

(1970) 03 CAL CK 0023

Calcutta High Court

Case No: Appeal from Original Order No. 215 of 1958

Sukesh Chandra Mallik

APPELLANT

Vs

Amiyalal Mallick and others

RESPONDENT

Date of Decision: March 6, 1970

Acts Referred:

- Arbitration Act, 1940 - Section 16, 16(1), 16(3), 17, 19
- Civil Procedure Code, 1908 (CPC) - 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 Dharendra 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 Suresh 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 Suresh 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". Suresh 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 Suresh 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 1/6th 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.