IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.592 of 2011

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SRI RANJIT KUMAR SINGH, SON OF LATE DR. JAMUNA PRASAD SINGH, RESDIENT OF VILLAGE-PIRPAINTI, POLICE STATION, PIRPAINTI, DISTRICT-BHAGALPUR AND RESIDING AT 95/1/3A, COSSIPORE ROAD, 2^{ND} FLOOR, KOLKATA-700002.

.... APPELLANT/S

VERSUS

1. DR. DILIP KUMAR SINGH
2. SRI AJIT KUMAR SINGH.
3. ADITYA KUMAR SINGH.

   ALL SONS OF LATE DR. JAMUNA PRASAD SINGH, RESIDENT OF VILLAGE-PIRPAINTI, POLICE STATION-PIRPAINTI, DISTRICT-BHAGALPUR.

.... RESPONDENT/S

WITH

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Miscellaneous Appeal No. 594 of 2011

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SRI AJIT KUMAR SINGH S/O LATE DR. JAMUNA PRASAD SINGH R/O VILL-PIRPAINTI, P.S.-PIRPAINTI, DISTT-BHAGALPUR AND RESIDING AT MOHALLA-GAUTAM BUDH COLONY , TILKAMANJHI, P.S.-TILKA MANJHI, TOWN AND DISTRICT-BHAGALPUR.

.... APPELLANT/S

VERSUS

1. DR. DILIP KUMAR SINGH S/O LATE DR. JAMUNA PRASAD SINGH.
2. SRI RANJIT KUMAR SINGH S/O LATE DR. JAMUNA PRASAD SINGH R/O VILL-PIRPAINTI, P.S.-PIRPAINTI, DISTT-BHAGALPUR AND RESIDING AT RESIDING AT 95/1/3 A, COSSIPORE ROAD, 2ND FLOOR, KOLKATA-700002.
3. ADITYA KUMAR SINGH S/O LATE DR. JAMUNA PRASAD SINGH R/O VILL-PIRPAINTI, P.S.-PIRPAINTI, DISTT-BHAGALPUR.

.... RESPONDENT/S

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Appearance:
(In MA No. 592 of 2011)

For the Appellant/s : Mr. Ajay Kumar, Adv.
Mr. Amit Bhushan, Adv.
Mr. Ravi Bhatia, Adv.
Mr. Jashawir Singh Arora, Sr. Adv.

For the Respondent/s : Mr. Chitranjan Pd. Sinha, Sr. Adv.
Mr. Siddhartha Prasad, Adv.

(In MA No. 594 of 2011)

For the Appellant/s : Mr. Anil Kumar Singh, Adv.
Mr. Ritesh Kumar, Adv.
Mr. Rakesh Kumar, Adv.
Mr. Manoj Kumar, Adv.
Mr. Jashawir Singh Arora, Sr. Adv.

For the Respondent/s : Mr. Chitranjan Pd. Sinha, Sr. Adv.
Mr. Siddhartha Prasad, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

Date: 9-02-2016

M.A. No.592 of 2011 wherein Ranjeet Kumar Singh is the appellant while M.A. No.594 of 2011 wherein Ajit kumar Singh is the appellant have been brought up against an order dated 23.04.2011 passed by Sub-Judge, Ist, Bhagalpur in Misc. Case No.28 of 1982 on account thereof, with the consent of the learned counsels have been heard analogously and are being decided by a common judgment. .

2. It is apparent that the learned lower court of Sub-Judge, Ist, Bhagalpur vide order dated 23.04.2011 passed in Misc. Case No.28 of 1982 accepted the award and made it rule of the court, the subject matter of these two appeals.

3. Shorn of unnecessary details, it is evident that rival parties happens to be full brother who, to have amicable partition of their ancestral property agreed for appointment of Dr. Ayodhya Prasad Singh, their maternal uncle to be the sole arbitrator and for that, having entered into a registered agreement dated 26.05.1973. The sole arbitrator, after his nomination took the issue, got partitioned the properties amongst the brothers in terms of award dated 23.11.1976 with its clarification vide dated 26.12.1976 as well as 13.05.1977 and placed it before the court as required under the Arbitration Act,1940 whereupon, these two appellants put an objection on various grounds to nullify the award which, by the order impugned, have been negativated by the learned lower court and made the award rule of the court. Hence this appeal.

4. In support of their plea, it has been submitted by the learned counsel for the appellants that the learned lower court acted against the mandate of law while brushing aside the objections raised on their behalf. The first and foremost argument happens to be that arbitrator neither happens to be witness nor a party. The award which was required to be filed in terms of Section 14(2) of the Arbitration Act, 1940, which was prevalent at the time of inception of arbitration proceeding, was only to have seal of the court by way of making it as rule of the court. While the award was filed by the arbitrator, it was drawn up on his name and further, he was examined by the Court just after filing of award before appearance of the respective parties. The aforesaid eventualities were not at all required under the statute therefore, since inception of the proceeding the learned lower court chosen a wrong path which, bound to affect the ultimate result. In its continuity, it has been submitted that once proceeding was drawn up in name of arbitrator who subsequently died, then, in that event, on account of non substitution of the party the proceeding was to abate.

5. On this score, it has also been submitted that learned lower court had wrongly interpreted that once at an earlier occasion it was observed by predecessor that proceeding was maintainable and as the same was not challenged on account thereof, met with finality, hence, the chapter was not open to challenge. Maintainability of the proceeding is a legal issue which could be taken up at any stage, at any time and the court is bound to entertain the same. Hence, as per submission made on their behalf, the proceeding lost its identity on account of illegality committed since inception of the proceeding.

6. Then it has been submitted that arbitrator had acted in partisan as well as collusive manner going to the camp of Dr. Aditya Narayan Singh and to substantiate the same so many factual aspects have been placed. In likewise manner propriety of the award has also been challenged.

7. With regard to propriety of the award, it has been submitted that award has to be filed within stipulated period of four months as per Rule-3 of Schedule-Ist of the Arbitration act while it has been filed after more than three years without having extension of period by a competent court on a prayer made on behalf of arbitrator and on account thereof, it happens to be barred by limitation whereupon the award in question became nonest in the eye of law.

8. It has also been submitted that it happens to be collusiveness of the arbitrator which makes the award inadmissible in the eye of law because of the fact that after filing of award on 23.11.1976, the arbitrator ceased to continue as an arbitrator and on account thereof, the subsequent filing of document at his end in its continuity dated 26.12.1976 as well as 13.05.1977 made the situation worsen and further, derecognized the identity of award dated 26.05.1973, to be an award in terms of Section 2 of the Arbitration Act. Therefore, by having three conjoint awards nullified sanctity of each other hence, there was no award in terms of Section 2 of the Arbitration Act before the learned lower court and that being so, there was no question for making the award dated 23.11.1976, rule of the court as well as considering the subsequent document dated 26.12.1976 as well as 13.05.1977 to be an ancillary one.

9. It has further been submitted that learned lower court failed to construe that the award so filed by the arbitrator on account of illegality having cropped up on account of collusiveness and partisan attitude of the arbitrator, was not fit for acceptance and on account thereof, would not have declared it to be rule of the court. In likewise manner, it has also been pleaded that signature of appellant though taken in deceitful manner, did not find place over other relating document.

10. It has further been submitted that the arbitrator, as he was conducting the so-called arbitration proceeding in collusive and partisan manner, failed to notice to either of the parties to participate during proceeding, giving an opportunity to the parties to place their grievances, also failed to identify the place of the proceeding and that happens to be reason behind that no proceeding, papers, documents were filed along with the award before the court which also happens to be in utter violation of law and on account thereof, it not only suggest and support the contention of the appellants rather also make the whole proceeding illegal.

11. It has also been submitted that no copy of award was ever served upon the parties and whatever been served that happens to be by the adversary Dr. Aditya Narayan Singh, who had no role to play.

12. Furthermore, it has been submitted that from mode of partition in terms of award, it is apparent that transfer of share of other coparceners was allowed in favour of Dr. Aditya Narayan Singh with regard to homestead land whereupon their ancestral house stands and for that, the remaining brothers were given 18000/- in lieu of price to the extent of their share and on account thereof, the award should have been registered. As the award has not been registered, therefore the award has lost its legal identity and is fit to be rejected. The learned counsel also referred AIR 1962 SC 78, AIR 1985 SC 920, AIR 1975 SC 1259, AIR 2001 SC 2062, AIR 1957 Pat. 633, AIR 1989 SC 1923, AIR 1953 SC 21, AIR 1995 SC 1927, AIR 2007

SC 2062, (2004) 5 SCC 304, AIR 1968 SC 1299.

13. On the other hand the learned counsel for the respondents repulsing the submission made on behalf of appellants submitted that all the submissions made on behalf of appellant happens to be fallacious one as, single conduct of appellants which the learned lower court also took notice, supports the whole procedure as well as genuineness of award and that happens to be during midst of the proceeding, appellants have sold away different plots allotted to their share to different persons wherein theme of partition has been incorporated. That means to say while the award was pending to be made as a rule of the court, a mere paper work as required in the eye of law, at the other end, the parties have accepted the same whereunder they began to transfer the properties having allotted to their share. The authenticity of the documents have not been denied and in the aforesaid background the vendor, appellants herein are bound by the recitals having incorporated therein. Accordingly, the grievances whatsoever may be, the objections in which form it may be, the challenge in whatever manner, all gone perished. Thus, the learned lower court rightly acted upon after brushing aside the same.

14. It has further been submitted that status of arbitrator Ayodhya Prasad Singh being maternal uncle was out of controversy and further, all the parties were knowing since before regarding his old age, poor health and that happens to be reason behind that such kind of privilege was itself incorporated in the deed of agreement by which appointment was made. Not only this, the aforesaid registered document also shows presence of passage in favour of arbitrator in giving further relaxation over filing of subsequent part of the award even after filing of the main award, if so required and in the aforesaid background, the other ancillary event visualized vide dated 26.12.1976 as well as 13.05.1977. Hence, the objection raised on behalf of appellants that all the three are carrying independent status, is nothing but misdeem.

15. It has also been submitted that in the aforesaid background as well as relaxation having available in favour of arbitrator, none of the statutory application as referred by the learned counsel for the appellant, is applicable in the facts and circumstances of the present case, and therefore, is misemployed .

16. It has further been submitted that, that the question of registration of the award does not arise because of the fact that under the award no right has been transferred rather an adjustment has been made and in token thereof, the other co-sharers were duly compensated. Hence, the order impugned does not attracts interference. Also referred AIR 1979 Del. 97, AIR 1970 SC 833, AIR 1961 SC 1077, (1976) 3 SCC 113, AIR 1952 SC 145.

17. In ***Thyssen Stahlunion Gmbh v. Steel Authority of India Ltd.*** reported in ***AIR 1999 SC 3923***, it has been held that once arbitral agreement was under the old Act, there would be applicability of the old Act, which is found further fortified in terms of Section 85 of the Arbitration and Conciliation Act, 1996 and further, as there happens to be no agreement amongst the parties to be governed by new Act on account thereof, there would be applicability of the old Act that means to say the Arbitration Act, 1940.

18. Now salient features of the Arbitration Act (Act before brevity) has to be seen.

Section 2(a) defines the arbitration agreement prescribing a written agreement to submit present or future differences to arbitration, whether the arbitrator is named therein or not;

(b) "award" means an arbitration award;

Section 3 prescribes provisions to be applied to arbitrator agreement and further, to include the provisons disclosed under first schedule.

Section 13 prescribes the power to be exercised by arbitrator during course of arbitration wherein clause (c) makes the award conditional or in the alternative; and to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Section 14 deals with mode of preparation of award as well as event of filing wherein an obligation has been put over the arbitrator that after having their signature over award, they will give notice to the parties in writing and further, amount of fees and charges payable in respect of arbitrators and award has to be furnished. Sub-section (2) and (3) also prescribes an obligation upon the court to notice and upon payment of fees and charges due in respect of arbitration and award, cause the award and sign copy of it together with any depositions and documents which have been taken and proved before them, to be filed in court.

Section 15 powers of Court to modify the award on the ground so mentioned therein where (a) the matter out side of reference has been dealt with, (b) happens to be is imperfect in form, or contains any obvious error which can be amended without affecting upon decision, (c) when the award contains a clerical mistake or an error arising from an accidental slip or omission.

Section 16 prescribes the grounds whereupon award could be remitted to the arbitrator or comprise and Section 17 deals with the judgment in terms of award. Section 28 authorizes the court to extend the time in filing award. Section 30 prescribes the grounds for setting aside the award. Section 39 deals with event of appeal.

19. Because of the fact that appellants put an objection before the learned lower court for setting aside the award, therefore the grounds as laid down under Section 30 of the Act is incorporated below:-

> "30. Grounds for setting aside award:- An award shall not be set aside except on one or more of the following grounds, namely:-
> (a) that an arbitrator or umpire has misconducted himself or the proceedings
> (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
> (c) that an award has been improperly procured or is other- wise invalid."

20. The first schedule in terms of Section 3 speaks regarding implied condition of Arbitration Agreement wherein condition (III) mandates that the arbitrator shall make their award within four months after entering on the reference or after having called upon to act by notice in writing from any party to the arbitration agreement or within such extent or within such extent time as the court may allow.

21. As per Section 28 of the Act, the court has been empowered to extend the time. Admittedly award has been filed after elaspse of statutory period and no prayer was ever made before the learned lower court at the end of either of the party or by the arbitrator himself for extension of period then, in that event, it is to be seen what kind of repercussion it has.

22. In ***M/s Chowdhury and Gulzar Singh, New Delhi-1, vs. M/s Frick India Ltd. New Delhi-1*** reported in ***AIR 1979 Del.97*** it has been held:

> "14. In the case of Champalal v. Mst. Samrathbai, AIR 1960 SC 629, which was a case under the Limitation Act (1908), it was held that Art. 178 of the Limitation Act applies to applications made by the parties and not to the filing of the award by the arbitration. Corresponding Article in the Limitation Act, 1963 is Art. 119 where the words are similar to the words of Art. 178 of the Limitation Act, 1908. The matter came up for consideration in this Court. In the case of Moti Ram v. Mangal Singh ILR (1971) 2 Delhi 451, it was held that the application moved by the arbitrator to file the award in court 7 years after the same was made was not barred by limitation and it was further held that there is no provision in the Limitation Act which is applicable to an application made by the arbitrator to file an award under S.17 of the Arbitration Act. It is, therefore, held that the arbitrators rightly filed the award in court and that the filing of the award by the arbitrators was not barred by any period of limitation. As a matter of fact, no period of limitation is prescribed for the arbitrator to file the award in court. Since the award is filed in court it is for the court to proceed with the matter to serve notice of the filing of the award in court and to give an opportunity to the parties to file objections and in case no objections are filed against the award, it is the duty of the court to make the award a rule of the Court."

23. In ***Hindustan Construction Co. Ltd. v. Governor of Orissa*** **and others** reported in ***AIR 1995 SC 2189***, it has been held:

> **"9.** The first schedule to the Arbitration Act specifies the implied conditions of the arbitration agreements. Because of Condition No. 3, the arbitrator has to make award within four months of his entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow. In other words, the power to extend the time of four months has been vested in the court, otherwise the award after expiry may become invalid.

But that condition has to be read along with Section 28 of the Act.

"28. *Power to Court only to enlarge time for making award.*— (1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time, the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect."

Sub-section (1) of Section 28 vests power in the Court to enlarge the time for making the award from time to time. Sub-section (2) of Section 28 says in clear and unambiguous terms that any provision in an arbitration agreement whereby the arbitrators or umpire can enlarge the time for making the award shall be void and of no effect "except with the consent of all the parties to the agreement". Sub-section (2) of Section 28 has been the subject-matter of controversy, as to whether even if the time is extended with the consent of both the parties, the restrictions prescribed in sub-section (1) of Section 28 and under Condition No. 3 of the First Schedule are contravened. In the case of *Hari Krishna Wattal* v. *Vaikunth Nath Pandya (1974) 1 SCR 259,* it was pointed out that under clause 3 of the Schedule to the Arbitration Act, the Arbitrator is expected to make his award within four months from his entering on the reference or on his being called upon to act or within such extended time as the Court may allow. But then it was said: (at pp. 2481-82 of AIR):-

"Sub-section (2) of Section 28, however, indicates one exception to the above rule that the Arbitrator cannot enlarge the time, and that is when the parties agree to such an enlargement. The occasion for the Arbitrator to enlarge the time occurs only after he is called upon to proceed with the arbitration or he enters upon the reference. Hence, it is clear that if the parties agree to the enlargement of time after the Arbitrator has entered on the reference, the Arbitrator has the power to enlarge it in accordance with the mutual agreement or consent of the parties. That such a consent must be a post-reference consent, is also clear from Section 28(2) which renders null and void a provision in the original agreement to that effect. In a sense where a provision is made in the original agreement that the Arbitrator may enlarge the time, such a provision always implies mutual consent for enlargement but such mutual consent initially expressed in the original agreement does not save the provision from being void. It is, therefore, clear that the Arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the arbitration the parties to the arbitration agreement consent to such enlargement of time."

Again in the case of *State of Punjab* v. *Hardyal (1985) 2 SCR 649,* it was said: (at p.922 of AIR): -

"Sub-section (1) of Section 28 is very wide and confers full discretion on the court to enlarge time for making the award at any time. The direction under sub-section (1) of Section 28 should, however, be exercised judiciously. Sub-section (2) of Section 28 also makes it evident that the court alone has the power to extend time. It further provides that a clause in the arbitration agreement giving the arbitrator power to enlarge time shall be void and of no effect except when all the parties consent to such enlargement. It is not open to arbitrators at their own pleasure without consent of the parties to the agreement to enlarge time for making the award."

In the case of *Hindustan Steel Works Construction Ltd.* v. *C. Rajasekhar Rao (1987) 4 SCC 93,* this Court said:

"In this connection reference may be made to *H.K. Wattal* v. *V.N. Pandya (AIR 1973 SC 2479)*, where this Court reiterated that sub-section (2) of Section 28 indicated one exception to the above rule that the arbitrator could not enlarge the time, and that was when the parties agreed to such an enlargement. It is clear this Court reiterated that the arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the arbitration the parties to the arbitration agreement consent to such enlargement of time. In this case precisely it so happened."

> According to us, the High Court overlooked the provision of sub-section (2) of Section 28. After the Special Tribunal had entered into reference, by consent of the parties, the time for making the award could have been extended. In the present case it is not in dispute that the appellant and the respondent-State both had agreed for extension of the period for making the award after the Special Tribunal had entered into reference. As such the award cannot be held to be invalid on that ground."

24. In ***Jatinder Nath v. Chopra Land Developers (P) Ltd.*** reported in ***AIR 2007 SC 1401,*** it has been held:

> "**17.** As stated above, one of the points raised on behalf of the appellant herein is that ex parte award dated 29-3-1994 was non est since it was made beyond four months from the date when the arbitrator entered upon the reference. We do not find any merit in this contention. Chapter II of the Arbitration Act covers references, in which the parties may proceed, if nothing goes wrong, up to the stage of delivery of the award, without the intervention of the court. This does not mean that the court has no authority to intervene at an early stage, should it become necessary. In the present case, as stated above, the arbitrator entered upon a reference pursuant to the notice given by the appellant on 24-8-1992. The notice was given on 20-8-1992. Therefore, Section 8 of the Act has no application. Section 8 applies only where the parties do not concur in the appointment. Section 8 and Section 20 operate in different provinces. Section 20 confers power on the court to order the agreement to be filed and to make an order of reference to the arbitrator appointed by the parties or where they do not agree, the court can appoint any other person of its choice as an arbitrator. This discussion is important. This difference between Section 8 and Section 20 shows that the reference flows from an agreement between the parties in the cases falling under Section 8. The reference flows from the agreement in cases falling under Chapter II of the Arbitration Act and as

long as the agreement stands, the reference remains valid unless it is superseded by an order of the court under Section 19. Under that section, where award becomes *void* under Section 16(3) or where an award is set aside, the court may by an order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect. Therefore, till such time as the order is passed by the court under Section 19 superseding the reference, the same shall remain valid till the agreement is superseded. This is the scope of Section 8 read with Section 19 of the Act. On the other hand, in cases falling under Section 20 of the Act, power is conferred on the court to make an order of reference to the arbitrator. That power is conferred on the court which orders the agreement to be filed before it. In a proceeding under Section 8, disputes are presented by the parties before the arbitrator, whereas in proceedings under Section 20, the disputes are referred by the court. It is for this reason that it has been repeatedly held that merely because an arbitrator does not make an award within the specified period of four months the court has the power to extend the period. The award given by an arbitrator after four months is not binding on the parties. Such an award is vitiated as the arbitrator has no power to make an award after four months. However, a bare failure of an arbitrator to make an award within the time allowed by law will not involve the consequences of it being set aside only on that ground. The court has ample powers in a given case to extend the time and give life to the vitiated award by exercising judicial discretion under Section 28 of the Act. An application to have the award set aside on the ground that it was made beyond time prescribed has to be moved under the Act. No separate suit would lie for that purpose. Section 28 is not limited only to references to arbitration made in a suit pending before the court. Further, the power given to the court under Section 28 is so wide that it can extend the time even if the award is made beyond four months from the date of the arbitrator entering upon the reference. The only restriction is that it must be exercised with judicial discretion. In the present case, as stated above, the Developer moved an application for making the award the rule of the court on 12-4-1994. Unfortunately, the appellant chose not to appear before the trial court. In the circumstances, an ex parte decree came to be passed on 31-5-2006. We have used the word unfortunately because the appellant herein had filed his objections before the trial court. Those objections were dismissed as he chose to remain absent. The appellant chose to remain absent as he had moved or decided to move this Court in special leave petition against the impugned judgment of the High Court on the point of territorial jurisdiction. The judgment of the High Court is dated 19-4-2006. The award is made the rule of the court by the trial court on 31-5-2006 in view of the impugned judgment of the High Court. We have also gone through the award. We do not wish to express any opinion on the merits, however, the fact remains that the arbitrator entered upon the reference on 24-8-1992. He fixed the date of hearing on 5-9-1992. On 5-9-1992 the appellant appeared before him. The arbitrator was absent. The award has been given after almost fourteen months and that too after 14-10-1993 when the appellant herein moved an application under Section 20 of the Act for appointment of a new arbitrator. Taking into account the above circumstances, we set aside the ex parte order dated 31-5-2006 passed by the trial court at Faridabad making award dated 29-3-1994 the rule of the court. Consequently, we direct restoration of the matter to the file of the Court of the Additional Civil Judge (Senior Division), Faridabad in Case No. 7 instituted on 12-4-1994 titled *Chopra Land Developers (P) Ltd.* v. *Jatinder Nath* (Case No. 7 decided on 12-4-1994). We may clarify that the trial court will proceed on the basis that it has territorial jurisdiction to decide the application made by the Developer under Sections 14 to 17 of the Act. The said application will be decided on merits alone in accordance with law. In other words, the trial court will re-examine the question on merits as to whether the award given by the arbitrator on 29-3-1994 should or should not be made the rule of the court. The trial court will have to decide whether to extend the period for making the award or not, whether to supersede the reference or not. The trial court will proceed in accordance with law. Any observation on the merits of the case mentioned hereinabove shall not be treated as opinion of this Court. Further, the trial court will proceed on the basis that it has territorial jurisdiction to decide the above matter."

25. In ***State of Punjab v. Hardyal*** reported in ***AIR 1985 SC 920,*** it has been held:

> "**8.** The same points have been reiterated before this Court. Before dealing with the points involved it will be convenient to refer to the relevant provisions of the Arbitration Act. Section 3 reads:
>
> "3. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule insofar as they are applicable to the reference."
>
> Section 28 reads:
>
> "28. (1) The court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time, the time for making the award.
>
> (2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect."
>
> Clause 3 of First Schedule provides:
>
> "3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow."
>
> **9.** A perusal of these provisions indicates that it is open to the parties to an arbitration agreement to fix the time within which the arbitrator must give award, but it has to be so stated in the agreement itself. If perchance no time has been specified by the parties in the arbitration agreement, then by virtue of operation of Section 3 read with clause 3 of the First Schedule the award must be given within four months of the arbitrator entering on the reference or after having been

called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow.

10. Sub-section (1) of Section 28 is very wide and confers full discretion on the court to enlarge time for making the award at any time. The discretion under sub-section (1) of Section 28 should, however, be exercised judiciously. Sub-section (2) of Section 28 also makes it evident that the court alone has the power to extend time. It further provides that a clause in the arbitration agreement giving the arbitrator power to enlarge time shall be void and of no effect except when all the parties consent to such enlargement. It is not open to arbitrators at their own pleasure without consent of the parties to the agreement to enlarge time for making the award.

11. In *H.K. Wattal* v. *V.N. Pandya (1974) 1 SCR 259 : AIR 1973 SC 2479)* dealing with Section 28(1) of the Arbitration Act this Court observed: (at p. 2481 of AIR):

> "There is no doubt that the arbitrator is expected to make his award within four months of his entering on the reference or on his being called upon to act or within such extended time as the Court may allow. Reading clause 3 of the Schedule along with Section 28 one finds that the power to enlarge the time is vested in the Court and not in the arbitrator. Clause 3 and Section 28(1) exclude by necessary implication the power of the arbitrator to enlarge the time. This is emphasised by Section 28(2) which provides that even when such a provision giving the arbitrator power to enlarge the time is contained in the agreement, that provision shall be void and of no effect. The headnote of Section 28 brings out the force of this position in law by providing that the power is of the Court only to enlarge time for making the award.
>
> Sub-section (2) of Section 28, however, indicates one exception to the above rule that the arbitrator cannot enlarge the time, and that is when the parties agree to such enlargement. The occasion for the arbitrator to enlarge the time occurs only after he is called upon to proceed with the arbitration or he enters upon the reference. Hence, it is clear that if

the parties agree to the enlargement of time after the arbitrator has entered on the reference, the arbitrator has the power to enlarge it in accordance with the mutual agreement or consent of the parties. That such a consent must be a post reference consent, is also clear from Section 28(2) which renders null and void a provision in the original agreement to that effect. In a sense where a provision is made in the original agreement that the arbitrator may enlarge the time, such a provision always implies mutual consent for enlargement but such mutual consent initially expressed in the original agreement does not save the provision from being void. It is, therefore, clear that the arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the arbitration the parties to the arbitration agreement consent to such enlargement of time."

12. The next question that crops up for consideration is what will be the effect if a party to the arbitration took part in the proceedings before the arbitrator even after the expiry of four months, that is, the period prescribed for giving the award. Some High Courts have taken the view that in such a situation the condition of four months' period will be deemed to have been waived. Such a view has been taken by the Allahabad High Court in *Shambhu Nath* v. *Surja Devi AIR 1961 All 180*. A learned Single Judge of that High Court observed:

"A party to an arbitration agreement who voluntarily takes part in the arbitration proceedings after the expiry of the period of four months will be deemed to have waived the implied conditions as to time."

A similar view has been taken by the Madhya Pradesh High Court in *Shivlal* v. *Union of India AIR 1975 Madh Pra 40*. In *Ganesh Chandra* v. *Artatrana AIR 1965 Orissa 17 (at P.19)* a Single Judge of the Orissa High Court observed:

"If the parties, after the expiry of the four months, submit themselves to the jurisdiction of the arbitrators and take part in the proceeding enabling them to pass an award, it cannot be said that the arbitrators acted without jurisdiction. In such a contingency, the principle of waiver and estoppel would have full application."

13. Once we hold that the law precludes parties from extending time after the matter has been referred to the arbitrator, it will be contradiction in terms to hold that the same result can be brought about by the conduct of the parties. The age-long established principle is that there can be no estoppel against a statute. It is true that the time to be fixed for making the award was initially one of agreement between the parties but it does not follow that in the face of a clear prohibition by law that the time fixed under clause 3 of the Schedule can only be extended by the court and not by the parties at any stage, it still remains a matter of agreement and the rule of estoppel operates. It need be hardly emphasised that the Act has injuncted the arbitrator to give an award within the prescribed period of four months unless the same is extended by the court. The arbitrator has no jurisdiction to make an award after the fixed time. If the award made beyond the time is invalid the parties are not estopped by their conduct from challenging the award on the ground that it was made beyond time merely because of their having participated in the proceedings before the arbitrator after the expiry of the prescribed period.

14. The policy of law seems to be that the arbitration proceedings should not be unduly prolonged. The arbitrator therefore has to give the award within the time prescribed or such extended time as the court concerned may in its discretion extend and the court alone has been given the power to extend time for giving the award. As observed earlier, the court has got the power to extend time even after the award has been given or after the expiry of the period prescribed for the award. But the court has to exercise its discretion in a judicial manner. The High Court in our opinion was justified in taking the view that it did. This power, however, can be exercised even by the appellate court. The present appeal has remained pending in this Court since 1970. No useful purpose will be served in remanding the case to the trial court for deciding whether the time should be enlarged in the circumstances of this case. In view of the policy of law that the arbitration proceedings should not be unduly

> prolonged and in view of the fact that the parties have been taking willing part in the proceedings before the arbitrator without a demur, this will be a fit case, in our opinion, for the extension of time. We accordingly extend the time for giving the award and the award will be deemed to have been given in time."

26. In ***Hari Shanker Lal v. Shambhu Nath*** reported in ***AIR 1962 SC 78,*** it has been held:

> "**4.** The answer to the question raised turns upon the true meaning of the provisions of Rule 3 of the First Schedule to the Act. It will be convenient at the outset to read the relevant provisions of the Act.
>
> Section 3 of the Act reads:
>
> > "An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule insofar as they are applicable to the reference."
>
> Rule 3 of the First Schedule to the Act is as follows:
>
> > "The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow."
>
> Section 28 says:
>
> > "(*i*) The court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award."
>
> Section 3 of the Act makes the period prescribed in the First Schedule for making an award a term of the arbitration agreement. Rule 3 of the First Schedule to the Act is couched in a mandatory form and it imposes a duty on the arbitrators to make their award within one or other of the three alternative periods mentioned therein. The first construction suggested by learned counsel for respondents is that the words "entering on the reference" in the first clause of the rule and the words "to act" in the second clause thereof are synonymous and they mean the same thing. This would make the second alternative unnecessary in

many cases, for if the words "to act" means "to enter on the reference" there is no need for fixing two separate periods; for, on that construction, notice would always precede the act of entering on the reference and, therefore, the first alternative would serve the purpose. On that construction, the only purpose it serves is that a party may force the pace by calling upon the arbitrators, who are delaying to enter on the reference, to act expeditiously. If the legislature intended to give such a limited scope to the said rule, it would not have used two different sets of words in the two alternative clauses and different starting points for computing the period of four months. The word "act" is certainly more comprehensive than the words "enter on the reference". The distinction between the said two sets of words has been brought out with clarity in *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate (1899) 2 Ch D 80*. There, on January 11, 1898, one of the parties served on the arbitrators a notice in writing addressed to both the arbitrators requiring them to appoint an umpire; on February 15, 1898, the arbitrators appointed an umpire; the arbitrators did not make any award, but on April 30, 1898, the umpire made his award; it was contended that by the notice requiring the arbitrators to appoint an umpire, they had not been "called on to act" within the meaning of Schedule I(*c*), to the Arbitration Act, 1889, and consequently the three months within which the arbitrators were required by that clause to make their award had not expired, and the jurisdiction of the umpire had not arisen and his award was invalid. In that context it became necessary to decide what the words "called on to act" mean and whether they were synonymous with the words "called on to enter on the reference." Lindley, M.R., adverting to that contention observed at p. 91:

> "The three months are to run first 'after entering on the reference'; and then, in the alternative, after 'having been called onto act'…. If they are 'called on to act' as arbitrators, it must mean that they are called on to do an act as arbitrators. It appears to me that these arbitrators were 'called on to act' by the notice to appoint an umpire; and there was very good reason for making the period of three months

> run from that time. If the arbitrators do not 'enter on the reference', and they are 'called on to act', it is an intimation to them that they are called on to do the work. I cannot agree with Stirling, J. that 'called on to act' means 'called upon to enter on the reference'. Being called on to do anything as an arbitrator is being called on to act. That the appointing of an umpire is an act done by the arbitrators as arbitrators is obvious. To do that which they could only do in the character of arbitrators is, in my judgment, clearly within the words, and I think it is within the sense of the expression used in clause (*c*)."

No doubt in the above case, unlike in the present case, the arbitrators were called on to act before they entered on the reference; but that cannot make any difference in the application of the principle, namely, that "to act" is not the same as "to enter on the reference", and that the former is of a wider import than the latter. The Allahabad High Court, in *Sardar Mal Hardat Rai* v. *Sheo Bakhsh Rai Sri Narain (1922) ILR 44 All 432* had to consider the scope of Rule 3 of the First Schedule to the Act in a different context. There, on January 14, 1919, a dispute had been referred to arbitrators; the award was made on August 23, 1919; it was contended that the award had not been made within three months after the arbitrators entered on the reference, nor was it made within three months after having been called upon to act by notice in writing by one of the parties to the submission. Piggott and Walsh, JJ., held that the two clauses were alternative in the sense that when no reference was entered upon at all then the time ran from the notice calling upon the arbitrators to act, and that if they had entered on the reference, they had three months from that moment for making their award. In that case, the notice to act was given before the arbitrators entered upon the reference, and as the award was made within the prescribed time from the date of entering upon the reference, though beyond the prescribed time from the notice asking the arbitrators to act, they held that the award was within time on the basis of the second alternative. In neither of the two cases the question that now falls to be considered had directly arisen, namely, whether, if the notice to act was given subsequent to the arbitrators entering on the reference, the period should be computed from the former date or from the latter date. That question arises in this case.

5. The said discussion leads us to the conclusion that though entering on the reference is an act of the arbitrators, that is not exhaustive of the content of the word “act” in the second alternative.

6. But this wide construction, without limitation, would defeat the purpose of Rule 3. The object of the rule is to prescribe a time-limit in the interest of expeditious disposal of arbitration proceedings. If under the second alternative notice to act can be given at any time, it would enable one of the parties to enlarge the period of time prescribed indefinitely: not only the time-limit prescribed would become meaningless but one of the parties could also, without the consent of the other, resuscitate a dead or stale reference. This could not have been the intention of the legislature and, therefore, a reasonable construction should be placed upon the provision. Such a limitation on the right of a party to reopen an abandoned reference is implicit in the words “to act”. A party can ask the arbitrator to act if he is legally bound to act under the reference. If after the expiry of four months from the date of entering on the reference an arbitrator can no longer act, a notice given thereafter cannot ask him to act. Realising this difficulty, learned counsel for the respondents suggests that an arbitrator can act even after four months, though the award cannot be filed without getting an extension of time from the court. But the relevant provisions do not support this contention.

7. The third alternative in Rule 3 shows that an award can be made within the extended time allowed by the court. Section 28 of the Act enables the court to extend the time for the making of the award; extension of time may be given even after the award has been factually made. So till the time is extended an award cannot be made, though, when extended, the award factually made may be treated as an award made within the time so extended. To put it differently, if time was not extended by court, the document described as an award would be treated as

> non est. In this view, the second alternative in Rule 3 can be invoked only in a case where a notice to act has been given to the arbitrators either before the arbitrators entered on the reference or after they have entered on the reference but before the period of four months from that date has run out."

27. Therefore, it is found conclusively settled at rest that in case there happens to be no extension of period as per section 28 of the Act, the award loses its legal identity, as, after consuming the prescribed period, it is found de-recognized in terms of condition III of first schedule as per Section 3 of the Act. Moreover, there is no substantive piece of material to suggest that parties have actively participated during arbitration proceeding even after expiry of statutory period as no proceeding has been filed by the arbitrator in terms of Section 14(2) of the Act.

28. The second question so raised relates with legality of the order impugned. It has been submitted that registration of the award was necessary in the background of the event whereunder the land having residential house standing thereupon has been allotted exclusively to the share of Dr. Aditya Narayan Singh and in lieu thereof, all the remaining co-sharers have been directed to receive Rs.18,000/-. By these actions, virtually the right, title, interest and possession of other co-sharer have been extinguished and vested to in favour of Dr. Aditya Narayan Singh who, on account thereof, borrowed the right, title and interest of the other co-sharer. Payment of Rs.18,000/- in lieu thereof is suggestive of the fact that it happens to be transfer and as it goes out of Rs.100/- therefore, as per Section 17 of the Registration Act, it has to be registered. Because of the fact that the award is not registered one hence the learned lower court should have rejected the award.

29. On the other hand, the learned counsel representing the respondent submitted that arbitration agreement executed in favour of sole arbitrator Ram Ayodhaya Singh was for partition of the joint family property which he partitioned and happens to be in form of award. Therefore, there happens to be no effect of transfer rather the award happens to be mere a memorandum of partition and as such, no registration was required.

30. In ***Mattapalli Chelamayya v. Mattapalli Venkataratnam*** reported in ***(1972) 3 SCC 799 ,*** it has been held :

> "9. The contention of the appellant was that the award is a non-testamentary instrument which purports or operates to create and declare right title or interest of the value of more than Rs 100 in immovable property and hence it is compulsorily registrable under Section 17(1)(*b*) of the Indian Registration Act. It is submitted that the award not only declares the title of the sharers in immovable property of more than rupees hundred and upwards but also creates a charge in immovable properties of more than that value. This submission is only partly correct. The award so far as it refers to the partition of immovable properties does not purport to create or declare any interest or title in immovable property. That is the view taken by the

High Court and we are in agreement with it. We have already referred to the fact that the partition of the immovable properties had been effected by the arbitrators between May 26, 1952 and May 30, 1952 and the award merely refers to this fact in the following terms:

> "As per the partition effected by us from May 27, 1952 to May 30, 1952, of the lands, houses and house sites belonging to your joint family and in the possession and enjoyment of your joint family, the lands, etc., mentioned in Schedule B (referred to have come to you) and each of you obtained individual and separate possession of the lands that came to his share and you were in enjoyment peacefully and without any disturbance or dispute."

This recital is consistent with the parties' own admission about the partition in Ex. A-2 namely the second arbitration agreement, dated October 10, 1954. The partition of the immovable properties had been effected in about the middle of 1952 and the parties were since then in possession of the lands, etc which had been allotted to their share. The recital in the award is no more than a reference to an existing fact and does not purport to create or declare, by virtue of the award itself, right title or interest in immovable property. Therefore, as shown in *Kashinathsa Yamosa Kabadi, etc*. v. *Narsingsa Bhaskarsa Kabadi, AIR 1961 SC 1077* etc., the award cannot be regarded as compulsorily registrable on the ground that it embodies partition. So far as the charge is concerned it is created for the first time by the award and it is not disputed that the transaction of the charge would require to be registered. On taking an account of the funds and collections of the family the arbitrators came to the conclusion that Chelamayya had received Rs 14,050-7-3, in excess of his share and Narainamurty had received Rs 8926-3-6, in excess of his share. The arbitrators directed that they should make good the amount which came to Rs 22,009-7-9. This amount was distributed by the arbitrators between Venkataratnam and Venkataswamy — the former getting Rs 8268-11-0 and the latter Rs 14,708-15-9 and then the arbitrators directed as follows:

> "We decided that for the amounts due to

> Venkataratnam and Venkataswamy, Chelamayya and Narainamurty should pay interest from August 30, 1955, till the date of award at 0-8-0 per cent per mensem. It is decided that the amounts noted above have to be paid on the basis of the first charge on immovable properties that came to both and on the basis of the personal liability."

It will be thus seen that Chelamayya and Narainamurty i.e. the present appellant were made liable to pay certain amounts personally to the plaintiffs-respondents along with interest and this amount was made a charge on the immovable properties in the possession of Chelamayya and Narainamurty."

31. In ***M. Anasuya Devi v. M. Manik Reddy*** reported in ***(2003) 8 SCC 565,*** it has been held:

> "**4.** After we heard the matter, we are of the view that in the present case this issue was not required to be gone into at the stage of the proceedings under Section 34 of the Act. In fact, this issue was premature at that stage. Section 34 of the Act provides for setting aside of the award on the grounds enumerated therein. It is not in dispute that an application for setting aside the award would not lie on any other ground, which is not enumerated in Section 34 of the Act. The question as to whether the award is required to be stamped and registered, would be relevant only when the parties would file the award for its enforcement under Section 36 of the Act. It is at this stage the parties can raise objections regarding its admissibility on account of non-registration and non-stamping under Section 17 of the Registration Act. In that view of the matter, the exercise undertaken to decide the said issue by the civil court as also by the High Court was entirely an exercise in futility. The question whether an award requires stamping and registration is within the ambit of Section 47 of the Code of Civil Procedure and not covered by Section 34 of the Act."

32. In ***Satish Kumar v. Surinder Kumar*** reported in ***AIR 1970***

SC 833, it has been held:

> **"10.** We may mention that an appeal was filed in this Court against the decision of the Division Bench of the Patna High Court, which had referred the case of *Sheonarain Lal* v. *Prabhu Chand ILR 37 Pat. 252* to the Full Bench for opinion on certain questions and which decided the case in accordance with that opinion, and the same was dismissed by this Court in *Sheonarain Lal* v. *Rameshwari Devi (Civil appeal No.296 of 1960) A* in which the judgment was delivered by the same Bench which decided the case of *Uttam Singh Dugal* v. *Union of India (Civil Appal no.162 of 1962)*. It is true that this Court in *Sheonarain Lal* v. *Rameshwari Devi (Civil appeal No.296 of 1960)* did not expressly rule on the validity of the answer given by the Patna Full Bench in *Sheonarain Lal* v. *Prabhu Chand ILR 37 Pat. 252* that such awards did not require registration, but decided the case on the point whether the award in dispute in that case in fact purported or operated to create a right, title or interest of the value of more than Rs 100 in immovable properties. But, after holding that the document did not operate to create or extinguish any right in immovable property, this Court observed:
>
> > "The position would have been otherwise if the arbitrators had directed by the award itself that this shop would go to Prabhu Chand without any further document. In that case the award itself would have created in Prabhu Chand a right to these properties. That is not, however, the provision in the award. In the absence of a registered document, Prabhu Chand would get no title on the award and Sheonarain's title would remain in the shop."
>
> In this connection we may mention two other decisions of this Court. In *Champalal* v. *Samarath Bai [1960] 2 SCR 810,816* Kapur, J., speaking for the Court, observed as follows:
>
> > "The second question that the award required registration and would not be filed by the arbitrators before it was registered is equally without substance. The filing of an unregistered award under Section 49 of the Registration Act is

not prohibited; what is prohibited is that it cannot be taken into evidence so as to affect immovable property falling under Section 17 of the Act. That the award required registration was rightly admitted by both parties."

11. Again in *Kashtinathsa Yamosa Kabadi* v. *Narsingsa Bhaskarsa Kabadi [1961] 3 SCR 792,806* Shah, J., speaking for the Court observed:

"The records made by the Panchas about the division of the properties, it is true, were not stamped nor were they registered. It is, however, clear that if the record made by the Panchas in so far as it deals with immovable properties is regarded as a non- testamentary instrument purporting or operating to create, declare, assign limit or extinguish any right, title or interest in immovable property, it was compulsorily, registerable under Section 17 of the Registration Act, and would not in the absence of registration be admissible in evidence."

12. In view of the above decisions it is not necessary to refute the other reasons given by both the Full Benches, but out of respect for the learned Judges we will deal with them. We may mention that no comment was made in these cases on the provisions of para 7 of Schedule 1 to the Act. This para provides:

"7. The award shall be final and binding on the parties and persons claiming under them respectively."

If the award is final and binding on the parties it can hardly be said that it is a waste paper unless it is made a rule of the Court.

13. We are unable to appreciate why the conferment of exclusive jurisdiction on a court under the Act makes an award any the less binding than it was under the provisions of the Second Schedule of the Code of Civil Procedure. The Punjab Full Bench held that the registration does not in any manner add to its efficacy or give it any added competence. We cannot concur with these observations. If an award affects immovable property over the value of Rs 100, its registration does get rid of the disability created by Section 49 of the Registration Act.

14. Regarding the difficulty pointed out by the

Punjab Full Bench that there may be many registrations we are not called upon to decide whether these difficulties would arise because the language of Section 17 of the Registration Act is plain. It may be that no such difficulties will arise because under Section 16(2) of the Act what the arbitrator submits to the Court is his decision and it may be that the decision may not be registerable under Section 17 of the Registration Act. But as we have said before we are not called upon to decide this point.

15. In our opinion, Capoor, J., was right in dissenting from the Patna Full Bench in *Seonarain Lal* v. *Prabhu Chand ILR 37 Pat. 252* and holding that the award in dispute required registration.

16. In the result the appeal fails and is dismissed with costs."

33. In ***Lachhman Dass v. Ram Lal*** reported in ***AIR 1989 SC 1923,*** it has been held:

"**11.** The first question that requires consideration in the instant case is whether the court could have looked into the award for the purpose of pronouncing judgment upon the award. In order to deal with this question, it is necessary to refer to Section 17 of the Act. Section 17 deals with documents of which registration is compulsory. Section 17 of the said Act mentions the documents which must be registered. Section 17(1)(*e*), inter alia, provides:

"non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property."

Section 23 of the said Act provides as under:

"Subject to the provisions contained in Sections 24, 25 and 26, no document other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution:

Provided that a copy of a decree or order may be presented within four months from the day on which the decree or order was made, or where it is appealable, within four months from the day on which it becomes final."

Section 25 of the said Act provides as under :

"If, owing to urgent necessity or unavoidable accident, any document executed, or copy of a decree or order made, in India is not presented for registration till after the expiration of the time hereinbefore prescribed in that behalf, the Registrar, in cases where the delay in presentation does not exceed four months, may direct that, on payment of a fine not exceeding ten times the amount of the proper registration fee, such document shall be accepted for registration."

Section 49 of the said Act provides as under :

"No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—

(*a*) affect any immovable property comprised therein, or

(*b*) confer any power to adopt, or

(*c*) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered."

The proviso to this section deals with a suit for specific performance with which we are not concerned.

12. Shri Ashri contended that the document in question was one which did not require registration. He submitted that the High Court was right in the view it took. He further submitted that the property in dispute was in the joint name of the appellant and the respondent. The dispute was whether the half of the property held by the appellant was benami for the respondent or a declaration to that effect could be made by the arbitrator. Mr Ashri further submitted that it was the case of the appellant that he was the owner of the property in question. The award in question recites that Shri Ajit Singh had been appointed as arbitrator by an agreement dated March 7, 1974 by both the parties. The award further recites that he was appointed arbitrator to adjudicate through arbitration "their disputes regarding property against each other". The arbitrator thereafter recites the steps taken and the proceedings before him. It was further stated that the appellant did not orally reply to the contentions of the respondent nor did he submit his claims in writing. In these circumstances, the award was bad. The award stated, inter alia:

> "Land of Tibbi comprising of rect. No. 13 Killa Nos. 23(3-11), 26(1-11), 16(5-15), 17(5-14), 25(4-4), 23/27 and 26/1 situated in Mauz Ugra Kheri, near Chandni Bagh, which is in the joint name of Shri Ram Lal, party 1 and Shri Lachhman Dass, party 2. The half-ownership of Shri Lachhman Dass shall be now owned by Shri Ram Lal in addition to his half share owned by him in these lands."

The award gave certain other directions. Regarding other claims, it was held that lands were allotted in the names of both the brothers and in that context Rs 16,000 were spent by the respondent from his own sources. The arbitrator stated that he admitted these expenses at Rs 10,000 and awarded that an amount of Rs 5000 equal to half share should be paid by the appellant to the respondent. The other claims were also decided by the award with which it is not necessary to deal in the present appeal. The question is — does this award purport or operate to create, declare or assign, limit or extinguish any right, title or interest in immovable property? Shri Ashri submitted that as his client was the real owner and as Respondent 1 was mere benamdar, and the arbitrator merely declared the true position the award did not as such create, declare or assign any right, title or interest in any immovable property by the aforesaid clause in the award.

13. The Division Bench of the Madras High Court in *Ramaswamy Ayyar* v. *Thirupathi Naik (1904) 27 ILR Mad 43* has observed that the criterion for purposes of registration under the Registration Act, 1877 (3 of 1877), which was in the same terms as the provision of the present Act, was what was expressed on the face of the document, not what incidents might be annexed by custom to a grant of the kind. Therefore, we have to see not what the document intends to convey really, but what it purports to convey. In other words, it is necessary to examine not so much what it intends to do but what it purports to do.

14. The real purpose of registration is to secure that every person dealing with the property, where such document requires registration, may rely with confidence upon statements contained in the register as a full and complete account of all transactions by which title may be affected. Section 17 of the said Act being a disabling section, must be construed strictly. Therefore, unless a document is clearly brought within the provisions of the section, its non-registration would be no bar to its being admitted in evidence.

15. On a proper construction of the award, it does appear to us that the award did create, declare or assign a right, title and interest in the immovable property. The award declares that half share of the ownership of Shri Lachhman Dass shall "be now owned by Shri Ram Lal, the respondent in addition to his half share owned in those lands". Therefore, the said award declares the right of Ram Lal to the said share of the said property mentioned in that clause. It is not in dispute that the said property is immovable property and it is not merely a declaration of the pre-existing right but creation of new right of the parties. It is significant to bear in mind that the section enjoins registration wherever the award "purports or operates to create, declare, assign, limit or extinguish" whether in present or in future any right, title or interest of the value of Rs 100 or upwards in immovable property.

16. Shri Ashri tried to submit that while reading the award reasonably and fairly, it must be construed that there was no creation or declaration of any new right in the immovable property. What was done was only, according to Shri Ashri, a declaration of existing right, that is to say, Ram Lal's full ownership of the property in question. The section, however, enjoins registration in respect of any document, which purports not which intends to create a right in immovable property or declare a right in immovable property. It is not a question of declaration of an existing right. It is by this award that a new right was being created in favour of Ram Lal, the respondent herein. In that view of the matter, in our opinion, it cannot be contended that the award did not require registration. This question was considered by this Court in *Satish Kumar* v. *Surinder Kumar (1969) 2 SCR 244*. There an arbitrator appointed by the appellants and the respondents partitioned their immovable property exceeding the value of Rs 100. The arbitrator applied under Section 14 of the Arbitration Act, 1940 to the court for making the award a rule of the court. On the question whether the award was admissible in evidence as it was not registered it was held that the award required registration. It was further held by Justice Sikri, as the Chief Justice then was, and Justice Bachawat that all claims which were the subject-matter of a reference to arbitration merged in the award which was pronounced in the proceedings before the arbitrator and after an award had been pronounced, the rights and liabilities of the parties in respect of the said claims could be determined only on the basis of the said award. After an award was pronounced, no action could be started on the original claim which had been the subject matter of the reference. The position under the Registration Act is in no way different from what it was before the Act came into force. Therefore, the conferment of exclusive jurisdiction on a court under the Arbitration Act did not make an award any less binding than it was under the provisions of the Second Schedule of the Code of Civil Procedure. It was further held that the filing of an unregistered award under Section 49 of the Act was not prohibited. What was prohibited was that it could not be taken into evidence so as to affect immovable property falling under Section 17 of the Act. It was further reiterated that it could not be said that the registration did not in any manner add to its efficacy or give it added competence. If an award affected immovable property above the value of Rs 100, its registration would not rid of the disability created by Section 49 of the Act. The award in question was not a mere waste paper but had some legal effect and it plainly purported to affect or affected property within the meaning of Section 17(1)(*b*) of the Act. Justice Hegde gave a separate but concurring judgment. He observed that it was one thing to say that a right was not created, it was an entirely different thing to say that the right created could not be enforced without further steps. An award did create rights in that property but those rights could not be enforced until the award was made a decree of the court. For the purpose of Section 17 (1)(*b*) of the Act, all that had to be seen was whether the award in question purported or operated to create or declare, assign, limit or extinguish whether in present or future any right, title or interest whether vested or contingent of the value of one hundred rupees and upwards to or in immovable property. It was incorrect to state that an award which could not be enforced was not an award and the same did not create any right in the property which was the subject-matter of the award. An award whether registered or unregistered, according to Justice Hegde, does create rights but those rights could not be enforced until the award is made the decree of the court. The learned Judge made it clear that for the purpose of Section 17(1)(*b*) of the Act, all that had to be seen was whether the award in question purported or operated to create or declare, assign, limit or extinguish whether in present or future any right, title or interest whether vested or contingent of the value of Rs 100 and upwards in the immovable property. If it does, it is compulsorily registrable. A document might validly create rights but those rights might not be enforced for various reasons. The court found that the award in that case created right in immovable property and it required registration.

17. This Court in *Ratan Lal Sharma* v. *Purshottam Harit (1974) 3 SCR 109* had to consider the question of registration and the effect of non-registration of an award. The appellant and the respondent therein had set up a partnership business in the year 1962. The parties, however, thereafter fell out. At the time the disputes arose, the running business had a factory and various movable and immovable properties. On 22-8-1963, by agreement in writing, the parties referred "the disputes of our concern" to the arbitration of two persons and gave "the arbitrators full authority to decide their dispute". The arbitrators gave their award on 10-9-1963. The award made an exclusive allotment of the partnership assets, including the factory, and liabilities to the appellant. He was "absolutely entitled to the same" in consideration of a sum of Rs 17,000 plus half the amount of the realisable debts of the business to the respondent and of the appellant's renouncement of the right to share in amounts already received by the respondent. The award, stipulated that the appellant should not run the factory unless he had paid the awarded consideration to the respondent. The arbitrators filed the award in the High Court on 8-11-1963. On 10-9-1964, the respondent filed an application for determining the validity of the agreement and for setting aside the award. On 27-5-1966, a learned Single Judge of the High Court dismissed the application as time-barred. But he declined the request of the appellant to proceed to pronounce judgment according to the award because in his view: (*i*) the award was void for uncertainty and (*ii*) the award, which created rights in favour of the appellant over immovable property worth over Rs 100 required registration and was unregistered. From this part of the order, the appellant filed an appeal which was dismissed as not maintainable by the Division Bench of the High Court. The appellant preferred an appeal by special leave to this Court against the decision of the Single Judge declining to pronounce judgment in accordance with the award. He also filed a special leave petition against the judgment of the Division Bench. In the appeal before this Court, the appellant contended that the award was not void for uncertainty and that the award sought to assign the respondent's share in the partnership to the appellant and so did not require registration and that under Section 17 of the Arbitration Act, the court was bound to pronounce judgment in accordance with the award after it had dismissed the respondent's application for setting it aside. It was held that the share of a partner in the assets of the partnership, which had also immovable properties, was movable property and the assignment of the share did not require registration under Section 17 of the Act. But the award in the instant case, this Court observed, did not seek to assign the share of the respondent to the appellant, either in express words or by necessary implication. The award expressly makes an exclusive allotment of the partnership assets including the factory and liabilities to the appellant. It went further and made him "absolutely entitled to the same", in consideration of a sum of Rs 17,000 plus half of the amount of Rs 1924.88 to the respondent and the appellant's renouncement of the right to share in the amounts already received by the respondent. In express words the award purported to create rights in immovable property worth above Rs 100 in favour of the appellant. It would require accordingly registration under Section 17 of the Act. As the award was unregistered, the court could not look into it. The award being inadmissible in evidence for want of registration the court could not pronounce judgment in accordance with it. Section 17 of the Arbitration Act presupposes an award which could be validly looked into by the court. The appellant could not successfully invoke Section 17. The award is an inseparable tangle of several clauses and cannot be enforced as to the part not dealing with immovable property.

18. In the instant case also, it appears to us that the award affects immovable property over Rs 100 and as such was required to be registered. Shri Ashri, however, contended that the fact that the award was unregistered had not been taken before the learned trial Judge. Indeed, this was not urged within 30 days and the time for filing of application for setting aside an award under Section 30 of the Arbitration Act, was 30 days and as such this not having been taken, the appellant was not entitled to take this point at a later stage. It is true that in the application for making the award a rule of the court before the learned trial Judge this point had not been taken."

34. In another two decisions, the first one ***Siromani v. Hemkumar and others,*** reported in AIR 1968 SC 1299 relating to partition amongst the members of the joint family filed a document deed of partition having transfer of share having value of one thousand attracts registration. In ***Kale v. Dy. Director of Consolidation*** reported in (1976) 3 SCC 119, it has been held that family arrangement would not attract registration and in likewise manner mere memorandum prepared after the family arrangement however, registration would be necessary if the terms of the family arrangement are reduced into writing. Although, aforesaid decisions are not on the theme of award filed by the arbitrator after conclusion of the arbitration proceeding, but implied a condition that registration is mandatory in all other circumstance save and except where it mere happens to be memorandum of partition.

35. After going through the relevant judicial pronouncement referred to above, it is apparent that the sanctity of the award has been bifurcated in two parts. The first one with regard to identity of the award and the other over admissibility of the award. With regard to identity of award, it has been held that even in absence of registration it cannot be brushed aside because of the fact that by such award an intention of severance of joint family is found there but so far admissibility of the award is concerned, that would not be allowed in absence of registration when the property so involved happens to be more than Rs.100/- and in likewise manner, whenever question arose over its enforcement. That means to say, without registration the award will have no teeth to bite.

36. The present controversy has been allowed to deep furthermore in the background of plea of legal misconduct having at the end of arbitrator while proceeding with the event of arbitration. To substantiate the same it has been submitted at the end of the appellants /objector that no sitting was ever made by the arbitrator during course of proceeding with arbitration proceeding nor directed the respective parties to furnish details and that being so, there happens to be complete absence at the end of arbitrator while tendering the award before the court concerned, the proceeding of the arbitration proceeding placed before the court.

37. At the other end, the learned counsel for the respondent submitted that the ground taken up by the appellant regarding legal misconduct is neither persisting nor is apparent. Simply because no proceedings has been filed by the arbitrator, it cannot be said that it happens to be on account of legal misconduct rather it was mere genuine lapses at the part of the arbitrator who was none else than maternal uncle of the respective parties and further, was actively cooperated by both the parties by way of furnishing details of the lands possessed by the joint family, on account thereof, the event as visualizes happens to be mere irregularity and not illegality.

38. Recently in ***M/s Cochin Shipyard Ltd. Vs. M/s Apeejay Shipping Ltd.*** reported in ***2016 (1) PLJR 92 (SC)*** the issue has been taken up:

> "**9**. In this regard, reference to a three-Judge Bench decision in **Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore** AIR 1967 SC 1030 would be apposite. In the said case, issue arose with regard to misconduct. It was contended before this Court that the learned arbitrator was guilty of misconduct as he had amended an issue behind the back of the appellant. Repelling the said submission, the Court opined :-
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> > "Counsel then submitted that by amending an issue behind the back of the appellant, the arbitrator was guilty of misconduct. This contention has no force. The arbitrator had raised two issues. The second issue referred to the respondent's claim in respect of 46-1/2 bales a claim for loss in respect of the bales. At the time of the writing of the award, the arbitrator corrected this issue so as to show that the claim was for the price of the bales. By this amendment, the appellant suffered no prejudice. The parties well knew that the respondent claimed the price of 46-1/2 bales and fought the case before the arbitrator on that footing."
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> 10. In the said authority, the Court referred to the decision in **Champsey Bhara & Company v. Jivraj Balloo Spinning and Weaving Company Ltd.** wherein it has been laid down :-
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> > "An error in law on the face of the award means, in their Lordship's view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."
>
> Be it noted, the proposition laid down in **Champsey Bhara & Company** (supra) has also been followed in **Firm Madanlal Roshanlal Mahajan** (supra).
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> 11. In **K.P. Poulose** (supra) while dealing with the concept of misconduct, a three-Judge Bench was

dealing with the speaking award where the reasons had been ascribed by the learned arbitrator. A contention was raised that the learned arbitrator was guilty of legal misconduct in conducting the proceedings, for two very material documents were absolutely ignored by the arbitrator resulting in miscarriage of justice. The Court referred to the said two documents and took note of the finding recorded by the arbitrator in the award but made an observation which was inconsistent with his conclusion that the contractor had no right to extra
payment for the particular work. In that context, the Court proceeded to observe as follows:-

> "We now come to the award. Although the arbitrator has held that "jetting, however, is not an authorised extra covered by the agreement", he has made the following significant observation which is inconsistent with his conclusion that the contractor has no right for extra payment for the jetting:-
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> > "The Chief Engineer has rejected the claims of the contractor on grounds of non-inclusion of this (jetting) in the agreement which was executed subsequent to the direction issued by the department to adopt jetting. The Chief Engineer's decision totally ignores the next sentence in that letter 'Meanwhile you may execute the agreement'. By this sentence the issue of extra payment for jetting is left open even after the execution of the agreement."
> >
> > If the above is the conclusion of the arbitrator, rejection of the claim on the ground that "jetting, however, is not an authorised extra covered by the agreement" cannot be anything but rationally inconsistent. The award, therefore, suffers from a manifest error apparent ex facie."

12. After so stating, the three-Judge Bench opined that under Section 30(a) of the 1940 Act an award can be set aside when an arbitrator has misconducted himself or the proceedings and

misconduct under Section 30(a) has not a connotation of moral lapse. It further observed that it comprises legal misconduct which is complete if the arbitrator on the face of the award arises at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring the very material documents which throw abundant light on the controversy to help a just and fair decision. On that backdrop, the Court opined that there was a legal misconduct.

13. In **Jain Associates** (supra), the Court referred to the authority in **K.P. Poulose (supra) and Dandasi Sahu v. State of Orissa (1990 (1 SCC 214** and observed thus:-

> " ... The arbitrator/umpire may not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. Misconduct is often used, in a technical sense denoting irregularity and not guilt of any moral turpitude, that is, in the sense of non-application of the mind to the relevant aspects of the dispute in its adjudication. In K.V. George v. Secretary to Government, Water & Power Department, Trivandrum, (1989) 4 SCC 595, this Court held that the arbitrator had committed misconduct in the proceedings by making an award without adjudicating the counter-claim made by the respondent..."

14. In this regard we may usefully refer to the authority in Paradip Port Trust and Others v. Unique Builders (2001) 2 SCC 680. In the said case, a contention was raised that the award was passed in violation of principle of natural justice inasmuch as, certain documents were received without notice to the Port Trust. Such a contention was raised before the High Court and the said stand was abandoned after perusal of the order sheet of the arbitrator which showed that at each stage adequate opportunity was given to both the parties.

Thereafter the court referred to the principles stated in Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji Puri Construction Pvt. Ltd. v. Union of India, State of Orissa v. M/s Lall Brothers , Gujarat Water

Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. and Another, Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises and Another and opined thus:-

> "... It is not a case where the arbitrator has acted arbitrarily, irrationally, capriciously or independently of the contract. It is difficult for us to take a view that there has been a deliberate departure or conscious disregard of the contract to say that the arbitrator misconducted himself..."

15. In the case of Ispat Engineering & Foundry Works, B.S. City, Bokaro v. Steel Authority of India Ltd., B.S. City, Bokaro (2001) 6 SCC 347, it has been held that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. The court as a matter of fact cannot substitute its own evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties."

39. In ***M/s Cochin Shipyard Ltd.*** (supra) the Hon'ble Court also considered the jurisdiction of the court also considered the scope of Section 30 of the Arbitration Act, 1940 and further explained as follows:-

"16. At this juncture, we may refer to some other authori ties as regards the scope of Section 30 of the 1940 Act. In Allied Constructions (supra), a three-Judge Bench after referring to earlier judgments has opined that an award passed by an arbitrator can be set aside only if one or other condition contained in Sections 30 and 33 of the 1940 Act is satisfied. The Court further opined that the term provided for setting aside an award under Section 30 is restrictive in its operation and unless one or other condition contained in Section 30 is satisfied, an award cannot be set aside, for the arbitrator is a Judge chosen by the parties and his decision is final. It has been further observed that even in a case where the award contains reasons, the interference there with would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law and further an error apparent on the face of the record would not imply closer scrutiny of the merits of documents and materials on record.

17. In Hari Om Maheshwari (supra), the Court after referring to the decisions in Arosan Enterprises Ltd. (supra) and Allied Constructions (supra) opined thus:-

" From the above it is seen that the jurisdiction of the court entertaining a petition or application for setting aside an award under Section 30 of the Act is extremely limited to the grounds mentioned therein and we do not think that grant or refusal of an adjournment by an arbitrator comes within the parameters of Section 30 of the Act..."

18. In Wig Brothers (supra) while dealing with the challenge under Sections 30 and 33 of the 1940 Act, the Court opined that a court while considering a challenge to an award under Sections 30 and 33 of the 1940 Act, does not sit as an appellate court and it cannot reappreciate the material on record. The Court further proceeded to state that an award is not open to challenge on the ground that the arbitrator had reached a wrong conclusion or had failed to appreciate some facts, but if there is an error apparent on the face of the award or if there is misconduct on the part of the arbitrator or legal misconduct in conducting the proceed ngs or in making the award, the court will interfere with the award. In the said case reference was made to Rajasthan State Mines and Minerals Ltd. (supra) and certain passages were quoted. We think it seemly to reproduce the said paragraphs:-

"22. . ... The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the

> said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part but it may tantamount to mala fide action.
>
> 23. . It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose agreement is required to be considered. ..."

40. At the present juncture the learned counsel for the respondent drew attention towards the relevant para of the order impugned wherein the learned lower court had taken into account the effect of three sale deeds executed by Ajit Kumar Singh which is of dated 18.11.1991 and submitted that from recital of the aforesaid sale deeds it is further evident that executants had accepted oral partition having effected in the family wherein the land so detailed therein has been allotted to his share and the survey plot number enumerated therein is the survey plot number given under the share of Ajit Kumar Singh under award and so, it was not the event of oral partition rather by way of award which has been acted upon. The aforesaid event is not going to cure the melodies persisting on record, even accepting plea at the end of respondent that term of award has been substituted with oral partition.

41. After discussing and analyzing the material available on the record in consonance with the legal principle so involved as referred above, it is evident that the order impugned by which award has been made rule of the court is not at all found having legal substance, and on account thereof is set aside. Appeal is allowed. However, in the facts and circumstances of the case, parties will bear their own cost.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated 9th day of Feb., 2016
Prakash Narayan

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