

(2000) 07 AHC CK 0044
In the Allahabad High Court
Case No : C.M.W.P. No. 28503 of 2000

Smt. Ila Mitra

APPELLANT

Vs

Justice Amitava Banerji, Retd. Chief Justice, Sole Arbitrator
and others

RESPONDENT

Date of Decision : 24-07-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2), 34(3), 36, 9
Constitution of India, 1950 — Article 226

Citation : (2000) 3 AWC 2538

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Salil Kumar Rai, for the Appellant; J. Nagar and S.C., for the Respondent

Judgement

D. K. Seth, J.—In this petition, an award of the Arbitrator dated 19th January, 2000 between S/Shri Ashoke Mitra and Manmohan Mitra on the one hand and S/Shri Aloke Mitra and Deepak Mitra in Re Mitra Prakashan Ltd., Maya Press Pvt. Ltd., Allahabad has since been challenged.

2. Mr. Salil Kumar Rai, learned counsel for the petition contends that the petitioner, a shareholder of the company was not a party to the arbitration proceeding and. therefore, by virtue of the award. her right cannot be affected. By elaborating his submission, he contended that in the award, the entire management has been changed. The existing Directors were divested of their right and the Chief Executive Officer and Chief Accounts Officer were appointed and they are not permitted to take directions from the Directors and the Directors were directed not to interfere with their day to day working. Thus, the petitioner has right to get the company managed through an elected Board under the Companies Act. which has been taken away. He further contends that there was a direction for continuance of the existing Directors without holding further election which has also affected the right of the petitioner. Mr. Rai next contends that the Arbitrator had exceeded Jurisdiction in entering into the question of

Management which was not one of the terms of reference out of the seventeen terms referred to the Arbitrator and as such, the Arbitrator had out-stepped the limits of the reference. He then contends that the petitioner was never given any opportunity before the award was passed and as such, the petitioner has no right to take advantage of Section 34 of the Arbitration Act. In support of his contention, he further contends that the petitioner cannot seek remedy u/s 34 of the Arbitration and Conciliation Act, 1996, on two-fold grounds namely, that the petitioner was not a party to the proceeding and secondly, that the question of taking away of her right could not have been gone into by the "civil court in view of the facts and circumstances of the case. Mr. Rai had taken me through various parts of the award and had pointed out that the Arbitrator had taken a view that he is not supposed to overlook the views of the shareholders as would be apparent from the expression that the shareholders did not approve the scheme of partition and majority of the shareholders were not in favour of the partition between the companies. Therefore, the Arbitrator had acted against the interest or will of the shareholders by interfering with the Management, which is otherwise a protected right under the provision of the Companies Act available to the shareholders. On these grounds, he contends that the award should be set aside.

3. Mr. J. Nagar, learned counsel for the respondents on the other hand contends that this petition is not maintainable in view of Section 34 of the Arbitration and Conciliation Act, 1996, a remedy open to the petitioner. He submits that Article 226 of the Constitution of India cannot be invoked to establish a Civil right which otherwise can be established through civil proceeding. Then he contends that the question of validity of the award cannot be gone into in exercise of writ jurisdiction, in view of the fact, that it requires certain decisions on the question of fact which is otherwise impermissible. He then contends that the petitioner was given notice which is apparent from the arbitral proceedings, the records whereof have since been produced, from which it was so pointed out by Mr. Nagar. Since, the petitioner did not participate in the proceeding and did not submit any objection, it is not open to her to assail the same. He further contends that the petitioner is the wife of Shri Alope Mitra who was a party to the proceeding and therefore, he cannot feign ignorance about the initiation of the arbitral proceeding altogether. The petitioner may contend that she was not aware of the details of the proceeding. But it is very difficult to presume that she did not have any knowledge that there was an arbitral proceeding in respect of the companies. Therefore, this petition cannot be entertained.

4. I have heard both the counsel at length.

5. The question that has been raised by Mr. Rai relates to the merit of the case. Before going into those questions. It would be appropriate to look into the preliminary question as raised by Mr. Nagar as to the maintainability of the petition. In fact, Article 226 cannot be invoked in respect of the matter, which can be decided by civil court involving civil disputes relating to certain findings of fact

which can be best determined by such Court. Then again, Article 226 is not omnipotent to include in itself all the remedies available under the law and thereby encroaching upon the jurisdiction of the Court which are otherwise conferred on it. The High Court in exercise of writ jurisdiction cannot usurp the jurisdiction of the subordinate courts simply because the counsel makes out certain grounds which are also disputed and not free from doubt.

6. Be that as it may. The main point on which Mr. Rai had led stress is that the petitioner was not a party to the proceeding and that the Arbitrator had overstepped the terms of reference.

Section 34 does not prescribe as to who can make the application. The expression used in Section 34 are as follows :

"34. Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force ; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case : or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration :

Provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part ; or

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India."

7. A plain reading of the said provision shows that an application for setting aside an award can be filed and it can be set aside on the ground mentioned in clause (a) or (b) as the case may be. Whether it falls in clause (a) or clause (b) is immaterial, and need not be gone into at this stage. The question remains that whether the petitioner could take recourse to the said provision. It is open to the petitioner to apply for setting aside the award u/s 34 provided she had participated in the award upon having notice. Here, there was notice to all the shareholders and there was nothing to show that the petitioner had ever intended to participate in the proceeding as is apparent from the arbitral proceeding. Whether resort to Section 34 is open to her or not, need not be decided at this stage. If such proceeding is initiated in that event, the same may be decided at appropriate stage by the appropriate court or forum as the case may be. It will be preponing issue at this stage.

But the fact remains that the question that has been raised can very well be challenged u/s 34 provided it is beyond the terms of the reference.

8. Sub-clause (iv) of clause (a) of sub-section (2) of Section 34 prescribes that if the award deals with a question which is not contemplated or which does not fall within the terms of the submission to arbitration or if it contains the decisions on matters beyond the scope of the submission to the arbitration in that event, the award could be set aside. In the event, any of the grounds could be separated in that event, the award to the extent of such separated part is to be set aside. Thus, Section 34 is one of the remedies which can be resorted to with regard to points that have been assailed by Mr. Rai.

9. Then again, the petitioner has a remedy u/s 9 of the Arbitration Act to seek interim measure until the award is implemented u/s 36 of the Act. As such, it is still open to her to seek interim measure if she is so advised. Therefore, it cannot be said that the petitioner is without remedy as a whole.

10. Whether the petitioner had knowledge or not, need not be gone into at this stage in view of the fact that the notice were issued to all the shareholders. Therefore, it can be presumed that the petitioner had notice. The question that her husband was a party to the proceeding may be one of the factor that may be counted for the presumption that the petitioner had knowledge about the proceeding. This presumption cannot be avoided unless it is proved that the petitioner is living separately from her husband or that there is no link between the husband and the wife.

11. The question that the shareholders views were taken is related to the question of partition. Therefore, that point also cannot be available to invoke the Jurisdiction of this Court to the extent to which Mr. Rai had argued as referred to above. Since there is an appropriate remedy u/s 34 and u/s 9, as the case may be, the writ jurisdiction cannot be invoked in order to stretch the jurisdiction to the extent of usurping the jurisdiction of the Courts under the said Act and to render the provisions contained in the said Act nugatory and irrelevant.

12. Mr. Rai had relied upon on the decision in the case of Smt. Dulari Devi Vs. Rajendra Prakash and Others, , in order to contend that it would be a misconduct on the part of the Arbitrator if the award contains a direction touching the persons who are not parties before the Arbitrator. This question need not be gone into at this stage since in view of the observation made above with regard to the determination of the question of parties, namely, whether a shareholder would be a party to a proceeding when there is a dispute between the Directors and as to the extent of right of the shareholders in the facts and circumstances of the case. This decision might help Mr. Rai in order to invoke Section 34 of the arbitration proceeding. But the same is a question to be decided by the appropriate court at appropriate stage.

13. Mr. Rai had also relied on the decision in the case of Natwarlal Shomaldas & Company v. Minerals and Metal Trading Corporation of India Ltd. AIR 1982 Del 44, where it was held that the Arbitrator cannot enlarge the scope of reference. The proposition is absolutely a sound proposition with which there cannot be two opinions. Whether the scope of the arbitration is enlarged or not in this award, need not be gone into at this stage because of the view I have taken. Since, the enlargement of the scope of reference is one of the grounds for setting aside the award u/s 34. therefore. It remains open to challenge the award u/s 34 of the Act and as such. I do not need to go into those questions for the purpose of invoking the writ jurisdiction except as observed here-in-before.

14. Mr. Rai had also relied on the decision in the case of Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, . Relying on the said decision, Mr. Rat contended that here in fact the Arbitrator had misconducted himself in entering into certain question which under the law is impermissible. In that he contends that the Arbitrator had approached for a conciliation between the parties. He cannot do so because Arbitrator is not a conciliator. He has to act according to law. Whether he had acted as a conciliator or had acted in terms of the reference is not necessary to be gone into at this stage because of the view I have taken. All these questions shall remain open for decision at appropriate stage if occasion so arises.

15. Mr. Rai had relied on the decision in the case of Associated Engineering Co. Vs. Government of Andhra Pradesh and another, . Relying on this decision, he contends that if the Arbitrator exceeds the limit of the arbitration agreement or the question of reference in that event, the same would be treated to be a misconduct making the award liable to be set aside. Again this is a question which is open to be assailed or espoused u/s 34 of the Arbitration Act. Since, I have not entered into the merit of the case, I find it appropriate not to decide this question and keep it open to decide at appropriate stage.

16. For all these reasons. I am not inclined to Invoke the writ jurisdiction. The writ petition is dismissed as not maintainable. However, there will be no orders as to costs.

Let it be noted that I have not entered into the merit of the case. All questions shall remain open.