

PATNA HIGH COURT

Jagdish Mahton

Vs

Sundar Mahton

(Reuben, J.)

02.01.1948

JUDGMENT

Reuben, J.

1. This appeal arises out of an application under Section 14, Sub-section (2), Arbitration Act, 1940 (Act x [10] of 1940).

2. The parties are descendants of one Chandra Mahto, the applicants appellants being his second son Jagdish and Jagdish's sons, and the opposite party respondents being Chandra's eldest son Sundar and Sundar's descendants. Chandra had another son Hari, who is dead leaving no widow or issue.

3. According to the applicants Hari died joint with his brothers and after his death a partition by arbitration was effected between the two remaining branches of Chandra's family. They plead that the reference to arbitration was made on 18th February 1941, 20 arbitrators being nominated and agreeing to act as such, that an award in accordance with the terms of the reference was made by the arbitrators and that the parties accepted the award, but subsequently Sundar began opposing the giving of effect to the award. They therefore requested the Court to direct the arbitrators to file the award. The application was filed on 15th November 1943.

4. Separate written statements have been filed by Sundar and his sons but the defence of both is substantially the same. According to them there was separation in the family about 25 years ago, Hari and Sundar remaining joint and getting a two-third share of the family property and the applicant Jagdish remaining joint with his father and getting only a one-third share. They say that since then they are separate from Jagdish's branch, and both they and the applicants have acquired property separately, that the applicants are setting up a false claim; and that an influential landlord of the village, one Kanoji Lal, on the pretence that he would get the dispute decided by arbitration took the thumb impression of Sundar on a blank piece of paper, but on being told by Sundar later on that he was unwilling to refer the matter to arbitration said that he would destroy the paper. The suggestion is that the arbitration deed was forged on this blank paper. The opposite party deny knowledge of the arbitration and the alleged award. They plead that the award is a forgery and does not even bear the signatures of the alleged arbitrators. They deny that there was in fact any arbitration.

5. Although the pleadings involved serious allegations of fraud, the learned Subordinate Judge decided to proceed upon affidavits as provided in Section 38, Arbitration Act. Five affidavits were filed on behalf of the applicants, including affidavits by three persons who appear as arbitrators in the arbitration deed and the award. On the other side 12 persons who appear in these documents as arbitrators filed affidavits denying to have taken part in any such arbitration. Accepting the evidence of the latter, the Subordinate Judge had dismissed the application. Hence, the present appeal.

6. On the face of it, it appears to me that this appeal ought to be allowed and the case remanded for rehearing, the reason being that the issues raised were not such as could properly be decided on affidavit. This is clear from a perusal of the order under appeal. The Subordinate Judge seems to have been impressed with the fact that as many as 12 so-called arbitrators denied the story of the arbitration. He remarked:

If any farther evidence is ordered to be taken, these 12 arbitrators cannot be expected to go against their affidavits. Moreover at the time of hearing, no suggestion whatsoever was made by anybody on behalf of the plaintiffs that these affidavits were not reliable or that these 12 panches had any reason to swear false evidence, as it was done in connection with the 3 affidavits of the three panches filed on behalf of the plaintiffs, it having been urged by the learned pleader for the defendants that these three panches were accused in a dacoity case recently started at the complaint of the defendants, in which charge sheet had been submitted against them by the police. This allegation made in open Court by the learned pleader for the defendants was not at all challenged by the plaintiffs or anybody on their behalf.

He overlooked a very important consideration viz., that, apart from anything that might be urged against them by the plaintiffs, the persons swearing the affidavits did not deny their signatures, which appear at two different places in the award, and that they admit that they appeared before the Sub-Registrar and admitted the document as being their award. It seems to me that the weight of their sworn statements is affected by these facts, and the Court should have been cautious about accepting their affidavits without seeking some satisfactory explanation of their previous conduct in this matter. As for the argument that there was no suggestion on the side of the applicants against these witnesses, how could the lawyer for the applicants make any suggestion against them in the absence of any evidence on the record? Had he had an opportunity to cross-examine them and made no such suggestion, there would have been some justification for this argument. That the defence made such a suggestion against the three arbitrators on the other side, is no argument. That suggestion was apparently based on matters which could be proved by documentary evidence; so that the defence lawyer has some material to go upon. As to the value of this suggestion as affecting the credit of these witnesses, might it not be suggested that the accusation of these men in the dacoity case was merely because the defence felt that they were likely to support the case of the applicants? Does it not seem fair that the applicants should have been given an opportunity to bring their witnesses before the Court so as to enable the Judge by his own impression of those witnesses to

decide what weight to attach to their statements, and that they should also have been given an opportunity by cross-examination to test the weight of the witnesses on the other side and of the suggestions put forward against their own witnesses? As soon as the case opened before us, therefore, I felt that a remand for rehearing was called for. This feeling is strengthened by reading the affidavits themselves. Obviously, these documents are not in the language of the witnesses themselves. Particularly is this apparent in the case of the affidavits on behalf of the respondents which fell into two or three sets, each of them in identical terms for the several witnesses belonging to that set. The law is particular that witnesses shall not be told what they are to say, hence the prohibition against putting leading questions to party's own witnesses. Here, however, it may well be urged that the whole affidavit has been put in the mouth of the witnesses.

7. It has been urged that there ought not be a remand in this case because it was at the instance of the applicants that this procedure was followed. This is not correct. All that the applicants did was to draw the attention of the Court to Section 33, Arbitration Act, and to leave it to the Court, after taking the affidavits, to "decide whether it would dispose of the matter on the affidavits alone" (vide order dated 8th December 1944 at page 36 of the paper book, Part I).

8. Before passing an order of remand, however, it is necessary to deal with several important points of law raised before us: (1) That the appeal does not lie. (2) That the application itself did not lie. (3) That the application was time-barred, and (4) That the award is legally unenforceable for want of registration.

9. The provisions of the Arbitration Act regarding appeal are set out in Section 39 of the Act. An appeal lies from only such orders as are specified in this section, the relevant clauses of which are Clause (i) relating to an order superseding an arbitration, and Clause (vi) relating to an order setting aside or refusing to set aside an award. Mr. Sarju Prasad for the respondents argues that in the present case neither of these clauses applies. He contends firstly, that the application was purely one only under Section 14 (2), for a notice on the arbitrators to file an award, and secondly, that the order was one not setting aside an award, but holding that there was no award at all.

10. There is no force in the first contention. It is true that the prayer in the application is "that steps may be taken under Section 14(2), Arbitration Act, 1940, for having the award filed in Court." Section 14(2), however, does not stop there. It requires the arbitrators, when so directed by the Court, to file the award, and proceeds: "the Court shall thereupon give notice to the parties of the filing of the award." This necessarily leads to the further steps, culminating either in a judgment and decree in accordance with the award under Section 17, or the supersession of the award under Section 19. It cannot be seriously urged that this is not what the applicants intended. Hence, although only the filing of the award by the arbitrators is mentioned in the application, the order of the Subordinate Judge is one refusing the relief sought by the applicants and can form the basis of an appeal if it comes within the operation of section 39(1).

11. For his second contention Mr. Sarju Prasad attempts to draw a distinction between; Sections 30 and 33 of the Act. The former Section provides that an award shall not be set aside except on one or more of certain specified grounds, and the latter that a party desiring to challenge the

existence or validity of an arbitration award shall apply to the Court and the Court shall thereupon decide the question. He contends that it was under the latter section that the Subordinate Judge held that there was no award, and that Clause (vi) of Section 39(1) provides for an appeal only against an order under Section 30. The answer to this contention is that Section 30 is not the section which empowers the Court to entertain an application for setting aside an award; it merely specifies the only ground on which an order setting aside an award may be passed. Section 31 expressly deals with jurisdiction. Under it, an award may be filed in any Court having jurisdiction in the matter to which the reference relates (Sub-section (1)). Further, it provides that all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement shall be decided by that Court and by no other Court (Sub-section (2)). The other provisions of this section are irrelevant here. Then, Section 32 excludes the ordinary jurisdiction of the civil Courts. Under it no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award and no arbitration agreement or award shall be set aside, amended, modified or affected in any way otherwise than as provided in the Act. Finally, Section 33 provides that any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award shall apply to the Court and the Court shall decide the question. To my mind it is clear that it is under Sections 31 to 33 that the Court gets its exclusive jurisdiction to investigate matters relevant to the setting aside of an award, and Section 30 merely specifies the grounds on which it can set an award aside. It is not for every little irregularity that the award is liable to be set aside. It may be set aside first of all if an arbitrator or umpire has misconducted himself or the proceedings (Clause. (a), Section 30). The award may also be set aside if it is made after the issue of an order of the Court superseding the arbitration or after the arbitration proceedings have become invalid under Section 35 (Clause (b), Section 30). The circumstances contemplated by this clause are both circumstances under which the arbitrators have ceased to have the power to make a legal award. Their award, therefore, is not really an award. Nevertheless, the provision is for setting their award aside. The third ground for setting aside an award is that the award "has been improperly procured or is otherwise invalid" (Clause (c), Section 30). The provisions of this clause are very general, and I see no reason why they should not be held to cover a case like the present. The finding is that the award is signed by the persons who are named as arbitrators in the arbitration deed. Can it not be fairly said that the award was improperly procured, or at least that it is 'otherwise invalid'? The order of the Subordinate Judge, therefore, refusing to act on the award is an order setting aside the award and an appeal lies against it.

12. The principal reason urged against this interpretation is that on the finding of the Court below there was in fact no award. I have, how-ever, pointed out that in the cases coming under Clause (b) of Section 30 there is really no award and yet the section provides for the setting aside of the "award". Similarly, Section 33 speaks of a "party to an arbitration agreement" though that very person may be challenging the existence of an arbitration agreement.

13. There is another way of looking at this problem. Suppose that the decision of the Subordinate Judge had been the other way, and had held that there was a proper reference to arbitration and a proper award by the arbitrators. Would the opposite party have been able to appeal against the decision as being an order refusing to set aside an award (Clause (vi), Section 39, Sub-section (1))? I have very little doubt that the answer should be in the affirmative and, applying the rule of reciprocity, I think that, here, the unsuccessful applicants have a right of

appeal.

13a. I am forced to the same conclusion by a study of the general provisions for appeal, and the restriction of the ordinary powers of the civil Courts to which I have referred above. Among other orders against which an appeal is provided is an order modifying or correcting an award (Section 39 (1), Clause (iii)). This power of modification is exercised by the Court in certain limited circumstances and is strictly restricted (Section 15). Nevertheless, the Legislature has provided for an appeal against the exercise of this power. Is it likely that it would not provide an appeal against an order which has the effect of doing away with the award altogether? It might be possible to accept this if the party affected by it was able to seek his remedy by a recourse to the civil Courts in the ordinary course. All such remedy, however, is carefully barred by Sections 31 and 32.

14. On the above grounds I am unable to agree with Mr. Sarju Prasad that no appeal lies in this case.

15. The second and third points set out at p. 5 above (see para. [8]) are alternative to each other. Under Article 178 of Schedule 1, Limitation Act, as amended by the Arbitration Act, 1940, the period of limitation for an application under Section 14(2) is 90 days from 'the date of service of the notice of the award'. It is pointed out that the award is said to have been made in July 1941 and that, according to the applicants it was accepted and partly acted on by the parties. Hence, it is argued an application under Section 14(3) filed in November 1943 is hopelessly barred by time. The answer to this argument is that the notice referred to is the notice in writing required by Section 14(1) to be given by the arbitrators. In Article 178 as it formerly stood the starting point for the running of limitation was "the date of the award". When this has been altered by the Arbitration Act to "the date of service of the notice of the award", and we find that the provision for notice of the award is a new one (vide para. 10, Schedule. 2, Civil Procedure Code, 1908), it seems proper to connect the two and to take it that time runs from the date of service of the notice under Section 14(1). This interpretation is supported by the use of the word 'service', which in its ordinary connotation implies something more than a mere verbal communication of particular fact. It is generally used in connection with written documents, the contents of which are required to be communicated to some person.

16. Our attention has been drawn to the mention in the so-called award of the service of notice (p. 57 of the paper book). The notice referred to however is one given before the signing of the award, whereas the notice under Section 14(1) is required to be given after the award has been made and signed.

17. The alternative argument is that Section 14(2) only comes into play after service of the notice under Section 14(1) and so the application itself is not maintainable. This contention has no force. Except that Sub-section (2) follows Sub-section (1), there is no necessary connection between Sub-section (2) and the service of the notice required by sub Section (1). The whole scheme of the Act seems to be against the interpretation sought to be put upon Sub-section (2). To mention only a few provisions, Sub-section (2) of Section 8 provides that if there is delay in the appointment of an arbitrator the Court may appoint one. Section 9 provides that, on the failure of a party to appoint an arbitrator within 15 days after notice in writing, the arbitrator of

the other party may act as sole arbitrator in the case. An award remitted for reconsideration becomes void on the failure of the arbitrator to reconsider it and submit his decision within the time fixed (Section. 16, Sub-section. (3)). Only the Court may extend the time for making an award (Section 28) All these provisions show an anxiety to expedite arbitration proceedings. If the power of a party to apply to the Court to direct the filing of the award depends on the service of the notice under Section 14(1), the arbitrators would be able to hold up proceedings by delaying service of the notice. Hence, the interpretation which I have placed on Sub-section (2) is consistent with the policy of the Act. Therefore, as soon as a party knows an award has been made it is open to him to file an application to the Court to direct the award to be filed. Time will, however, not run against him till a written notice has been served upon him as required by Sub-section (1). This provision is necessary as a safeguard against fraud.

18. On the above grounds I would decide both the second and third points against the respondents.

19. Due registration of the award is challenged on two grounds, firstly that its execution has not been admitted before the Sub-Registrar by one of the arbitrators who was a party to the award, and secondly that the award was executed by some arbitrators after it was filed for registration and execution was admitted before the Sub-Registrar on several different occasions. On the other side, it has been contended by Mr. Jha for the appellants that registration of the award is not necessary under the law as enacted by the Arbitration Act of 1910; secondly, that the certificate of registration endorsed on the award is conclusive proof of due registration; and thirdly, that under the terms of the arbitration agreement the absence of admission of execution by one of the arbitrators does not affect the binding force of the award.

20. The first ground for challenging due registration proceeds on the assumption that the non-registering arbitrator was a party to the award. That he was a party to it is not quite clear from the application, which says that the arbitrators nominated by the parties "excepting Dwarika Mandal who fell seriously ill and Shah Kaman who went away from the village during the arbitration proceedings" made the award. Looking at the document itself we find that it consists of two parts. The first portion is dated 16th June 1941. It recites the substance of the award, that one item of orchard property has been allotted entirely to Sundar as Jethana, that in the remaining property each branch has been given 8 annas share, the property detailed in schedules Ka and Ga being the share of Sundar's branch, and that in schedules Kha and Gha being the share of Jagdish's branch. The second part of the document consists of the schedules, which are dated 19th July 1941. The two parts of the award are separately signed, the first part by all the arbitrators except Dwarika Mandal and the second by all the arbitrators except Dwarika Mandal and Shaikh Kaman. The schedules are very big, covering 16 pages of the paper book, and may well have taken time to write. The signature of the arbitrators below them are dated and the earliest date is 19th July 1941. So prima facie it is not certain that Shah Kaman was a party to the award and therefore required to admit execution of it before the Sub-Registrar. This is a matter for evidence. Our attention is drawn to the affidavits by the applicants on the subject of the making of the award but, like those filed for the other side, they are in identical terms and represent a statement which has been put into the mouths of the witnesses by the person who drafted affidavits. It is desirable that the real facts should be ascertained before deciding whether registration by Shah Kaman was necessary.

21. In this connection, reference may also be made to the provisions of the Registration Act permitting registration where execution is admitted by some of the executants of a document. These are contained in Sub-section (3) of Section 35 of the Act. Whether circumstances existed making it permissible to register a document in respect of only some of the executants is a matter for investigation (vide *In re Sheikh Abdul Aziz*¹ *Radha Kissen v. Choonee Loll*² *Kudrathi Begum v. Najibunnessa*³ *Kanhaiya Lal v. Sardar Singh*⁴). The matter necessary for this investigation has not been brought on the record in this case. Connected with this point is the provision relied on by Mr. Jha for his third contention viz., that the arbitration agreement provides that if all the arbitrators be not present or that if they be not unanimous in their award then in such circumstances both the parties will be bound by the award of the arbitrators who be present and by that of the majority of the arbitrators.

We are not in a position to deal with Mr. Jha's contention till the facts of the making of the award and of its registration have been investigated and ascertained.

22. The second ground relied on by Mr. Sarju Prasad on the point of registration also calls for an investigation of facts. The document was presented for registration on 19th July 1941 and execution was admitted before the Sub-Registrar on 19th, 21st and 28th July. The signatures of the executants are of various dates, from 19th July to 28th July, indicating that some of them signed after the document was presented for registration and after some of the executants had admitted execution before the Sub-Registrar. It does not follow from this that there is any irregularity, for under Section 24, Registration Act, where there are several executants the document may be presented for registration and re-registration within four months of each execution, thus making it possible that some executants may execute the document after the document has been presented for registration and execution has been admitted by other executants before the registering office. In the present case we know that this procedure has been permitted by the Sub-Registrar. The presumption, is that he proceeded in accordance with the law. If the opposite party challenge this, it is for them to prove that the facts necessary to legalise this procedure do not exist. This is also the correct attitude towards the registration certificate on which reliance is placed by Mr. Jha, It is prima facie evidence that the document has been legally registered. In support of his contention he cites *Mohammad Ewaz v. Birajlal*⁵. All that their Lordships of the Judicial Committee laid down there was that a certificate of registration is sufficient to render a document admissible in evidence without inquiry as to whether the certificate was properly granted. This was said in answer to a proposition laid down too broadly by the High Court that "unless a deed be registered in accordance with the substantial provisions of the law, it must be regarded as unregistered, though it may, in fact, have been improperly admitted to registration". Their Lordships did not intend to say that the certificate is conclusive proof of due registration, and an investigation into the validity of the registration was made in spite of such a certificate in *Jambu Prasad v. Md. Nawab Aftab Ali Khan*⁶ and *Bharat Indu v. Md. Hamid Ali Khan*⁷.

23. This brings me to Mr. Jha's final contention that under the Arbitration Act of 1940 an award need not be registered. Under Clause (vi) of Sub-section (2) of Section 17 Registration Act, 1908, awards were exempted from the operation of Clauses (b) and (c) of Sub-section (1). Hence, an award was not required to be registered. This was altered by the Transfer of Property Amendment (Supplementary) Act, 1929, and as the clause now stands the exemption no longer applies. It has therefore been repeatedly laid down that a private award without the intervention

of the Court falls within the mischief of Clauses (b) and (c) of Sub-section (1) and requires registration: *Bachchan Lal v. Narottam Datt*⁸, *Jitendra Nath De v. Nagendra Nath*, AIR 1934 Calcutta⁹ *Muhammad Azizullah Khan v. Md. Nurullah Khan*¹⁰ *Badri Chaudhuri v. Mt. Chamoia Chaudhuri*¹¹. The principle as stated in Jitendra Nath De's case AIR 1934 Calcutta 815 : 153 Ind. Cas. 776, is that, whereas an award made by arbitrators under orders of the Court has no force until a decree is passed on it, a private award, if it is valid, is operative even though neither party has sought to enforce it by a regular suit. Mr. Jha contends that under the procedure prescribed by Schedule 2, Civil Procedure Code, 1908, the award itself was made a rule of the Court, whereas under the present procedure it is merely the material on which the Court grants its own operative decree, that therefore registration was necessary under the old procedure but is not necessary now. On a comparison of the provisions of the schedule of the Code with the relevant provisions of the Arbitration Act it appears to me that there is no substantial difference,

24 In the old procedure, when a private award had been made, it was open to a person interested to apply to the Court "that the award be filed in Court". The Court was required thereupon to direct the other parties to show cause why the award should not be filed (para. 20 of the schedule). The Court, if it was satisfied that the matter had been referred to arbitration and that an award had been made thereon, was empowered to order the award to be filed and to pronounce judgment according to the award, whereupon a decree would follow; this was subject to the proviso that no ground such as is mentioned in paras. 14 or 15 of the Schedule was proved (vide para. 21 of the Schedule). Under the present procedure, proceedings commence with the filing of the award in Court, either at the request of a party or under the directions of the Court, whereupon the Court gives notice to the parties of the filing of the award (Section 14 (2)). The Court has certain power to modify or correct an award (Section 15), and to remit the award for reconsideration (Section 16). Where the Court sees no cause to remit the award or to set aside the award, the Court is required to "proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow." (Section 17). Also, where the award has become void or has been set aside the Court is empowered to supersede the reference (Section 19).

25. One obvious difference is that under the old procedure the order for filing the award came at the end, just before the Court pronounced judgment, whereas the filing of the award is now the commencement of the proceedings. This, however, is merely a difference in terminology. Under the present procedure, the filing of the award means the actual physical filing of it in Court, whereas formerly the term was used in a technical sense to indicate the approval of the award by the Court as duly made and fit to be recorded. This approval is shown now, as it was previously also, by the pronouncing of judgment in accordance with the award upon which a decree would necessarily follow. Nordo Sections 15, 16 and 19 of the Act introduce new matter affecting the necessity for the registration of the award. I have noticed above the saving as to grounds mentioned in paras. 14 and 15 of the schedule to the Code. Under this saving the award cannot be filed if there are any of the defects enumerated in para. 14, or if there is misconduct by an arbitrator or a party (para. 15). The power of the Court is rather more under the present law. In the case of the defects it is open to the Court now to remit the award for reconsideration (Section 16), but the award on which the final judgment is to be based is still the award of the arbitrators and, on the failure of the arbitrators to reconsider the award and to submit their decision within the time fixed, the award remitted becomes void. Similarly, the power of the Court under Section 15 to modify or correct the award is confined to cases where

(a) it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred, or

(b) the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision, or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

In other words, the intention is that the corrected or modified award, will represent the award of the arbitrators as it ought to have been, and will not be an independent decision of the Court. The object is to further the intention of the parties to settle the dispute by arbitration by enabling the Court to help in removing removable defects in the award. Finally, the provisions of Section 19 partly follow from the extended power given to the Court under Section 16 and partly correspond to the power of the Court under the old procedure to refuse to file the award if it was not satisfied that the matter had been referred to arbitration and that the award had been made thereon, matters which the Court would now investigate under Section 33, preliminary to an order setting aside the award.

26. On the above grounds I see no reason for holding that the previous decisions regarding the applicability to private awards of Clauses (b) and (c) of Section 17, Sub-section. (1), Registration Act, are no longer good law.

27 In the result, I would allow this appeal, set aside the order of the Court below, and remand the case to be reheard in the light of the above remarks. In the circumstances of the case there will be no order as to costs.

Mukharji J.

I agree.

Cases Referred.

111 Bom. 691

25 Cal. 445

325 Cal. 98

429 ALL. 284

54 I.A. 166

6A.I.R. 1914 P.C. 16

7A.I.R. 1921 P.C. 93

8AIR 1933 All59

9815 : 153 Ind. Cas. 776

10A.I.R. 1939 Nag. 233

11A.I.R.1987 Pat. 183