
(1943) 02 BOM CK 0001

In the Bombay High Court

Case No : O.C.J. Appeal No. 32 of 1942 and Suit No. 218 of 1941

Brijlal Ramjidas

APPELLANT

Vs

Govindram G. Seksaria

RESPONDENT

Date of Decision : 15-02-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Citation : AIR 1943 Bom 201 : (1943) 45 BOMLR 358

Hon'ble Judges : Weston, J; John Beaumont, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is an appeal by the plaintiffs against a decision of Mr. Justice Chagla dismissing the suit on certain preliminary issues. The effect of the learned Judge's decision is that the real substance of the dispute between the parties has been determined by a decision of the High Court of Indore, which is binding between the parties in this suit u/s 13 of the Civil Procedure Code, 1908.

2. The facts giving rise to the appeal are these. The plaintiffs and defendants are partners in a firm, the business of which is to act as managing agents of the Indore Malwa United Mills, Limited, a company which owns mills in Indore State, and they carried on business under articles of partnership dated July 17, 1935, which are exhibit A to the plaint. Disputes arose between different groups of partners, and on December 17, 1940, the parties signed a written submission authorizing the Prime Minister of Indore State to arbitrate between them. The terms of the submission are these :

We, the undersigned, the seven partners in the Managing Agency Firm of the Malwa United Mills Limited, Indore, by this writing authorize the Prime Minister of the Holkar State to fix the price of the transaction of purchase or sale of any debentures of the said Mills or any share in the agency or capital stock of any

nature that may be effected by any one of us. And the price fixed by him shall be acceptable by each one and all of us and we shall act accordingly.

Another version of the English translation of the original document, which was in Hindi, makes it rather clearer that the price was to be fixed conditional on the parties wishing to sell, because the terms of that document are :

If any of us were to sell or buy any debentures of this Mill or any share of the Managing Agency or any kind of "Capital Stock" then the Prime Minister is to fix the price of such dealings and the price fixed by him shall be acceptable to each one and all of us and we shall abide by it.

3. On February 8, 1941, the Prime Minister made his award in writing, in which he recites that the partners in the Managing Agency had come to see him on December 17, 1940, and requested him to decide as to who should buy or sell their respective shares and at what price. Then he goes on : " They further signed a letter of authority authorizing me to decide this point and agreed to be bound by my decision." Then he mentions that a large number of shareholders of Indore State had waited upon him from time to time and had expressed their dissatisfaction with the present management. Then he decides that Seth Govindram Gowardhandas Seksaria is to buy up the five-anna-shares of Seth Brijlal Ramjidas and Bilasrai Juharmal at par and that the latter should sell their respective shares of annas 2-6 each in the rupee at par, and that they are also to sell the debentures held by them to Seth Govindram Gowardhandas Seksaria at par. Then he provides that the outgoing partners in the managing agency will be entitled to the managing agency and selling agency commission and also interest on their invested capital excluding debentures till the day of payment of the invested capital which must be paid within one month. Then he directs that the outgoing partners shall be liable for all acts or defaults which they may have previously committed as members of the managing agency of the Malwa United Mills, and that they shall sign necessary letters, papers and documents evidencing their retirement from the managing agency to enable Seth Govindram Seksaria and his friends to carry on the business as managing and selling agents in the same name. The partners who were to be bought out are the present plaintiffs, and the partners entitled to buy them out are the defendants.

4. To any lawyer reading that award it is apparent that serious objections may be taken to it. The most serious is that, whereas the submission merely enables the arbitrator to fix the price of a transaction of purchase or sale, the award determines which of the partners are to sell and which are to purchase, a matter which appears plainly to go beyond the terms of the written submission. It is also to be noticed that the arbitrator in the absence of the parties allowed people to come and see him in relation to the subjectmatter of the arbitration who are not parties to the submission, and further that he fixed the value of the shares in this partnership" at par," an expression to which it is difficult to assign any meaning in relation to a partnership.

5. The plaintiffs on February 12, that is directly after the award had been published, filed this suit in the Bombay High Court, asking for a declaration that the decision of February 8, 1941, that is to say, the award, is invalid, of no effect, and not binding on the plaintiffs, and for a declaration that the plaintiffs continue to be partners in the managing agency firm, and an injunction to restrain the defendants from excluding them from partnership. An interlocutory injunction was granted restraining the defendants from excluding the plaintiffs. After the filing of the suit, namely, on February 25, the arbitrator sent the award to the District Judge of Indore to file, and gave notice of so doing to the plaintiffs.

6. Under the Indore Arbitration Act it is provided that "the Court" means the Court of the District Judge, and "submission" means a written agreement to submit present or future differences to arbitration. Clause 11 provides that the arbitrator shall sign the award, and give notice to the parties, and on payment of his proper fees cause the award to be filed in the Court. Clause 14 enables the Court to set aside the award on the ground of misconduct by the arbitrator. Clause 15 provides :

An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court.

It would appear from the terms of that Act that the Court on receiving the award can file it without any reference to the parties, leaving them subsequently to apply to have it set aside. The learned District Judge, however, gave notice to the parties to show cause why the award should not be filed, and on that notice the plaintiffs put in a long document called "Objections to the filing of the alleged award," and in the last paragraph they submitted that the award should not be taken on file of the Court, and further that : "This award is one which ought to be set aside." The defendants put in cross-objections contending that the award was in order. Certain hearings took place on those objections and cross-objections before the learned District Judge. But on August 23, 1941, the High Court of Indore made an order transferring the case to itself. The order was made by the learned Chief justice, and his principal ground for directing the transfer appears to have been that the learned District Judge was hesitating, as he well might be, to allow oral evidence to be given that the parties suffered under a mutual mistake when they signed the submission in question. It is objected that the High Court had no power to deal with the matter after transfer, and I will deal with that objection later on.

7. The matter being in the High Court of Indore it was dealt with by Mr. Justice Jambhekar, and on October 29, 1941, he gave judgment directing the award to be filed. There was an appeal from that judgment to two Judges of the Indore High Court, who differed on the question as to whether an appeal lay. There is a notification having effect in Indore State, which provides that when there is a difference of opinion between the two Judges of the High Court constituting a

bench, the decision of the lower Court will prevail. Accordingly the Appeal Court made an order :

That this appeal is dismissed, that the decision of the lower Court prevails; that the parties should bear their own costs.

8. Now, the first question is whether the judgment of the Indore High Court is binding upon the parties to this suit u/s 13 of the Code of Civil Procedure, 1908. That section provides :

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title.

9. Then there are certain exceptions to this enactment. The first is :

Where it has not been pronounced by a Court of competent jurisdiction.

10. The second is :

Where it has not been given on the merits of the case.

11. The third is not relevant. The fourth is :

Where the proceedings in which the judgment was obtained are opposed to natural justice.

The other exceptions are not material. "Foreign judgment" is defined in the CPC as "the judgment of a foreign Court", and "judgment" is defined as meaning "the statement given by the Judge of the grounds of a decree or order." The CPC deals with a "decree" or "order" as the document containing the actual directions of the Court, and "judgment" as the statement given by the Court as grounds of the decree or order, but the definitions in the Code only apply so far as there is nothing repugnant in the subject or context. I have no doubt that u/s 13 judgment is not used in the sense of a statement of the Judge's reasons. I have no doubt that a foreign judgment means an adjudication by a foreign Court upon the matter before it. It would be quite impracticable to hold that a foreign judgment means a statement by a foreign Judge of the reasons for his order. If that were the meaning of "judgment," the section would not apply to an order where no reasons were given. Section 13 applies to foreign judgments generally, and we must remember that some systems of foreign procedure may not recognise the distinction between decrees and orders with which we are familiar, and, there may be no requirement on a Judge to give reasons. We have to ascertain what is the actual adjudication of the foreign Court, and for that purpose the first thing to look at is the actual decree or order of the foreign Court. But in order to understand and interpret the decree or order, we may have to look at the pleadings of the parties and the reasons of the Judge. Those reasons would not, in my opinion, be binding on any question of fact or law, except so far as they show what the judgment actually decides, and whether any of the exceptions to Section 13 applies. It is, therefore, necessary to consider the

judgment of Mr. Justice Jambhekar and the reasons for it, although, of course, we are not sitting in appeal on such judgment.

The learned Judge in an early part of his judgment says this :

The moment you introduce an oral agreement as the basis on which the arbitrator is to act, the special remedies open to the parties under the Arbitration Act are no longer available to them.

He then embarks upon a long discussion of the principles upon which Courts of equity act in rectifying a written agreement, and points out that where a written agreement, owing to mutual mistake, does not carry out the actual arrangement at which the parties arrived, the Court can rectify the written agreement so as to bring it into line with the true agreement of the parties. As I understand him, the learned Judge holds that there was an oral agreement between the parties that the arbitrator should decide, not only the price at which a sale or purchase should take effect, but also which partners should sell and which purchase, though the learned Judge agrees that the written submission as it stands does not cover that point. Then, as I understand him, he holds that there was a mutual mistake in not including this further matter in the written submission, and, therefore, the arbitrator was entitled to decide such matter. I must confess that I have the greatest difficulty in appreciating the relevance of the discussion as to the principles on which Courts of Equity act in rectifying a written document. It is not suggested by the learned Judge that the arbitrator himself could rectify the submission. So to hold would at once destroy the efficacy of insisting that the submission must be in writing. It is apparent that no application had ever been made to the Court to rectify the submission. The learned Judge himself was dealing with a notice to show cause why the award should not be filed, and on such an application he could hardly have rectified the written submission. In any case he does not purport to rectify it. The document never has been rectified. The only written submission is the original submission of December 17, 1940. But the learned Judge definitely holds, on an issue whether the decision of the arbitrator contains several matters which were not referred to him that the decision of the arbitrator does not contain any matter which had not been referred to him. He then concludes his judgment by saying :

As the result of the above finding, I dismiss the respondents' objections to the filing of the award which has been properly filed. I direct that the award be filed.

12. It is argued that the only actual order is that the award be filed. But it seems to me that, looking at the whole judgment, and the actual holding on the issues, the learned Judge has decided that the award does not go beyond the submission, and that it is valid, and ought to be filed. I think the learned Judge has really directed the filing of an award, which was made in part on an oral submission.

13. The law as laid down by the learned Judge is certainly not the law in force in British India. In British India an arbitrator, acting on a written submission, must

confine himself to the terms of the submission, and none the less so, because he may think that possibly the submission ought to have gone further than it does go, and that it may have been a mistake on the part of the parties to limit it in the manner in which it has been limited. In such a case the most an arbitrator can do is to defer making his award until the submission has been extended, either by agreement between the parties, or by an order of a competent Court, and he certainly would not be at liberty in British India to proceed to arbitrate on something not included in the written submission. I have no doubt myself that if it were open to this Court to decide the question on merits, we should set aside this award, by whomsoever made, on the ground of legal misconduct of the arbitrator.

14. But u/s 13 the judgment of the Indore Court is conclusive, unless it can be shown, in the first place, that it was made without jurisdiction. Even taking it that the learned Judge has directed an award to be filed, which proceeded largely upon an oral submission, I do not think it possible to say that the Indore Court had no jurisdiction to make such an order. It may not be an order which this Court would have made, but we cannot say that it was outside the competence of the Indore High Court. There is no evidence before us, apart from the statement to which I have referred in the learned Judge's own judgment, that it is illegal under the law of Indore to file an award on an oral submission. At common law a submission can be oral. It seems to me, therefore, that Mr. Justice Chagla was right when he held that the judgment of the Indore High Court does amount to an adjudication that this award is a valid award, and for that reason ought to be filed, and we cannot say that the only decision is that the award be filed. That is the main question in dispute between the parties.

15. But the award is challenged on other grounds. It is said, in the first place, that the High Court had no jurisdiction under the Indore Arbitration Act to deal with the filing of an award; that that is entirely a matter for the District Court. No doubt, under the Act the District Court is the Court in which the award has to be filed. But the transfer was made u/s 24 of the CPC of Indore, which is in the same terms as Section 24 of our Code, and provides so far as material that on the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and try and dispose of the same. Mr. Justice Chagla held that the very power given by the Code to the High Court to withdraw a suit and dispose of it enabled the Court to decide the matter withdrawn, although under the Arbitration Act no such power was given. He held that that construction was not precluded by Section 4 of the Code, which provides that nothing in the Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred. I think that view is right. But, in my opinion, the point is really not open to us, because there is no doubt that some Court in Indore can deal with the question of this arbitration, since the subject-matter of the arbitration is

within the competence of that Court, and the parties are within its jurisdiction. That being so, it is really a question for the Indore tribunal to decide which domestic Court should deal with the matter, and as the Indore Courts have held that the High Court has jurisdiction, I do not think it is open to this Court to disagree. What is the law of Indore is, in this Court, a question of fact, and the case of *Vanquelin v. Bouard* (1863) 15 C.B. 341 shows that where a foreign tribunal has decided a question of fact necessary to determine the jurisdiction of a particular foreign Court it is not open to an English Court to go behind that decision. I think, therefore, it is not open to us to hold that the Indore High Court had no jurisdiction to deal with the matter after it was transferred to it.

16. Then the next point taken is that this is not a judgment on merits. There is no doubt that the judgment of Mr. Justice Jambhekar was a judgment on merits, and there is equally no doubt that the decision of the Court of Appeal was not. It is argued on the strength of the Privy Council decision in (1897) L.R. 24 I.A. 50 (Privy Council) that the decision of the Court of Appeal has destroyed the finality of the decision of the lower Court. In that case the lower Court had dismissed the suit on merits, and the Court of Appeal dismissed the appeal on the ground that the proper parties were not before the Court. The Privy Council in appeal held that there was no decision upon merits, because the decision of the Court of Appeal, which was not upon merits, had overridden, and destroyed the finality of, the decision of the lower Court. It was sought to apply that principle here. But the difficulty in this case is that the Court of Appeal never really entertained the appeal at all, because the two Judges constituting the Court differed on the question whether an appeal lay, and, that being so, the decision of the lower Court prevailed, not under the order of the Court of Appeal, but under the notification dealing with the matter in Indore State. No doubt, the decision of the Court of Appeal was that the decision of the lower Court prevails, but that result would have followed, if the Appeal Court had made no order. If the Appeal Court's order had recited that the Judges differed as to whether an appeal lay, and, therefore, thought fit to make no order, exactly the same result would have followed; the decision of the lower Court would have prevailed. In my opinion, it is impossible to say that merely filing an appeal, which becomes infructuous, destroys the finality of the lower Court's judgment. I think, therefore, that there was here a decision on merits.

17. Then it is argued that there was misconduct in the arbitrator in that he allowed, as the award shows, people to come and see him who were not parties to the arbitration. But, in my opinion, misconduct of that sort, which does not go to jurisdiction, is not a matter which can be gone into in this Court. Such a point can only be taken in the foreign Court. The decision of the Privy Council in *Oppenheim and Co. v. Mahomed Haneef* seems to me conclusive on that point."

18. It is also argued that the decision of the Indore Court is opposed to principles of natural justice. It is not, in my opinion, possible to reach that conclusion. The parties were heard by the learned Judge, and he reached his conclusion, and the

mere fact that we may disagree with the conclusion is clearly not enough to justify us in saying that it was opposed to natural justice.

19. The only other question argued is whether the finding that the judgment of the Indore Court determines that the award is valid, justifies the dismissal of the plaintiffs' suit. It is said that the plaintiffs have asked not only for relief in relation to the award by declaring it invalid; they have also asked for a declaration that the plaintiffs continue to be partners in the firm and are entitled to exercise the rights and privileges of partners; and that the defendants may be restrained from preventing them from so doing. But it seems to me, on the basis that the award is valid, that there is really nothing left. The learned Judge in Indore has expressed the view in his judgment that the reference to the "par value" of the plaintiffs' share in the partnership, in the context in which it appears, means the capital brought into partnership by them, and excludes any value for goodwill. It is apparent, therefore, that the High Court in Indore will not entertain any doubt as to how the award has to be given effect to, and the award having been filed, it can be executed as a decree. In the circumstances, it seems to me that the learned Judge was right in dismissing the suit. To make any order reserving the rights of the plaintiffs remaining outside the award would be useless, because as they have been directed to sell at a particular price, there is nothing left for them when the price is paid, and we are told that it has been tendered.

20. I think, therefore, the learned Judge was right in dismissing the suit, and the appeal must be dismissed with costs.

21. Injunction dissolved.

Weston, J.

22. I agree and have nothing to add.