

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Miscellaneous Appeal No.878 of 2010**

**Against the Judgment and Decree dated 8<sup>th</sup> June, 1990 passed by Subordinate Judge, Ist Begusarai in Title Suit No.100 of 1987.**

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Santosh Kumar & Ors.

.....Defendants-Appellant/s

Versus

Surendra Mohan Sinha & Ors.

.....Plaintiff-Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Kamal Nayan Chaubey, Sr. Advocate

For the Respondent/s : Mr. S. S. Dwivedi, Sr. Advocate  
Mr. Ranjan Kumar Dubey, Advocate with him.

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**Dated : 24<sup>th</sup> day of March, 2015**

**P R E S E N T**

**CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO**

**CAV J U D G M E N T**

1. This Misc. Appeal has been filed by the defendants appellants under Section 39 of the Arbitration Act, 1940 against the Judgment and Decree dated 08.06.1990 passed by Sub Judge Ist,, Begusarai in Title Suit No.100 of 1987.



2. It appears that the appellants and the respondents referred their dispute to arbitrators. Two arbitrators were appointed on behalf of the plaintiff respondents and two arbitrators were appointed by the defendants-appellants, namely, (i) Mashudan Lal, Wakil (ii) Babu Jogendra Singh, Wakil (iii) Babu Jagjeewan Nath Lal (iv) Babu Hari Dwar Singh. These four arbitrators appointed the umpire (Surpanch) Babu Arjun Singh. The parties accepted the appointment of all the Panches and Surpanch and to that effect, agreement was entered which is registered agreement, ext.1. The arbitrators gave their Award on 14.4.1985. Since there was reference of opinion, the Surpanch made final Award on 18.6.1985. The Award was filed in the Court and the defendant appeared and filed objection to the Award. The case was registered as Misc. Case No.26 of 1985 which was thereafter converted to a title suit as aforesaid. By the impugned Judgment and Decree, the Court below refused to set aside the Award and made the Award rule of the Court. Against the impugned Judgment and Award, earlier First Appeal was filed being First Appeal No.329 of 1990. However, subsequently, it was converted to Misc. Appeal.

3. It appears that the dispute between the parties was that the plaintiff was claiming partition with respect to the suit property

whereas according to the defendants appellants the suit property was self acquired property and plaintiff had got no share. There had already been partition in the year 1924 and the properties have been purchased thereafter. Because of this dispute the matter was referred to arbitrators as aforesaid.

**4.** The objection was filed in the Court by the appellants to the effect that (i) no notice was given to all the parties by the arbitrators. (ii) The Award was barred by law of limitation and (iii) the arbitrators misconduct themselves in the proceeding. After hearing the parties, the Court below recorded the finding that there is no misconduct and that the Award is not barred by law of limitation and no notice is necessary as the defendants were represented before the arbitrators and accordingly rejected the objection.

**5.** The learned senior counsel, Mr. K. N. Chaubey, appearing on behalf of the appellant submitted that the period for making the Award was extended by consent of the parties on 18.4.1985 for two months. Therefore, the Award should have been made on or before 17.6.1985 but it is admitted fact that in the present case, the Award was made on 18.6.1985, therefore, the Award is barred by law of limitation. The Court below has not considered this aspect of the matter and in general observed that two months time was extended on

18.4.1985 and the Award was made on 18.6.1985, therefore, it is within time. According to the learned counsel, two months expired on 17.6.1985.

6. The learned senior counsel further submitted that no notice was given to the parties by the arbitrators but the Court below held that the arbitrators had informed the parties and both sides represented their respective units before the Punches. According to the learned counsel, each person have got their specific share in the property, therefore, in absence of each of them, the proceeding could not have been completed by the arbitrators, as such the arbitrators misconducted themselves in the proceeding.

7. The learned counsel further submitted that the plaintiff nominated his Advocate as one of the Punches and after Award, the Advocate was appearing on behalf of the plaintiff which clearly indicate that he misconducted himself in conducting the proceeding.

8. The learned counsel further submitted that one Shashiwala Sinha and Shanti Devi who were not party to the proceeding also filed objection but it was rejected only on the ground that it is not supported by affidavit. The Court below wrongly rejected the objection on that ground. If there was no affidavit, the Court below should have directed them to file affidavit in support of the objection

because admittedly, they are sisters and have got share in the property.

**9.** The learned counsel further submitted that no schedule has been prepared by the arbitrators allotting which property in favour of which party and only share has been determined. Therefore, also the Award is liable to be set aside as it is not according to reference. On these grounds, the learned counsel submitted that the learned Court below has wrongly made the Award a Rule of the Court, therefore, the appeal be allowed and the impugned Judgment and Decree be set aside and the Award made by the arbitrators may also be set aside.

**10.** On the other hand, the learned senior counsel, Mr. S. S. Dwivedi, submitted that the parties consented for extension of period and lastly two months time was extended on 18.4.1985 and the Award was made on 18.6.1985, therefore, the learned Court below has rightly held that it was within two months. Moreover even if there was one day delay, then the Court has the jurisdiction to extend the period and this power can be exercised even by the appellate Court. But on that ground, the Award cannot be set aside. When the Court below refused to set aside the Award, impliedly it will mean that the period has been extended.

**11.** So far notice to all party is concerned, the learned counsel submitted that there was two branches only. One branch, this



defendant was claiming that there had already been partition in the year 1924 and this property to be self acquired property whereas the plaintiff was claiming share in the property. Therefore, the matter was referred to arbitrator. The defendants branch, i.e., branch of Yadupati Sahay was represented by Binod Kumar. The plaintiff represented the branch of Raghupati Sahay. It was not a partition suit and the reference was not made for carving out the share of each and every individual. In view of the reference, it was only with respect to share presence of all the parties before the arbitrators in the arbitration proceeding was not necessary.

**12.** So far the objection filed by Shashiwala and Shanti Devi is concerned, the learned counsel submitted that they also belonged to Yadupati Sahay, and therefore, the estate of Yadupati Sahay was represented sufficiently by Binod Kumar who was actively participating before the arbitrators. It is not their case that any less share has been given. Whatever share has been given is branch wise, therefore, in the share of Yadupati Sahay, they are entitled to get their share defined but on that ground, the Award cannot be set aside.

**13.** So far the point raised by the appellant that the arbitrators have not prepared the schedule showing which property is allotted in favour of whom is concerned, the learned counsel submitted that this



was not the reference made to the arbitrators. The only reference was with respect to what will be the share because the reference was as to whether the plaintiffs are entitled to a share or not. The Court below has considered the reference and has quoted also. Therefore, this ground has also got no merit.

**14.** The learned counsel further submitted that according to Section 17 of the Arbitration Act, 1940, the Judgment and Decree can be set aside only if it is shown that it is in excess of or not otherwise in accordance with the Award. Here all the objections raised by the appellant has been considered by the Court below and then refused to set aside the Award. In such circumstances, the appeal is liable to be dismissed.

**15.** In view of the above submissions of the learned senior counsels appearing on behalf of the appellants and respondents, now let us consider each and every point raised by them separately.

**16.** The point of limitation is concerned, admittedly on 18.4.1985 with consent of both the parties, the time for making Award was extended for two months. Therefore, the date of order, i.e., 18.4.1985 is to be excluded. If it is excluded then two months from 19<sup>th</sup> April, 1985 will be completed on 18<sup>th</sup> June, 1985 and the Award has been made on 18.6.1985. The learned senior counsel for the

appellant submitted that two months is = 60 days and on calculation 17<sup>th</sup> June will be the 60<sup>th</sup> day, therefore, it is barred. So far this submission of the learned counsel is concerned, it is hyper technical. In general and in ordinary parlance, two months has been mentioned, and therefore, 18<sup>th</sup> June, will be the 60<sup>th</sup> day.

17. The Hon'ble Supreme Court in the case of *State of Punjab Vs. Hardyal 1985 (2) SCC 629* has held that 'if no time has been specified by the parties in the arbitration agreement then the Award must be given within four months as prescribed in Section 3 read with Clause 3 of the First Schedule to the Arbitration Act. The Court alone has been given full discretionary power under Section 28 to extend time even after the Award has been given or after the expiry of the period prescribed for the Award. This power can be exercised even by the appellate Court.' It appears that in that case, the appeal before the Supreme Court had been pending since 1970. The Hon'ble Supreme Court held that no useful purpose will be served in remanding the case to the trial Court for deciding whether the time should be enlarged in circumstances of this case and extended the time. Here also the time for two month was extended and not 60 days. Ordinary the date of order is to be excluded and then two months will start running from 19<sup>th</sup> April,



therefore, in ordinary manner two month will expire on 18.6.1985. However, in this case also, I find that the appeal is pending before this Court since 1990 and even if the appellants arguments is accepted the delay is only one day. Therefore, in the facts and circumstance of the case and as discussed above the nature of objection, I hereby extend the period for making the Award till it was made on 18.6.1985. It is settled principle of law that with consent of the parties, the period can be extended and in the present case, the parties have from time to time gave the consent of extension of time and the Hon'ble Supreme Court in the case of *H. K. Wateal Vs. V.N. Pandaya 1973 (2) SCC 510* has held that **'with the consent of the parties, the time can be extended.'** This decision has been relied upon by the Supreme Court in the case of **State of Punjab (Supra)**. I , therefore, find no reason to interfere the Judgment on this point.

**18.** So far the question regarding service of notice on all the parties are concerned, it may be mentioned here that the only male member Binod represented the branch of Yadupati Sahay. He was appearing and taking part in the proceeding before the arbitrators. They have got the same interest and the arbitrators were to decide only the point of reference. It was not a partition suit as such. It may be mentioned here that Binod Kumar who represented the branch of



Yadupati Sahay is also an Advocate. From perusal of the impugned order, it appears that the Court below has considered all these aspects of the matter and came to the conclusion that Binod Kumar was representing the branch, i.e, the defendants party. In view of the above, it appears that the defendants branch was effectively represented by the Advocate, Binod Kumar, who is party also. Therefore, it cannot be said that the proceeding before the arbitrators was ex.-parte and on that ground, it cannot be said that the arbitrators misconducted themselves.

**19.** So far the objection of Shashiwala and Shanti Devi is concerned, also they are entitled to a share of Yadupati Sahay. I have already found the estate of the deceased Yadupati Sahay was sufficiently represented by Binod Kumar Sinha. The two ladies, Shanti Devi and Shashiwala Sinha has also got the same interest as that of Sri Binod Kumar Sinha. Whatever right they have they will get from the share of Yadupati Sahay, therefore, objection or no objection does not matter any thing. The learned counsel for the appellant submitted that their objection has been rejected on the ground that it is not on affidavit. From perusal of the Judgment, it appears that the Court below has considered this aspect of the matter and found that Sri Binod Kumar Sinha has not included these two



ladies and they are not party to agreement. The Court below also found that Binod Kumar Sinha was appearing on behalf of the defendants in the case. With regard to these ladies, also the same principle will apply that they will be entitled to their share in the share of Yadupati Sahay, but on that ground that they were not made party in the agreement or no notice was sent to them by the arbitrators, the Award cannot be set aside.

**20.** The next question raised by the appellant is that the arbitrators should have made the schedule of the properties showing particular property in the *takhta* of one branch and particular property in the *takhta* of other branch. But in this case no such schedule had been given. Therefore, the Award is not according to reference. So far this submission is concerned, from perusal of the impugned Judgment at paragraph 23, I find that the Panches have decided and came to the conclusion that the ponds belongs to Maithili Sharan. The Court below quoted the two points for which the matter was referred to at paragraph 22 of the Judgment. From perusal of the point, 'Ka' it appears that the reference was to the effect that in land house trees and establishment etc. and movable and immovable property in partition what will be the share. According to this reference, ordinary meaning is that reference was made for determining the share only.

**21.** Further, it may be mentioned here that it is not the case of the appellant that the other two arbitrators appointed by the appellants interpreted this reference in other way and have made the Award making two schedules and allotted the properties to two branches.

**22.** The learned counsel next submitted that the two arbitrators appointed by the appellant have not signed the Award. So far this submission is concerned, it may be mentioned here that when there was reference of opinion between the arbitrators umpire was appointed who has given reasoned award supporting the case of the other two arbitrators appointed by the plaintiff respondents, therefore, the Award is valid and the majority will be accepted.

**23.** It appears that an interlocutory application has been filed by the appellant No.4 and 6 under Order 41 Rule 27 for permission to adduce additional evidence. The learned counsel submitted that there had already been partition between the parties in the year 1924, and therefore, the properties have been acquired by the appellants branch, i.e., Yadupati branch, as such the properties are self acquired property and the plaintiff respondents have got no share. Some sale deeds of the year 1927, 1930, 1943, 1953, 1974 have been annexed. Likewise other documents also have been annexed with the interlocutory application. The learned counsel, Mr. Naresh Kumar Sinha,



submitted that there are sufficient materials which show that there had already been partition in the year 1924 and then the properties were sold or purchased by the parties separately which would be evident from the registered sale deeds. In such circumstances, the appellants may be permitted to adduce additional evidence. So far the submission of the learned counsel is concerned, it has got no meaning in this Misc. Appeal because this Court is not examining the correctness or otherwise of the Award passed by the Arbitrators. The parties themselves submitted to the jurisdiction of the arbitrators, therefore, the Award made by the arbitrator will be binding on them. The Award can be set aside on the proof of any ground mentioned in Section 30 or 33 of the Arbitration Act, 1940. This Court is not sitting in appeal under Section 96 of the Code of Civil Procedure against the Award. It is settled principle of law that Arbitration Act, 1940 is self-contained code relating to Arbitration and a self-contained code carries within a negative import that only such acts as are mentioned therein are permissible to be done and acts or things not mentioned therein are not permissible to be done. In this connection, reference may be made to the decision of the Supreme Court in the case of *Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.* (2011) 8 SCC 333.

**24.** In view of the above settled proposition of law, I find no merit in this interlocutory application. Thus, this interlocutory application is dismissed.

**25. In the result, I find no merit in this Misc. Appeal. Accordingly, this Misc. Appeal is dismissed.**

**(Mungeshwar Sahoo, J)**

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