 4, 40, 46, 48

Citation : AIR 1960 Cal 693 : 64 CWN 816 : (1961) 1 ILR (Cal) 931

Hon'ble Judges : S.C. Lahiri, C.J.; R.S. Bachawat, J

Bench : Division Bench

Advocate : B.N. Sen, for the Appellant; B.C. Dutt, B. Banerji and M. Dutta, for the Respondent

Final Decision : Dismissed

Judgement

Bachawat, J.—This is an appeal from an order refusing to set aside an award. The appellants and the respondents carried on business in co-partnership in Homoeopathic medicines under the name and style of Paul & Co., at No. 82, Clive Street, and another business in paper under the name and style of Hari Narayan Paul and Co., at No. 103, Old China Bazar street. The appellants Pannalal Paul, Chunilal Paul and Lakshman Chandra Paul are the sons of one Hari Narayan Paul, deceased, and each of them had one-fourth share in the profits and losses of the two partnership businesses. The respondent Padmabati is the widow and the respondents Satya Charan Paul and Amar Nath Paul are the minor sons of another son of Hari Narayan Paul and they jointly had one-fourth share in the profits and losses of the two businesses. The respondents instituted a suit in this Court for dissolution and accounts of the two partnerships and for the realisation and distribution of the partnership assets and properties. The respondents also applied for appointment of a receiver. By an order dated January 31, 1956 all disputes in respect of the two partnerships mentioned in the plaint and in the petition for appointment of receiver were referred to the sole arbitration of Mr. D. K. Ghose, Barrister-at-Law. The parties filed their respective statements before

the arbitrator and adduced oral and documentary evidence. We are informed that the arbitrator held over one hundred sittings. Several issues were raised in the reference. Eventually, the arbitrator made his award on July 25, 1957. The appellants being dissatisfied with the award moved an application to set it aside. Mallick, J., held that the appellants had made out no ground for setting aside the award and dismissed the application. The appellants have preferred this appeal from that order.

2. To appreciate the arguments addressed before us it is necessary to refer to relevant portions of the impugned award. Clauses 1, 2, 3 and 4 of the award are as follows :

1. "Pannalal Paul, Chunilal Paul and Lakshman Chandra Paul are from this day entitled to) the right, title and interest in the business of Harinarayan Paul and Co. and Paul and Co. They will have all the assets of the said 2 businesses including "Good Will" and tenancy rights of the shop. They will be responsible for and bear all the debts and liabilities of the said businesses in respect of Income Tax, Sales Tax, chartered Bank of India Ltd., Titagar Paper Mills Ltd., Bholanath Paper House, arrears of rent and other small sundry debts";

2. "S. Padmabati Paul, Satya Charan Paul and Amarnath Paul will from this day have no right title and interest in the said businesses nor will they have any liability or debt of the said 2 businesses."

3. ""Pannalal Paul, Chunilal Paul and Lakshman Chandra Paul will indemnify and reimburse Sm. Padmabati Paul, Satya Charan Paul and Amar Nath Paul in case the 3 latter suffer any loss on account of the aforesaid liabilities or debts of the said 2 businesses."

4. "Pannalal Paul, Chunilal Paul and Lakshman Chandra Paul will forthwith pay Sm. Padmabati Paul, Satya Charan Paul and Amarnath Paul the sum of Rs. 1,2,255/- (Rupees Twelve thousand two hundred and fifty five) only."

3. In support of this appeal Mr. Sen contends that the award is bad, inasmuch as it purports to create a new partnership between the three appellants, Pannalal, Chunilal and Lakshman. He contends that on a true construction of the award the arbitrator has not dissolved the partnership, that in substance he has compelled some of the partners to retire, and has awarded that the remaining partners are to carry on the two businesses in future in co-partnership. I am unable to accept this contention. The whole argument is based upon fact that award does not explicitly award that the two firms have been dissolved. But it is to be seen that by Clause 1 of the award the two businesses with all their assets and liabilities have been allotted to the appellants with effect from the date of the award and by Clause 2 it is provided that the respondents will have no right, title and interest in the two businesses as from the date of the award. On a fair construction of the award it must be held that the arbitrator awarded that the two partnerships would stand dissolved as from the date of the award. Clauses 1, 2, 3 and 4 of the award contain directions consequential on the dissolution of the

two partnerships. The award allots the two businesses and all their assets to the appellants. By force of the award the appellants have become the co-owners of the two businesses and of all the business assets. But the award has not created a new partnership. It has not directed the appellants to carry on the two businesses in co-partnership. Partnership is a relation created by contract. The appellants may now agree to carry on the two businesses in co-partnership and if they do so, a new partnership will be created, not by the award, but by the agreement. Mr. Sen relied upon the decision in AIR 1925 293 (Privy Council) . That decision is entirely distinguishable. In that case by the express terms of the award the arbitrator purported to create a new partnership. The arbitrator had no authority to create the new partnership. In the instant case the arbitrator has not by his award created a new partnership. The first contention raised by Mr. Sen therefore fails.

4. Mr. Sen next contends that the award is in contravention of Sections 46 and 48 of the Indian Partnership Act inasmuch as the entire assets of the dissolved firms have been allotted to the appellants without providing for payment of the liabilities of the dissolved firms out of the assets in the first instance and that consequently the award is in excess of the powers conferred on the arbitrators by the order of reference and is also erroneous in law on the face of it. By Section 46 of the Indian Partnership Act, on the dissolution of the firm, every partner is entitled, as against all the other partners, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners according to their rights. Section 48 of the Indian Partnership Act provides for the mode of settlement of accounts between the partners and for the Order of the application of the assets of the firm on its dissolution. Sub-clause (b) of Section 48 provides that the assets of the dissolved firm shall be applied, in the first instance, in paying the debts of the firm to third parties. Every partner has the right as against the other partners to insist that the assets of the dissolved firm be applied in accordance with the provisions of Sections 46 and 48 of the Indian Partnership Act. Each partner has for that purpose a general lien over the assets of the dissolved firm. By the award in this case the appellants have been allotted all the assets and properties of the dissolved firms and have also been made responsible for all the liabilities thereof. It is expected that the appellants will apply all the assets allotted to them towards discharge of those liabilities. The rights conferred on the appellants by Sections 46 and 48 have in no way been infringed by the award. Far from suffering a prejudice they have obtained an advantage by it. Instead of their general lien over the properties of the dissolved firms they have now obtained the full ownership over those properties. The respondents also were entitled to insist that all the assets of the dissolved firms should be applied in the first instance towards the discharge of those liabilities; they could contend that the award was in contravention of their rights under Sections 46 and 48, inasmuch as it had allotted all those assets to the appellants without providing, in the first instance, for the payment of the liabilities. But the respondents have

made no complaint on that account. The appellants are in no way prejudiced by the contravention of the respondents' rights under Sections 46 and 48 and they are not entitled to have the award set aside on that ground.

5. It is well settled that a party who is not prejudiced by an erroneous award and who, on the contrary, has gained an advantage by it cannot move to set aside the award. In *Narsing Narayan Singh v. Ajodhya Prosad Singh* 16 CWN 256, *Mookerjee and Carnduff, JJ.*, observed:

"It is an elementary principle that only the party prejudiced by the exercise of excessive authority by the arbitrator is entitled to object to the award by reason of it; the party in whose favour the erroneous action of the arbitrator operates cannot be heard to impeach the validity of the award on this ground,"

Similarly an error on the face of the award is not a valid ground of complaint, where the error is in favour of and to the advantage of the party moving to set it aside.

6. Mr. Sen relied upon the decision in *Sherbanubai Jafferbhoy Vs. Hooseinbhoy Abdoolabhoy*, . In that case the award provided that the debts and liabilities of the dissolved firm were to be discharged by the two partners in equal shares and that on payment of a certain sum of money by one-partner to the other, the properties of the partnership would belong to the partner paying the money. The other partner moved to set it aside. She complained that her rights u/s 48 of the Indian Partnership Act had been infringed. The ground taken was that if the partner to whom the properties had been allotted was unable to pay his share of the liabilities and the applicant had to discharge all the liabilities, the applicant would not be able to look to the assets of the partnership for the discharge of the liabilities, though she was in law entitled to do so. The Bombay High Court set aside the award. It is to be noticed that the award there was set aside at the instance of the partner who complained of the infraction of her rights u/s 48. In the instant case the partners whose rights, if any, u/s 48 have been contravened do not move to set aside the award. The Bombay case is therefore distinguishable. The second contention raised by Mr. Sen, therefore, fails.

7. In this Court Mr, Sen urged several new contentions. Mr. Sen contends that the award is invalid, inasmuch as the arbitrator ought to have sold or directed the sale of the partnership assets and properties. He contends that on a reference of the disputes in a suit for dissolution of a firm the arbitrator has no power to allot the assets and properties of the dissolved firm to one or more of the partners. This contention was not raised in the Court below. The argument that on such a reference the arbitrator has in no circumstances the power to allot the assets and properties of the partnership to one or more partners at a valuation fixed by the arbitrator has no substance. By Section 46 of the Indian Partnership; Act each partner is entitled to insist that all the assets of the dissolved firm shall be applied for the purposes mentioned therein. As a corollary to this right, the partners are entitled to ask that all those assets be converted

into liquid money and that the money so realised be applied for those purposes. Ordinarily this conversion is made by a sale of the partnership properties. In a suit for dissolution of a firm, sale of the assets of the dissolved firm is the general rule. But the Court has the power to mould the relief in accordance with the circumstances of the case. If the equities of the case so require, the Court has the power to direct that the properties be allotted to the partner who is willing to take them at a valuation fixed by the Court and that the proceeds be applied for the purposes mentioned in Section 46 of the Indian Partnership Act. In *Syers v. Syers* (1876) AC 174 at 183-4, Lord Cairns, L. C., observed:

"My Lords, it is very true, as was said at the Bar, that on dissolving a partnership of this kind the ordinary course would be for the Court to direct a sale of the assets, and, if necessary, a sale of the concern as a going concern, and to give liberty for proposals to be made by either party to purchase it before the Judge in Chambers. My Lords, those provisions are moulded in every case by the Court to meet the circumstances of the particular case; and it appears to me that, looking at the nature of this business, and looking at the very small interest which was taken in it by the Respondent, it would certainly not be desirable in this case to have a sale, or to bring these premises to the hammer for the purpose of ascertaining what sum ought to be given for them. It is a case, therefore, in which, if a decree for a dissolution had been made in the first instance, I apprehend that the Court would have thought it right to authorise the owner of seven eighths of the concern to lay proposals for a purchase before the Judge in Chambers."

8. Similarly, on a reference of disputes in a suit for dissolution of a firm the arbitrator has full power to make an allotment of the assets and properties of the dissolved firm to one of the partners at a valuation fixed by the arbitrator. The award in this case is therefore not in excess of the authority conferred on the arbitrator. We are not concerned with the propriety of the allotment. Whether, on the facts of the particular case, the allotment to the appellants should have been made and if so, on what terms were matters entirely for the arbitrator to decide. This new contention of Mr. Sen, therefore, also fails.

9. Mr. Sen next contended relying upon the decision in *Sivagnanathammal Vs. S.V. Nallaperumal Pillai*, , that the arbitrator had no power to allot the properties to the appellants as the appellants were not willing to take them. This is a hopeless contention. This contention was not raised either in the petition or in the argument before the learned Judge or in the memorandum of appeal. The question whether or not the appellants were-willing to take the properties at a valuation, fixed" by the arbitrator is entirely a question of fact. The appellants cannot be allowed to raise a new question of fact for the first time in this Court.

10. Mr. Sen next contended that it was the duty of the arbitrator to answer the several issues raised by him specifically and that he misconducted himself, particularly in not answering issues Nos. 4, 6, 7, 11, 13, 17 and 19 relating to the valuation of the assets and liabilities of the firm. I am totally unable to accept

this contention. The arbitrator is not bound to make a separate and distinct finding, on each issue. He may award on the whole case. In the instant case the arbitrator has awarded that on the final taking of the accounts the appellants are liable to pay to the respondents a sum of Rs. 12,255/-. The arbitrator has given an award on the whole case whereby he has fully and finally determined the rights of the parties in respect of the subject-matter referred.

11. Mr. Sen next contends that the arbitrator has in fact not valued the assets and liabilities. This is a totally new contention. The appellants did not contend either in the petition or before the learned Judge that the arbitrator had failed to value the assets and liabilities. The appellants cannot be allowed to make a new case for the first time in appeal. Every presumption must be made in favour of the award. There is nothing to show that the arbitrator did not value the assets and liabilities before he made his final award.

12. No other contention has been urged by Mr. Sen in this Court.

13. In the trial Court the appellants raised the further contention that the award should be set aside on the ground that it had been filed out of time. That contention is not pressed in this Court.

14. There is no merit in this appeal. The appeal therefore fails.

15. I propose that the appeal be and is hereby dismissed. The appellants do pay to the respondents the costs of and incidental to this appeal.

Lahiri, C.J.

16. I agree.