

indrajit Singh and ors. Vs. Mirza JaliluddIn Baig and ors.

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Court : Orissa

Decided On : Jun-18-1979

Reported in : AIR1979Ori196; 48(1979)CLT389

Judge : K.B. Panda, J.

Acts : [Arbitration Act, 1940](#) - Sections 13, 28 and 30

Appeal No. : Misc. Appeal Nos. 64 and 69 of 1979

Appellant : indrajit Singh and ors.

Respondent : Mirza JaliluddIn Baig and ors.

Advocate for Def. : B.K. Mohanty, ;Ch. P.K. Misra, ;R.N. Mohanty No. 2, ;S.C. Mohapatra, ;A.K. Sahu, ;R.C. Patnaik, ;G.A.R. Dora (in both Appeals) and ;S. Rath, Advs. (in M.A. No. 69 of 1979)

Advocate for Pet/Ap. : G. Rath, ;Devanad Misra and ;Deepak Misra, Advs. in M.A. No. 64 of 1979 and ;M.N. Das, ;M.M. Das and ;N.M. Misra, Advs. (in M.A. No. 69 of 1979)

Disposition : Appeals dismissed

Judgement :

K.B. Panda, J.

1. These are two Miscellaneous Appeals under Section 39 of the Indian [Arbitration Act, 1940](#) (hereinafter referred to as the Act) against the judgment and decree of the Subordinate Judge, Cuttack dismissing Title Suit No. 167 of 1975 by making the Award a Rule of the Court on 20-2-1979 in the circumstances stated hereunder.

2. Syed Maqusud Ali, appellant in Misc. Appeal No. 69/79 had filed as the sole plaintiff Title Suit No. 167 of 1975 in the Court of the Subordinate Judge, Cuttack for (i) dissolution of the partnership running in the name of 'Suraj Talkies'; (ii) for rendition of accounts of the said business by defendants 1 and 2; and (iii) for an injunction restraining defendants 1 and 2 from managing the partnership business. The suit based on a deed of partnership was filed on 17-9-1975. Defendants Nos. 1, 2, 4 and 3 filed petitions under S. 34 of the Act on 18-9-1975, 25-9-1975, 24-10-1975 and 9-1-1976 respectively for staying further proceedings in the suit on the ground that the partnership deed contained an arbitration clause to the following effect:

'That in the event of any dispute between the parties aforesaid touching upon the business of the partnership firm, the same shall be referred to arbitration under the Indian [Arbitration Act, 1940](#).' These petitions of defendants 1 to 4 under Section 34 of the Act were registered as Misc. Case No. 21 of 1976 and on contest was rejected by the then Subordinate Judge, on 28-1-1976. But on appeal by the aforesaid defendants, the High Court in Misc. Appeal No. 19 of 1976 reversed the order of the Subordinate Judge and directed disposal of the matter afresh in accordance with law. After remand, the learned Subordinate Judge heard the parties and by his order dated 21-12-1976 allowed the applications under Section 34 of the Act. The operative portion of the said order reads as follows :

'In the result, the petitions filed by defendants 1 to 4 for staying the suit under Section 34 of the Arbitration Act and of the defendant No. 3 for referring the dispute to an Arbitrator to be appointed by the Court are allowed on contest. The suit is therefore stayed under Section 34 of the Arbitration Act. Misc. Case No. 21 of 1976 is allowed on contest. Put up on 8-1-1977 for nomination of an Arbitrator. Parties may come up with a common name for appointment of an Arbitrator in

terms of Clause 22 of the Deed of Partnership'. (The underlinings are mine) The learned Subordinate Judge thereafter called upon the parties to submit names for appointment of an Arbitrator, but there was no concurrence. So he appointed Shri S.K. Mohanty, a retired District and Sessions Judge and a practising Advocate on 28-1-1977 and issued a letter to him dated 2-2-1977 to submit his Award on or before 15-3-1977. The learned Arbitrator entered into the reference on 4-2-1977 and issued notices to the parties for appearance. On the next date, that is, 12-2-1977, the plaintiff asked for time to move the High Court against the order and defendants 5 and 6 (appellants in Misc. Appeal No. 64/79) did not appear. On 14-2-1977, the plaintiff filed M. A. No. 36 of 1977 challenging the order of the Subordinate Judge dated 21-12-1976 wherein he had stayed the suit under Section 34 of the Act and had directed for the nomination of an Arbitrator. It may be mentioned here that the appointment of Sri Mohanty as the sole Arbitrator by the Court prior to the filing of the appeal on 28-1-1977 was not challenged in this appeal nor at any time subsequently. Later, the plaintiff did not press the appeal.

In the meanwhile, defendants 1 and 2 filed Misc. Appeal No. 60 of 1977 in the High Court against an order of appointment dated 20-1-1977 of Shri R.K. Patnaik, Advocate as receiver to manage the cinema business during the pendency of the suit. While this Court dismissed the appeal by its order dated 31-11-1977 subject to some modification, it directed that the Arbitrator should submit his Award within two months thence. Appellants in Misc. Appeal No. 64 1979 (defendants 5 and 6) now make a grievance that though the time prescribed by this Court thus expired on 21-1-1978, yet the learned Arbitrator proceeded with the hearing of the matter without any formal extension order from this Court. Neither the parties had agreed before the Arbitrator for extension of time for giving the Award. It is urged on behalf of these two appellants that they did not appear before the

Arbitrator as the proceedings were without jurisdiction and had been rendered illegal in absence of an extension order from this Court. However, they admit that the learned Arbitrator had written some letters to the Subordinate Judge for extension of time who extended the same -- vide his order dated 5-3-1978, 4-5-1978 and 25-7-1978. Thus, all these orders, according to these appellants, were passed 'without any notice to or the knowledge of the parties' (See para 7 of

Appeal memo). Ultimately, the learned Arbitrator submitted his Award on 27-9-1978. The plaintiff (appellant in Misc. Appeal No. 69/79) and defendants 5 and 6 (appellants 1 and 2 in Misc. Appeal No. 64/79) filed objections to the Award before the Subordinate Judge. However, no misc. case was registered on the objection and the learned Subordinate Judge proceeded to deliver the judgment in Title Suit No. 167 of 1975 making the Award submitted by the learned Arbitrator a Rule of the Court and dismissing the suit on contest against defendants 1 to 4 with costs and against the remaining defendants without costs.

3. Being aggrieved by that judgment and decree, defendants 5 and 6 have preferred Misc. Appeal No. 64 of 1979 under Section 39 of the Act and the plaintiff has preferred Misc. Appeal No. 69 of 1979 under the same provisions of the Act. Both the appeals were heard analogously and this common judgment will dispose of them both.

4. The grounds of attack in both the appeals are that --

(i) It is an invalid award as the reference by the learned Subordinate Judge to the Arbitrator was without jurisdiction in the absence of any petition therefor under Sections 8 and 20 of the Act. The Court was merely disposing of the petitions under Section 34 of the Act which contemplates nothing more than staying of the legal proceedings. The reference therefore itself being void, it was urged, any amount of participation by the appellants in the proceedings before the Arbitrator will not cure the basic defect.

(ii) The Award having been made beyond the time granted by the Hon'ble High Court and Hon'ble High Court not having granted extension of time to the parties, under Section 28 (2) of the Act, the Award as passed is bad in law. This tantamounts to a legal misconduct on the part of the Arbitrator.

(iii) Dispute regarding dissolution of the partnership is not referable to arbitration; and the finding that it cannot be dissolved as per se illegal. The merits of the above contention be now considered.

5. Ground No. (i): -- Expatiating the point, it was submitted that the reference of the disputes arising out of Title Suit No. 167 of 1975 to an Arbitrator as made by the Subordinate Judge is wholly illegal and without jurisdiction and consequently the Award that followed being ab initio void is liable to be quashed. In that context, it was urged that while disposing of the applications under Section 34 of the Act, the learned Subordinate Judge had no jurisdiction to appoint an Arbitrator and to refer the dispute to him. He could only stay the suit and give opportunity to the parties to take recourse to arbitration. Great stress was laid on Ground No. 3 of the memorandum of appeal which says that --

'.....in absence of an application under Section 20 of the Arbitration Act, or under any other provision thereof, the learned Subordinate Judge has no jurisdiction to make a reference to arbitration. It is submitted that no application was filed either under Section 8 or Section 20 or Section 21 of the Arbitration Act and the parties never agreed amicably to refer the disputes to the Arbitrator.'

6. There is no escape from the conclusion that in fact the parties to the suit, including the three appellants (plaintiff and defendants 5 and 6) had participated in the proceedings before the Arbitrator on several dates without demur. The details thereof would be referred to at the relevant place. So Mr. Rath, the learned counsel for appellants in M. A. 64/79 (defendants 5 and 6) endeavoured to attack the very basis of the reference to the Arbitrator. His contention was that, this Court while disposing of the Misc. Appeal No. 19 of 1976 had remanded the matter to the Court below for disposal of the applications under Section 34 of the Act according to law. Thus, the matter before the learned Subordinate Judge was the petitions under Section 34 of the Act which contemplates nothing more than staying the proceedings and giving opportunity to the parties to take recourse to arbitration. His further contention was that there was no prayer from any side nor any petition for taking action under Section 8 or 20 or 21 of the Act; the parties had never agreed to amicably refer the disputes to the Arbitrator and, therefore, the reference is a nullity having no existence in the eye of law. Consequently all that followed including the submission of the Award is vitiated for inherent lack of jurisdiction. In support of his stand, he cited several case laws such as AIR 1976 SC 1745 -- Union of India v. Om Prakash; AIR 1962 SC 1810 -- Khardah Co. Ltd.

v. Raymon & Co. (India) Pvt. Ltd.; AIR 1963 SC 90 --Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) Pvt. Ltd.; AIR 1978 Cal 37 -- Sunil Mukherjee v. Union of India and AIR 1963 Guj 141 -- Bhailal Manilal v. Amratlal Lallubhai Shah.

7. Mr. Mohanty, the learned counsel for defendant-respondent No. 1 on the other hand was equally emphatic that the reference was not at all a nullity. His contention was that the trial Court while passing the order on 21-12-1976 only stayed the suit. It did not appoint an Arbitrator. It only gave opportunities to parties to come up with a common nomination in terms of the arbitration clause and the Act. On 12-1-1977 nomination was filed by one party but there was no concurrence to that. After the statutory period of 15 days, the Court made the appointment. Furthermore, while appointing the Arbitrator, the Court did not make any reference except stating that the disputes between the parties be adjudicated upon. It was the Arbitrator, who, after entering upon the reference and receiving the statements and documents from the parties, was indicted by the plaintiff about the scope of dispute and point of difference between the parties. Therefore, it is not correct on facts to suggest that the appointment of the Arbitrator and the reference are nullities. His further alternative argument that the appointment of and the reference to Shri S.K. Mohanty, Arbitrator was violative of the provisions of the Act, defendants Nos. 5 and 6 have never challenged the same at any stage earlier. On the other hand, defendant No. 6 on 26-11-1977 paid Rs. 40/- to the Arbitrator for sending notices to parties by registered post, took part in the arbitration proceedings, and filed his written statement. Similarly defendant No. 5 when noticed engaged his lawyer to appear and took part in the proceedings and at no point of time raised any objection to the appointment, continuance or jurisdiction of the Arbitrator when the proceeding was before him. Further they (defendants 5 and 6) have not even raised objection under Section 30 of the Act. Rather the plaintiff objected by filing an appeal and also required clarification. But later on kept quiet and co-operated in the proceedings before the Arbitrator. In this background, it was contended that by their conduct the plaintiff and defendants 5 and 6 held out representation which made defendant No. 1 and other believe that irregularity and/or illegality, if any, in the appointment of Arbitrator had been waived. His further contention was that after the stay of the suit, the parties could have agreed for appointment of a common Arbitrator. Instead of the same being

suggested by the parties, the nomination was suggested by the Court and the parties have agreed. Therefore the conduct of the plaintiff and defendants Nos. 5 and 6 would either mean that they have waived their objection or have acquiesced in the proceedings estopping them from making the challenge now. Distinguishing the case laws cited on behalf of defendants 5 and 6, a series of decisions were cited main amongst which are AIR 1920 PC 123 -- Donald Campbell & Co. v. Jeshraj Girdhari Lal; AIR 1976 SC 1745 *ibid* (at p. 1748) relied on by both the sides; AIR 1975 SC 230 --N. Chellappan v. Secretary, Kerala State Electricity Board; AIR 1954 Orissa 234 -- V. Gurumurthy Raju v. V. Narasimha Raju; AIR 1953 Cal 488 -- India Hosiery Works v. Bharat Woollen Mills Ltd.; AIR 1958 Cal 415 -- Union of India v. K.P. Mandal; AIR 1965 Cal 42 -- New India Assurance Co. Ltd. v. Dalmia Iron & Steel Ltd.; AIR 1979 Delhi 97 --Chowdhury & Gulzar Singh v. Frick India Ltd. and (1972) Cut WR 951 -- State of Orissa v. Bhagabat Prasad Bal.

8. To appreciate the rival contentions some relevant facts need be quoted. The order disposing of the application under Section 34 of the Act (the operative portion of the order which has been quoted above) says in unmistakable terms that --

'the petition filed by defendants 1 to 4 for staying the suit under Section 34 of the Act and of defendant No. 3 for referring the dispute to an Arbitrator to be appointed by the Court, are allowed on contest.'

Defendant No. 3 in his petition dated 9-1-1976 had prayed thus :

'The petitioner in the aforesaid circumstances respectfully prays that your Honour may be pleased to make an order under Section 34 of the Indian [Arbitration Act, 1940](#) staying the proceedings in the aforesaid Title Suit No. 167 of 1975 to afford opportunity to the parties to get the disputes raised in the suit settled through arbitration as agreed to by them.'

(Vide records in Misc. Case 21/76) Defendant No. 1 in his earlier petition dated 19-9-1975 had prayed thus :

'This defendant accordingly prays that the Hon'ble Court may be pleased to stay the legal proceedings arising out of the above suit and direct the plaintiff to go before the domestic tribunal for settlement of disputes raised by him;'

Defendant No. 2 also had similarly prayed in his petition dated 25-9-1975 thus:

'This defendant accordingly prays that the Hon'ble Court may be pleased to stay the legal proceedings arising out of the above suit and direct the plaintiff to go before the domestic tribunal for settlement of disputes raised by him.'

Defendant No. 4 in his petition dated 24-10-1975 had prayed thus:

'In the aforesaid facts and circumstances of the case the petitioner prays your Honour to examine the aforesaid matter and further prays that this Hon'ble Court may be pleased to order that the said suit shall be stayed and the matter may be referred to arbitration as provided under Section 34 of the Indian Arbitration Act.'

Order No. 68 dated 10-1-1977 in Title Suit No. 167 of 1975 is thus :

'.....Defendants 5 and 6 filed Hazira, Lawyer for the plaintiff stating that submitting the names of arbitrator be stayed on the grounds stated therein. Defendants 1, 2 and 3 pray separately for time for furnishing the name of the arbitrator. Defendant No. 4 also files a petition praying for time to furnish the name of arbitrator. In view of strong opposition for adjournment, time allowed till 12-1-1977 for nomination of an arbitrator. Parties failing to concur in the nomination. Court will appoint an arbitrator.'

Order No. 70 dated 12-1-1977 was as follows:

'Defendants 5 and 6 file hazira. Lawyer for the plaintiff files a memo stating that the case may be stayed for a month on the grounds stated therein. Defendants 1 to 4 file a list of names of the Arbitrators, plaintiff objects and there is no concurrence in the nomination. Plaintiff filed a petition for time to obtain stay orders from the Hon'ble High Court, Time till 28-1-1977 for obtaining stay orders, failing which nomination of arbitrator will be made under Section 8 of the Arbitration Act.'

On 28-1-1977 (Order No, 73) in T. S. No. 167/75, the following order was passed:--

'Plaintiff prays for time to obtain stay order or to furnish the names of Arbitrators. Sufficient time was granted and no valid ground exists for granting further adjournment. So time petition is rejected. Heard Advocates. Plaintiff does not concur in the nomination of arbitrators as per list furnished by defendants 1 to 4 and so none of them could be appointed as Arbitrator, Plaintiff also fails to obtain the concurrence of the defendants in his nomination if any. Parties are therefore not in concurrence in the nomination of Arbitrators. Therefore, in exercise of the powers conferred under S. 8 of Arbitration Act, I appoint Sri Sarat Kumar Mohanty (retired Dist. Judge) as arbitrator. So let a reference be made to the appointed Arbitrator for adjudicating the dispute between the parties.X X X X'

9. Record shows that by a letter dated 2-2-1977, the matter in dispute was referred to the Arbitrator Shri Mohanty. The Arbitrator on 4-2-1977 entered upon the reference. After appearance of all the parties on 26-11-1977 the plaintiff explained the scope of arbitration.

10. It is otiose to go into a detailed discussion of all the case laws cited at the Bar. Suffice it to say that these citations lay down two clear propositions of law. The first one is that if the appointment of the arbitrator and/or reference to him is a nullity then participation of the parties does not cure the inherent defect. Further if the agreement itself that embodies the arbitration clause is void for some reason, viz., being against the provisions of any statute, against public policy or against public morals, then the whole agreement perishes and along with it the arbitration clause and therefore question of participation or non-participation, is immaterial. The second principle laid down as far back as in AIR 1920 PC 123 and consistently followed is that a defect in procedure as absence of notice under Section 9(b) of the Act which would have been fatal to the authority of the persons appointed as sole arbitrator can be waived by failure to object in time.

AIR 1976 SC 1745 is an authority coming under the former type that lays down the dictum that after appointment of Arbitrator under Section 8 (2) of the Act, the Court becomes functus officio and it has no further jurisdiction to refer the dispute to

Arbitrator. Such reference made and awards passed is a nullity and therefore could be set aside under Section 30 (c) of the Act coming under the clause 'otherwise invalid'. The learned Advocate for respondent No. 1 also relied on this and referred to an observation where their Lordships while stating facts (in para 2) have observed:

'If the respondent's contention in these appeals is correct that after appointing an arbitrator under Section 8 (2) the Court ceases to have jurisdiction and cannot make an order of reference, the further directions given in the order of Feb. 13, 1950 were invalid. However, the question did not assume importance at that stage because both sides agreed to submit the disputes to Col. Ranbir Singh for arbitration.'

The underlined portion is in line with the second category of cases mentioned above. In brief, the facts of this case are that seven cases were filed by the respondent and at first there was appointment of an arbitrator (Mr. R. Singh) not in the list on 13-2-1950 and a reference to him. Initially both the parties agreed and the above remark is made in that context. Later, after one year on 13-2-1951 another Judge to whom the cases had been transferred appointed another arbitrator (Brigadier H. L. Bhandari) and directed as follows:

'All these cases should be referred to him for arbitration. He must file his award within one month of this order.'

The respondent-petitioner did not agree to this order and did not participate in the proceeding and challenged the order, but before it could be decided, the award was submitted.

Thus the facts and circumstances of that case are obviously different. Each case must be decided on its own facts and circumstances.

AIR 1962 SC 1810 -- Khardah Co. Ltd. v. Raymon & Co. (India) Pvt. Ltd. lays down the principle that --

'..... the arbitration clause cannot be enforced when the agreement of which it forms an integral part is held to be illegal. On principle it must be held when an

agreement is invalid every part of it including the clause as to arbitration contained therein must also be invalid.

X X X X XThe party applying under Section 33 is not estopped by its conduct in appearing before the arbitrators and in taking part in the proceedings before them from questioning the validity of the award. What confers jurisdiction on the arbitrators to hear and decide a dispute, is an arbitration agreement as defined in Section 2 (a), and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence.'

The case reported in AIR 1963 SC 90 --Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) Pvt, Ltd. is also an authority for the proposition that --

'.....if a contract is illegal and void an arbitration clause which is one of the terms thereof, must also -perish along with it and a dispute relating to the validity of a contract is in such cases for the Court and not for the Arbitrators to decide.'

11. Some of the authorities coming under the second category besides. AIR 1920 PC 123 referred to above, may now be discussed. AIR 1975 SC 230 - N. Chellappan v. Secy., Kerala State Electricity Board lays down that on the arbitrators failing to make the award within the specified time, consent order directing the Umpire to act as sole arbitrator and party acquiescing in the proceeding before the Umpire is precluded from challenging the award for lack of jurisdiction. It further says --

'If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant facts will amount to such acquiescence.' (See 'Russel on Arbitration', 17th Edn., p. 215)'.

In Chowdhri Murtaza Hossein v. Mst. Bibi Bechunnissa, (1876) 3 Ind App 209 (PC) at p. 220 the Privy Council said:

'..... 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.'

XXX X X

As we said, the umpire could have entered upon the reference under Rule 4 of the First Schedule when the arbitrators failed to make the award within the extended time. Neither the fact that the umpire wanted an order from the Court to enter upon the reference nor the fact that an application was made by the Board on 5-2-1972 to extend the time for the arbitrators to make the award would denude the umpire of his jurisdiction to enter upon the reference and pass an award under Rule 4 of the First Schedule. Therefore, when the Board without demur participated in the proceedings before the umpire and took the chance of an award in its favour, it cannot turn round and say that the umpire had no inherent jurisdiction and therefore its participation in the proceedings before the umpire is of no avail. The fact that the umpire did not purport to act in the exercise of his jurisdiction under Rule 4 of the First Schedule but under the order of the Court, would not make any difference when we are dealing with the question whether he had inherent jurisdiction.

X X X X X

The High Court was, therefore, clearly wrong in thinking that acquiescence did not preclude the Board from challenging the jurisdiction of the umpire as sole arbitrator.'

(1972) 1 Cut WR 951 lays down as follows:

'Parties submitting to the jurisdiction of the Arbitrators after accepting the position that the dispute is covered by the Arbitration clause, it is no longer open to either of the parties to resile from the arbitration agreement on the plea that the dispute does not come within the purview of the agreement clause.'

It is not open to challenge the validity of the award on the ground that the Arbitrators had no jurisdiction to decide the dispute and pass the impugned award.'

12. From the above it is clear that it is only inherent lack of jurisdiction or illegality of the contract embodying arbitration clause that could invalidate the award; and irregularities in procedure if acquiesced in without demur would preclude a party both from challenging the appointment of the arbitration and passing of the Award at a later stage when it finds that the award is not convenient for it. It is well settled law that each case is an authority for the facts stated therein. So we are here to see, which of the above two principles would apply to the facts of the present case. Here, admittedly in the agreement of partnership there is a clause for arbitration. It is not very specific. According to Section 3 of the Act, 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, and the First Schedule in Rule 1 provides --

'Unless otherwise expressly provided, the reference shall be to a sole arbitrator.'

When the plaintiff (appellant in M. A. 69/79) filed the suit, some of the defendants prayed before the Court to stay the proceedings under Section 34 of the Act and to refer the matter to an arbitrator as already quoted. So their prayer was firstly to stay the proceedings and secondly to refer the matter to arbitration. If the contention on behalf of the appellants be accepted, namely, that it was only a prayer for staying the proceedings, it would be both against the wishes of some of the defendants and the spirit of law. Merely staying the proceedings does not help any party, nor solves the problem. Besides, four of the defendants, at least, have prayed for referring the matter to an arbitrator. The only flaw picked up and dilated upon by the appellants, in both the appeals, is that Section 8 had not been mentioned in those petitions referred to above. The Court is to see to the pith and substance of the petition, intention of the party making the petition, the prayer sought for and not the section mentioned in the petition, nor the nomenclature given -- which are unessential, From the petitions of the four defendants quoted above, it is clear that they wanted the matter to be referred to arbitration and they sought the assistance of the Court therefor. Accordingly the Court also passed the

orders as would be evident from the portions of the order sheet already quoted. Under Section 8 of the Act, the statutory period for giving option to the parties is 15 days, but in this case, the Court has given longer period to suggest a common arbitrator. On 10-1-1977 it passed orders that 'Parties failing to concur in the nomination, Court will appoint one arbitrator.' Yet, there was no concurrence. Is the Court then helpless and anxious parties remediless Regard being had to the arbitration clause and the prayer of at least four of the defendants for referring the dispute to an arbitrator, the Court, in exercise of its powers under Section 8 of the Act did appoint a retired District and Sessions Judge as the Arbitrator for deciding the dispute. If any party was dissatisfied with the Court's nomination, it was open to that party to object. But the very fact that there was no objection means agreement. The Arbitrator gave notice. The record shows that on 12 occasions, namely, 17-2-1977, 15-11-1977, 26-11-1977, 12-12-1977, 18-12-1977, 10-1-1978, 15-1-1978, 22-1-1978, 3-4-1978, 11-4-1978, 24-4-1978 and 14-4-1978, notices had been given to the parties intimating them about the date of hearing. Out of those, the first two were under registered post and the rest under certificate of posting. There is no controversy that the parties did take part in the proceedings before the Arbitrator. The appointment of the Arbitrator was on 28-1-1977; letter was issued to him on 2-2-1977 and the award submitted on 27-9-1978.

13. It was submitted on behalf of defendants Nos, 5 and 6 that after 19-4-1978 they did not appear before the arbitrator. But I do not consider this statement to be correct, for, the proceedings before the Arbitrator dated 25-6-1978, 5-7-1978, 18-7-1978, 19-7-1978, 28-7-1978, 11-8-1978, 12-8-1978 and 13-8-1978 show that the parties were present. That apart, the appellants here, if they were dissatisfied in any way with the manner in 'which the proceedings were being conducted by the Arbitrator, it was open for them to challenge at the right time and not to wait till the award was submitted hoping that it might go in their favour. Accordingly they are precluded from challenging the proceedings at a belated stage. It may be recalled here that while the proceedings before the Arbitrator were continuing, on 14-2-1977 the plaintiff filed Misc. Appeal No. 36 of 1977 challenging the order of the Subordinate Judge dated 21-12-1976 (that is the order staying the suit and directing nomination of the Arbitrator) but later did not press the appeal and thereafter took part in the proceedings. Again on 3-2-1978 this plaintiff filed a copy

of the petition to the Subordinate Judge for seeking clarification as to whether he shall take part in the proceedings. But the order sheet of the trial Court does not reflect any such action. It may also be mentioned here that on 8-1-1978, defendant No. 6 filed his written statement before the Arbitrator and the plaintiff and defendants Nos. 5 and 6, who now seem to make a common cause, took part in the proceedings before the Arbitrator.

14. The facts which cannot be cavilled at are that the partnership deed has a clause for arbitration; some of the parties barring the plaintiff, that is, appellant in M. A. No. 69/79, were anxious for decision of the dispute by arbitration; the Court wanted that they should agree to a common arbitrator; there was no concurrence; so the Court appointed one under Section 8; the parties accepted the nomination and participated in the proceedings without demur, It follows, therefore, that there was' no inherent lack of jurisdiction on the part of the Court in appointing an arbitrator; nor the proceedings before the Arbitrator vitiated on that score. Procedural defects, if any, are deemed to have been waived by the parties by their conduct and cannot be raked up now. Further the parties having acquiesced and participated in the proceedings before the Arbitrator are also estopped from challenging the same. Accordingly this point is decided against the appellants.

15. Point No. (ii): -- The grievance of the appellants here is that the High Court while disposing of the receiver matter (Misc. Appeal No. 60/77) had directed that the Arbitrator should submit his award within 2 months' time which expired on 21-1-1978 and therefore the proceedings before the Arbitrator thereafter, were without jurisdiction. The law is well settled that the Court having jurisdiction to entertain applications for filing of award has jurisdiction to grant extension of time under Section 28 of the 'Act (See AIR 1960 SC 629 --Champalal v. Mst. Samrathbai; AIR 1954 Orissa 29 -- Narsing Das Hiralal Ltd. v, Bisandayal Satyanarain Firm; AIR 1968 Pat 150 (FB) Bokaro & Ramgur Ltd. v. Dr. Parsun Kumar Banerjee; AIR 1973 Ker 237 -- State of Kerala v. K.P. Poulouse). Therefore, the proper Court to grant time is the Subordinate Judge and not the High Court The record shows that at least on 12 occasions, the parties had been noticed about the proceedings before the Arbitrator either under certificate of posting or under registered cover as already pointed out, while deciding point No. (i). There is

no complaint that the parties had no notice of the arbitration proceedings at the initial stages. Now a grievance is made that after the expiry of the time fixed by the High Court i, e. 21-1-1978, no further notice was given by the Arbitrator of the date, time and place of sitting. Record of the Arbitrator as already quoted shows, how long after that date, the plaintiff and defendants 5 and 6 have participated in the proceedings. It was argued on behalf of the appellants that they did not participate from 19-4-1978, but there is no basis for such a statement. Even otherwise, there is no justification for them to stand by till 27-9-1978 (when the Award was submitted) if really they had any grievance.

On the assumption that the Award should have been submitted by 21-1-1978 as fixed by the High Court, it was argued that the learned Arbitrator had illegally misconducted himself in not informing the parties about the extended time. Neither on facts nor in law this is sustainable. Besides, if the parties noticed misconduct on the part of the Arbitrator, proper action was under Section 11(2) of the Act for his removal. That ground is not germane to challenge the Award under Section 39 of the Act. So this point is also decided against the appellants.

16. Point No. (iii): -- Thus argument proceeded on the assumption that the Court has made a reference to the Arbitrator. The record does not support this stand. The order sheet shows that the trial Court had only stayed the suit and referred the dispute for adjudication to the Arbitrator. The entire matter was before the Arbitrator and no specific reference had been made to him. The question, therefore, that the Arbitrator had gone beyond the reference does not arise. It was contended on behalf of respondent No. 1 that assuming the Arbitrator travelled beyond the scope of any such reference, it was only because of the conduct of the plaintiff and defendant No. 6. The plaintiff, while explaining the scope of the dispute and defendant No. 6 in his written statement before the Arbitrator, Mr. Mohanty urged, widened the scope of arbitration, they allowed the Arbitrator to proceed and are squarely responsible for the field the arbitrator covered and should not be permitted to turn round and object to the same now. The parties having full knowledge of the circumstances in which the Arbitrator was proceeding and they having enough chance to stop it by raising objection thereto, either before the Arbitrator or before the trial Court, they by their conduct should be

precluded from raising these points at this stage. It seems, there is enough force in this contention and so this point is also decided against the appellants,

17. Incidentally it was argued that dissolution of the partnership is a matter exclusively within the jurisdiction of the Court and a reference of the dispute to an arbitrator is bad in law. This point will not detain me much in view of the earlier decision of the High Court on the point. In M. A. No, 19 of 1976, it was contended before this Court that the suit being one under Section 44 of the Indian Partnership Act for dissolution of the partnership firm, the matter could not be referred to arbitration. This point was answered in the following manner :

'The second reason given by the learned Subordinate Judge is that the plaintiff respondent No. 1 having prayed for dissolution of the partnership firm under Section 44 of the Indian Partnership Act, the case has to be decided in the Court itself and not through arbitration. For this position, reliance is placed on a decision reported in (1972) 1 Cut WR 264 (Bankey Behari Lal v. Hirendralal Adhikari). In that decision, by referring to a paragraph at page 91 of the book 'Russel on Arbitration' (17th Edition) R.N. M., J. observed thus:

x x x x x' He has invited my attention to that very particular passage in the book 'Russel on Arbitration' which reads as follows:

'The Court has a discretion to refuse a stay. This discretion must be exercised upon the facts involved, but when a dissolution is claimed, the facts involved are very apt to be such as to call for refusal. This has led to the opinion of the Court in Joplin v. Postlethwaite (1889) 61 LT 629 (CA) that a question of dissolution was not a suitable one to be left to arbitrators to decide. Whilst this is not a proposition of law as the cases previously cited show, it may perhaps be regarded as a 'proposition of good sense' and the principle is frequently persuasive.' That passage as is rightly contended by Mr. Mohanty does not show that in all cases where 'dissolution of a firm is claimed by the plaintiff the matter should be left alone to the Court and should not be permitted to be decided by a domestic tribunal under an arbitration clause.'

Finally this Court in that appeal negated the finding of the lower Court and held that the matter could be decided by an Arbitrator. This being a decision of this Court as between the same parties (M. A. 19/76), the appellants, having accepted it, cannot raise that point once again. The matter is concluded and cannot be re-agitated. So this point is also without any merit and hence decided against the appellants,

18. Before closing this judgment I may say that Mr. S. C. Mohapatra appearing on behalf of defendant No. 4 raised an objection that a joint appeal preferred by defendants Nos. 5 and 6 is unsustainable. In support of it he has drawn my attention to certain provisions of the General Rules and Circular Orders, Civil Vol. I and relied on (1975) 41 Cut LT 714 -- Abdul Rahim v, State of Orissa and (1973) 39 Cut LT 330 --Dr. Mrs. Sarojini Pradhan v. Khirode Chandra Pradhan. His argument is that every party aggrieved by the award has an independent cause of action and therefore each one should prefer a separate appeal. That not having been done, the joint appeal by defendants 5 and 6 is invalid and they must be asked to confine it either in favour of defendant No. 5 or defendant No. 6. Shri Mohapatra also argued that if a selection is made now and the appeal is confined to one, in case the appeal is allowed, it would lead to inconsistency in the award in that it would be set aside in case of one appellant and confirmed in case of the other. Mr. Rath, the learned counsel for defendants 5 and 6 probably realising the technical defect, and the weighty authorities in its support, preferred that the appeal might be confined to defendant No. 6. In that context, Mr. Rath also argued that the learned Subordinate Judge has not registered the objections of different parties as independent miscellaneous cases as against which separate appeals could be filed. The learned Subordinate Judge disposed of the main suit and in that has considered the different objections. As such, there being one order defendants 5 and 6 could file one joint appeal. In view of the fact that on each of the three points raised on behalf of the appellants I have held against them, it would be academic to go into this question and hence need not be answered.

In the result, all the points raised on behalf of the appellants having been answered against them, both the appeals must fail and are hereby dismissed with costs to be borne by the plaintiff and defendants Nos. 5 and 6 equally. The interim

orders passed during the pendency of the appeals stand vacated. Judgment and decree in Title Suit No. 167 of 1975 on the basis of the Award stand.

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