

(1958) 05 CAL CK 0017
In the Calcutta High Court
Case No : Suit No. 3198 of 1955

Sm. Padmabati Paul and Others

APPELLANT

Vs

Pannalal Paul and Others

RESPONDENT

Date of Decision : 12-05-1958

Acts Referred:

Arbitration Act, 1940 — Section 14(2), 23(1), 30
Partnership Act, 1932 — Section 46, 48

Citation : AIR 1959 Cal 156

Hon'ble Judges : P.C. Mallick, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

P.C. Mallick, J.—This is an application to set aside an award. The sons of One Hari Narain Paul deceased used to carry on two businesses, one business in Homoeopathic medicines known as Paul and Co. at 82, Clive Street and another in paper known as Hari Narain Paul and Co., at 103, Old China Bazar Street. These businesses were carried on in co-partnership. In August 1952, there was a dissolution of partnership and a new partnership agreement was entered into between three of the sons of Hari Narain, namely, Pannalal, Chunnial and Luxmi Narain, and the legal representatives of Jiban Chandra, another son of Hari Narain, who was dead. On 13-12-1955 the heirs of Jiban Chandra instituted a suit in this court for dissolution of partnership and accounts against the said three sons of Hari Narain. In the said suit the plaintiffs made an application for the appointment of Receiver. Thereupon, the defendants made an application u/s 34 of the Indian Arbitration Act for stay of the suit on the ground that the partnership agreement contained an arbitration clause.

2. It appears that on 31-1-1957 a consent order of reference was passed by this court in both the suit and the pending matter under the Indian Arbitration Act. On the date of the order the following matters were pending: (1) the suit for dissolution of partnership, (2) an application for the appointment of Receiver in

that suit, and (3) the application for stay of the suit u/s 34 of the Indian Arbitration Act.

3. Mr. R. Chowdhury, learned counsel for the petitioners contends that it is a reference made in a pending suit under Chapter IV of the Indian Arbitration Act. The petition dated 14-1-1957 on which the order of reference was made, is a petition u/s 21 of the Arbitration Act, and the order of reference is made u/s 23. The order consists of two parts. The first is the stay of the suit. That is clearly u/s 34. The second part which is the order of reference is made u/s 23 of the Act. It seems to me that Mr. Chowdhury is right in his submission that the reference was made u/s 23 of the Indian Arbitration Act in the pending Suit No. 3192 of 1956.

4. Mr. D.K. Ghosh, the Arbitrator appointed by the order, thereupon entered upon the reference. He heard the parties and their witnesses and made his award on 25-7-1957. The Arbitrator sent the award along with all papers to the Registrar of this Court on 9-9-1957. The award was filed by the Registrar on 6-12-1957. Thereupon notice u/s 14(2) of the Act was duly served on the parties. The instant notice to set aside the award was taken out by the defendants on 5-2-1958.

5. The first point taken by Mr. Chowdhury to set aside the award is that the Arbitrator went beyond his power inasmuch as by the award a new partnership was created between the defendants after dismissing the plaintiffs with a certain sum of money to be paid by the defendants. The award is short and reads as follows:

"I award that:--

1. Pannalal Paul, Chunilal Paul and Lakshman Chandra Paul are from this day entitled to the right title and interest in the businesses of Harinarayan Paul & Co. They will have all the assets of the said two 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 two businesses in respect of Income Tax, Sales Tax Chartered Bank of India Ltd., Titaghar Paper Mills Ltd., Bholanath Paper House, arrears of rent and other small sundry debts;

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

3. Pannalal Paul, Chunilal Paul and Lakshman Chandra Paul will indemnify and reimburse Sm. Paul in case the latter suffers 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. 12,255/- (Rupees Twelve thousand two hundred and fifty-five only)."

6. Clauses 5, 6 and 7 deal with costs, and may be left out of consideration.

7. The suit in which this award is made is one for dissolution of partnership and accounts instituted by the plaintiffs against all the defendants. The plaintiffs' allegation is that the defendants are guilty of mis-appropriation and of taking more than their proper share. The order of reference was made before any written statement was filed. What the case of the defendants is does not therefore appear upto this stage. The same is the case in respect to the petition for appointment of a Receiver. No affidavit has been filed on behalf of the defendants at the date when the order of reference was passed. Before the Arbitrator the plaintiffs filed their Statement of Facts stating their own case with full particulars against the defendants. The case is substantially the same as made in the plaint. The defendants jointly filed their Counter Statement of Facts affirmed on 15-3-1956 disputing all the allegations made by the plaintiffs. After dealing with the allegations made in the plaintiffs' Statement of Facts, the defendants pleaded in paragraph 22 as follows:

"The respondents submit that the petitioners have no cause of action herein and the learned Arbitrator should make an award accordingly dismissing her claim with costs."

The defendants have been acting throughout jointly as a single unit. They have neither claimed a dissolution of partnership nor accounts inter se. They want the plaintiffs claim to be dismissed and continue to carry on the partnership business as before, apparently without the plaintiffs, if necessary.

8. What the Arbitrator has done in this: The plaintiffs are dismissed from the partnership. They are given a certain sum as their share of the business. The defendants jointly are allotted all the assets and all the liabilities, including the good-will, so that, if they so desire, they can carry on a new partnership business. If the plaintiffs are held liable for any debt due by the partnership, the defendants must indemnify the plaintiffs. There is nothing in law to prevent dissolution of a partnership in this way. Having regard to the facts of the case, namely, the nature of the dispute, the grouping of the parties and the desire of the parties as can be ascertained from their respective pleadings, this is one of the most sensible ways of adjusting the dispute between the plaintiffs on the one part and the defendants on the other.

9. As I read the award, I do not find any attempt on the part of the Arbitrator to create a new partnership between the defendants. The defendants have been given the assets, liabilities and good-will jointly and if they so choose they can carry on the business as a new partnership. This does not mean that the Arbitrator has created a new partnership by his award. He has only left it open to the defendants to create a new partnership if they so desire to carry on the business by themselves. On the other hand, the defendants, if they so desire, need not carry on the business under a new partnership. They are free to realise all the assets, liquidate the liabilities of the partnership and appropriate the

balance amongst themselves. That is all that has been done. I do not find anything wrong in it. I do not agree with Mr. Chowdhury that the Arbitrator has gone out of his way and acted in excess of his power by creating a new agreement of partnership for the parties. In this view of the matter the decision of the Judicial Committee in the case AIR 1925 293 (Privy Council) becomes inapplicable to the facts of this case. The award in Ram Pratap's case (A) expressly created a new partnership after dissolving the old partnership. It declared the shares of the parties in the new partnership and stated what would happen in the event of any of the parties not agreeing to the terms and conditions of new partnership. The Judicial Committee held that the order of reference in a suit for dissolution of partnership did not authorise the arbitrator to create a new partnership and the arbitrator was held to have acted in excess of his powers in making such an award. In the instant case the Arbitrator has not created a new partnership in his award and as such cannot be said to have exceeded his power under the Order of Reference.

10. The next point urged by Mr. Chowdhury is that the award is contrary to the provisions of Section 48 of the Partnership Act and as such is "otherwise void", The argument is that a partner has a right on the dissolution of partnership, to have the assets of the partnership applied in payment of the debts and liabilities of the partnership in the first instant. The award does not provide for the payment of partnership debts out of the assets. Instead the entire assets and liabilities of the partnership are allotted to the defendants without making provisions for the payment of partnership debts out of these assets. This is contrary to law. Mr. Chowdhury strongly relies on the case of Sherbanubai Jafferbhoy v. Hosseinbhoy Abdoolbhoy decided by a Division Bench of the Bombay High Court consisting of the Acting Chief Justice Chagla and Bhagwati J., and reported in Sherbanubai Jafferbhoy Vs. Hooseinbhoy Abdoolabhoy, . In this case the award provided that the debts and liabilities of the partnership should be discharged by the parties in equal share. So also the outstanding are to be equally divided between the parties after realisation. The award however provides that on payment by Hosseinbhoy of the sum of Rs. 34,180/-to the petitioner the other partner, the property of the partnership and assets including books of account, papers, documents and vouchers and goodwill shall vest in and belong to Hooseinbhoy. This award was challenged, inter alia, on the ground that the above provisions run counter to Section 48 of the Indian Partnership Act. The award was attacked on the ground that notwithstanding the award, the petitioner continues to be liable to third parties for the entire partnership debts. The result may be that if the petitioner is compelled to pay more than her proper share, she will not be able to look to the partnership assets, which in law she is entitled to. This contention was upheld by the Court.

11. Facts in the cited case have a good deal of resemblance to the facts in the instant case. But there are points of difference. In the cited case, the party challenging the award is the partner to whom the assets have not been allotted, whereas in the instant case, the defendants who are challenging the award are

the allottees of the entire partnership assets. This makes a world of difference between the cited case and the instant case. The reasoning in support of setting aside the award in the cited case has, therefore, no application to the facts in the instant case, in which the plaintiff-respondent has not been allotted any assets whatsoever of the partnership. The defendants have been allotted all the partnership assets, and they are expected to apply the partnership assets in liquidation of the liabilities of the partnership. If they do not, the plaintiff would suffer against which an indemnity is given to her in the award. She does not complain. The defendants to whom the entire assets have been allotted is not entitled to object to the award on the ground that the plaintiff might suffer. The defendants in the instant case cannot make any grievance as the petitioners could and did in the cited case.

12. Section 48 of the Act lays down the rules for settlement of accounts between the partners. The right of partner to have the partnership assets applied in payment of the debts and liabilities is provided for in Section 46 of the Act. This right of a partner is as against the other partners. If there is any violation of this right, the aggrieved partner is entitled to complain and not others. The aggrieved partner may not insist on this right and agree to the allotment of all the assets of the partnership to the other partner before the debts due to third partner are paid off. This right may be waived by the aggrieved partner. In my judgment it is not open to any party other than the aggrieved party, far less the party to whom the entire assets have been allotted, to challenge a decree or award on the ground that the decree of award does not provide for payment of the partnership debt out of the partnership assets. The method of dissolution embodied in the award, in my judgment, does not run contrary to the provisions of Ss. 46 and 48 of the Partnership Act.

13. Mr. Mustaphy, following Mr. Chowdhury, made another point, which requires to be considered now. The order passed by me on 6-9-1957 is in the following terms:

"It is ordered that the Arbitrator appointed herein be and is hereby directed to serve notice of making and signing of the order to the parties personally and file his award in Court on or before the 23rd day of September instant: and it is further ordered that the office of the Registrar of this court do, accept the said award if filed as aforesaid on due notice u/s 14(2) of the Indian Arbitration Act."

Mr. Mustaphy contends that the Arbitrator has been directed by the order to file his award in court on or before 23-9-1957. The Arbitrator has not complied with this order of the court. All that he did was to forward his award along with the papers to the Registrar on 9-9-1957, but he did not file the award within the period, as directed by the order. The distinction is there, between the forwarding of the award to the Registrar and the filing of the same after the award is properly stamped. There is invariably a time-lag between the receipt of the award by the Registrar and filing it after the award is stamped. Under the rules of this court, the Arbitrator is only to cause the award to be filed by sending it to

the Registrar of this court. The Registrar thereupon serves notice on the parties, and the party in whose favour the award is, thereupon furnishes the stamp to be determined by the Collector of Calcutta, if necessary, and thereafter the award is filed. In the instant case, though the award was forwarded to the Registrar as far back as 9-9-1957, the award was actually filed on 23-12-1957.

14. It is argued by Mr. Mustaphy that the Arbitrator in the award in the instant case must be held to have not complied with the directions of the court, and, as such, is guilty of having misconducted in the proceedings. The Chamaria case (A) and the Bombay case (B), previously noted are relied on as authorities in support of the proposition that it is incumbent on the Arbitrator acting under an order of the court strictly to comply with the terms and make an award which is in obedience to the order of reference. An arbitration conducted in pursuance to an order of the court is subject to the general supervision of the court, and the power of the Arbitrator is defined in the order of reference. The scope of the reference cannot be expanded, even by consent of the parties. If more power is to be given to the Arbitrator than is provided for in the order of reference, the parties or Arbitrator must come to the court to get an order to that effect. If there is no order expanding the scope of the Arbitrator, and the Arbitrator makes an award in excess of the order of reference, even though such excess of power was exercised with the consent of all the parties, such award will be set aside as being "otherwise invalid", having been made in excess of powers. This is the proposition laid down in Chamaria's case (A) and the Bombay case (B). It is to be noted that "the making of the award" is held to be bad. The making of an award is a judicial act, while the filing of the award is a mere ministerial act. The above two authorities do not lay down the proposition that if the filing of the award is beyond the date laid down, the award will be bad and is liable to be set aside. It has been held, amongst others, in the case of Haji Ebrahim Kassam Cochinwalla Vs. Northern Indian Oil Industries Ltd., , by this court that the filing of an award is a ministerial act and is not a judicial act or a quasi-judicial act and has nothing to do with the validity of the award, except so far as the Limitation Act affects the question. In the case of Dhansukhlal C. Mehta v. Navnitlal Chunilal, reported in AIR 1934 Bom 898 (D), it has been held by Kania J., that where the Arbitrator has made the award but not filed it within the time, the court has jurisdiction to extend the time for filing it. In the case of Kumbha Mawji Vs. Union of India (UOI), , it is stated:

"Under Section 14(2) the actual filing by the umpire is not essential. It is sufficient if the umpire causes the award to be filed. Where in response to a notice issued to him by the Court, the umpire forwards to the court the award by post, there is sufficient compliance with Section 14(2)."

15. Even if on the construction put on the order by Mr. Mustaphy, it is held that the Arbitrator was required not merely to forward the award to the Registrar for being filed within the 23rd September 1957 but to file the same within that date, in my judgment, such filing beyond the date does not amount to misconduct for

which the award is liable to be set aside. In such a case, the court has always power to extend the date of filing the award, which I do in the instant case. In the instant case, all that the Arbitrator was required to do was to forward the award to the Registrar for being filed. That is what I meant when I made the order dated 6-9-1957. That is now everybody, including the Arbitrator and the Court officers, understood the order. The arbitrator, in my judgment, has not disobeyed the order of the court in forwarding the award to the Registrar for being filed in September 1957. This point taken by Mr. Mustaphy also fails.

16. It is faintly argued that even though a number of issues were settled by the Arbitrator in the proceedings, the Arbitrator in his award has not answered the issues. The Arbitrator is not bound to answer each issue, and failure to answer the issues does not amount to misconduct. It is to be noted that in the instant case, the court did not frame the issues in the order of reference. In such event it would be necessary for the Arbitrator to answer the issues. In the instant case, issues were framed by the Arbitrator in the proceedings before himself, and the law does not require the Arbitrator to answer each one of the issue. I should state, however, that this point is not very strongly pressed. I hold that this point is without any substance.

17. No other point has been urged in support of the application.

18. For reasons stated above, the application is dismissed with costs.