(1991) 06 OHC CK 0020

In the Orissa High Court

Case No : Misc. Appeal No. 299 and 300 of 1983

Smt. Kamala Saha and Others APPELLANT

Vs

Jogeswar Prasad Saha and Others RESPONDENT

Date of Decision : 24-06-1991

Acts Referred:
Arbitration Act, 1940 — Section 30

Citation : AIR 1992 Ori 23

Hon'ble Judges : A.K. Padhi, J

Bench : Single Bench

Advocate : I. Mohanty, L. Pradhan, P.K. Mohanty, Sanjit Mohanty and B.B. Mohanty, for the Appellant; S.C. Ray and N. Ray, for the Respondent

Judgement

A.K. Padhi, J.—An Arbitrator is normally, target of attack, by those very persons who choose him to arbitrate the differences between them. Parties repose confidence on him because normally he is the well wisher of all the parties concerned and unrelated with the dispute. He is chosen to decide the matter with the desired intention that the decision shall be respected. More often than not, after the decision is given, allegations pour in impugning mala fides, non-application of mind so on and so forth. These two appeals are of the same category, One Nathuram Khandanwal, a businessman of Baripada was chosen by the parties concerned to act as Arbitrator and necessary orders were passed by this Court in O. J. C. No. 1174 of 1979. All the parties executed agreement of reference in favour of the Arbitrator. Award was passed by the Arbitrator which was not accepted by two sets of defendants who filed objections under sections 30 and 33 of the Arbitration Act. Rejecting the objections of two sets of defendants, award was made rule of the Court. Challenging the decision of the trial Court, these two appeals have been filed. As both the appeals arise out of one judgment, this judgment will govern both the appeals.

2. Facts of these appeals are, Munilal Saha, the common ancestor, died in the year 1948 leaving behind three sons. A partnership firm was constituted on

1-4-1950 under the name and style "M/s. Munilal Ramdayal". In this firm all the three brothers had equal shares which continued till 30-9-1962. On the death of Ramdayal, the eldest son of Munilal, the partnership firm was re-constituted in which each of the branches had 1/3rd interest. In the year 1973, the partnership firm was again re-constituted in which six sons of late Ramdayal, Jogeswar Saha and his two sons, Raghunandan Saha and his only son were partners. The partnership deed specified the shares of each of the partners. Subsequently three other firms came into existence in which the family members of all the three branches including the ladies were partners. As dissension arose between the partners. The parties went to litigation. One of the disputes between the parties was pending in this Court in O.J.C. No. 1174 of 1979 in which on 29-1-1980 on agreement of all parties this Court appointed Mr. Nathuram Khandenwal as the sole Arbitrator to arbitrate all the disputes between the parties. The award passed by the learned Arbitrator, which has been made rule of the court after rejecting the objections is challenged in these two appeals.

3. The contention on behalf of the appellants are that :--

(a) The refernce to the Arbitrator was for dissolution of the partnership firm, but the Arbitrator has re-constituted the firms, without keeping in view the limitation imposed under the Partnership Act :

(b) The lady members of the family had shares in the partnership firms. In the award passed by the Arbitrator there is no reference to any lady member nor any share has been allotted to them though they were parties to the agreement of reference:

(c) The award is based on no evidence :

(d) Adequate opportunity was not given to the parties to prove the documents; and

(e) Authority was given to the arbitrator to co-opt soem assessors, but the Arbitrator was to co-opt the assessors with prior consent of the parties. The order sheet discloses that the assessor was co-opted before taking consent of the parties.

The learned advocate for the respondents while supporting the award submits that:--

(a) The Arbitrator after hearing the parties and considering the number of family members of each of the branches had passed the award. There being no infirmity or error apparent on the face of the record, the Court has no jurisdiction to interfere :

(b) Re-constitution of a firm is not possible without dissolution. Therefore since the Arbitrator had ordered for re-constitution of the firms specifying the shares of the branches, the Arbitrator has acted within the scope of reference:

(c) Since the Arbitrator had made equitable distribution of the assets of the family, question of violation of section 48 of the Partnership Act does not arise; and

(d) The Arbitrator has awarded the shares to each of the branches including the female members. Non-allotment of specific shares to female partners will not vitiate the award.

4. One of the main grounds of attack to the award in adequate opportunity was not afforded to the parties to put forth their grievances before the Arbitrator. This submission appears to be correct as on 4-6-1980 the parties appeared before the Arbitrator and the Arbitrator noted that there was no evidence led on that day. From the previous order, it does not appear that the Arbitrator had directed the parties to lead evidence. The order sheet also does not show that the parties did not intend to lead evidence. It merely stated that "adjourned", "put up for consider- ation of award". No specific date was indicated. On 13-6-1980 certain documents were filed by the parties and reply from Shib Prasad Saha was received. On 26-6-1980 a document stated to be an earlier family arrangement was filed. The Arbitrator noted in the order sheet that the other side was absent. The Arbitrator refused to take the document filed on 26-6-1980 into consideration on the ground that the award is already ready and the last date was 30-6-1980. He also noted that since none of the parties had whispered about the document earlier, he was not inclined to accept the alleged family arrangement. He also noted that the parties were not in possession of the properties mentioned in the family arrangement. It is clear that the parties concerned were not given opportunity to show the acceptability or otherwise of the document. Further, the observation that the order has been ready does not appear to be correct in view of the fact that the Arbitrator has in the award himself mentioned that the award was made by him, signed and sealed on 30th June, 1980 moreover the order sheet dated 8-4-1980 records:--

"Sri Mangal Prasad Saha praying for personal hearing on some allegations."

xx xx xx

"Sri Mangal Prasad Saha is being called upon to have his say as earlier as possible."

On 16-4-1980 on scrutiny of accounts the Arbitrator directed Mangal Prasad saha to explain about the expenditure of Jagadhstri Cinema and on 18-4-1980 Mangal Prasad Saha explained about the expenditure of the said cinema hall. The entire order sheet does not disclose that Mangal Prasad Saha was given an opportunity of personal hearing though he had specifically prayed for it. After considering all these features of the case, I am satisfied that the learned Arbitrator had not given adequate opportunity to the parties to prove their respective cases and therefore the award has to be set aside.

5. Another important question which arises for consideration is as to whether the award is beyond the scope of reference. In the agreement for reference the pre-

emble reads as follows:--

"WHEREAS differences and disputes have arisen amongst the parties hereto, and the parties agree that the said partnership firms cannot be continued any longer and should be dissolved and proper accounting should be done, and the assets and liabilities of different firms divided, amongst the parties hereto."

In paragraph 1(a) of the reference it has been mentioned as follows :--

"That the said Arbitrator shall dissolve the partnership firms and divide the assets of the firms indicated below:

XX XX XX"

In paragraph 2 of the award, the learned Arbitrator has directed as follows:--

"Now considering all the above facts, circumstances, the quantum of the family members of each brand, relative burdens, called upon to meet such family members and after my analysis of the above para I honestly feel and allot 45% share to six sons of Late Ramdayal Saha and their family members and allot 30% share to Sri Jogeswar Saha, his two sons and their family members and allot 25% to Sri Raghunandan Saha, his only son and their family members."

In paragraph 12 of the award the learned Arbitrator has directed as follows :--

"That all the parties concerned shall affect the reconstitution of the aforesaid four firms in dispute after 1-4-80 according to the discussion and distribution of the disputed property and business etc."

Since the reference was specifically for dissolution of the partnership firm as all the partners did not want to continue the partnership firms, the learned Arbitrator in the award directing re-constitution of the partnership firms after specifying the shares of each branches is beyond the scope of reference and therefore the award is not also sustainable on this count,

6. As the award cannot be sustained on these two grounds. I do not propose to give any finding on the other contentions raised by the parties.

7. In Misc. Appeal No. 299 of 1983 the appeal has ceased to proceed so far as respondents 9 to 14 are concerned vide order dated 24-9-1983, therefore the appeal has abated. Respondents 9 to 14 are appellants in Misc. Appeal No. 300 of 1983 which appeal is in order. Abatement of Misc. Appeal No. 299 of 1983 shall not affect the merits of Misc. Appeal No. 300 of 1983.

8. In the result, the award which has been made a rule of the court is set aside, the matter is remitted to the learned Arbitrator to proceed with the Arbitration proceeding afresh and pass the award in accordance with law after giving adequate opportunity to both the sides to adduce evidence in their support.

Misc. Appeal No. 299 of 1983 is dismissed as abated and Misc. Appeal No. 300 of 1983 is allowed, but in the circumstances of the case, there shall be no order as to costs.

