

(2013) 08 MP CK 0075

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2176 of 2009

Dinesh Kumar Shah and Others

APPELLANT

Vs

Rajendra and The State of M.P.

RESPONDENT

Date of Decision : 01-08-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4
Constitution of India, 1950 — Article 227
Registration Act, 1908 — Section 11, 17, 17(1)(b), 49

Citation : (2013) 08 MP CK 0075

Hon'ble Judges : A.K. Shrivastava, J

Bench : Single Bench

Advocate : R.D. Hundikar and Mr. Devashish Sakalkar, for the Appellant; Vivek Rusia, Advocate by Respondent No. 1 and Shri Anubhav Jain, Panel Lawyer by Respondent No. 2, for the Respondent

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.—By this petition under Article 227 of the Constitution of India, the defendants no. 1 to 3 and 5 to 9/petitioners have challenged the order dated 09.02.2009 passed by learned Additional Civil Judge, Class-I, Burhanpur by which the award of the Arbitrator dated 22.08.1995 has been held to be inadmissible in evidence since it is not a registered document. The facts in brief giving rise to this petition lie in a narrow compass. One Ratilal having received his share from the ancestral property came to Burhanpur and started business there and acquired suit properties and movables. The plaintiff/respondent No. 1 and defendants no. 1 and 9 are sons of Late Ratilal while defendant no. 2 Ketan Kumar is son of first defendant Dinesh Kumar Shah; Smt. Gunwantibai defendant no. 3 is widow of Ratilal; defendants no. 5 to 8 are married daughters of Late Ratilal. The suit property consists of agricultural lands and therefore the State of M.P. has been implicated as proforma party as defendant no. 4. According to the plaintiff, Late Ratilal during his lifetime executed a will on 02.11.1969 in respect of his all immovable and movable properties including the suit property in favour

of plaintiff, defendant no. 2 Ketan Kumar son of defendant no. 1 Dinesh Kumar Shah and Mukesh defendant no. 9. On the death of said Ratilal on 23.07.1970 succession certificate in respect to movable property was obtained vide succession Case No. 11/1973 among the legatees. The further case of plaintiff-respondent no. 1 is that in khasra-panchshala the name of plaintiff-respondent no. 1 is recorded. The first defendant-petitioner taking disadvantage thereof, is illegally creating hindrance and causing interference in the use of plaintiff in his property and hence a suit for declaration that he is the owner of the suit property and injunction has been filed by him.

2. The defendants no. 1 to 3 filed their joint written-statement (Annexure-P/3A) and 9th defendant filed separate written-statement (Annexure-P/3B). The defendants no. 5 to 8 have also filed separate written-statement. All the defendants have denied the allegations made in the plaint. According to the defendants in respect to the suit properties, the differences arose among the family members. Eventually the matter was referred to the sole Arbitrator Shri Murarilal Tiwari, retired District Judge vide agreement dated 11.07.1991 executed between the parties, for arbitration on 07.08.1991. The Arbitrator gave his award on 22.08.1995 (Annexure-P/4). The award was submitted to the Court of Additional District Judge Burhanpur to make it a rule of Court and a Misc. Case No. 25/1995 was registered. The said Court vide its order dated 07.10.1995 (Annexure-P/5) made the award as rule of the Court and the said case was closed after making the award, the rule of Court, the mutations etc. were made. Further in the written-statement it has been pleaded that dealing took place between the parties for which memorandum of understanding was also recorded between them and payment was also acknowledged by plaintiff-respondent no. 1. The petitioners-defendants placed all these documentary material in the Trial Court.

3. Learned Trial Court proceed with the trial. The plaintiff-respondent no. 1 submitted his affidavit in evidence under Order XVIII Rule 4 CPC and during the course of his examination in para 16 of his deposition it has been admitted by him that the reference of dispute was referred to the sole Arbitrator Shri Murarilal Tiwari and also admitted about passing the award by him. But, when counsel for defendants tried to put exhibit mark on the award which was made rule of the Court, an objection was made by Counsel for plaintiff-respondent no. 1 on the ground that the award is not a registered document. This objection was upheld by learned Trial Court by passing the impugned order dated 09.02.2009, Hence this petition has been filed.

4. The contention of learned counsel for the petitioner Shri Hundikar is that the said objection of registration should have been made by the plaintiff before the award was made rule of Court. Having not done so and after the award was made rule of the Court and closure of the Misc. Civil Case No. 25/1995, the question of admissibility cannot be raised particularly when it was acted upon. Learned counsel submits that in such a situation the registration of award was

not required. In support of his submission, learned counsel has placed reliance upon the decision of this Court in Gangaprashad and others vs. Mt. Banaspati AIR 1937 Nagpur 132. Learned counsel has also placed reliance upon the decision of Supreme Court in Satish Kumar and Others Vs. Surinder Kumar and Others, . Further learned counsel has placed reliance upon the decision of Full Bench of this Court in Moolchand and Others Vs. Maganlal, and also placed reliance upon the Division Bench decision of this Court in Bansilal Bansidhar Vs. Nandlal, . It is further contended by learned counsel for the petitioners that opinion of amicus curiae was also sought by this Court vide order dated 08.09.2009 by appointing Shri Ravish Agrawal, Senior Advocate as amicus curiae. The opinion of amicus curiae is on record.

5. On the other hand Shri Rusia, learned counsel appearing for plaintiff-respondent no. 1 argued in support of the impugned order and by placing reliance upon the decision of Supreme Court in Sardar Singh Vs. Smt. Krishna Devi and another, has submitted that learned Trial Court did not commit any error in holding that the document of award which has been made rule of the Court is inadmissible in evidence on account of its non-registration.

6. Having heard learned counsel for the parties, I am of the view that this petition deserves to be allowed.

7. This Court in Gangaprashad (supra) has held as under-

Therefore since the award cannot be challenged any longer the present appeal must fail, for the award is a complete answer to the plaintiff's suit. It hardly matters whether S. 11 applies in terms to proceedings under Sch. 2 or not, for the principle underlying it certainly does. It was then argued that even though it is not possible for the plaintiff to challenge the fact that there was a reference to arbitration, and an award, and that there was no misconduct, etc., he can still question its validity on the ground that it has not been registered. But this question also is barred by the rule of constructive res judicata. Mulla states at p. 96 of his Registration Act that if an application is made to the Court to file an unregistered award which requires registration, then the Court must reject it. It follows this is one of the grounds which can be urged against the filing of an award. If it is not urged, and the award is filed, then that question is as much barred in a subsequent suit as the others. incidentally this point is raised here for the first time. The appeal fails and is dismissed with costs.

8. The Supreme Court in Satish Kumar (supra) in para 19 although Hon"ble Justice Hegde concurred with the view of the Bench but added few words and it would be condign to quote para 19 which reads thus;

19. HEGDE, J. I agree. But I would like to add few words. Arbitration proceedings, broadly speaking may be divided into two stages. The first stage commences with arbitration agreement and ends with the making of the award. And the second stage relates to the enforcement of the award. Paragraph 7 of the First Schedule to the Arbitration Act lays down that "the award shall be final

and binding on the parties and persons claiming under them respectively". Therefore it is not possible to agree with the Full Bench decisions of the Patna High Court and that of the Punjab and Haryana High Court that an award which is not made a decree of the Court has no existence in law. The learned judges who decided those cases appear to have proceeded on the basis that as award which cannot be enforced is not a valid award and the same does not create any rights in the property, which in the subject matter of the award. This in my opinion is not a correct approach. The award does create rights in that property but those rights cannot be enforced until the award is made a decree of the Court. It is one thing to say that a right is not created, it is an entirely different thing to say that the right created cannot be enforced without further steps. For the purpose of Sections 17(1)(b) of the Registration Act, all that we have to see is whether the award in question purports 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 immoveable property. If it does, it is compulsorily registrable. In the aforementioned Full Bench decisions sufficient attention has not been given to Section 17 of the Registration Act. The focus was entirely on the provisions of the Arbitration Act and there again on the enforcement of the award and not in the making of the award. A document may validly create rights but those rights may not be enforceable for various reasons. Section 17 does not concern itself with the enforcement of rights. That Section is attracted as soon as its requirement are satisfied. There is no gainsaying the fact that the award with which we are concerned in this case, at any rate, purported to create rights in immoveable property of the value of rupees more than one hundred. Hence, it is compulsorily registrable.

9. The Full Bench decision of this Court in Moolchand (supra) has held as under:-

(11) For the foregoing reasons, the opinion is that the view expressed in AIR 1943 165 (Nagpur)) that a decree given on the basis of an unregistered award is not a nullity and cannot be question in execution is correct; and the later decision, namely, AIR 1946 311 (Nagpur) does not contain a correct enunciation of the law on the point.

It has also been relied upon by the Division Bench in Bansilal (supra) wherein in para 4 Justice J.S. Verma (as His Lordship then was) who spoke for the Bench held that the objection of registration having been raised at the stage of execution, the same is not tenable. Since at this stage decree could be challenged only if it is a nullity and not otherwise and reliance was placed upon Full Bench Decision of Moolchand (supra).

10. In the aforesaid facts and circumstance since the award passed by the sole Arbitrator dated 22.08.1995 (Annexure-P/4) was made rule of the Court on 07.10.1995 (Annexure-P/5) in the Misc. Civil Case No. 25/1995, therefore, according to me, before making it rule of Court objection could have been raised by the plaintiff that it cannot be made rule of Court since it is unregistered

document. Having failed to do so and after award became rule of the Court it is executable as a decree and therefore in subsequent proceedings in a suit filed by plaintiff its admissibility cannot be challenged particularly when rule of Court has been implemented and acted upon by the parties including the petitioners since mutation has been made in terms of award of rule of Court (Annexure-P/5). It will also amount to constructive res judicata as held by Justice Vivian Bose in Gangaprashad (supra).

11. That apart, u/s 49 of the Registration Act also, a document which is compulsorily registrable document though unregistered and inadmissible as evidence of transaction affecting immovable property, may be admitted as evidence of collateral facts, or for any collateral purpose, that is for any purpose other than that of creating, declaring assigning limiting or extinguishing a right to immovable property (see Section 49 in the commentary of Registration Act (Mulla) at page 225 to 227).

12. In Sardar Singh (supra) placed reliance by learned counsel for plaintiff-respondent no. 1 the Supreme Court in para 12 has categorically held that the document can be looked into as evidence of the conduct of the parties of accepting the award acting upon it that they have pre-existing right, title or interest in the immovable property.

13. That apart, once the award making rule of the Court was passed vide Annexure-P/5 it is as good as a decree since it was later on implemented in the revenue record etc. and looking to the conduct of the plaintiff-respondent no. 1, he cannot take such an objection. The said award cannot be said to be a waste paper.

14. Hence, I am of the view that learned Trial Court acted illegally while holding that document is inadmissible in evidence and thus the impugned order dated 09.02.2009 (Annexure-P/1) is hereby set aside. It is hereby held that the document of rule of Court Annexure-P/5 in the facts and circumstance of the present case is admissible in evidence. Resultantly, this petition is allowed and disposed of with no order as to costs.