

**Mathulla Mathulla Vs. Thomas George and anr.**

**Mathulla Mathulla Vs. Thomas George and anr.**

**SooperKanoon Citation :** [sooperkanoon.com/721285](http://sooperkanoon.com/721285)

**Court :** Kerala

**Decided On :** Nov-13-1961

**Reported in :** AIR1962Ker320

**Judge :** M.S. Menon, Ag. C.J. and; T.K. Joseph, J.

**Acts :** [Arbitration Act, 1940](#) - Sections 14, 17, 30 and 39

**Appeal No. :** Appeal Suit No. 166 of 1961

**Appellant :** Mathulla Mathulla

**Respondent :** Thomas George and anr.

**Advocate for Def. :** C.M. Kuruvilla and; P.E. Cherian, Advs.

**Advocate for Pet/Ap. :** K.K. Mathew,; George Vadakkal,; M.A. Joseph and;

**Disposition :** Appeal dismissed

**Judgement :**

**Joseph, J.**

1. This appeal is from the decree passed by the Additional District Judge, Mavelikara, in Arbitration Petition No. 1 of 1956 of that court. The second counter petitioner in the court below is the appellant.

2. There were disputes between the appellant and the first respondent, who was the petitioner in the court below, regarding settlement of accounts of two chitties conducted by the appellant and the deceased father of the 1st respondent. The case of the first respondent was that the dispute was referred for decision to the second respondent, the first counterpetitioner in the court below, and that the latter gave an Award (Ex. P-2) on 16-6-1956. The first respondent, made an application under section 14 of the Indian Arbitration Act and prayed for a decree in terms of the Award. The appellant objected mainly on two grounds, namely, that there was no submission to the second respondent and that the award was vitiated by the arbitrators' misconduct. These objections were overruled and a decree was passed in terms of the award. The decree allowed the first respondent to recover a sum of Rs. 18,584.80 from the appellant.

3. The first respondent raised certain preliminary objection to the maintainability of the appeal. These were that there was no application by the appellant for setting aside the award and that the appeal being one from the decree, the same is not maintainable as the appellant has no case that the decree has been passed in excess of the award. The submission of the appellant on this point was that his objection to the petition under Section 14 was substantially one for setting aside the award and that the court not having passed a separate order on the petition, the appeal was competent as regards the alleged submission as well as the award. The first respondent relied on the Rules made by the Travancore-Cochin High Court under the Arbitration Act and the provision of the Court Fees Act and argued that an application in writing was essential under the Act and that proper court-fee should also have been paid on the application.

The decision of a Single Judge of the High Court of Andhra Pradesh in *Lakshmikantha Rao v. Venkiteswarlu*, AIR 1960 A. P. 576 was also relied on. This decision no doubt, supports the first respondent but we are not inclined to uphold the preliminary objection as the appellant cannot be blamed for the procedure adopted by the court below. What the court below did was to issue notice on the petition under Section 14 to both the arbitrator and the appellant. The notice was stated that the petition was posted for hearing on 26-9-1956 and that the same would be disposed of unless objection, if any, was filed on that day. It was in

pursuance to this notice that the appellant filed objections-alleging that he had not made a submission for arbitration and that the award was invalid. The award was actually filed in court only on 26-9-1956. Notice should have been issued to the appellant regarding the filing of the award and objections to the submission as well as the award were to be filed only after receipt of such a notice. The starting point of limitation for filing a petition for setting aside the award is the date of receipt of such notice. Such a notice was not issued by the court.

Again, the court did not pass a separate order on the petition under Section 14 of the Arbitration Act but only a decree in terms of the award. In these circumstances it cannot be said that the appellant is precluded from raising all the grounds taken in the appeal. In taking this view we are supported by the decision of the High Court of Allahabad in *Ram Alam Lal v. Dukhan*, AIR 1950 All 427 where the facts were almost identical. It was held in that case that the written statement filed by one of the parties amounted to an objection contemplated by Section 33 of the Arbitration Act and that the appeal could be treated as one from the order refusing to set aside the award. The court fee leviable on an application to set aside the award, no doubt, has to be realised from the appellant, but it is competent for the court to pass an order in that behalf at any time. We therefore overrule the preliminary objections and proceed to decide the appeal on the merits.

4. The two points which arise are : (1) Was there a submission for arbitration, and (2) Whether the award is liable to be set aside?

5. As regards the first point, the appellant's case is that he had not signed the alleged agreement to refer the dispute for arbitration and that his signature in Ex. P-1 is not genuine. The court below found on evidence that the appellant had agreed to refer the disputes for arbitration and that he had signed Ex. P-1. (After discussing evidence (Paras 5, 6, 7) His Lordship came to the following conclusion). We have therefore no hesitation to hold that Ex. P-1 was signed by the appellant.

8. The next point for consideration is whether the award is vitiated by the misconduct of the arbitrator. The misconduct pressed at the hearing was that the arbitrator took statements from witnesses in the absence of the appellant thereby

violating principles of natural justice. It is true that an arbitrator must ordinarily follow the principles of natural justice but where the parties agree that the proceedings may be conducted in any particular way the contract prevails over what are called the principles of natural justice. The position has been summed up by Mukharji J., in *D.L. Miller and Co., Ltd. v. Daluram (S)* AIR 1956 Cal 361. Mukharji, J., observed :

'The doctrine of Arbitrator's legal misconduct has been so over-worked in recent years that across the whole branch of case law on this point one finds the blazing trail of principles of natural justice. They are discussed and agitated in an atmosphere of complete unreality and divorced from the facts of each case.

Some how the obvious point is missed in most of such cases, that when the parties agree to go to arbitration they stipulate not so much for vague principles of natural justice as for concrete principles of contractual justice according to the contracts of the parties and their specific stipulations. Where the contract of arbitration itself prescribes a private procedure of its own, then so long as such agreed private procedure is not against the laws and the statutes of the land, then such agreed procedure must prevail over the notions and principles of natural justice.

If the origin of the application of the principles of natural justice to arbitration procedure is remembered then this confusion is easily avoided. When a contract or agreement for arbitration itself does not lay down any particular procedure for the conduct of the arbitration, the courts have said that the arbitrators must follow the principles of natural justice which are no other than common sense standards of fairness and impartiality such as no party should be condemned unheard or without representation. It was necessary to do that because the arbitrators are not strict courts of law guided by the Civil Procedure Code and Evidence Act laying down massive details of procedure. In the absence of any procedure, prescribed either by statute or by contract, the arbitrators must follow the principles of natural justice, or else there is nothing for the arbitrators to fall back upon to ensure fair adjudication. It will therefore be contrary to its origin and *raison d'être* to apply natural justice where an available procedure is prescribed by contract or statute.

Parties are forced to depart from natural justice by statute and similarly parties can agree to depart from natural justice. In fact they very often do for avoiding delay, expenses and formality. In the case before me they have done so in unmistakable terms.'

9. The Allahabad High Court has also taken the same view in *Banwari Lal v. Jagannath Prasad*, AIR 1958 All 717. After quoting the following passage from *Russel on Arbitration*.

'This course of conduct, of examining one party or the witnesses of one party, or receiving evidence from one party in the absence of the other, is often adopted by mercantile arbitrators. But the courts in the above instance and in many others, have strongly repudiated the idea that a different course is allowable in this respect in the case of mercantile referees; and although the lawful usage of merchants may be imported into the contract of reference, they have said that the practice of receiving evidence which the party affected has no opportunity of meeting is not a lawful one',

it was held:

'In laying down the above proposition it must, however, be understood that it is subject to this qualification that the parties may agree that a reference may be conducted in any particular way and such an agreement may be either express or implied from their conduct during the arbitration; and they may also expressly or by their conduct, waive their objection to an irregular course of conduct on the part of the arbitrator'.

The decision of Mukharji, J., was followed by Bhan-dari, C. J., and Bishan Narain, I., In *Damodar Pershad v. Saxena and Co.* AIR 1959 Punj 476. After reviewing several decisions, the Bench held :

'In the absence of specific provisions to the contrary in the statute or the contract of agreement, the parties to an arbitration proceeding are entitled to a reasonable notice of the time and place of the hearing and have an absolute right to be heard and to present their evidence before the arbitrators. If they are deprived of this

right the court will not hesitate to set aside the award on the ground of misconduct even though there may have been no improper intention. The rule that the parties to an arbitration agreement have a right to be heard is, however, subject to the qualification that where the agreement of submission provides in clear and unequivocal language that the arbitrator may proceed in the absence of the parties or that he may or may not hear the witnesses, or that he may give his award without enquiry, the award will not be invalidated on the ground that the arbitrator had refused to hear evidence. If the arbitrator acts within the scope of the authority conferred upon him by the agreement of the parties and if he keeps himself Within the jurisdiction so conferred his award is as valid the binding as the judgment of a court of law'.

Ex. P-1 has to be examined in the light of the principle laid down in these decisions.

10. It was provided in Ex. P-1 that in order to make an award after examining the accounts of the Chifty and other transactions, the arbitrator could look into the accounts and if found necessary take evidence in addition to examining the parties and taking such evidence as they would produce. The arbitrator stated that he examined the parties in the first instance and then proceeded to take evidence. The parties were present during the initial stages when some of the witnesses were examined by hint, but later on they said that they have no time to be present and they left it to him to examine such witnesses as he considered necessary. In our opinion Ex. P-1 authorised the arbitrator to take such evidence as he considered necessary.

We have to refer in this connection to the fact that the appellant did not object to this procedure while the arbitration proceedings were going on and did not mention this in the reply sent by him on receipt of notice of the making of the award. Although a ground was taken in the objection filed by the appellant in the court below that evidence was not taken after notice to him, he did not mention this when he was examined as Dw. 3. The arbitrator who was examined as Dw. 4 appears to be a respectable man and we do not see any reason to disbelieve his evidence that the parties declined to be present when he took the evidence of

some witnesses. The conduct of the appellant as sworn to by Dw. 4 shows that he waived the right to cross-examine those witnesses. In view of this, we are unable to hold that the award is vitiated by misconduct in the proceedings. As the only act of misconduct alleged by the appellant is the above, we hold that the award is not liable to be set aside.

11. The respondent has filed a memorandum of cross objections claiming interest on the sum decreed. The award did not make any provision for interest and the court would not have been justified in awarding the same. The cross objections must therefore be dismissed.

12. In the result we confirm the decree of the court below and dismiss the appeal and memorandum of cross objections with costs.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**