Sukesh Chandra Mallik Vs Amiyalal Mallick and others

Court: Calcutta High Court

Date of Decision: March 6, 1970

Acts Referred: Arbitration Act, 1940 â€" Section 16, 16(1), 16(3), 17, 19
Civil Procedure Code, 1908 (CPC) â€" Order 9 Rule 13, 151

Citation: 74 CWN 636

Hon'ble Judges: C.N. Laik, J; A.K. Sinha, J

Bench: Division Bench

Advocate: Upendra Chandra Mallick and Dhirendra Kumar Das, for the Appellant;S.C. Pain for Respondent Nos. 1, 2 and 4 and P.N. Chunder, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Sinha, J.
This appeal is preferred by Sukesh Chandra Mallik, defendant No. 3, in a partition suit being title suit No. 58 of 1941 in

the first court of Subordinate Judge, Alipore against an order rejecting his petition for superseding arbitration and also a petition for setting aside

the Arbitrator''s Award. The suit culminating in the present appeal offers an unpleasant picture of what seems to be an unending feud between the

brothers over division of father''s properties, although attempt was made to shorten the life of this litigation through arbitration. The father Pramatha

Nath Mallik a Hindu governed by Dayabagh School of Hindu Law died on September 21, 1934 leaving behind him his six sons and substantial

landed properties some at Calcutta, one at Shillong and majority of these at Chinsurah in the District of Hooghly. He had also a business under the

name of Mullick & Co. as agent of Bharat Electric Bulb Work Ltd. and also heavy amount of Government Promissory Notes, furniture,

Jewelleries, one motor car and other valuables.

2. On or about November 11, 1941 Amiyalal Mullik then a minor son, represented by his sister''s husband and next friend Radha Raman Dutta,

filed the plaint for partition of their joint family properties against his other brothers, defendants Nos. 1-5 including the present appellant. In course

of proceedings in this suit under an agreed order of reference dated April 31, 1942 the entire dispute was referred to the arbitration of one

Raibahadur N.N. Chakraborty but as he left Calcutta his appointment was recalled. After this the present appellant filed written statement so also

did the defendants Nos. 1 and 4 jointly. Although defendants Nos. 2 and 5 entered appearance they did not file written statement. On April 16,

1943 again on the joint petition of all the parties the entire matter in dispute in the suit was referred to arbitration of one Nrisinghapada Dutta, then

a senior practising Pleader of Small Causes Court of Calcutta and a distant common relation of the parties. On May 30, 1943 the arbitrator

entered on the reference. After protracted proceedings, thereafter, before the arbitrator between June 1943 and May 1948 the arbitrator'' signed

and filed his Award on June 3, 1948 in court in which each of the parties were allotted in their respective one sixth share separately both

immovable and movable properties including G.P. Notes, furniture, jewelleries, ornaments and other articles belonging to the joint family. On the

same date the court directed the parties to file objections, if any, within June 28, 1948 against the Award. As there was no objection against the

Award by any of the parties the suit was finally decreed on June 28, 1948 in terms of the Award which formed part of the decree. On January 17,

1949 this final decree was signed and sealed.

3. Thereafter, the present appellant Sukesh Mallik turned up and made an application under order 9 rule 13 and section 151 of the CPC for setting

aside the ex parte decree on the ground amongst various other objections that notice of filing the Award was not served on him. This application

was allowed by an order made on March 25, 1950 and the ex parte decree was set aside. Then on September 11, 1950 Sukesh filed objections

to the Award with a prayer either to set aside or remit the Award for reconsideration. Upon these objections the court did not set aside the Award

but remitted certain matters under the Award to the arbitrator for reconsideration and rectification with direction to file a ""fresh Award"" within

November 9, 1953.

4. Again there was another course of proceedings before the arbitrator during which a number of sittings were held by him and the arbitrator

submitted his report on March 2, 1954 which was recorded by the court as ""fresh Award"". Sukesh again filed his objections on April 7, 1954 and

then on the objection of the other parties he filed another objection supported by an affidavit. Since no statutory notice was given after submission

of report upon other parties nothing upon this objection was decided. After the service of statutory notice on June 8, 1955, the defendant No. 2

and the present appellant filed two separate sets of petitions of objections for setting aside ""fresh Award"" of March 2, 1954. Then again, on

February 7, 1957 Sukesh put in another petition supported by an affidavit as prayed for superseding the arbitration for non-compliance amongst

other things with the direction of court. This petition of supersession was rejected on December 13, 1957 by the court below on the view that the

matters remitted by the court to the arbitrator were reconsidered by him and he gave his decision with justifiable reasons, on treating the report as

a ""fresh Award"". By the same order the court below also rejected the other petition of June 8, 1955 for setting aside the Award. That is how, in

short, the present appellant felt aggrieved and preferred the present appeal.

5. Before we enter into the merits, we must notice that a preliminary point as to maintainability of the present appeal arises. Under the Indian

Arbitration Act, 1940 (referred to herein as the Act) scope of appeal either against a decree on the basis of the Award or any order passed by the

court relating to arbitration proceedings or Award with or without intervention of the court is very limited. Section 17 of the Act provides for an

appeal against a decree upon the Award ""only on the ground that it is in excess of, is not otherwise in accordance with, the Award"". The only other

provision viz., section 39 of the Act provides for an appeal against not all but certain types of orders as follows: 39. (1) An appeal shall lie from the

following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court

passing the order:

An order-

(i) superseding an arbitration; (ii) on an award stated in the form of a special case; (iii) modifying or correcting an award; (iv) filing or refusing to file

an arbitration agreement; (v) staying or refusing to stay legal proceedings where there is an arbitration agreement; (vi) setting aside or refusing to set

aside an award: Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to

appeal in the Supreme Court.

6. We are not concerned with the provision of section 17, for, the present appeal is not against a decree upon the Award of the arbitrator. The

appeal is, clearly, against an order rejecting first, the petition for superseding the reference or arbitration. Now, looking at the clause (i) to (v)

enumerating appealable orders, it appears that although an order superseding an arbitration contained in clause (i) is appealable, there is no appeal

against an order refusing to supersede an arbitration. The appellant''s petition of February 7, 1957 was made obviously u/s 19 of the Act for

superseding the arbitration on the ground that the Award became void on the failure of the arbitrator to reconsider and submit his decision in

accordance with section 16(3) of the Act. The decision of the court below upon this petition was that the arbitrator carefully considered the

matters remitted to him in the Award and submitted his decision which was accepted as a "fresh Award" along with the original Award and thus it

refused to supersede the arbitration and rejected the petition. It is, therefore, clear that no appeal lies against such an order to this Court u/s 39 of

the Act.

7. Mr. Mullik on behalf of the appellant, however, contended that even if the present appeal was incompetent against the order rejecting the

appellant"s petition of supersession of arbitration, the appeal would still be maintainable as the court below by the same order refused to set aside

the Award on rejecting the appellant"s petition dated June 8, 1955. We fail to see how this is so. The arbitrator after the remission of several

matters under the Award reconsidered them and came to the same conclusion with the consequence that the original Award given by him remained

unaltered. Admittedly, the petitioner"s application previously made on September 11, 1950 for setting aside this Award was rejected by the court

below by its order dated July 9, 1953 but his alternative prayer for remission of certain matters under the Award was allowed on limited grounds

for reconsideration by the arbitrator u/s 16(1) of the Act. As the present appellant did not prefer any appeal that order became conclusive and

final. No question, therefore, arises for setting aside the same Award at any subsequent stage of the proceedings in the suit. It also does not appear

that any argument was advanced in support of this petition and the court below simply rejected the petition without assigning any reason obviously

because this petition was clearly misconceived and not maintainable. In any case, the appellant certainly cannot be allowed at this stage to reopen

the entire matter which was made final as long back as in July 1953 on preferring the present appeal on the pretext of attacking ""fresh Award"". In

fact, there was no fresh Award at all. The arbitrator submitted a report showing that he reconsidered several matters referred to him and

concluded that the Award given by him was correctly made. That being the position in the instant case, no question arises for either setting aside or

refusing to set aside the same Award so as to attract the provisions of clause (vi) of section 39 of the Act for the purpose of appeal. Such being the

position, it must be held that the present appeal is not maintainable. Even so, we will proceed to decide the appeal on merits.

8. The main grievance of the appellant as pressed by Mr. Mullick was that the arbitrator failed to rectify the defects and submit a fresh Award after

reconsideration of several matters referred to him in terms of the directions given in the order of the court below made on July 9, 1953 and.

therefore, the Award was void. To appreciate the correctness of this contention now raised, we need not restate the entire order as made by the

court below. It would be sufficient to notice the relevant portion which is as follows: ""The Award as it stands now, cannot be said to have led to a

substantial miscarriage of justice. The defendant No. 3 has himself made an alternative prayer in his objection for remitting the award. In view of

the long drawn proceedings. I think I should exercise my powers u/s 16(1) of the Arbitration Act to remit the award for its rectification. The

objection of defendant No. 3 succeeds in part accordingly. Therefore it is

Ordered

That the award be remitted to the learned Arbitrator for resubmission by him after reconsideration of the matters referred to him, so that nothing is

left undetermined, in the light of my observations recorded above and so that each of the parties gets l/6th equal share of the assets available for

distribution. The fresh award is to be submitted by 9th of November, 1953.

9. From this order it appears clear that the Award which has now become the target of attack for the second time was not set aside. Instead, the

court below exercised its power u/s 16(1) of the Act and remitted to the arbitrator for his reconsideration several matters covered by the Award

which briefly speaking related to (I) the difference or discrepancies in the valuation of the total assets in the plaint and the valuation made by the

arbitrator in the Award, (II) omission to calculate accumulated interest on total G.P. Notes, (III) failure of the arbitrator to take account of sum of

Rs. 3,000/- which Ramlal, defendant No. 5, agreed to pay for his first choice of accepting the allotment of northern portion of the Calcutta House

at 112/37, Lower Circular Road, (IV) omission to take into account the valuation of furnitures of the Shillong House, (V) a minor matter namely,

arbitrator did not file his documents and evidence recorded by him. The arbitrator took adjournments from time to time and held a number of

sittings in presence of some defendants, the appellant being present in some of them. In one of such sittings before the arbitrator it appears from the

minutes of the arbitration proceedings dated November 1, 1953 that matter regarding accumulated amount of interest was considered in general

accounts of mutual dues and liabilities between the parties mentioned in the Award, on G.P. Notes worth Rs. 10,000/-, receipt of which was

produced by the present appellant and this was so recorded without any objection from him. The appellant, thereafter, remained absent from

December 20, 1953 onwards during which several other sittings were held by the arbitrator. Then, finally the arbitrator submitted his report on

March 2, 1954 which, however, it appears, was recorded by the court below in these lines: ""Arbitrator has submitted his Award. Put upon 13th

March, 1954 for orders. Parties may file objections if any"".

10. This report shows that the arbitrator considered each of the matters referred to him and came after giving reasons to the following conclusion:

Now, in the circumstances stated above and on further scrutiny and careful consideration of the matter I find that nothing has been left

undetermined and that for reasons stated above each item of assets could not be partitioned in one sixth (1/6th) share and accordingly I beg to

submit that in consideration of the situation of the properties and assets and liabilities to the Estate the entire assets have been rightly distributed as

much as possible in accordance with shares and to make up the deficiency, proper compensation also was ordered for and allowed by me and

these were, according to me, rightly done.

11. Upon such conclusion the question is whether there was sufficient compliance with the directions given by the court below in its order dated

July 9, 1953 made in exercise of its powers u/s 16(1) of the Act. Now, section 16(1) of the Act provides: ""16. (1) The Court may from time to

time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit-

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration

and such matters cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it.

12. On a fair reading of the above provision it seems clear that the court has no power to remit the Award except in three cases mentioned in

clauses (a), (b) and (c) for reconsideration by the arbitrator. In face of these provisions it is very difficult to see how the court could have exercised

its power to remit the Award for rectification and for submitting a fresh Award again by the arbitrator which does not appear to have suffered from

any defect provided in these three clauses. In any case, we would proceed on the footing that the order of remission was substantially a valid order

and see if the arbitrator failed to comply with the order which was made u/s 16(1) of the Act.

13. Mr. Pain took us at great pains through the original Award given by the arbitrator. The Award appeared to us to be fairly long and exhaustive

containing separate and specific allotments of one sixth share to each of the parties both of immovable and movable properties including G.P.

Notes, furnitures, jewelleries, utensils and other valuables set out in schedule of the plaint or that could be found or supplied to the arbitrator by the

parties. The parties came to an agreed valuation of the immovable properties which though intended were not partitioned by lottery but allotted by

the arbitrator in lots. The distribution of jewelleries, furnitures were accepted by parties amicably including the present appellant. The allotment of

G. P. Notes to each of the parties including the appellant appears to have been accepted without any protest. Relying on this Award it was

contended that really the court below remitted only certain matters for reconsideration and the arbitrator fully considered them and submitted his

decision with reasons on a finding that Award was correctly made and thus complied with order of the court. Reliance was placed on a decision of

the Judicial Committee reported in 48 CWN 590, (1) S.M. Mills Ltd. v. Patel Brothers, where Lord Justice Du Parcq on construction of section

16 of the Act though in different set of circumstances observed inter alia (at page 593): ""With regard to the Appellant''s first submission, their

Lordships are of opinion that, although the order under appeal was in substance correct, it could not properly be founded on section 16 of the

Arbitration Act, 1940. It appears to their Lordships, with great respect to the learned Chief Justice, that this section has no relevance to the

peculiar circumstances to the present case. This section specifies three sorts of defects which may necessitate reconsideration of an Award, and

empowers the Court to remit the defective award in the cases specified (and in no others) to the arbitrator or umpire, and to fix the time within

which the arbitrator or umpire is to submit his decision to the Court.

14. Although this decision has no direct bearing to the case under consideration, from the above observation it also follows that all that is required

by the arbitrator is to reconsider and submit his decision within the time fixed on the Award or certain matters remitted to him when the court

considers that Award suffered from any or all of the three classes of defects. It is for the arbitrator to reconsider the Award on the matters referred

to him and finally come to his own decision. It is true that in the instant case the court below gave directions for rectification of the Award and for

submission of a fresh Award on reconsideration of matters referred to him but that will, as it must, mean only reconsideration and submission of the

decision by the arbitrator within the time fixed in accordance with sub-section (1) and (2) of section 16 of the Act.

15. So, where, as here, the arbitrator after remission of certain matters remitted to the arbitrator under sec. 16(1) of the Act has reconsidered and

submitted his decision within the time fixed it is not for the court to sit as an Appellate Authority over such decision and take a different view of the

matter. Whether or not the decision given by the arbitrator in the present case as a part of the Award already given should be set aside on any of

the grounds enumerated u/s 30 of the Act is quite a different matter. At the present moment we are concerned with the question whether in spite of

such consideration and decision submitted by the arbitrator the Award became void u/s 16(3) of the Act which provides: ""(3) An award remitted

under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

16. On a true and proper construction of the above provision it seems clear that the Award remitted u/s (1) shall become void only if the arbitrator

or umpire fails to consider it and submit his decision within the time fixed. From the discussion already made it follows that in the instant case the

arbitrator did consider several matters remitted to him in the Award and submitted his decision within the time fixed by the court. It may be that the

court also directed the arbitrator to rectify certain matters and submit a fresh Award but if the arbitrator actually found no defects or mistakes for

rectification, non-compliance in such events with these directions does not constitute failure of the arbitrator to consider and submit his decision

within the meaning of sub-sections (1) and (3) of section 16 of the Act. Mr. Mullick''s extreme argument that this decision u/s 16(3) of the Act

could be no other decision than rectification of defects and submission of fresh Award according to court''s direction cannot be accepted. Mr.

Mullick also could not convince us with any plausible argument that the report of the arbitrator could not be accepted as his decision. From the

report it is clear that arbitrator reconsidered the matters referred to him and on the decision reached by him he found no necessity of rectification

and submit any fresh Award accordingly. In our opinion, therefore, there was sufficient compliance with the direction given by the court u/s 16(1)

of the Act as there was no failure of the arbitrator to consider the matters referred to him and submit his decision.

17. This apart, the court below itself scrutinised and examined each matter remitted to arbitrator on merits and found that decision submitted by the

arbitrator was right and proper. Mr. Mullick contended that on the question of accumulated interest on G.P. Notes there was clear inconsistency

between the report and deposition given in court by the arbitrator on May 30 and June 6th 1953. We cannot allow the appellant to raise this

question at this stage but even if we do allow, we think, there is no substance in such contention. Whether or not accumulated interest was taken

into consideration in general accounts is a question of fact. The appellant did not adduce any evidence at the hearing of his objections in proof of

his allegations. On the contrary, in course of proceeding before the arbitrator in his presence without objection it was recorded by the arbitrator in

his sitting held on 1st November, 1953 that accumulated interest on G.P. Notes worth Rs. 10,000/- the receipt of which was produced by him

was taken into consideration in general accounts. After this in subsequent proceeding the appellant absented himself without any notice to the

arbitrator or giving any explanation whatsoever even upto this stage. It, therefore, only stands to reason to conclude that this question was fully

considered and decided by the arbitrator. On the other matters Mr. Mullick had little or no grievance. We do not think it necessary to deal with

them categorically. It would be sufficient to state that we do not find any reason to deviate from such finding of the court below. Clearly, therefore,

the provision of section 19(1) of the Act for "superseding the reference" on the ground that the Award has become void under sub-section (3) of

section 16 is not attracted.

18. This very point may be considered from another angle. u/s 16(1) of the Act there are two kinds of remission, viz., (I) remission of the Award

and (II) remission of any matter referred to the arbitration. In the instant case if we proceed on the footing that only certain matters and not the

Award were remitted by the court below for reconsideration- the question arises whether the Award will be void u/s 16(3) of the Act in such

cases even if the arbitrator fails to reconsider these matters and submit his decision within the time fixed. It appears that, although, the court has

power to remit any matter referred to the arbitration u/s 16(1) of the Act the consequence that follows on the arbitrator"s failure to comply with the

court"s direction to reconsider and submit his decision on such matters is not the same. u/s 16(3) it is only when the Award is remitted and the

arbitrator fails to reconsider and submit his decision, the Award shall become void. But not so, in cases where only certain matters are referred to

for this purpose by the court, as, clearly, the words ""any matter"" referred to the arbitration are significantly absent in the provision of sub-section

(3) of section 16 of the Act and that only shows, in such cases section 16(3) may not have any application at all. In other words, it may be said

that if there is any failure of the arbitrator to reconsider and submit his decision on certain matters referred to him the Award does not become

void; In this connection we may usefully refer to a passage in Sarkar"s Tagore Law Lectures, 1942 on "The Law of Arbitration in British India" in

which it is stated (at page 207, printed Edition 1942) as follows: ""....Under sub-section (3) of section 16 an award remitted, becomes void on

failure of the or umpire to reconsider it and submit his decision within the time fixed, but there is no provision to cover the case where instead of the

award, "any matter referred to arbitration" is remitted. In re Aitken"s Arbitration, (1857) 3 Jur. (N.S.) 1296, only one question out of several left

undecided was remitted. Apparently in a case like this, section 16(3) has no application.

Even so, we do not think it necessary to decide finally this aspect of the matter in the facts and circumstances of the present case. For the reasons,

however, already given the question of superseding the arbitration u/s 19 of the Act on the ground of "the Award" being void, does not arise at all.

19. Nevertheless, Mr. Mullick argued this appeal with great persistency. He then passed on to his next point and contended that even if the Award

was not void, it should have been set aside upon the other petition on the ground of misconduct of the arbitrator. Precisely, his argument was that

the decision submitted by the arbitrator was a part of the original Award and in giving such Award he misconducted ""himself or the proceeding"". In

support of this argument he drew our attention again to the inconsistency of evidence given by the arbitrator on 30.5.53/6.6.53 and the report he

submitted on the question of accumulated interest on G.P. Notes. He also pointed out that in proceedings before the arbitrator on 20.12.53 the

defendant No. 5 Ramlal Mullick pressed for re-opening of accounts but then the arbitrator directed that there would be no further sitting although

he directed him to come on 25.12.53 at 3 P.M. We are not prepared to enter into these questions at this stage for it appears that the appellant was

himself absent in the proceedings held on and from 20.12.53. Then again, he never adduced any evidence in proof of any alleged misconduct of

the arbitrator nor even, excepting bare and vague allegation, he pressed this point in the court below at the hearing of his objections. Whether or

not the arbitrator misconducted himself or the proceeding can only be proved by cogent and clear evidence. The appellant cannot be allowed to

speculate on this issue for the first time before us in the appeal. In any case, even if we allow the appellant to do so, we would only say that we are

not at all impressed with the argument of Mr. Mullick. In our opinion, there is nothing on record to show that the arbitrator misconducted himself or

the proceeding in considering and giving his decision on the matters under the original. Award remitted to him. We are constrained to repeat that it

is admitted at least partially by the appellant himself in the proceeding before the arbitrator that the accumulated interest on G.P. Notes were taken

into consideration in the general accounts. Even so Mr. Mullick contended that such statement of the arbitrator in his report was not supported by

any account papers. According to him the casual story of destruction of account papers by white ants was a myth, and that alone would clearly

establish his misconduct. This again is a matter of evidence. The appellant never adduced any evidence to show that the facts were otherwise. If

these papers were not produced along with the Award, it was for the appellant to seek suitable direction from the court at the proper time. We are

told that the arbitrator is long dead. Now, there is no other way than to accept the statement of the arbitrator in his report as final and conclusive.

We, therefore, find no substance in any of these contentions.

20. There is yet another aspect of the matter. After the remission of the Award on certain matters, there was further continuous proceeding before

the arbitrator. In some of these proceedings as already noticed, the appellant was present but he remained absent without any notice or explanation

during rest of the proceedings held by him. In fact, even in earlier proceedings before the arbitrator the appellant remained absent for a long period

between August 1945 and May 1948 as appears from the annexures of his own petition filed on June 13, 1953 in the court below on the plea of

taking up a Government service. The arbitrator had to seek for direction of the court upon him to produce documents and account books, savings

bank accounts, accounts of collection of rents but the appellant could not show anything to satisfy us that he had complied with such direction. The

appellant did not even appear in court and submit any explanation. Ultimately the court had to direct the arbitrator to proceed ex parte against the

appellant on service of registered notice to him. It is not disputed that the petitioner was mostly serving at places not far away from Calcutta. In any

case, we fail to appreciate how the petitioner could have been prevented from complying with court''s direction or taking any suitable steps in court

or in the proceedings before the arbitrator on the mere plea of being employed outside Calcutta. No explanation has been given even in any of his

petition of objection by the appellant filed for either setting aside the Award or superseding the arbitration. The whole conduct of the appellant as

revealed throughout the arbitration proceedings or in the proceedings in court below thus appears to us to be extremely unsatisfactory. It seems

clear that the appellant by his own conduct acts or omissions waived his rights to put forward any or further objections to the Award or decision

given by the arbitrator. It is well settled that ""the court will not permit a party to lie by or act in an indecisive manner so as to obtain benefit of the

Award if it is in his favour and endeavour to set it aside if it is not."" (See Russell on Arbitration 17th Edition page 176.) Such being the position, the

appellant surely cannot now be permitted to turn round and attack the validity of the Award or decision which were no doubt given by the

arbitrator after affording sufficient opportunities to all the parties including the appellant in enormously long and protracted proceedings before him.

Clearly, therefore, in these circumstances, there is absolutely no case for our interference. In our opinion, the order passed by the court below is

correct. In the result, the appeal fails. We dismiss the appeal with costs and affirm the order passed by the court below.

Hearing fee assessed at 20 gold mohurs.

There will be one set of costs in this appeal.

C.N. Laik, J.

I agree.