
(1993) 09 MP CK 0029
In the Madhya Pradesh High Court
Case No : F.A. No. 35 of 1978

Champalal Harchand Mahajan

APPELLANT

Vs

Kanakmal Devchand Mahajan and Others

RESPONDENT

Date of Decision : 16-09-1993

Acts Referred:

Arbitration Act, 1940 — Section 32

Citation : (1993) ILR (MP) 575 : (1994) JLJ 628 : (1994) 1 MPJR 95 : (1994) 39 MPLJ 140 : (1994) MPLJ 140

Hon'ble Judges : A.R. Tiwari, J

Bench : Single Bench

Advocate : S.D. Sanghi and Upadhyay, for the Appellant; R.G. Waghmare and Ravi Waghmare, for the Respondent

Judgement

A.R. Tiwari, J.

This appeal presented u/s 96 of the CPC (for short, "the Code") is directed against the judgment and decree dated 13th February, 1978 rendered by the Additional Judge to the Court of Distt. Judge, Jhabua in COD No. 1-D of 77, thereby dismissing the Appellant's suit on the ground of untenability in view of Section 32 of the Arbitration Act, (for short, "the Act").

Briefly stated, the facts of the case are that parties had faced some dispute as regards monetary liability. They, therefore, referred that dispute to the Panchas in 1974 without intervention of the Court, The panchas passed Award on 27-9-1974. On the basis of that Award, the appellant was held entitled to recover the sum of Rs. 16,000/- from the respondents. The parties, on being read over, accepted this award and declared the intention to act according to it. In pursuance of this, the respondent No. 1 paid the sum of Rs. 3000/- to the appellant on 31-10-1974 through panch Babulal. The remaining amount was, however, not paid as a result of which the demand was made through notice dated 7-10-1975. This demand was not met. So the appellant filed the suit for recovery of the amount. The respondents resisted the claim and contended that

the suit was hit by Section 32 of the Act and as such was barred by law. The trial Court tried this objection as preliminary issue. After hearing the parties, the trial Court concluded that the suit was in fact, a suit to enforce the Award and was clearly hit by Section 32 of the Act. Consequently, the suit was dismissed. Aggrieved by this judgment and decree the appellant has preferred this appeal.

I have heard Shri S.D. Sanghi, learned Sr. Counsel with Shri Upadhyaya for the appellant and Shri R. G. Waghmare learned Sr. Counsel with Shri Ravi Waghmare for the respondents.

Factual matrix is jejune. In fact, facts are undisputed and all that is entailed is the application of the "law" to the following facts:

"(a) Parties to the lis had referred their dispute, involving monetary liability to the Panchas in 1974 through private agreement.

(b) The panchas, in pursuance of this arbitration agreement, adjudicated the matter and gave the award on 29-9-1974 pronouncing that the appellant/plaintiff would be paid the sum of Rs. 16,000/- by the adverse party.

(c) This Award was not filed in the Court and was thus not converted into judicial mandate by a decree, albeit parties accepted the same on the date of the award itself i.e. 27-9-1974 and affixed their signatures under the following endorsement "Uprokt Panch Nirnaya Hum ubhaya Paksha Ko Panchaon ne Sunaya, Es, Nirnaya Ke Hum ubhaya Paksha Paband rahenge Va Essi Anusar Vartan Kareng. "

It was pleaded that this award was acted upon in that the respondent No. 1 paid sum of Rs. 3,000/- to the appellant on 31-10-1974. The remaining amount was not paid despite notice dated 7-10-1975. Hence, the suit for recovery was instituted.

The respondents resisted the claim and sought anesthetization of the suit just at its infancy via legal preliminary objection to the effect that the suit as laid, being in essence for enforcement of the Award, was barred by law i.e. Section 32 of the Act, as per the statement in the plaint itself as a result of which the plaint was demonstrably rejectable under Order 7, Rule 11(d) of the Code.

Shri Sanghi placed reliance on the following decisions -

(i) Kashinathsa Yamosa Kabadi, etc. Vs. Narsinga Bhaskarsa Kabadi, etc.,

(ii) 1957 MPLJ 649, State of MP v. Veereshwar Rao.

(iii) Munshi Ram Vs. Banwari Lal, Munshi Ram v. Banwarilal.

(iv) Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, Shankar Ramchandra v. Krishnaji.

(v) O. Mohamed Yusuf Levai Saheb Vs. S. Hajee Mohammed Hussain Rowther (died) and Others, Mohamed Yusuf Lavai Saheb v. S. Hajee Mohd. Hussain

Rowther.

(vi) Sait Pamandass Sugnaram Vs. T.S. Manikyam Pillai and Others, Salt Panandas Sugmram v. T. B. Manikyam Pallet and Ors..

(vii) Govinda Gouda Vs. Kalu Houda and Another, Govinda Gauda v. Kalu Mauda and Anr..

(viii) Satish Kumar and Others Vs. Surinder Kumar and Others, Satishkumar and Ors. v. SurinderKumar and Ors..

(ix) AIR 1937 Lah 851, Firm Joxabir Singh v. Hemina Shaw and Co. Ltd.

(x) Modi Narandas Chhaganlal Vs. Shah Jamnadas Maneklal and Another, ModiNarandasChhaganlalvs.ShahJarnanadas Maneklal and Anr..

(xi) AIR 1956 MB 115, Bidhichand v. Darshanlal.

(xii) AIR 1937 Ran 287, A.K.A.C.T.A.L. Alagappa Chettyar v. AKRNNK Chettyar firm.

Shri Waghmare has placed reliance on Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, Smt. Rukmanibai Gupta v. The Collector, Jabalpur and Ors., and State of U.P. Vs. Thakur Kundan Singh, State of U. P. v. M/s. Thakur Kundan Singh.

Shri Sanghi urged that once the Award was accepted and taken to be binding and promise was made to pay the sum then such an Award ceased to be an Award and it was in reality, the agreement between the parties on the basis of which a suit was competent. He submitted that in that case, it ceased to be the decision of the Arbitrator but became the matter of agreement between the parties. He contended that by the declaration about compliance in future the appellant lost the right to challenge the Award in the Court of law and as such Section 32 of the Act does not operate as an embargo for such a suit. Shri Waghmare on the other hand, submitted that despite the endorsement as contended, the suit in reality remained one for enforcement of the Award. As a result of amendment, inserting the word "enforced" there was total ban and bar for reception of such a suit. If the contention advanced by the appellant was to be accepted, then Section 32 would be rendered otiose. Shri Waghmare submitted that the cases cited were distinguishable on facts and in view of the amendment incorporated in Section 32 of the Act.

In Munshi Ram Vs. Banwari Lal, Munshi Ram's case it is held that the Court can pass a decree in accordance with the Award if there is no objection to it. In my view, on the basis of endorsement, there was no hurdle in applying to the Court for passing the decree in accordance with the Award. By the endorsement all that was done was that the parties would stand precluded from raising any objection. The promise for compliance in future is nothing but assurance about enforcement of the award.

Modi Narandas Chhaganlal Vs. Shah Jamnadas Maneklal and Another, Modi Narandas Chhaganlal's case (supra) is distinguishable on facts. My attention was drawn to para 6 of the judgment. It was primarily concerned with Order 23, Rule 3 of the Code. On acceptance, it became the agreement or adjustment in terms of Order 23, Rule 3 of the Code.

In Kashinathsa Yamosa Kabadi, etc. Vs. Narsinga Bhaskarsa Kabadi, etc., Kashinathsa Yamosa's case (supra) the question was about the tenability of a plea offered in defence. It was held that the plea on the basis of acceptance of Award as a defence to the suit was tenable. This authority is not for the proposition that a suit can be filed on the basis of such an acceptance. On the other hand, it was ruled that the acts done in pursuance of the acceptance of the Award, were not liable to be ignored. In para 22 of the judgment it is observed that "It is not necessary in this appeal to express a considered opinion on this disputed question." I have gone through other decisions also as noted above and I find that the position of law is materially altered after amendment effected by Section 43 of the Specific Relief Act. The suit by which enforcement of the Award is sought expressly or by implication will stand hit by Section 32 of the Act as amended. The decisions relied on by Shri Sanghi are clearly distinguishable on facts and inapplicable to the case on hand.

After appreciating the decisions relied upon, it is time to probe the matter further. I proceed accordingly. The aforesaid objection as to the untenability was taken in the written statement presented on 15-11-1977. Thereafter, an application under Order 14, Rule 2(2) of the Code, praying to frame distinct issue in this behalf and determine it as preliminary point, was submitted on 15-12-1977. This prayer was accepted and relevant issue was framed for its trial as a preliminary issue in terms of Order XIV, Rule 2(2) of the Code.

The relevant issue is as extracted below - "Whether the suit is not tenable as the Award was not presented within 30 days in the Court ?"

Order XIV, Rule (2) of the Code provides as under -

"Order XIV, Rule (2). - Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to -

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

Shri Sanghi very fairly submitted that the appellant would have been non-suited due to clog and constraint imposed by Section 32 of the Act, in case the

undernoted line, constituting premise in terms of Sections 2(b) and 9 of the (The Indian) Contract Act, 1872, would not have been in existence.

"Essi Anusar Varten Karange."

The thrust of the argument is that this "Premise" constituted subsequent and separate agreement and that in terms of Section 2(a) of the Contract Act, the appellant abstained from taking steps towards making the Award rule of the Court and as such this abstinence and promise became the consideration for it. It is thus, urged that the suit is not for enforcement of the Award but for the enforcement of such an agreement and was thus, free from the clutches of the rigour of Section 32 of the Act. As such, non-presentation of the Award within 30 days in the Court was an altogether irrelevant matter.

The inbred question is whether the aforesaid statement of one line altered the nature of this lis and saved the cause from mortality? Could it be held that the suit was not for enforcement of the Award but was resting on the linchpin of the so called agreement categorised as one independent of the Award?

Now is the time to make reference to provision. Section 32 of the Act embodies the fetters as under -

"32. Bar to suits contesting arbitration agreement or award. - Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be (enforced) set aside, amended, modified or in any way affected otherwise than as provided in this Act."

The jurisdiction of the domestic tribunal is founded on public policy. As between the parties or their privy, an Award is entitled to that respect which is due to the judgment of the Court of last resort. In reality, award possesses all the elements of vitality even though it has not been formally enforced and remains operative though neither party applied to have it filed in Court.

Section 32 of the Act was amended by Section 43 of the Specific Relief Act (42 of 1963) with effect from 1-3-1964 by inserting the word "enforced". The conjoint effect of Sections 31, 32 and 33 of the Act is to entrust the decisions of relevant disputes to the specified Court in the form of petitions and to bar remedy by way of regular suits.

The trial Court has also placed reliance on a Division Bench Judgment of Bombay High Court, *Narbadabai and Others Vs. Natverlal Chunilal Bhalakia and Another, Narbadabai and Ors. v. Natverlal Chunilal Bhalakia and Anr.* It was ruled that -

"Realising the difficulty in his way, Mr. Desai in the first place, attempted to argue that this was a suit to enforce an agreement that was arrived at between the parties subsequent to the Award and his contention was that the award was merged in the agreement, that the rights of the parties were determined under that agreement and that the suit was maintainable to enforce that agreement

which was something very different from the award. In our opinion, that contention is not open to Mr. Desai in view of his own pleadings. Para 4 of the plaint makes the position perfectly clear. As already pointed out, it refers to disputes between the parties - the disputes which relate to the subject-matter of the suit; it refers to reference to arbitration; it refers to the award and then it goes on to state that the "parties accepted and agreed to the said award and signed the same in token thereof." There is no plea of any agreement subsequent to the award. The plea is that the award was accepted and agreed to. At the highest, this plea can only mean that the parties agreed not to challenge the award and to abide by the award. But the acceptance of the award and the agreement.".....

The aforesad judgment was relied upon by this Court in Kanhyalal Vishweshwarlal Mahajan Vs. Ramchandra Shankarrao Holkar, Kanhayalal v. Ramchandra:

"In Narbadabai and Others Vs. Natverlal Chunilal Bhalakia and Another, Chagla, C.J. and Dixit, J., held that the expression "effect of the award" is wide enough to cover a suit to enforce an award. It was observed that although a party may not in terms ask for decision of the court to give effect to the award, the fact that he asks the Court to enforce the award must result in the court giving decision upon its effect and therefore such a suit is not maintainable.

In view of the aforesaid decisions, the former of which is binding upon me, it ought to be held that a suit of this nature was incompetent as the provisions of Indore Arbitration Act, which was in force when the suit was filed, are practically identical with those of Indian Arbitration Act, 1940."

The case law on this aspect is indeed plentiful.

In 1979 JLI 36-N, Dayasan v. William, it is held that -

"In this connection it is sufficient to say that reliance on the award would obviously be an enforcement of the same and that is expressly prohibited by Section 32 of the Arbitration Act. If the plaintiff wanted to enforce the award, Ex. P/7, he had to resort to the provisions of the Arbitration Act and a separate suit for enforcing the award could not be filed."

In 1977 (2) MPWN 257, Deepchand v. Firm Chintaman Kishanlal, it is laid down that -

"To decide this question reference has to be made to Section 32 of the Arbitration Act. This section clearly puts an embargo on the power of the plaintiff to proceed with the suit, the decision whereof may have a bearing upon the existence, effect or validity of an award or in any way effects the award. There can be no gainsaying to the fact that after the award which admittedly is given, in the instant case, the effect of the decree in the suit by the Court shall effect the award. Therefore, by virtue of Section 32 of the Act, the trial Court had no jurisdiction to proceed with the suit."

in 1978 1 MPWN 54, Aisa Bi and Ors. v. Khemlal and Ors., it is reiterated that -

"There can, thus, be no doubt that the subject matter of the present suit simply because the relief claimed in the present suit is one of specific performance, that does not alter the cause of action so as to circumvent the bar contained in Section 32 of the Arbitration Act. The obvious test is whether any cause of action survived to the plaintiff as a result of settlement of the dispute by the award (Ex. D-10). The answer obviously must be in the negative. In such a situation there can be no doubt that the present suit is not maintainable being barred u/s 32 of the Indian Arbitration Act, 1940."

In Satish Kumar and Others Vs. Surinder Kumar and Others, Satish Kumar and Ors. v. Surinder Kumar and Ors., it is held that -

"The award is not a mere waste paper but has some legal effect. It is final and binding on the parties and it cannot be said that it is a waste paper unless it is made a rule of the Court. The conferment of exclusive jurisdiction on a Court under the Act does not make an award anytheless binding then it was under the provisions of the Second Schedule of the Code of Civil Procedure. The Award is, in fact, a final adjudication of a court of the parties" own choice and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the face of it regular, is conclusive upon the merits of the controversy submitted."

In The Union of India (UOI) Vs. Shri Om Prakash, Union of India v. Om Prakash, it is laid down that -

"Section 32 bars the institution of suits concerning arbitration agreement or awards and provides that no arbitration agreement or award shall be set aside, amended, modified or in any way affected otherwise than as provided in this Act. Section 33 says that a party to an arbitration agreement seeking to challenge the agreement or the award must do so by making an application to the Court."

Relying on the aforesaid case, the Division Bench of this Court reiterated the position of law in 1978 J LJ 6, Biharilal and Anr. v. Khuman Singh and Anr., by holding that if the party wanted to enforce the award it was necessary that it was made the judgment of the Court. In absence, prohibition contained in Section 32 of the Act would spring into action.

The law is thus quite settled. There is not tenebrosity. Applying the law as enumerated to the facts, as they emerge, it is held that the aforesaid "sentence" did not alter the nature of the suit and did not lead to the tenability of such a cause. The undertaking to comply with the award tantamounts as a step to indicate resolve to obey it and thus to proclaim about the need of enforcement of the award. The word "ESSI" meaning award, is clearly suggestive of the position that in substance the suit is designed to enforce the award and that suffered the embargo.

The separate agreement as such was not pleaded. In fact none was born. It is

part of the award and is intimately linked with it. It is inseparable from the award. The promise to abide by the award and to act on that basis was nothing independent of the award. In any case, the cause of action is failure to pay as awarded and suit in essence turned out to be one for "enforcement" of the award which had awaited compliance. It is different matter that the respondents had breached the so called "promise". Yet, it remained a question of enforcement of the award and it obtained no separate identity.

Morality and legality are two distinct features. Right existed but remedy stood barred. The shelter under the Contract Act or aforesaid one line, however, good in morality, was bad in law. It was not open to canvass contrary-wise. It was not liable to be read in isolation of the award. This is how the suit suffered infirmity on the fulcrum of Section 32 of the Act and was decisively destined to have the fate of infecundity. The submissions urged are thus found to be non-meritorious.

In the result, it is held that the conclusion reached by the trial Court is not liable to be dislodged and demolished. The verdict is not subvertible and the appeal on scrutiny, is found to be acarpous. The judgment and decree are found worthy of being maintained.

In the ultimate analysis, it is held that this appeal is devoid of merit. It is accordingly dismissed. The judgment and decree passed by the Court below are accordingly maintained. Parties are, however, directed to bear their own costs of this appeal as incurred. Counsel's fee on each side is fixed at Rs. 1,000/-. Let decree be drawn up accordingly.

The record of the Court below is directed to be returned.