

(1963) 02 KAR CK 0009
In the Karnataka High Court
Case No : Second Appeal No. 725 of 1960

Kapgal Konda Gireanna and Another	Vs	APPELLANT
Kapgal Konda Basappa		RESPONDENT

Date of Decision : 08-02-1963

Acts Referred:

Arbitration Act, 1940 — Section 17, 17 (2), 32

Citation : AIR 1964 Kar 238 : (1964) 1 MysLJ 131

Hon'ble Judges : Iqbal Husain, J

Bench : Single Bench

Advocate : Manohar Rao Jagirdar, for the Appellant; S.R. Kagalkar, for the Respondent

Judgement

1. A moot point arises for determination in this second appeal as to whether notwithstanding Section 32 of the Arbitration Act defendants are entitled to take shelter under, and to rely upon, the terms of an unregistered award passed by the arbitrators.

2. Plaintiff-respondent filed a suit for possession of lands and for mesne profits. The contesting defendants who are appellants before this Court alleged that a partnership shop in the name and style of "Halkod Venkata Setty and Konda Manikya Setty" was run in Raichur of which the plaintiff, the defendants and one Halkod Gundaiah were partners. Halkod Gundaiah had eight annas share therein and in the remaining eight annas share plaintiff had five annas four pies share and the two defendants had two annas and eight pies share. This business was closed on account of disputes between the partners. The dispute was referred to the arbitrators as per the agreement marked Exhibit A-1 in the case dated Karthika Sudda Panchami of Jayanama Samvastara, correspondent to November 1954. The arbitrators passed an award on 24-11-1954 marked as Exhibit A-2 in the case to the effect that plaintiff had to pay a sum of Rs. 10,000/- to the defendants in respect of the partnership dues to the shop. Until that amount was paid, the suit, properties should be in the possession of Halkod Gundaiah who

should pay the defendants the amount due to them out of the usufruct of the land. As per its terms Halkod Gundaiah took possession of the suit properties. He, in turn, put the defendants in possession thereof to enable the latter to realise the dues therefrom. Hence the defendants contended that they were entitled to be in possession of the suit properties until their dues were paid up and plaintiff's suit in disregard of the Award to which he was a party was liable to be dismissed.

3. Plaintiff's suit was decreed by the trial court viz., the court of the Subordinate Judge, Raichur and the contention of the defendants based on the award dated 24-11-1954 was negated on the ground that as the said award created interest in Immovable properties of a value of more than Rs. 100/- it was compulsorily registrable u/s 17(2) of the Registration Act and not having been so registered, the terms of the agreement and award were unenforceable. Hence, the defendants were not entitled to rely on the same. In appeal to the District Court, Raichur, the defendants met with no success. The learned Additional District Judge, Raichur, held that the defendants had failed to prove that in pursuance of the terms of the award they were put in possession. Moreover, they cannot plead the terms of the award.

4. The main contention of Sri Jagirdar for the defendants-appellants in this second appeal is that notwithstanding Section 32 of the Arbitration Act, the defendants are entitled to make use of the terms of the award for collateral purpose as a defence to the suit for possession and mesne profits brought against them. Though such a plea was not taken in defence at the first instance nor any specific issue was raised thereon as it is a point of law arguments were allowed to be addressed on the same.

5. The important question, therefore, for decision before this court is whether the terms of the award could be made use of as a shield or a defence. As per Section 17 of the Indian Arbitration Act of 1940, the award passed by the arbitrators should be filed so as to enable the court to pass judgment in terms of the same provided the conditions stated in the said section are satisfied. In other words, the award passed by the arbitrators even though both the parties to the dispute agreed for a reference to the arbitration will not have any binding effect nor will it be enforceable unless it receives the blessings of the court by a decree passed in terms thereof. Section 31(2) states:

"31. ? ? ? ? ... (2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed and by no Other court."

This sub-section gives exclusive jurisdiction to the Court wherein the award has been filed to determine its validity, effect etc. Section 32 states:

"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 set aside, amended, modified or in any way affected otherwise than as provided in this Act."

In specific terms the section prohibits the parties to an arbitration from agitating questions relating to the same in any manner other than as provided by the Arbitration Act. Section 33 provides for the machinery for the effectuation of the award or for challenging its existence or validity by filing an application.

6. A careful study of these sections reveals that a private award on a reference by parties by mutual agreement in order to be enforceable should be in the form of a judgment of a court. A decree passed on such an award will have the attributes of a decree of a court of law as defined in the Civil Procedure Code. In other words, if a party desires to rest his case on such an award he cannot do so unless it becomes a rule of the court. For that purpose he has to take the necessary steps as contemplated under the Arbitration Act by filing an application in court to be followed up by a decree on such an award. In the instant case however, though the award was passed as far back as 24-11-1954, no steps were taken to make it enforceable as a decree of the court. In spite of it, the defendants want to rely upon its terms by way of defence. It is urged on behalf of the defendants-appellants that there is no specific prohibition for so doing in the provisions of the Act referred to supra. There does not seem to be any force in such a contention. When no separate suit otherwise than as provided by Arbitration Act is contemplated for a decision upon the existence, effect or validity of the award, can it be stated that even without a decree of the court on the private award its terms could be made use of as a shield to protect the interests of the defendants against the claim of the plaintiff who is also a party to the award? To my mind, it appears that the same rule which prohibits the plaintiff to rely upon its terms unless an award has received the imprint of a court also prohibits the defendant to rely on its terms by way of defence unless he has a judgment and decree on the said award in his favour.

7. There is a divergence of views on this question of law between the several High Courts which has been referred to in a decision of the Supreme Court in the case of Kashinathsa Yamosa Kabadi, etc. Vs. Narsinga Bhaskarsa Kabadi, etc., This moot point was, however, not resolved by their Lordships as such a determination was perhaps thought to be unnecessary for decision of the case before them. A majority of the High Courts in India take the view that the Arbitration Act prohibits the defendants to plead by way of defence the terms of an award passed; out of court which has not received its approval terminating in a decree. The Patna High Court in the case of Seonarain Lal Vs. Prabhu Chand, accepted the proposition that the provisions of the Arbitration Act 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"

It is further held that the scheme of the Act is to prevent the parties to an arbitration agitating questions relating to the arbitration in any manner other than that provided by the Act, "If the only way to challenge the validity or otherwise of an award is by filing the award in court under the Act and taking a decision upon it in terms, of the award then the matter cannot be agitated even by way of defence in a proceeding other than a proceeding envisaged by the Act itself."

8. A bench decision of the Madras High Court in the case of Pamudurthi Suryanarayana Reddi and Others Vs. Pamudurthi Venkata Reddi and Others, on which Sri Jagirdar for the appellants strongly relies, took a contrary view. It held that:

"The words "no suit shall lie" in Section 32 cannot be read as prohibiting a defence which involves a decision upon the existence, effect or validity of an award."

In other words, it held that though the right of suit is taken away and the remedy by way of an application is substituted for it, Section 32 has to be read as only precluding a suit praying for the relief for which an application is provided u/s 33 of the Act. In view of such a decision the question whether an award of such a kind could be pleaded by way of defence was referred to and was decided by the Full Bench of the Andhra Pradesh High Court in the case of Sait Pamandass Sugnaram Vs. T.S. Manikyam Pillai and Others, . It was held by their Lordships as follows:

"A party to an award cannot afford to lie by and not take steps to get the award filed in court and get it declared as valid and binding and after the lapse of a considerable period of time produce the award in answer to a suit that may be filed against him. It would amount to circumventing the provisions of law. A perfectly just claim may be sought to be resisted by the setting up of an award having been made at some remote time and it might have become impossible by sheer lapse of time to establish the invalidity or unenforceability of such award and the defendant would be enabled to escape the liability merely on this ground. It is to avoid a contingency like this that the Arbitration Act requires that the process of making it a rule of court and a decree passed thereon should be gone through. If, therefore, a defendant has not taken steps to have an award filed and gone through the formalities enjoined by the specific provisions of the Arbitration Act, it is not open to him to set up the award as a bar to an action that may be brought against him."

Their Lordships further say:

"The putting up of an award as a defence to a suit in substance is to get a declaration that a previous award is binding on the parties and therefore, a bar

to the suit. What is prohibited under the law is the matter about the existence of an award its effect or validity being agitated in a regular suit. There can be no doubt that the question of the existence, the validity and the enforceability of the award does arise where the defendant sets up the award in defence. In effect the party wants the court to hold that there is a valid and subsisting award which had already determined the rights of the parties in so far as the subject matter of the suit was concerned.

If a plaintiff cannot bring a suit to enforce the award because of the existence of the prohibition u/s 32 the defendant cannot be in a better position and cannot be permitted to have it declared that it is a valid award. It would apply to either of the parties to the award."

Their Lordships distinguished the decision of the Madras High Court on the ground that in that case, the parties by mutual agreement not only settled the dispute but subsequently acted upon the terms thereof. In other words, the award had been fully performed.

9. A later decision of the Madras High Court in the case of Bhimavarapu Venkatasubbayya Vs. Addanki Bapadu and Others, after distinguishing the case of Suryanarayana Reddy AIR 1948 Mad 436 has held as follows:

"Where the defendant, who is himself, relying upon the award, did not take steps to have it filed and dealt with under the appropriate provisions of the Arbitration Act, it is not competent to him to rely upon it in answer to the action."

This case of Venkatasubbiah has been referred to in the decision of the same High Court in Rajamanickam Pillai and Others Vs. Swaminatha Pillai (died) and Others, . That decision follows the earlier decision of Pamudurthi Suryanarayana Reddy. Just as in the case of the earlier decision so also in the case of Rajamanickam Pillai the award had been accepted and acted upon by the parties. Hence both these decisions are distinguishable from the facts of the present case. In the instant case, however, there is a definite finding of the learned Additional District Judge that the defendants were not put in possession of the lands in pursuance of the terms of the award by the plaintiff. If so, it leads to the conclusion that the award was not acted upon. Under the circumstances, the law as laid down by the two Full Bench decisions referred to supra fully covers the present case.

10. The counsel on both the sides have stated that so far as they have been able to investigate, there is no reported decision of this court on the point. The Supreme Court has only referred to the divergence of opinion. Under the circumstances, after a careful consideration of the several decisions I come to the conclusion that the defendants who have failed to take steps to file the award and obtain a decree thereon as per the Arbitration Act are incompetent to rely on the same in answer to the action against them.

11. I am further strengthened in this view by another case of the Rajasthan High

Court in the case of Firm Gulzarimal Gheesalal Vs. Firm Rameshchandra Radhyeshyam, which considered the effect of Sections 32 and 33 of the Arbitration Act and held that the object of the Legislature was to prevent the parties to an arbitration to agitate questions relating there to in any manner other than that provided under the Act.

12. In the result this Second Appeal fails and is dismissed. In the circumstances of the case I order each party to bear his or their respective costs.

13. Appeal dismissed.