

ORISSA HIGH COURT

Ganesh Chandra Misra

Vs

Artatrana Misra

Civil Revn. No. 288 of 1963

(G.K. Misra, J.)

06.05.1964

ORDER

G.K. Misra, J.

1. The facts leading to the Civil Revision may be stated in extenso. On 7-6-1953 Ganesh Chandra Misra (the petitioner) and Artatran Misra (opposite party 1) executed an arbitration agreement in favour of Narasingh Mohapatra (opposite party 2), Lingaraj Misra (Opposite Party 3) and Lokanath Misra (Opposite Party 4) appointing them as arbitrators to decide their dispute and agreed that their decision would be binding on them. The arbitrators entered on the reference on 10-7-53. Both the parties applied for time before the arbitrators on 10-7-1958, 13-9-58, 3-12-58 and 16-1-1959. On 14-4-1959 Artatran Misra alone filed an application for time and again on 3-5-1959 both the parties applied for time. 8 witnesses were examined by the petitioners and 2 witnesses by Artatrana from 26-5-1959 to 28-5-1959. The award was passed on 26-6-1959 and was signed by all the arbitrators. On the award itself both the petitioner and Opposite Party 1 noted "seen" on the very day. The award was filed by Lokanath Misra (Opposite Party 4) in the Court of the Munsif, Parlakhimedi, on 25-7-1959, and the application was registered as M.J.C. No. 19 of 1959. In due course notice was issued on Artatrana who appeared through his lawyer on 23-10-1960. He, however, took adjournments for filing objections on 16-1-1961, 25-1-1961 and 8-2-1961. Ultimately he filed an application on 11-5-1961 under Section 33 of the Indian Arbitration Act 10 of 1940 (hereinafter referred to as the Act) challenging the validity of the award. Subsequently the following objections were raised by Artatrana-

- (i) The award is not maintainable inasmuch as it was filed only by one of the arbitrators who is an interested party.
- (ii) The entire arbitration proceeding is vitiated by misconduct on the part of the arbitrators as the witness-as were examined behind his back.
- (iii) The award was not passed within four month from the date of the arbitrators entered on the reference. The petitioner filed a counter asserting that the objections were baseless and further taking the plea that the application, filed by Artatrana, was barred by limitation under Article 158 of the Limitation Act. He also pleaded waiver of jurisdiction

of the arbitrators and estoppel as Artatrana participated in the arbitration proceeding throughout even after the expiry of 4 months.

2. The learned Munsif came to the following conclusion :-

- (i) The filing of the award in court by one of the arbitrators to pass a decree is not bad In law;
- (ii) The arbitrators misconducted themselves as all of them did not take part in the entire arbitration proceeding :
- (iii) The award was not passed within four months after the arbitrators entered on the reference, and the arbitrators had no jurisdiction to proceed with the arbitration proceeding after the expiry of the time limit fixed In Condition No. 3 in the First Schedule to the Act;
- (iv) The application filed by Artatrana was barred by time under Article 158 of the Limitation Act. The learned Munsif dismissed the miscellaneous case holding that as the award itself was not passed within the stipulated period, the same was not maintainable and the validity of the objections raised by Artatrana did not arise for consideration. He accordingly refused to make the award a rule of the Court.

3. In the- appeal, the learned Subordinate Judge did! not express any opinion as to whether the application filed by Artatrana under : Section 33 of the Act was barred by limitation. In view of his concurrence with the first three findings of the trial court, ha dismissed the appeal. Against the appellate order this Civil Revision has been filed.

4. Mr. Panda raised three conditions –

- (i) Even though the arbitrators made their award beyond 4 months of their entering on the reference, the award is valid as Artatrana waived objection to the jurisdiction of the arbitrators by taking part in the proceeding and his objection is barred by estoppel;
- (ii) If the case of waiver and estoppel is accepted, the application of Artatrana under Section 33 of the Act challenging the validity of the award is barred by time under Article 158 of the Limitation Act; 2nd
- (iii) The concurrent finding of fact that the arbitrators-misconducted as all of them did not take part in the proceeding at many stages, is not based on evidence or record. Such, art objection on a pure question of fad is not admissible and should not have been permitted to be raised.

All these contentions require careful examination.

5. From the facts narrated it is well established, and the position is also not disputed by Mr. Murty that Artatrana took part in the entire arbitration proceeding and submitted himself to the jurisdiction of the arbitrators after the expiry of 4 months from 10-7-58 when the arbitrators entered on the reference. From 10-7-1958 he himself applied for time on ail dates and took part

in examining, his own witnesses and cross-examining the witnesses for the petitioner from 25-5-59 to 28-5-1959. Prior to the passing of Act 10 of 1940, arbitration proceedings were governed by the Second Schedule of the Civil Procedure Code. Under the old law, the position of law was well settled that if a party took part in the proceeding and submitted himself to the jurisdiction of the arbitrators. In allowing the arbitration to proceed, he was estopped from challenging that the award was passed beyond time, and that the principle of waiver also applies to him. The matter was expressed in inimitable language by their Lordships of the Judicial Committee in *Choudhuri Murtaza Hossain v. Ml. Bechunissa*¹, their Lordships observed-

"On the whole, therefore, their Lordships think that the appellant having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself; and that it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award."

In *Patto Kumari v. Upendra Nath*², their Lordships, after thorough discussion laid down the proposition that where parties attend and recognise that the arbitrator has jurisdiction to continue the arbitration, even though the time for making the award has expired, they are estopped by their conduct from seeking to impugn the award on the ground that it was invalid by reason of being filed out of time. It is unnecessary to multiply decisions, That this was the position under the old law is unassailable. Mr. Murty, however, contends on the authority of *Kampta Prasad Nigam v. Ram Dayal*³, and *Lakhmir Singh v. Union of India*⁴ that the aforesaid view is no longer good law under Arbitration Act 10 of 1940. AIR 1957 Patna 633 merely follows AIR 1951 Allahabad 711 and gives no independent reasons. In AIR 1951 Allahabad 711 their Lordships held that there was no provision in the Second schedule of the Civil Procedure Code before 1940 analogous to Condition No. 3 in the First schedule of the Act under which the period of four months fixed is a statutory provision and no plea of estoppel against a statute is tenable in law. With respect, I am not inclined to accept this dictum as laying down, the correct law. It is necessary to examine the relevant sections in the Act. Section 3 enacts, that an arbitration agreement; unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference. Condition No. 3 in the First Schedule is to the effect that the arbitrators shall make their award within four months after entering on the reference or after having called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow. Section 28(1) vests power in the Court to enlarge time for making the award. The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award. The second and third clauses in Condition No. 3 have no relevance in the present case. The first clause that the arbitrators shall make their award within four months after entering on the reference has already been infringed. The Question for determination is whether, by consent, the parties can waive this prescribed period of four months by taking part in the arbitration proceeding and submitting themselves to the Jurisdiction of the arbitrators. There is no express provision in the Act that there can be such waiver or estoppel. The only provision which sheds some light on the problem is enacted in Section 28, Sub-Section (2) which lays down that any

provision in an arbitration agreement whereby the arbitrators or umpires may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be, void and of no effect.

Reading Section 3, Condition No. 3 in the First Schedule and Section 28 together, the position of law appears to be clear that the parties are free to enlarge the time for making the award with their mutual consent. With the consent of all the parties, a term can be incorporated in the arbitration agreement giving powers to the arbitrators to enlarge the time for making the award. By condition No. 3 in the First Schedule, statutory an implied term is embodied in the agreement that the award shall be made within four months after entering on the reference. By this statutory provision, the term is to be taken as an integral part of the agreement and is subject to alteration with the consent of the parties like only other terms of a contract. If that were not the intention of the Legislature Section 28 (2) would not authorise a provision in the arbitration agreement empowering the arbitrators to enlarge the time for making the award with the consent of the parties. If the parties, after the expiry of the four months, submit themselves to the jurisdiction of the arbitrators and take part in the proceeding enabling them to pass an award, it cannot be said that the arbitrators acted without jurisdiction. In such a contingency, the principle of waiver and estoppel would have full application. Despite absence of analogous provision in the Second Schedule of Civil Procedure Code before. 1940v the position of law has not been affected by the Act This is not a case of estoppel against a statute. It is against an implied term of the agreement introduced by the statute I am inclined to accept the view adopted in *Sambhunath v. Sm. Surja Devi*⁵, and *Sheoramprasad v. Gopal Prasad*⁶, which expressly dissented from AIR 1951 Allahabad 711. On the aforesaid analysis and on the admitted facts, there can be no escape from the conclusion that Artatrana waived his objection on the. question of jurisdiction of the arbitrators after the expiry of four months and is estopped from challenging the validity of the award as being, out of time. Mr. Panda's first contention must prevail.

6. The second contention may now be examined Article 158 of the Limitation Act runs thus-

Under the Arbitration Act, 1940 (10 of 1940) to set aside an award or to get an award remitted for reconsideration.	Thirty days
---	-------------

Indisputably notice of filing of the award was served on Artatrana before 23-12-1960 when he appeared through his lawyer. The application under Section 33 of the Act challenging the validity of the award was filed on 11-6-61 , long after the expiry of 30 days from the date of service of the notice. The application is therefore clearly barred; by time, Limitation cannot even be saved under Section 5 of the Limitation Act which is not applicable to an application filed to set aside an award under Section 33 of the Act - *Chandanmull and Co. v. Mohambal*⁷, In fact no application under Section 5 of the Limitation Act was filed. As Artatrana's application raising his objections was barred by limitation, it was not open to the Court to examine the objections. The award was filed within time, and unless a case is made out that the arbitrators misconducted themselves under Section 30 (a), or that the award is improperly procured or is otherwise invalid under Section 30 (c) of the Act, the award is to be made a rule of the Court, a judgment is to be passed in terms of. the award under Section 17 of the Act and upon a judgment so pronounced a decree shall follow. Though the learned trial Court found that the application of Artatrana was barred by limitation, the learned lower appellate Court expressed' no opinion in the matter. I am satisfied that the application under Section 33 of the Act is barred by

time. On the *authority of Ismail v. Hansraj, (s)*⁸ Mr. Murty contends that even if the application filed by Artatrana under Section 33 is barred by limitation, the Court has inherent jurisdiction to examine the vapidness of the award. The contention is too broadly stated. Under Section 16 (c) of the Act, the Court may remit the award for reconsideration where an objection to the legality of the award is apparent on the face of it. In cases of this nature alone, the Court has the jurisdiction to examine the award even if no objection is raised or the objection is barred by limitation. The very authority relied upon by Mr. Murty does not go beyond this limit. In this case there is no illegality apparent on the face of the award and no such question was raised in the Courts below. This Court has, therefore, no inherent jurisdiction to examine the legality of the award on the ground raised in the application under Section 33 which is barred by limitation. Mr. Murty's contention has no force and must be rejected.

7. In view of my conclusions that the arbitrators had Jurisdiction to pass the award on account of the waiver of jurisdiction by Artatrana and the estoppel application to him and that the application filed by Artatrana challenging the validity of the award was barred by time, the third question raised by Mr. Panda does not arise for consideration. Even on merits, I am, however, satisfied that both the Courts below exercised their jurisdiction with material irregularity in allowing Artatrana to raise such a contention, in his application challenging the validity of the award, Artatrana never pleaded that the arbitrators misconducted themselves as some of the arbitrators did not take part at some stages of the proceeding. So far as this Court is concerned, there is no dispute the legal position that there would be misconduct all the arbitrators act together in every stage of the arbitration proceeding, *Dharmu Saboto v. Krushna Saboto*⁹, But whether some of the arbitrators did not take part in any stage of the proceeding must be pleaded and proved to This case, there are neither pleadings nor evidence to prove that some of the arbitrators did not take part at some or any stage of the proceeding. Both the courts below recorded their conclusion merely from the fact that the depositions of some witnesses were not signed by all the arbitrators. It is elementary that the arbitrators do not constitute a Court and have not the trappings of a court. The mere fact that some depositions were not signed by all the arbitrators does not lead to the necessary conclusion that the non-signing arbitrators did not take part in the proceeding. That is a question of fact which must be pleaded and proved like any other essential fact. The finding of the Courts below is based merely on surmise and not on evidence and must be vacated. Mr. Panda's contention on this count must also prevail.

8. The next point for consideration is the jurisdiction of this Court to interfere in Civ. Revision under Section 115, Civil Procedure Code Under Section 39 (1) (vi) of the Act, an appeal shall lie from an order setting aside an award, and Sub-Section (2) no second appeal lies. Under Section 115 (b), C.P.C., the High Court can interfere with the order of the Subordinate Court if it fails to exercise its jurists vested. Under Section 17 of the Act, where the sees no cause to remit the award or to set aside award, it shall pronounce judgment according to the and upon the judgment so pronounced a decree follow. As I have already held, both the Courts completely misconceived the law as to the application of doctrine of waiver and estoppel under the Act. Having so misunderstood the law, they came to a conclusion that the award was passed beyond time and that the arbitrators had no jurisdiction to pass the award, and that failed to. exercise jurisdiction vested in them under Section 17 of the Act to pronounce a judgment according to the award. It is the duty of the Court, therefore, to set aside the judgments of the

courts below. The learned power appellate Court exercised its jurisdiction illegally and with material irregularity in not holding that the application to Artatrana raising objections was barred by time, that misconception of law with regard to the question of limitation it exercised its jurisdiction of entertaining the objection not vested in it by law. This court can, therefore, set aside such an order under Section 115 (a) C.P.C.

9. In the result, the Civil Revision is allowed and the judgment of the Courts below are set aside. The petitioner is entitled to a judgment according to the award and a decree shall follow the judgment. The petitioner is entitled to costs throughout. Hearing fee of Rs. 100/- (rupees one hundred).

Revision allowed.

Cases Referred.

¹3 Ind App 209 (PC). At p. 220

² AIR 1919 Pat 93

³ AIR 1951 All 711

⁴ AIR 1957 Pat 633

⁵ AIR 1961 All 180

⁶ AIR 1959 Madh-Pra 102

⁷ AIR 1953 Mad 561

⁸ AIR 1955 Raj 153

⁹ ILR (1956) Cut 222 : (AIR 1956 Ori 24)