(1990) 06 CAL CK 0002

Calcutta High Court

Case No: Matter No. 501 of 1986

Rudra Bilas Kisan Sahakari Chini Mills Ltd.		APPELLANT
	Vs	
Texmaco Ltd.		RESPONDENT

Date of Decision: June 7, 1990

Acts Referred:

- Arbitration Act, 1940 - Section 20, 30, 41

Citation: 95 CWN 290

Hon'ble Judges: Umesh Chandra Banerjee, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Umesh Chandra Banerjee, J.

From time to time plea of misconduct or legal misconduct in an application for setting aside the award has had considerable judicial attention. The long catena of decisions from Jugglilal Kamalapat (AIR 1955 Cal) down to the decision in Indian Iron and Steel Co.''s matter (Award case no. 72 of 1985 : In appeal from original order being no. 233 of 1986), however, echo on the same voice that the arbitrators must act reasonably and in accordance with the principles of natural justice. There exists no contra note and the law is well settled on this score that though the arbitrators have the right to proceed exparte but that does not clothe the arbitrators to act arbitrarily as otherwise the faith and belief of the people in general will be shaken as regards this chosen forum for adjudication of disputes between the contracting parties. Sabyasachi Mukherjee, J. (as he then was) in the matter of Dipti Bikash Sen and Another Vs. India Automobiles (1960) Ltd., while dealing with the issue of Arbitrator''s right to proceed exparte very succinelty laid down five several principles as rules of prudence in regard thereto, Mukherji, J. observed:-

The principles governing the arbitrator''s right to proceed exparte were : (1) If a party to an arbitration agreement had failed to appear at one of the sittinbs, the arbitrator could not or, at least ought not to proceed exparte against him at that sitting, (2) Where non-appearance was accidental or casual, the arbitrator should ordinarily proceed in the ordinary way, fixing another date of hearing and awaiting the future behaviour of the defaulting party.

(3) If, on the other hand, it appears that the defaulting party had absented himself for defending the object of the reference, the arbitrator should issue a notice that he intended at specified time and place to proceed with the reference and that if the party concerned did not attend he would proceed in his absence. (4) But if after making such peremptory appointment issuing such a notice the arbitrator did not in fact proceed ex-parte on the day fixed, but fixed another subsequent date, he could not proceed ex-parte on such subsequent date, unless he issued a similar notice in respect of that date as well. (5) If he issued a similar notice and the party concerned did not appear, an award made ex parte would be in. order. But, if he did not issue such notice on the second occasion but nevertheless recorded ex-parte, the award would be liable to be set aside in spite of a notice of peremptorily hearing having been given in respect of the earlier date, subject, however, to the condition that prejudice was caused tm the party against whom the ex-parte order was made.

Mukherji, J however observed that the duty to serve notice, however, canot be termed to be an absolute one and formality of issuaance of such a notice may be dispensed with in the event the party by his conduct makes it clear abandantly that be would not attend the meeting, then and in that event question of complying with required rules of prudence as above would not arise and no exception can be taken for such a non-compliance. Incidentally it is to be noted that in the facts under consideration, before the learned judge, it was held that by reason of non-service of such a notice there was a possibility of miscarriage of justice and prejudice being caused to the applicant before the Court.

2. In an earlier decision of this Court Sir Asutosh Mookherjee (AIR 1920, Cal 853) also laid down that service of a further notice prior to proceeding ex-parte was a requirement of prudence, but where a party was determined not to appear before the Arbitrators and he had openly repudiated the reference, the arbitrators are not required to issue a notice deficting an intention to proceed exparte.

3. In the latest decision of this Court in the matter of Indian, Iron & Steel Co. Ltd. vs. The Sutna Stone and Limes Co. Ltd. (Award" Case NO. 72 of 1985. In appeal from original order being No. 233 of 1986) Basak-J delivering judgment for the Court observed -

In our opinion, it is the duty of the arbitrators to act in a responsible fashion before they proceed to dispose of a matter exparte. The arbitrators have no doubt the authority to pass an award exparte in the facts and circumstances of a given case.

They may have such power in a given case even if there is no prior notice given that the matter would be heard exparte if there is no appearance. It is the duty of the arbitrator to apply his mind in the facts and circumstances of each case and not proceed exparte automatically merely because such notice is given. They must act in a proper and reasonable fashion. If on the basis of materials before him, the arbitrator is of the opinion that absence of a party is deliberate with the intention, to avoid or delay the proceedings, the arbitrator is certainly entitled to proceed exparte.

4. Turning back at this juncture on to the factual aspect of the matter under consideration it appears that by an agreement dated January 23, 1975 and a further agreement dated April 15, 1977 the respondent herein agreed to design, manufacture, supply, erect and commission plant and machinery at Bilaspur in the State of U. P. for a total consideration Rs. 5,45,000,00/- on the terms and conditions contained therein. It was the condition of the above named agreement that the plant to be set up by the respondent was to be capable of crushing per day on 22 working hours 1250 tonnes of sugarcane with fibre content of approximately 12-15 per cent and to produce commercially white crystal sugar by Double Sulphitation Process and the Milling Plant to give an average extraction of not less than 93 percent.

5. Clause 16(c) of the agreement provided furnishing of guarantee in respect of guaranteed performance of the plant and machinery supplied by the Sellers for Rs. 28,25,000/- within 2.0 months from the date of signing of the agreement and the guarantee shall be valid upto the end of on full crushing season as defined In Sec 2(1) of the U. P. Sugar Cane (Regulation of Supply and Purchase) Act., 1953. The bank guarantees required to be furnished by the Sellers under the provisions of the agreement was to secure the delivery, erection, commissioning and performance of the plant and machinery supplied by the Sellers or for any other purpose under the professional of the agreement and was to cover the period of supply, erection and commissioning and performance as the case may be, under the agreement, Needless to say, however, that there was an arbitration clause to the effect that in the event, there being any disfute or difference of whatsoever nature which may arise between the purchasers and sellers, the disputes were to be referred to arbitration of two persons one to be nominated by the purchasers and the other by the seller.

6. Subsequently, however, the respondent did supply, erect and commission the plant and machinery but according to the petitioners the same have failed to achieve the stipulated standard performance and was defective in nature and by reason of the premises, however, the petitioner invoked the bank guarantee and called upon the State Bank of India to pay to the petitioner the amount mentioned therein. The State Bank of India in its turn intimated the respondent-Seller of such invocation and shortly thereafter the respondent instituted a special suit being No.

49 of 1984 u/s 20 of the Arbitration Act, 1940 inter alia, with a prayer for filing of the arbitration agreement in Court and the disfutes raised therein be referred to arbitration. On the same day, however, the respondent herein also moved an application in the special, suit, u/s 41 of the Act inter alia, praying for an order of injunction restraining the petitioner from invoking or realising payment under the bank gurantee and obtained an ad-interim order.

7. By an order dated March 8, 1985, the learned Single Judge of this Court directed that the arbitration agreement dated January 23, 1975 be filed in Court and framed the following issues to be referred to Arbitration.

a) Have the plant and machinery supplied, erected and commissioned by the petitioner failed to give the guaranteed- performance as per the Agreement ?

b) If so, was it due to any reason not beyond the control of the petitioner?

c) If so, what is the amount payable by the petitioner to the respondent for the failure of performance?

8. It is to be noted that by the above noted order dated March 8, 1985, the learned Judge appointed the Director, National Sugar Institute, Kanpur to act as the sole arbitrator for adjudication of disputes as above. By the above-noted order, the Learned Single Judge has also disposed of the application u/s 41 of the Act by confirmation of the interim order granted earlier till the disposal of the arbitration proceeding. Subsequently, an appeal was taken from the order u/s 20 of the Act before a Division Bench of this Court by the petitioner and also before the Supreme Court of India against the order confirming the order of injunction u/s 41 of Act by way of a special leave Petition. The Supreme Court, however, by an order dated November 26, 1985 passed an order to the following effect : -

Special leave granted.

We had adjourned the case from the last date of hearing to today and issued notice to the arbitrator only to ascertain from him the time required for purposes of making the award. The Arbitrator has not appeared before this Court to-day. This: however, cannot come in the way of the case being disposed of today, since we are of the view that the Arbitration proceedings should be expedited.

The Arbitrator shall pass his award on or before 31st March 1986. The Bank Gurantee shall be kept in force by the respondent. If for any reason the award, is not passed on or before 31st March, 1986 the bank guarantee shall, however, become after that date, enforceable forthwith irrespective of the fact that the award is still to be made.

In view of this order the appeal filed by the appellant before the Division Bench of the Calcutta High Court does not survive. The Learned Counsel for the appellant states that the appellant will withdraw that appeal. The Arbitrator.-shall proceed

with the case forthwith notiwithstanding any order of stay issued by the High Court of Calcutta in that appeal. A copy of this order shall be sent to the arbitrator within three days. The appeal is disposed of accordingly. There will be no order as to costs.

9. From the records it appears that the arbitrator issued a notice of hearing in the matter after the initial direction in regard to the filing of statement and counter-statement of facts on January 27, 1986 to the effect that the meeting of the arbitration would be held at Kanpur on February 13, 1986 from 10 a.m. and the parties were directed to make themselves available upto February 16, 1986 by which time the arbitrator expected to complete the proceeding. Significantly, however, the notice itself mentioned that in the event of non-appearance of any of the parties on the. date fixed the matter would be dealt with exparte. though Mr. Bachawat, appearing in support of the application for setting aside the award levelled some amount of criticism on this count, but in my view the same need not be dealt with in detail by reason of subsequent facts in the matter in issue.

10. Coming back on to the further factual score, it. appears that both the parties intimated the learned Arbitrator about the difficulty in attending the arbitrator''s meeting at 10 a.m. on the date fixed by the Arbitrator. The matter, however, commenced at the appointed time in" the absence of any lawyer for either of the parties. It is on record, however, that the petitioner''s lawyer could arrive at the meeting at about 1.10 p.m. and the matter was heard and discussed and thereafter matter was adjourned till 11.00 a.m. on February 14, 1986. On the next date i.e. on February 14, 1986 hearing did take place upto 4.45 p.m. and the matter stood adjourned till February 15, 1986 at, 10 a.m.

11. At the initial stages of the hearing of the 3rd day three documents were produced before the arbitrator and it has been categorically stated that no oral evidence shall be tendered for and on behalf of the respondent being the claimant therein and the respondent on production of those three documents concluded its submission. The petitioner''s advocate thereafter, however, commenced his submission and at that juncture, the event turned out to be rather unfortunate and the main thrust of the submission of the petitioner herein rested on such unfortunate incident. In order to appreciate the same, however, in my view it would be convenient to note the case made out by the petitioner in the petition and the minutes of the meeting of the arbitrator. The petitioner in paragraph 20 has stated: -

The Learned Counsel of your petitioner then resumed his submission. The said Arbitrator thereupon demanded an answer in the form of ''yes or no'' from the counsel of your petitioner to the question that whether sugarcane supplied by the petitioner during the performance trial was of the required quality. The said counsel, of your petitioner stated in asnwer that sugarcane supplied by your petitioner was of the required quality and that the said fact would not only appear from the pleadings and the documents but the same would be conclusively proved

in the course of the hearing. To that the said Arbitrator was visibly agitated and in a temper retorted "You are making false statement". This led to some exchange and at the end, the said counsel of your petitioner stated that in view of the said Arbitrator''s feelings and remark, it would not be in the interest of his client to appear any more in the matter and he was, therefore, returning the brief. The said counsel also prayed that some time be given to brief another counsel which was also refused. The said counsel then left. While the said counsel was leaving the said arbitrator stated that he was withdrawing his statement. Your petitioner was unable to proceed with the reference without the said senior counsel. In the events that had happened, the junior Counsel, the Advocate-on-record and the officerss of the respondent had no other alternative but to leave, for which the permission of the said Arbitrator was sought, but. refused. Instead of adjourning the proceedings and given an opportunity to your petitioner being heard, the said arbitrator proceeded with the reference exparte. When your petitioner''s advocate-on-record with the junior counsel was leaving, the counsel for the respondent resumed his submissions on merits. The said arbitrator did not intimate or give notice that he would hear the case exparte. Your petitioner was prevented from concluding its case, to minutes were recorded even during the third sitting of the reference.

12. The minutes of the meeting of the Arbitrator, however, recorded as follows : -

Mr. A. K. Mitra, concluded his submissions Mr. P. K. Mullick resumed his submission in reply.

During his submission he was asked to clarify whether his client supplied cane of required quality during the performance trial. Mr. Mullick said that this is not the point raised by the claimant. The counsel for the claimant has only relied upon the 3 documents listed above and has not talked about cane quality today. The arbitrator then pointed out that the counsel for the claimant did mention about the proper quality of cane as specified in the agreement and mentioned that the cane of the quality as specified in the agreement was not supplied during the trial, when he was presenting the rejoinder, Mr. Mullick then want on to explain that, yesterday, only the rejoinder was placed and the counsel for the claimant has not talked about the cane quality today. The Arbitrator then opened that he has relied on the daily manufacturing reports during the performance trial which show the quality of cane supplied to- the factory during such trials. "Can you, by going through those reports, categorically state whether the proper quality of the cane was supplied? to which Mr. Mull idle explained that cane was supplied, when his attention was again drawn by the Arbitrator to the proper quality of cane, he said that proper- quality cane was supplied. The Arbitrator again drew the attention of the Learned Counsel to the performance of trial report and said that "If you say that during the trial period the quality of cane was as per terms of the agreement, then this statement is factually a false statement." Mr. Mullick took this remark as a personal insult and said "I have never been accused of making a false statement, and unless this remakr is

withdrawn by.the Arbitrator, I will not appear before the Arbitrator". The Arbitrator then immediately withdraw the remark and said, "please again chech the correctness of your statement because the report clearly specified the fib per cent and pol percent of cane which is not as per the limits specified in the agreement". In spite of withdrawing the remarks by the Arbitrator, Mr. Mullick refused to argue further and wanted the permission to leave the room. The Arbitrator drew his attention that he ahd requested that unless the remarkl was withdrawn he would not continue. Since the remark made by the Arbitrator was withdrawn, there was no reason for him to leave the room and the permission was refused. It was also clarified to him that this cannot be taken as a personal remark for a personal insult as he was making a statement on behalf, of his client. So the permission to leave the roan was refused, but in spite of" that, after threatening to take up the matter to" court, he left the room.

There after, Mr. Ronojit K. Mitra, his junior, informed that since he was assisting Mr. Prodosh Mullick who has left without passing any instructions to him, there was no point in his staying and he left the room. Mr. Ashok Dhar also followed him without making a statement. A very short while later, both Mr. Ronojit K. Mitra and Mr. Ashok Dhar resentered the room and asked the other representatives of Rudra Bilas to walk out of the room and, after informing the Arbitrator that since Advocate on behalf of Rudra Bilas had left the room, there was no point in their representatives being here and they all left.

NO prayer for adjournment was done.

Mr. A. K. Mitra, counsel on behalf of the claimant submitted that yesterday lawyers of respective parties had made their submissions. The question whether a guaranteed performance was achieved or not will appear from the performance trial reports which is a common document and signed by both the parties. I have no further submission to make in addition to what I have submitted yesterday and what T have submitted today.

The Arbitrator concluded the hearing. Award reserved. Claimant is directed to give requisite stamp papers.

13. On this score and in support of his contention on the issue of legal misconduct, Mr. Bachawat''s submission was mainly on three counts.

A) Arbitrator closed the case upon full knowledge that the Learned Counsel of the petitioner has not closed his case and was in the process of making his submission when he left the meeting.

B) Arbitrator did not inform the party leaving the proceedings that he would close the case or that the proceedings shall stand closed or at an end and the Arbitrator shall publish an award.

C) Arbitrator made the award exparte without hearing the applicant.

14. Mr. Mitra, however, appearing for the respondent strongly contended that question of proceeding exparte does hot arise in the event the party appearing, chooses to leave the arbitrator''s meeting. It was contended that as a matter of fact that no prayer for adjournment was made and it amounted to a virtual boycotting of the arbitration proceeding as such no exception can be taken to the above on the ground of misconduct in the event the parties abundon the proceeding.

15. Before proceeding farther in the matter on this count one short; point raised by the petitioner herein as an evidence of misconduct viz., non-supply of the minutes of the meeting of the Arbitrator ought to be noted at this juncture. It was contended that the arbitrator did not supply any minute of the meetings to any one of the parties and the minutes have taken the shape of fabrication since it was served all at once along with the award which is under challenge.

16. this Court, however, does not find any substance in such a contention. Arbitrator has fixed three days of hearing of the parties and in the event, the Arbitrator proceeds to give the minute of the meetings all at once, in my view, no exception can be taken in that regard far less constituting a ground of setting aside the award on the ground of misconduct of the proceedings or legal misconduct, on the part of the Arbitrator.

17. Coming back on other aspect of the matter as noted above the main thrust of the petitioner''s submission let us, therefore, now analyse the factual aspect in slightly more greater detail.

18. In the meeting of the Arbitrator there was some exchange of words between the senior counsel appearing in the matter for the respondent and the Arbitrator. By reason wherefor the Senior counsel thought if fit not to appear in the matter any longer. Without going into the controversy and assuming the statement in the petition to be factually correct it appears that before leaving the meeting the senior counsel prayed for an adjournment of the matter so that his client can engage another lawyer; that prayer apparently and according to the petitioner has been rejected. Though, however, the factum of such a prayer has been disputed by the respondent and the recorded minutes of the Arbitrator doesnot also lend any support to the same, but be that as it may, as noted above assuming such a prayer being made the same has been rejected by the arbitrator. Can it be said to be a conduct which is grossly irregular and amounting to miscarriage of justice. To grant or not to grant an adjournment is a discretion of the presiding officer. When the prayer for adjournment was made, the advocate-on-record along with the junior counsel, were present at the meeting and admittedly, they did not leave the meeting along with the senior counsel. On this backdrop, we will have to consider as to whether refusal to grant an adjournment amounted to miscarriage of justice. It is not that there were not any lawyer present at the time when the senior lawyer was leaving and in that background, in my view refusal to grant an adjournment cannot be termed to the such an irregularity so as to amount to a misconduct being a

ground for setting aside the award.

19. On the second stage we find admittedly, that after the senior counsel left junior counsel and the advocate-on-record though stayed back for a while, but without much time-loss also left the meeting leavinb the clients before the Arbitrator. Admittedly, there was no prayer for adjournment of the matter by the second batch of de-partees.

20. After the departure of the junior counsel and the advocate-on-record the clients continued to remain present and there comes the third stage; the junior counsel with the advocate-on record come and ask the clients as well to leave. There was no prayer for adjounrment at that juncture. In fine, therefore, on the factual score it appears that the senior counsel leves the proceeding with a prayer for adjournment on the ground of engagement of a lawyer which has been rejected by the Arbitrator. On the 2nd stage the junior counsel and the advocate-on-record leave the meeting without a prayer for adjournment and on the 3rd stage the advocate -on -record comes and ask the clients to leave, needless to say without the prayer for adjournment.

21. It, therefore, appears that only once the prayer for adjournment was made on the ground of an engagement of a lawyer and at a time when there was in fact, a lawyer appearing for the concerned party though subsequently, however, the lawyer present also leaves along with the advocate-on-record and lastly the clients also leave the meeting at the instance of the advocate-on-record. I do not see any reason whatsoever to ascribe the conduct of the arbitrator to be termed to be a mis-conduct in the matter of refusal to grant adjounrment in the circumstances noted above. Is it a deliberate act on the part of the petitioners herein to leave the arbitration proceedings which can be termed to be an act of abandonment and in any event a decision taken not to appear before the arbitrator or on the other hand is there a bounded duty on the part of the arbitrator to grant an adjournment as soon as a prayer for adjournment is made on the ground of engagement of another lawyer when in fact, a lawyer is present at the meeting-would the court be justified in ascribing this conduct of the arbitrator to be a misconduct in my view the answer is in the negative.

22. Admittedly, the arbitrator has expressed regret for what has been said by the arbitrator to the senior counsel and that expression of regret was effected prior to departure of the senior counsel. I am not expressing any opinion as regard the conduct and the propriety of the action of the lawyer neither I am called upon the decide the same but the fact remains as to whether the conduct of the arbitrator can be termed to be a misconduct of such a nature resulting miscarriage of justice by reason wherefor an award passed ought to be set aside. In my view, the answer cannot but be in the negative.

23. On this factual backdrop can it be said that the arbitrator closed the case hastly with full knowledge that the learned cousnel did not close the case and was arguing the matter when he left. Prayer for adjournment was made on the ground of engaging another lawyer which was refused by the arbitrator - such a prayer was made when there was a lawyer available before the arbitrator to represent the parties and under those circumstances and as observed earlier rejection of such prayer cannot be termed to be a misconduct but thereafter in two successive stages as detailed above there was admittedly no prayer for adjournment of the matter.

24. The other as feet of this matter is in regard to an obligation on the part of the arbitrator to inform the party that he would close the case or the proceeding shall come to an end and the award will be published. It was contended that at the time when senior counsel left a prayer for adjournment was amde and that clearly indicated that further submissions were to be made and as such the same does not suggest abandonment of the arbitration proceedings and closing of the case by the arbitrator thus amounted to misconduct entitling the Court to set aside the award.

25. Is there any obligation of the arbitrator to give a further notice to the parties on these state of facts. Does it not and imply that the party does not like to appear any longer before the arbitrator - Does it not evince an intention that so far so good but no further appearance? If a party leaves the meeting without a prayer for adjournment, in my view there cannot be any obligation of the arbitrator to adjourn the matter to enable the party to appear again. It is a deliberate act on the part of the party concerned and they left the proceeding out of their own violation. It, in fact, in my view, amounted to abandonment of the proceeding before the arbitrator and in that view I do not find any reason whatsoever to take exception in having the reference closed by the arbitrator.

26. A passage from Russell, to the effect that if an arbitrator does not give the party who has caused it proper opportunity to into his case, but makes his award too hastily, without giving due notice of his intention to do so, the court will set the award aside was strongly relied upon by the petitioner.

27. A further passage from Russell was also relied upon to the effect that the Court will normally set aside an award if or on deciding the case on a point not argued or otherwise failing to give the parties a proper opportunity or arguing their case. It was contended relying upon the passages of Russell that the proceeding and arbitration end as a general rule with counsel speeches and the arbitrator then informing the parties that he will make his award in due course and the arbitrator ought not to allow any mistake to take place as to his intentions and if there is any possibility of doubt that the proceedings are at an end, he should make it clear that he will proceed to make his award.

28. While it is true that there cannot be any manner of doubt as to. the procedure aspect as noted above, but the same only takes care of thenormal circumstances

and not when the parties leave the proceedinb making their intention quite clear that they would not be appearing in the proceeding any further.

29. The arbitrator has a duty to the parties to make his intention known as to the closing of the case but can it be said that there is no corresponding obligation on the part of the party concerned to continue to appear before the arbitrator. Is it fair or reasonable on the part of a party to leave the proceeding abruptly and thereafter come before the Court that the arbitrator has closed the case too hastily, in my view the complaint cannot be sustained.

30. Strong reliance was placed on an old English decision in the case of Peterson v. Ayre, 139, E.R. 271 wherein Jervis, C.J. observed to the following effect :

It seems to me that the arbitrators have not properly performed the duty that they were entrusted with. It appears that they from time to time informed Brown that they were proceeding with the reference; but it is not suggested that they told him that they were about to conclude without giving him an opportunity and proceding evidence, if he had any to produce. On this ground, I think the award is unsatisfactory. I think the matter must go back with an intimation that the 3rd arbitrator should have an opportunity to hear and considering the evidence with Wilson and Whealler.

31. While it is true that there must be an expression of intent of closing the matter in issue by the Arbitrators in the normal circumstances but that cannot be said to be of universal application, more so in the facts and circumstances of the matter under consideration. In that perspective the old English decision (Supra) does not have any manner of application in the facts and circumstances of the matter in issue.

32. It is now a well settled principle that the Arbitrator''s action ought to be in due compliance with the concept of natural justice - in. the event of there being any such violation, Law Courts ought not to hesitate to strike down an action of the arbitrator and set aside the award if made in the matter or to take such other step or steps in order to do effective justice between the parties. Lord Denning''s observation in the decision of Modern Engineering (Bristol) vs. C. Miskin & Sons Ltd. 1981(1) Loyd''s (LR 135 lends support to such a view that in the event the Arbitrator decides a case against a party Without having heard the submission in the case, the same amounts to a clear breach of natural justice and as such the award ought to be set aside on that score.

33. The decision of this Court in Juggilal vs. General Fiber Dealers Ltd. (supra) was also relied upon by Mr. Bachawat in support of his contention that the Arbitrator has no right or authority to proceed exparte in the matter without servinb a notice that the matter would be dealt with exparte. On an analysis of the facts and circumstances of the matter under consideration it appears that the notice of the Arbitrator itself contained that the proceeding shall continue up to a particular date and on that date one of the parties in the course of proceeding thought it fit to leave

the arbitration proceeding and by reason therefore question of any further notice for exparte hearing would not arise. No further sitting had taken place after the incident on the 3rd day of the proceedings and as such the decision in Juggilal''s case (supra) does not have any relevance in the facts and circumstances of the matter under consideration.

34. In the long line of cases cited from the Bar, next is the decision of the Kings Bench Division in the matter of arbitration between the Ownership of Steampship Catalina & Ors. vs. Owners of the Motor Vessel Norma (61 LLR 360). This decision also does not lend any assistance to Mr. Bachawat since the same is clearly distinguishable on facts and so is the decision in the case of Ganga Shah vs. Late Raj Singh (ILR 9 All 253).

35. On the Count of exparte hearing, turning back on to the factual aspect once more, what we find is that at the sitting of the Arbitrator Senior Counsel felt that certain uncharitable comments have made by the Arbitrator, though, however, admittedly, the Arbitrator expressed regret over the same, and left the proceedings leaving his junior Advocate and the Advocate on record together with the clients before the Arbitrator. Before leaving, however, the Senior Advocate prays for an adjournment on the ground of engagement of another lawyer that prayer has been refused but even then the senior lawyer left the meeting but at that juncture there was a lawyer appearing for the party as also the Advocate-on-record, who, however, at a subsequent stage also left the proceeding without any prayer for adjournment and without obtaining the leave to retire from the proceeding. In the event the lawyer leaves the proceedings as also at a stage subsequent thereto the client also leaves and in the event there being no other sitting can it be termed to be an exparte hearing liable to be set aside by the Courts of law. In my view the answer is in the negative.

36. In any event the law is now well settled that in the event there being an exparte award without giving any notice of intention to proceed exparte the award will be set aside. On the facts as above, it can not be said that there was in fact exparte hearing since the party made it clear that he will not attend under any circumstances. This as a matter of fact amounts to a virtual boycott of the arbitration proceeding and in the facts and circumstances of the matter under consideration as more fully detailed above there is no manner of doubt as regards the intent of the party. In such circumstances and since there was no further meeting, I am not inclined to accept the contention that there was any exparte hearing or that the Arbitrator has misconducted himself in the matter under reference in that regard.

37. As a matter of fact, it cannot be termed to be a case of exparte award or exparte proceeding at all. It is a matter where one party decides not to appear before the Arbitrator. It is neither exparte hearing nor it can be termed to be in violation of the principles of natural justice.

38. Section 30 of the Act provides the ground for setting aside the award viz., Arbitrator has misconducted himself of the proceeding that the award has been made after the issue of order superseding the arbitration and that the award has been improperly procured or is otherwise invalid. The second count need not be dealt with presently as the facts do not warrant any such discussion but what we are concerned is in regard to the first and the third counts as envisaged u/s 30 of the Act of 1940.As regards the first count, the same has been dealt with in detail as above and as such I need not dilate further on that score on account of the last count viz. of the Act of 1940 whether there has been an improper procurement of the award it would be convenient at this juncture to recapitulate, the order of reference and issue raised therein viz., as to whether the plant and machinery supplied by Texmaco have failed to give the guaranteed performance as per the agreement.

39. In the award itself which is a reasoned one, the Arbitrator recorded the following :-

According to the agreement the sugar plant was expected to be capable of crushing per day of 22 working hours 1250 tonnes of sugar cane with a fibre content of approximately 12-15 per cent and to produce commercial white crystal sugar by Double Sulphitation process and the Milling Plant to give an average extraction of not less than 93 per cent based on sugar cane with fibre content of 12-15 per cent while applying maceration upto 18 0% on fibre. The capacity and efficiency of the sugar plant shall be deemed to have been fulfilled if after one month from the start of crushing operations and the boiling house being in normal working condition on any three consecutive days an average of 1250 tonnes of sugar cane with a fibre content of approximately 12-15 per cent are processed in 22 working hours and on 5 consecutive days, including the said 3 days, the milling plant gives an average extraction of 93 per cent based on sugar cane with a fibre content of 12.5 per cent and a minimum sucrose content of 12.5 per cent while applying maceration upto 160% on fibre.

According to clause 8.4 of the agreement if the performance of mill extraction is not achieved upto the end of the second crushing season the sellers are required to pay liquidated damages equal to one per cent of contract price for every half per cent or part thereof less extraction but not exceeding 5 per cent of the contract price provided that non-fulfilment of performance is not due to circumstances beyond the responsibility and control of the sellers.

40. Arbitrator further observed :

Coming to the efficiency figures achieved during the performance trial it is observed that the reduced mill extraction has been varying from 92.62 per cent to 93.18 per cent, whereas, as per the agreement the plant should have given in average extraction of minimum 93 per cent based on sugar cane with 12.5% fibre and sucrose content of 12.5 per cent while crushing 1250 tonnes of cane per day of 22

hours having fibre content of approximately 12-15 per cent and applying maceration upto 180 per cent on fibre. If the mill extraction is calculated by the Mittal''s formula on the basis of data taken during performance trial, the figure for whole reduced extraction on 5 consecutive date come to 92.92, 92.67, 92.75, 92.50, and 93.17 (average 92.80 for 5 days). Thus, it may be seen that the desired milling efficiency could not be achieved except on the last day of the trial. It may, however, be kept in mind that during the trial period on no day the cane could be supplied with fibre content within the limits specified in the agreement.

41. It may thus be seen that where as the suppliers have failed to give the guaranteed milling efficiency, which is less than half per cent from the guaranteed figure of 93%, on the other hand the purchasers have failed to supply cane with a fibre content varying between 12-15 per cent. There is no mathematical formula to exactly corelate the effect of higher fibre content. It will be incorrect to say that the fibre content in cane has no role to play in mill extraction. Had it been so, there was no need to specify the limits of fibre per cent cane in the agreement. The penalty to be imposed on the sellers for non-fulfilment of the guaranteed efficiency should, in my opinion, not be imposed in full particularly when the purchaser on their part have also failed to give desired quality of cane over which claimants had no control. In the absence of any known corelation of influence of excessive fibre content in cane beyond the prescribed limits on milling performance, I as of the opinion, that one per cent of the contract price payable by the sellers for mill extraction being lower by half per cent or part thereof from guaranteed 93% should be equally shared by the two parties i.e. the liability of liquidated damages on sellers is reduced to half.

42. In my view reading the award in its entirely the question of improper procurement of the award would hot arise neither I am not, agreement with Mr. Bachawat that the Arbitrator has misconducted himself of the proceeding in any manner whatsoever.

43. Incidentally, it is to be noted that the dispute between the parties centred round the supply of sugar cane crashing plant for the purpose of production of white crystal sugar and this Court appointed the Director, National Sugar Institute being an expert on the subject. The expert arbitrator thereafter proceeded to deal with the matter and eventually passed a reasoned award in the matter - would the law Courts be justified in interferring with the same unless some grave errors or wrong looms large on the face of the award, in my view the answer ought to be in the negative. In this context reference may be made to the decision of this Court in the case of Shah Nanchand Anandji vs. vegetable Products Limited, ILR 1973 (II), Cal 255. In that decision this Court observed :

In the present case, I am therefore of the opinion that the arbitration was by commercial men with wide experience and expert knowledge on the subject, eminently fitted to decide the question and they were in a position to dispense with

evidence regarding matters relating to the trade or the fluctuations in the market and were perfectly competent to decide the question on the basis of their own experience and knowledge. The decision in the case of Mediterranean and Eastern Export Co. Ltd. vs. Fortress Fabrics (Machester) and the observations of Lord Goddard C.J. relied on by Mr. Modak and which I have already quoted, to my mind, clearly support the view I have taken. In view of my finding that the arbitrators had expert knowledge of the trade and were competent to decide the question of damages on the basis of their own knowledge and experience without any outside evidence, I do not consider it necessary to decide the question whether there were other materials in the shape of statements and documents available to the arbitrators which could enable them to come to their conclusion. The award of the arbitrators cannot, therefore, be assailed in the instant case on the ground that the arbitrators acted without any evidence and this contention of the petitioner is not, in my opinion, sound.

44. Significantly enough the principal ground challenging this application is in regard to the misconduct of the Arbitrators and as regards the award itself and on merits, no submission has been made on behalf of the applicant.

45. While it is true that it is not open to the arbitrators to come to any conclusion hastly or arbitrarily without some materials on record and in the evens of there being any departure of the well settled principle of law as above, law Courts shall not hesitate to set aside the award of the Arbitrators but in the facts and circumstances of the matter in issue, in my view, question of acting contrary to the above principle does not and cannot arise. The arbitrator being an expert in the matter in dispute had had definite materials on record to come to the finding as appears from the award. Needless to Say, however, that if some materials before the arbitrator which would enable the arbitrators to come a conclusion on the question of fact involved there can not be any mishandling of the proceeding. this Court is not foisted with the jurisdiction to appraise the evidence on record or to sit on judgment as an Appellate Court over the award as to whether the same has been correctly awarded or not. It is now well settled that while dealing with an application u/s 30 of the Act of 1940 the High Court might come to a different conclusion but that by itself would not be sufficient to interfere or set at naught the award of the arbitrator. The issue before the Court will always be as to whether on the basis of the available materials on record the Arbitrators can some to a conclusion as evinced in the award.

46. Coming back to Section 30 once again to justify an order in this application. There will have to be a finding by this Court that there was an improper procurement of an award.

47. The only other aspect of the matter left outstanding on which certain criticisms have been levelled by the applicant is in regard to the date of the award. It was contended that the award is undated. It was further contended by reason of the

conduct of the Arbitrator, the petitioner on 20th February, 1986 applied before the Supreme Court inter alia, for revocation of the authority of the Arbitrator and by letter dated 21st February 1986 the Advocate for the petitioner intimated the Arbitrator that the petitioner had applied before the Supreme Court for revocation of the authority of the Arbitrator. The said letter, however, admittedly, reached the Arbitrator on 24th February, 1986. On 25th February, 1986 the Advocate for the petitioner received a letter dated 17th February 1986 from the Arbitrator enclosing the minutes of the meeting and on 3rd March, 1986 the Advocate on record for the petitioner by a cover of a letter dated 24th February 1986 of the Arbitrator received a copy of the. undated award. Subsequently on 19th March, 1986 the petitioner applied before the Supreme Court to set aside the award and by an order dated 20th March, 1986 the Supreme Court directed the petitioner herein to take back the petition from the Court Records and to represent the same to this Court by 10th April 1986. In pursuance wherefor this application was filed before this Court. In my view, by reason of. the facts as above and in the absence of any cogent evidence in that regard I am...unable to accept the contention of the petitioner that the award ought to be set aside by this Court only more so on the wake of the findings as above. In the premises this application fails and is dismissed. All interim orders are vacated. No order as to costs.

On the prayer for stay of operation of this order, stay is granted for three weeks.