

(1962) 07 AP CK 0010

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 390 of 1959

Indurthi Srinivasa Rao

APPELLANT

Vs

Indurthi Venkata Narasimha Rao and Another

RESPONDENT

Date of Decision : 19-07-1962

Acts Referred:

Arbitration Act, 1940 — Section 14, 17, 30, 32, 33
Civil Procedure Code, 1908 (CPC) — Section 115
Registration Act, 1908 — Section 17(1), 17(2), 49
Stamp Act, 1899 — Section 17, 35
Transfer of Property (Amendment) Supplementary Act, 1929 — Section 10

Citation : AIR 1963 AP 193

Hon'ble Judges : Umamaheswaram, J; Chandrasekhara Sastry, J

Bench : Division Bench

Advocate : V. Gopalakrishnaiah and A. Raghuveer, for the Appellant; V. Madhava Rao, for the Respondent

Final Decision : Dismissed

Judgement

Umamaheswaram, J.—This revision petition arises u/s 115, Code of Civil Procedure. The application is to revise the order of the District Judge of Warangal setting aside an award in Case No. 102 of 1956 u/s 30(c) of the Arbitration Act. The petitioner herein originally filed an appeal u/s 39(1)(vi) of the Arbitration Act. But, on an objection taken by the office, he converted it into a revision petition u/s 115 C.P.C.

2. The relevant facts for the disposal of the Civil Revision Petition are as follows:--

The parties viz., Indurthi Srinivasa Rao and Indurthi Prahada Rao represented by his guardian Anjani Bai and Indurthi Venkatanarasimha Rao referred their disputes to arbitration by executing an agreement on 11-2-1955 in favour of five arbitrators. The four arbitrators chose an umpire Kudikala Venkatarama Rao. As the award could not be made within four months, they executed a fresh agreement of reference dated 10-10-1955 in favour of the same arbitrators. An

award was made on a plain sheet of paper signed by all the five arbitrators. On 17-4-1956 one of the arbitrators by name Murlidhar Rao died. The award dated 28-1-1956 was engrossed on stamp paper on 21-5-1956 and was signed by the four arbitrators (the fifth arbitrator having died by that time). The re-written award signed by the four arbitrators was submitted for registration by the umpire Kudikala Venkata Rama Rao on 19-6-1956 and it was registered on 27-6-1956. The umpire Kudikala Venkata Rama Rao filed an application u/s 14(2) of the Arbitration Act. Notice was issued to the parties to file their objections and Indurthi Venkafa Narasimna Rao among other objections raised the objection that the award dated 28-1-1956 was invalid as it was not duly stamped and registered. He also contended that the arbitrators had become functus officio as soon as they signed the award on 28-1-1956 and that the re-written award dated 21-5-1956 though duly stamped and registered is not valid. The learned District Judge held that as soon as the arbitrators had made the award on 28-1-1956, they became functus officio and they had no jurisdiction to re-write the award on stamp paper and have it registered. He also held that as the re-written award had been presented after four months from the date of the execution of the award it was invalid. It is against this order that the petitioner has filed the revision petition to this Court.

3. Sri Gopalakrishnayya, the learned advocate for the petitioner, strenuously contended that the re-writing of the award on stamp paper and getting it registered is only a ministerial act and that the arbitrators were perfectly justified in re-writing the document on proper stamp paper and presenting it for registration. He contended that if the second document does not convey rights to his client, he is entitled to rely upon the award dated 28-1-1956 which was written on plain white sheet of paper. He urged that under the proviso to Section 35 of the Indian Stamp Act, time should be granted to him to pay the stamp duty and penalty in order to validate it.

He also contended that the document dated 28-1-1956 did not require registration under the provisions of the Registration Act. An incidental objection was taken that the remedy of the petitioner was only to prefer an appeal u/s 39(1)(vi) of the Arbitration Act and not to file a revision petition u/s 115, C.P.C. We shall deal with the objections seriatim.

4. So far as the first contention is concerned, it is governed by the decision of the Supreme Court in *Rikhabdas Vs. Ballabhdas and Others*, . Sarkar, J. delivering the judgment of the Supreme Court, held that as soon as the award is signed by the arbitrators, they become functus officio. The question that arose for decision before the Supreme Court was whether the Trial Court was justified in passing an order remitting the award to the arbitrator for re-submitting it to the Court on a duly stamped paper and after getting it registered. The Supreme Court held that such an order does not fall within the provisions of Section 16(1) (c) of the Arbitration Act. In dealing with that objection, the learned Judge observed as follows:--

"Section 17 of the Stamp Act requires that stamping should be at the time of execution. u/s 14(2) of the Arbitration Act, it is only after the signing of the award that is, its execution, that the arbitrators are required to supply the information about the fees and charges. It is, of course, no part of the duty of the arbitrators under the Act or otherwise to find the costs of a stamp themselves. Therefore it is difficult to appreciate how the word "charges" mentioned in this section includes stamp. But on this question it is not necessary for us to express any final opinion in this case."

In the next paragraph, the learned Judge proceeded to state that it is well known that after making the award the arbitrators are *functus officio*. The learned Judge added:

"In the present case, *ex-hypothesis*, the award has already been made and the arbitrator has therefore become *functus officio*. It is that award which requires stamp. Section 151 of the Code cannot give the Court power to direct the arbitrator to make a fresh award; that would be against well-established principles of the law of arbitration. It would again be useless to have another copy of the award prepared and stamped for the copy would not be the award and no action in a Court can be taken on it."

This decision is, in our opinion, a direct decision negating the contention of Sri Gopalakrishnayya, that the arbitrators were entitled to re-write the award on a duly stamped paper on 21-5-1956 and present it for registration to get over the objection as to want of stamp and registration. The learned Judges made it clear in the last paragraph that nothing which they said in the judgment would affect the right of the parties to take such steps, if any are available to them, at law, for curing the defect arising from the award being on an unstamped paper.

Sri Gopalakrishnayya attempted to distinguish this case on the ground that the observations referred to *supra* are *obiter* and that the only question that arose for decision, in that case was whether the first Court had jurisdiction to remit the award u/s 16(1)(c) of the Arbitration Act. We are not inclined to accept this contention. The learned Judges decided in clear terms that the unstamped document was the award when it was duly signed by the arbitrators. They also made it clear by observing that as soon as they signed the award, the arbitrators became *functus officio* and that they had no right to get it duly stamped or registered.

(4a) Sri Gopalakrishnayya relied on the decisions of the Bombay High Court and Madras High Court reported in *Parshottamdas Narottamdas Patel Vs. Kekhushru Bapuji*, and *Dasaratna Rao v. Ramaswamy*, (S) AIR 1956 Mad 134 in support of the contention that the re-writing of the award on fresh stamp paper and presenting for registration is a ministerial act. It is no doubt true that both those decisions regard the act as a ministerial one. As these decisions are opposed to the recent decision of the Supreme Court, we do not follow those decisions.

5. A question might arise whether even assuming that the re-writing of the

award on fresh stamp paper and getting it duly registered by four of the arbitrators is a ministerial act, the death of the 5th arbitrator does not affect the validity of the latter stamped and registered document.

Sri Gopalakrishnayya relied on the decision of the Privy Council in AIR 1938 292 (Privy Council) It was held by Lord Wright, construing the provisions of Order XLI Rule 31 C.P.C. that if after the delivery of judgment in open Court, one Judge went on leave without signing the judgment, the judgment is not invalid in law. His Lordship held that Order XLI Rule 31 C.P.C. does not say that if its requirements were not complied with, the judgment should be a nullity. It was held that the defect was merely an irregularity. Order XLI Rule 31 C.P.C. provides that the judgment of the appellate Court shall be in writing and shall state the points mentioned therein and shall bear the date on which it is pronounced and shall be signed by the Judge or Judges concurring therein.

So far as Section 14(2) of the Arbitration Act is concerned, there is no provision like Order XLI Rule 30 C.P.C., that it should be pronounced. It clearly provides that where the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award. If the document dated 21-5-1956 is to be regarded as the award, it is not signed by all the five arbitrators to whom they referred the dispute for arbitration.

A contention was raised that it was unnecessary for all the arbitrators to have signed the award and that it was sufficient if a majority of them had signed. Reliance was placed for this contention on the decision of the Madras High Court in Johara Bibi and Others Vs. Mohammad Sadak Thambi Marakayar and Others, for the proposition that where an award is the outcome of the joint deliberations of all the five arbitrators to whom the dispute is referred and the award is pronounced after due notice to all the parties, the non-signing of the award by one of the arbitrators who has been throughout a party to the making of the award cannot vitiate the award. The learned Judges held that the signing of the award was only a formality after it had been made and pronounced and it is not open to the parties to challenge the award on such ground especially when they agreed to abide by the decision of the majority. It is clear from the facts of the case that the reference of the dispute was made to all the five arbitrators and not only to four of them who signed the document on 21-5-1956. The document dated 21-5-1956 cannot be relied on as the award given in pursuance of the agreement to refer the dispute to arbitration. It is unnecessary for us to express our final opinion as to whether the decision in Johara Bibi and Others Vs. Mohammad Sadak Thambi Marakayar and Others, is correct or not having regard to the mandatory provisions of Section 14(2) of the Arbitration Act.

6. Sri Gopalakrishnayya, the learned advocate for the petitioner contended that a decree should have been passed at least on the basis of the award dated 28-1-1956 which was signed by all the arbitrators. The objection raised by the 1st respondent is that no decree can be passed inasmuch as the document is not

duly stamped and registered. There is no doubt that the award requires to be duly stamped as pointed out by the Supreme Court in *Rikhabdas Vs. Ballabhdas and Others*, . Section 35 of the Stamp Act enacts that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped.

It was contended that having regard to the terms of proviso (a), we ought to grant him time to pay the penalty as provided thereunder. The proviso runs in the following terms:--

"Provided that any such instrument not being an instrument chargeable with a duty of one anna or half an anna only or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable....."

The question for consideration is whether we should permit the petitioner to pay the penalty and have the document duly admitted in evidence. The proviso enacts that it is not the duty of the Court in all cases to admit the document on payment of penalty. It provides that it is "subject to all just exceptions".

7. In Mulla's commentary on Indian Stamp Act, 1950 edition, at page 110, dealing with the phrase "subject to all just exceptions", the learned author states as follows:--

"These words do not give the Court a discretion to refuse to admit a relevant document when duty and penalty have been paid. They refer to exceptions under other statute such as irrelevancy under the Evidence Act, or non-registration under the Registration Act, or any other ground on which the document is not admissible in evidence."

The decision which is relied on by the learned author is the decision in *Shiva Prasad v. Shambu Nath* ILR 1939 All 546 : AIR 1939 All 515. Having regard to our conclusion that the document requires registration, we are not inclined to grant any time to the petitioner for paying stamp duty and penalty under the proviso to Section 35 of the Indian Stamp Act.

8. The most important question that arises for decision in the Revision petition is whether the document requires to be registered u/s 17(1)(b) of the Indian Registration Act. Section 17(1)(b) refers to other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in the 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 17(1)(b) of the Registration Act as amended provides that nothing in clauses (b) and (c) of Sub-section (1) applies to any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of

the suit or proceeding. The amendment was made by Section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929. The clause as it stood before the amendment provided that nothing in clauses (b) and (c) of Sub-section (1) applied to any decree or order of a Court and any award. The Amending Act came into force on 1st April, 1930.

Mulla, in his commentary on the Indian Registration Act, 5th (1950) Edition, sums up the effect of the amendment in the following terms at page 103:--

"The effect of the amendment is that an award which embodies a transaction u/s 17(1) (b) or (c) is no longer exempt from registration. Such an award must be regarded and is invalid if not registered. If application is made to the Court to file it, the Court must reject it for want of registration."

9. That the award requires to be registered after the Amendment Act is clearly laid down by the High Courts of Allahabad, Andhra, Calcutta, Madras, Nagpur and Punjab. In *Yanadama v. Venkateswarlu* AIR 1947 Mad 168 Wads-worth, J., delivering the judgment of the Bench held at page 170, column 1 as follows:--

"Since the amendment of the Registration Act in 1929, an arbitrator's award is not excluded from the operation of Section 17(1)(b). The only question is whether the award now under consideration does itself create, declare, assign, limit or extinguish any right, title or interest in immoveable property, or whether it merely creates a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest. If the latter is the case, then Sub-clause (v) of Clause (2) of Section 17(1)(b) will exempt the award from the necessity of registration."

This decision of the Madras High Court is binding on us having regard to the Full Bench decision of the Andhra High Court in *O) (FB)*. The decision of a single Judge of the Andhra High Court is to the same effect and it is reported in *Kalathooru Raghavareddi Vs. Kalathooru Venkatareddi and Others*, . Subba Rao, C. J., [as he then was] held at page 23 as follows:--

"A combined reading of Section 17(1)(b) and Section 49, Registration Act clearly shows that an unregistered partition deed or an award cannot affect any immoveable property comprised therein."

According to the learned Chief Justice, the non-registration invalidates the transaction altogether and cannot be looked at under the terms of Section 49 of the Registration Act. The same view was taken by the Allahabad High Court in *Jag Mohan Singh v. Bisheshar Singh* (1950) 5 DLR (All) 250 and by the Punjab High Court in *Shambhu Nath and Others Vs. Gokal Chand and Others*,

10. The next decision that might be usefully referred to in this connection is the decision of the Calcutta High Court in *Nani Bala Saha Vs. Ram Gopal Saha and Another* represented by pleader guardian Babu Kumar Gurukrama Mozumdar and Another, . The learned Judges considered the effect of the Arbitration Act of 1940 on the question as to whether an award requires to be registered or not. At

page 22, Column 2, the learned Judges observed as follows:--

"No doubt by the Arbitration Act of 1940, the law governing a private award dealing with mofussil properties have been placed on the same footing as an award dealing with properties situate in Presidency Towns with the result that the supervising powers of the Civil Court with regard to these awards have been enlarged and the procedure for filing such awards and the subsequent proceedings in the Civil Court have been changed, but those changes do not affect the question, which we are now dealing with, because the provisions of Section 17(1)(b) of the Registration Act have not undergone any change by way of further amendment since 1929. The authority of the decision in Jitendra Nath De and Another Vs. Nagendra Nath De, in so far as it decides that a private award has to be registered before it can be filed in the Civil Court for the purpose of obtaining a decree thereon has not been shaken by the repeal of Schedule 2, Civil Procedure Code, and the enactment of the Arbitration Act of 1940."

We are inclined to share the view of the Calcutta High Court that even after the passing of the Arbitration Act, a private award requires to be registered. The observations of Kapur J. in Champalal Vs. Mst. Samrath Bai, also lend support to this conclusion. The relevant observations are at page 631, column 2, and are in the following terms:

"The second question that the award required registration and could not be filed by the arbitrators before it was registered is equally without substance. The filing of an unregistered award u/s 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 u/s 17(1)(b) of that Act. That the award required registration was rightly admitted by both parties." The learned Judge therefore stated that even though the award may be filed into Court, it cannot be taken into evidence u/s 49 of the Registration Act so as to affect Immovable properties falling u/s 17 of the Act.

The Patna High Court had also taken the same view In Chhati Lal Vs. Ram Chariter Sahu and Others, Wort J., delivering the judgment of the Division Bench, held that once the arbitrators have issued an award, they become functus officio, and they have no jurisdiction subsequently to re-write the original award on duly stamped paper and present it for registration. The learned Judge held that as the award was not sufficiently stamped and was not registered, no decree can be passed in terms thereof. The Court below relied on this decision of the Patna High Court in setting aside the award u/s 30(c) of the Act.

11. As against the decisions referred to- supra, Sri Gopalakrishnayya, the learned advocate for the petitioner, strongly relied on the Full Bench decision of the Patna High Court in Seonarain Lal Vs. Prabhu Chand, . The learned Judges held that as under the provisions of the Arbitration Act of 1940 a private award has to be necessarily filed into Court and made a rule of Court, the award by

itself does not operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest. The learned Judges held at page 255 as follows:--

"This shows in unmistakable terms that an award, though given without the intervention of the Court, has to be made a rule of the Court, and the Court will pronounce judgment on the basis of the award, and a decree shall follow, that is to say, the award by itself is of no effect." With great respect, we are not inclined to follow this view.

12. On the question as to whether a private award cannot be set up as a defence, to an action unless it is filed into Court and a decree is obtained thereon, there is a conflict of authority. The Madras High Court held in *Pamudurthi Suryanarayana Reddi and Others Vs. Pamudurthi Venkata Reddi and Others*, that Sections 32 and 33 of the Indian Arbitration Act did not preclude a defendant from setting forth an award which had been fully performed by him but which was not filed in Court u/s 14(2) and on which a judgment was not pronounced or a decree given u/s 17(1)(b) of the Act in answer to the plaintiff's claim which was the subject-matter of the reference and the award.

That view was accepted by the Madras High Court in *Rajamanickam Pillai and Others Vs. Swaminatha Pillai (died) and Others*, . The conflict of authority is referred to by Shah J., in *Kashinathsa Yamosa Kabadi, etc. Vs. Narsinga Bhaskarsa Kabadi, etc.*, . The learned Judges stated:

"It is not necessary in this appeal to express a considered opinion on this disputed question."

It is no doubt true that the Full Bench decision of this Court in *Sait Pamandass Sugnaram Vs. T.S. Manikyam Pillai and Others*, held that it is not open to the defendant to set up an award as a bar to the suit on the original cause of action, where the award has not been filed and all proceedings relating thereto had not been gone through as required by the Arbitration Act.

13. In holding that the private award does not require to be registered, the Full Bench of the Patna High Court in *Seonarain Lal Vs. Prabhu Chand*, has also not taken into consideration the word "purport" in Section 17(1)(b) of the Registration Act. Reliance is only placed on the words that the award does not operate to declare or create or assign any interest in Immovable property. There can be no doubt that on a reading of the award filed in this case the document purports to create an interest in Immovable property. According to the preponderance of authority the document also operates to create an interest in immovable property. In the award it is provided that for the services performed by the 1st respondent he was entitled to be allotted particular properties in addition to his share. We are clear on a reading of the document that it not only purports to create but also operates to create an Interest in Immovable property. We accordingly hold that the award not being duly stamped and registered, the learned District Judge was perfectly right in setting aside the award.

14. On the question as to whether a revision petition lies u/s 115, C.P.C., we are inclined to take the view that as the award was set aside u/s 30(c) of the Arbitration Act on the ground that it was otherwise Invalid, an appeal is the proper remedy u/s 39(1)(vi) of the Arbitration Act. The view taken by a single Judge of this Court in P. Ramulu v. N. Appa-laswami AIR 1957 AP 11 is consequently wrong and is overruled. As the petitioner had originally filed an appeal u/s 39(1)(vi) of the Arbitration Act and not a Civil Revision Petition, we would have permitted the petitioner to convert the Civil Revision Petition into an appeal u/s 39(1)(vi) but for the fact that on the merits we are not impressed with his contention.

15. As we are accepting the contention of the 1st respondent on the merits it is unnecessary to uphold the technical objection that however erroneous the decision might be, it is not liable to interference u/s 115 C.P.C.

16. In the result, the Civil Revision Petition fails and dismissed with costs.