

Sukumar Ghosh Vs. Tulsi Charan Ghosh

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Court : Kolkata

Decided On : Jan-25-1980

Reported in : AIR1980Cal134

Judge : Anil K. Sen and ;B.C. Chakrabarti, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 32 and 34

Appeal No. : C.O. No. 2317-18 of 1979

Appellant : Sukumar Ghosh

Respondent : Tulsi Charan Ghosh

Advocate for Def. : Bankim Chandra Datta, ;Bidyut Kiran Banerjee and ;Rabi Chowdhury, Advs.

Advocate for Pet/Ap. : Manindra Nath Ghosh and ;Dhruba Bhattacharya, Advs.

Judgement :

Anil K. Sen, J.

1. An order dated April 10, 1979, passed by the learned Subordinate Judge, 2nd Court, Howrah, is the subject matter of challenge in these two revisional applications which are being heard on contest by the opposite party. By the order impugned the learned Subordinate Judge dismissed an application under Section

151 of the Code of Civil Procedure read with Order 9 Rule 13 thereof filed in Miscellaneous Case No. 15 of 1972 and an objection under Section 47 of the Code of Civil Procedure filed in Title Execution Case No. 23 of 1973 which objection was registered as Miscellaneous Case No. 43 of 1973. Facts leading to the passing of the impugned order are not in dispute and may be set out briefly as follows.

On June 24, 1970, the petitioner Sukumar Ghosh filed Title Suit No. 31 of 1970 in the 2nd Court of the learned Subordinate Judge, Howrah, praying for a decree for partition and accounts in respect of the suit properties against his brother the opposite party Tulsi Charan Ghosh and his mother Binodini Ghosh. The suit properties were (i) two storeyed residential house being premises Nos. 45 and 45/1, Desapran Sasmal Road, Howrah, (ii) the tenanted land and structures being premises No. 115, Brindaban Mallick Lane, Howrah, (in) some lands in Mouza Kalipur, P. S. Chanditala, District Hooghly, (iv) a stationery business run under the name and style of Messrs. Ghosh & Company at 14/2, Old China-bazar Street, (v) a printing press business run in partnership with a third party Ambarnath Misra under the name and style of Samudrika Press at 41, Desapran Sasmal Road, Howrah, and (vi) other movables and moneys deposited with banks. There is no dispute that even prior to the filing of the aforesaid suit for partition the third party partner Ambarnath Misra had filed in the same very court Title Suit No. 135 of 1970 (renumbered as Title Suit No. 9 of 1971) for dissolution of his partnership with the two brothers Tulsi Charan and Sukumar in respect of the said printing press business.

2. The summons of the partition suit being Title Suit No. 31 of 1970 having been served on Tulsi Charan Ghosh he on July 27, 1970, filed an application under S. 34 of the Arbitration Act for stay of further proceedings of the partition suit. He claimed such a stay on a pleading that in the agreement of partnership relating to the business of Messrs. Ghosh & Company between him and Sukumar Ghosh there is an arbitration clause. That disputes having arisen between the parties they agreed to have such disputes settled through the intervention and arbitration of a reputed local gentleman Shri Anath Nath Banerji. Sukumar Ghosh and his advocate attended the sittings held by Shri Anath Nath Banerji and they duly put

their signatures in the minutes of the said arbitration agreeing to resolve all their disputes through such arbitration which amounted to an agreement in writing to have the matters settled through arbitration. In view of that agreement and in view of the fact that the arbitration proceeding was pending between the parties further proceedings in the suit should be stayed.

3. It is explicit on this application under Section 34 of the Arbitration Act, that according to Tulsi Charan Ghosh though the initial agreement for arbitration was limited to the disputes relating to the partnership business such agreement was extended to cover all disputes in view of the further agreement which was arrived at at the sitting of the arbitration by Shri Anath Nath Banerji which was acknowledged by Sukumar when he and his advocate signed the Minutes of arbitration held by Shri Banerji.

4. By his order dated October 25, 1971, the learned Subordinate Judge, 2nd Court, Howrah, dismissed the aforesaid application under Section 34 of the Arbitration Act, obviously rejecting the case of Tulsi Charan that there was a further agreement for arbitration apart from the arbitration clause in the partnership.

5. There is no dispute that the arbitrator himself was summoned in the aforesaid partition suit and he was made to produce his Minutes as acknowledged by him in his application dated March 3, 1972, filed under Section 28 of the Arbitration Act.

6. Tulsi Charan having failed to obtain stay under Section 34 of the Act, filed an appeal to this court being F. M. A. T. No. 3263 of 1971 (renumbered as F. M. A. 256 of 1972) and in the said appeal on December 17, 1971, obtained an ex parte interim order of stay of further proceedings of the partition suit being Title Suit No. 31 of 1970. Having obtained such a stay, he kept the appeal and the application for stay in the cold storage of this Court until in the meantime he secured an award from the arbitrator in the manner set out hereunder and then on June 19, 1975, had the appeal and the application dismissed for non-prosecution.

7. In spite of the fact that the learned Subordinate Judge, 2nd Court, Howrah, had dismissed the application under Section 34 of the Arbitration Act, the arbitrator

Shri Anath Nath Banerji on March 3, 1972, filed an application before the same learned Subordinate Judge under Section 28 of the Arbitration Act, which was registered as Miscellaneous Case No. 15 of 1972. In this application the arbitrator pleaded that the two brothers Tulsi Charan and Sukumar referred their disputes to him for arbitration at a joint sitting on May 18, 1969, having earlier appointed him to be the arbitrator on May 1, 1969: that he drafted a Deed of Partition on August 10, 1969, but couldnot make the award because the parties failed to return the draft and because all his papers were summoned by the learned Subordinate Judge, 2nd Court, in connection with Title Suit No. 31 of 1971. Such papers having been returned on March 1, 1972, he prayed for extension of time to make the award.

8. Though the agreement for arbitration constituting the jurisdiction for the arbitrator to make the aforesaid application was the same as was pleaded in the application under Section 34 of the Arbitration Act, and was overruled by the learned Judge himself while dismissing the application under Section 34 on October 25, 1971, the learned Judge by an order dated May 11, 1972, extended the time for making the award until July 31, 1972.

9. On August 16, 1972, the arbitrator Shri Anath Nath Banerji filed an application before the learned Subordinate Judge stating that he had made and signed the award on July 25, 1972, and he is filing a signed copy of the said award along with the application -- the original being retained by him for taking necessary steps for registration. The learned Subordinate Judge called for an explanation from the arbitrator as to why the award had not been filed within July 31, 1972, and the arbitrator filed an application on September 2, 1972, pointing out that he was to make and sign the award on or before July 31, 1972, and not to file it within the aforesaid date. In this application, the arbitrator further pointed out that if directed by the court he can file the original award which has been retained by him for the purpose of registration. The award was registered on November 27, 1972, and filed in court. The learned Subordinate Judge passed judgment in terms of the award and made the award into a decree on May 19, 1973.

10. It is necessary to refer to the terms of this award briefly. By the award the arbitrator gave the partnership business run under the name and style of Ghosh & Company and the residential house being premises No. 45 and 45/1, Desapran Sasmal Road to Tulsi Charan. He, however, directed Tulsi Charan to pay a sum of Rs. 5,000/- as owelty to Sukumar who was given the tenanted land and the structures being premises No. 115, Brindaban Mallick Lane. In his award he further directed that the printing press business run under the name and style of Samudrika Press shall be dissolved subject to payment of a sum of Rs. 2,374.74 to the third party partner Ambarnath Misra by Sukumar Ghosh who shall get the said business absolutely in his share. Each of the two brothers were further directed to pay a sum of Rs. 6,797.35 to their mother Binodini and the properties allotted to each of them was directed to be charged for payment of such amounts. It is difficult to appreciate how the arbitrator could go to the extent of directing dissolution of a partnership of the two brothers with a third party, namely, Ambarnath Misra and how he could have directed allotment of that business to Sukumar subject to payment of Rs. 2,374.74 to that third party partner who had already filed a suit for dissolution of partnership. Neither the said Ambarnath Misra nor Binodini Ghosh was a party to the arbitration agreement even as pleaded by the arbitrator himself in his application under Section 28 even then the award as made involved those persons.

11. This award was put into execution by Tulsi Charan on September 5, 1973, in Title Execution Case No. 23 of 1973. An objection was raised to such execution on behalf of Sukumar, the petitioner who amongst other objections raised an objection that the decree made on the award was fraudulent, illegal and unenforceable and without jurisdiction. The said objection was registered as Miscellaneous Case No. 43 of 1973.

12. Simultaneously the petitioner Sukumar Ghosh filed an application under Section 151 of the Code of Civil Procedure read with Order 9 Rule 13 thereof for setting aside the ex parte decree on the award made on May 19, 1973, on the ground that none of the processes of court relating to the application for extension of time under Section 28 of the Arbitration Act, or the proceeding under Section 14 thereof were served on him and that those were all fraudulently suppressed. The

objection under Section 47 of the Code filed in the execution case and the application under Section 151 of the Code read with Order 9 Rule 13 thereof filed in Miscellaneous Case No. 15 of 1972 were heard analogously by the learned Subordinate Judge, 2nd Court, Howrah, and both were dismissed by the order impugned. He dismissed the application under Section 151 of the Code read with Order 9 Rule 13 thereof upon a finding that the notices were duly served. So far as the objection under Section 47 of the Code is concerned, the learned judge dismissed the same on the view that the petitioner Sukumar having the knowledge of filing of the award since November 1972, the application is hopelessly time barred. It is obvious that the learned judge disposed of the objection under Section 47 not on the footing that it is an objection to the execution of a decree on a ground that the decree is totally without jurisdiction and unenforceable but on the footing that it was an application for setting aside an award which was not filed within the period of limitation. Feeling aggrieved by the said order, the petitioner Sukumar Ghosh has preferred the present two revisional applications.

13. Mr. Ghosh appearing in support of the two revisional applications has first contended that the learned judge in the court below failed to appreciate that the decree on the award being without jurisdiction the petitioner's objection under Section 47 should succeed. According to Mr. Ghosh, the decree as passed is without jurisdiction firstly because the court having refused the prayer under Section 34 could not have any longer acted on the award made in breach of that order and secondly because the award on which the decree was passed was a nullity. According to him the award is a nullity because of several reasons. It was so firstly because there was no valid agreement between the parties which could confer any jurisdiction on the arbitrator to arbitrate over the disputes in view of the court's findings made in the proceeding under Section 34. Secondly, according to Mr. Ghosh the arbitrator upon his own showing entered into arbitration as early as in May, 1969, and he became functus officio when he could not make any award within 6 months nor did he obtain any extension of time within the said period; when the arbitrator on February 3, 1972, sought for extension of time for filing the award he was already functus officio and could not have sustained any such application so that the order granting the extension could not confer upon him any

jurisdiction to arbitrate. Thirdly, according to Mr. Ghosh when the court refused the prayer for stay made under Section 34 of the Act by Tulsi Charan Ghosh on October 25, 1971, to the knowledge of the arbitrator, the arbitrator lost all authority to arbitrate even assuming that he had any so that the award made was invalid and without jurisdiction. Fourthly, according to Mr. Ghosh the arbitrator having taken into consideration matters extraneous and having involved people who had not subjected themselves to the jurisdiction of the arbitrator, the award as made is not only beyond the jurisdiction of the arbitrator but is a nullity since such matters are inseparable. Referring to the decree as passed it has been contended by Mr. Ghosh that even if it be held that it is not open to the petitioner to challenge the award at the stage of the execution, it should have been held by the learned judge that the court itself had no jurisdiction to pass any decree on such an award when the court had earlier refused to stay further proceedings of the suit already pending and allow the arbitration to proceed. In support of the other revisional application Mr. Ghosh drew our attention to the returns of service and the evidence adduced in the proceeding under Order 9 Rule 13 of the Civil Procedure Code to impress upon us that the learned judge in the court below could not have come to the conclusion that those processes were duly served upon the petitioner. According to Mr. Ghosh records well establish the position that there was collusion between the arbitration and Tulsi Charan Ghosh when notwithstanding the refusal of the application under Section 34 of the Act, the arbitrator obtained an ex parte order extending the time for arbitration and then made an award giving all the properties worth the name in favour of Tulsi Charan to the prejudice of the petitioner. In such a background, Mr. Ghosh has contended, the learned judge in the court below should have held that the services on refusal were not bona fide services so that the petitioner is entitled to have the decree reopened.

14. All these contentions raised by Mr. Ghosh have been strongly contested by Mr. Dutt appearing on behalf of Tulsi Charan Ghosh, the other brother. According to Mr. Dutt, the challenge thrown by Mr. Ghosh on all the points raised by him is a challenge in respect of the award. According to Mr. Dutt, such an award irrespective of whether it was invalid, without jurisdiction or a nullity could be challenged only on an application under Section 33 of the Act, and such an application not having been made and that remedy being barred by limitation it is

not open to the petitioner to challenge the award collaterally by challenging the decree in his objection under Section 47 of the Code. Mr. Dutt has strongly contended that all the grounds put forward by Mr. Ghosh may be good grounds if they are substantiated for setting aside the award but none of them is a valid ground for upholding an objection under Section 47 of the Code as raised by the petitioner. So far as the other revisional application is concerned, according to Mr. Dutt an order refusing an application under Order 9 Rule 13 of the Code being appealable a revisional application is not sustainable in law. It has been further contended by Mr. Dutt that in any event, the court below having considered the material evidence on record and having found as a fact that all the relevant processes were duly served, it is not for this court to dispute or set aside such findings in a revisional application.

15. On a careful consideration of the facts and circumstances we have no manner of doubt in our mind that there are reasonable grounds for contending, as contended by Mr. Ghosh, that the arbitrator in the present case was not acting bona fide on matters submitted to him for arbitration. There was no agreement in writing to refer to arbitration any dispute other than the one referred to in Clause 19 of the partnership deed with regard to the stationery business run under the name and style of Ghosh & Company. Under that agreement any dispute relating to that partnership alone could have been referred to arbitration and not any dispute as to the other joint properties between the two brothers which were the subject matter of partition in Title Suit No. 31 of 1970. In an application under Section 34 of the Act in the aforesaid Title Suit, Tulsi Charan claimed that such an arbitration agreement was extended to cover all the disputes between the parties when the parties agreed as such at a sitting held by the arbitrator Anath Nath Banerji and the parties acknowledged the said position by signing the Minutes. Such a plea was rejected by the learned judge as we have indicated hereinbefore. The necessary consequence is that the court refused to accept existence of any such agreement for referring to arbitration all those disputes. The arbitrator upon his own admission had due notice of the said proceeding under Section 34 and as a matter of fact he had to file his Minutes before the court in relation to the said proceeding. But notwithstanding the order of the court rejecting such an application for stay under Section 34, very strangely the arbitrator himself made an

application for extension of time for filing the award pleading the very same alleged agreement which had been rejected in the proceeding under Section 34 of the Act as the basis for his arbitration. He did so taking advantage of the fact that Tulsi Charan having preferred an appeal to this court against the order rejecting the application under Section 34 had obtained stay of further proceedings of the suit. Be that as it may, this court had not stayed the operation of the order rejecting the application under Section 34 so that the effect of the finding that there was no agreement between the parties to refer to arbitration was not suspended nor could the arbitrator have any further jurisdiction to proceed with the arbitration since he became functus officio by the order of refusal. Such a position being quite known to the arbitrator it is quite obvious that he was proceeding collusively in aid of Tulsi Charan when he obtained extension of time for filing the award and then ultimately made an award giving all valuable properties to Tulsi Charan. In our view there is ample substance in all the objections raised by Mr. Ghosh to the award as made.

16. But even then, we are of the view that Mr. Dutt can rightly take the objection that thereby the award itself was liable to be set aside firstly on the ground that it was improperly procured from an arbitrator who had not the jurisdiction to arbitrate and secondly on the ground that it was so made when the proceeding was rendered invalid in view of the provision of Section 35 of the Act. Such an objection at the execution stage stands barred in view of the provision of Section 32 of the Act. Similarly in our view there may be some substance in the other two objections raised by Mr. Ghosh, namely, the order extending the time for filing the award could confer no jurisdiction on the arbitrator because he obtained such an extension at a time when he had already become functus officio and further on the ground that certainly he had no jurisdiction to make an award involving matters not confined to the parties and involving persons who had never submitted to the arbitrator's jurisdiction. These grounds may render the award without jurisdiction but even such an award is required to be set aside on an application under Section 33 of the Act and not otherwise. Strong reliance has been placed by Mr. Dutt on the provisions of Section 32 which provides that not only no suit shall lie to dispute the validity of an award but such an award cannot be set aside, amended, modified or in any way affected otherwise than as provided in the Act. The Full Bench of this court in the case of *Saha & Company v. Iswar Singh* (1956) 60 Cal

WN 471 had clearly laid down that the Arbitration Act contemplates that all applications challenging an award must be made under Section 33 of the Act for setting aside the award except where the award is challenged as not existing in fact. Therefore, any challenge to the award even on the ground that it is without jurisdiction or that it is otherwise a nullity being open only on an application under Section 33 of the Act, would be otherwise barred in view of the provision of Section 32.

17. Though we may uphold the aforesaid objection of Mr. Dutt we have still to consider the first objection raised by Mr. Ghosh to the effect that the court had not the jurisdiction to take cognizance of the award or pass a decree thereon. In our view there is a difference between an award and the decree passed on the basis of the award. Though Section 32 of the Act may bar any challenge to the award yet if there exists an independent ground to challenge the decree passed on such an award such a challenge is not barred by Section 32. Such being the legal position in our view there is some substance in the first objection raised by Mr. Ghosh. In our view the refusal by the court of the prayer for stay under Section 34 of the Act results in two consequences. In the first place it renders further proceedings before the arbitrator invalid as specified by Section 35. It is not rendered invalid because of the provision of Section 35 but because of the fact that the court having the paramount jurisdiction to decide the dispute between the parties unless the court stays its own proceeding, the arbitrator becomes functus officio. Before the incorporation of Section 35 such was the legal consequence irrespective of whether the arbitrator had any knowledge of the proceeding or not but the legislature modified the said consequence to the extent as specified in Section 35, namely, it is only on the fulfilment of the conditions specified therein, the proceedings would be rendered invalid. But this, in our view, is only one part of the consequence which follows the refusal. The other part of the consequence of the refusal is as pointed out in the well known decision of *Doleman & Sons v. Ossett Corporation* (1912) 3 KB 257. That consequence is that if the court refuses to stay an action, the court has seisin of the dispute and it is by its decision, and by its decision alone, that the rights of the parties are to be settled. This decision was approved by this court in the case of *Ramprosad Surajmull v. Mohonlal Lachmi Narain* (1920) ILR 47 Cal 752. Therefore, the position in law is that the court

having refused to stay its own proceedings and having kept the proceeding alive is not entitled to refuse to adjudicate or decide it itself. Since the court cannot decide it in one way and at the same time pass a decree on an award deciding the dispute in the other way, the necessary consequence which follows in law, in our view, is that once an application under Section 34 is refused, the court loses its jurisdiction to take any cognizance of any award made in an arbitration proceeding which has been held in breach of the order made under Section 34 of the Act or pass any decree thereon. In this view, we are of the opinion that even if the petitioner was not entitled to challenge the award, he could rightly challenge the decree independently on the ground that the decree had been passed by the court without any jurisdiction, and as such, that decree is not executable. Such an objection was raised under Section 47 but was overruled by the learned judge when he failed to appreciate the true nature of the objection and proceeded as if the objection was one as against the award. The court, therefore, failed to exercise its jurisdiction upon a misconception which is apparent on record. The revisional application challenging the impugned order so far as it relates to the objection under Section 47 of the Code is concerned, therefore, succeeds and is allowed. Consequently the objection under Section 47 succeeds and being allowed it is held that the decree under execution being without jurisdiction is not executable. It is now for the court to proceed with the partition suit.

18. In view of our decision as above, it is wholly unnecessary to go into the merits of the other revisional application which is disposed of as such.

B.C. Chakrabarti, J.

I agree.

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