
(1998) 09 BOM CK 0124

In the Bombay High Court

Case No : Notice of Motion No. 2896 of 1997 in Suit No. 1792 of 1997

Nari Rijhumal Khiani and another

APPELLANT

Vs

Metharam Rijhumal Khiani and others

RESPONDENT

Date of Decision : 28-09-1998

Acts Referred:

Arbitration Act, 1940 — Section 32

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 40 Rule 1

Specific Relief Act, 1963 — Section 20

Citation : (1999) 3 ALLMR 574 : (1999) 4 BomCR 395

Hon'ble Judges : D.K. Trivedi, J

Bench : Single Bench

Advocate : Mahendra Gilani, instructed by Law Charter, for the Appellant; Ms. K.C. Nichani, D.R. Zaiwala, N.G. Thakkar and T.G. Vora, instructed by Kirit N. Damaniz, for the Respondent

Judgement

D.K. Trivedi, J.—The plaintiffs have taken out this notice of motion supported with an affidavit of plaintiff No. 1 dated 3rd October 1997 and prayed for certain reliefs during the pendency of the suit which I will highlight later on.

2. As per the plaint, the plaintiffs have filed the suit for declaration that the award dated 31-12-1993 and the decree passed in terms of the said award, are no longer valid and subsisting and the same are not binding on the plaintiffs. The plaintiffs and defendants are closely related to each other and plaintiff No. 1 is the husband of plaintiff No. 2. In short, the plaintiffs have challenged the award of the Arbitrator dated 31-12-1993 and the decree passed, in terms of the said award. In view of the dispute, the said dispute was referred to before the Arbitrator and four different awards were declared in respect of firm of M/s Valiram Sons, M/s. Valsons Dyeing Bleaching and Printing Works Ltd., M/s. Valtex Silk Mills and M/s. R.V. Sons. The plaintiffs have also prayed that the defendant Nos. 1 to 3 be directed to render full, true and complete accounts and further the defendant Nos. 1 to 3 be directed to pay the plaintiffs' share in respect of the partnership business and prayed for appointment of Court Receiver with all

powers under Order 40, Rule 1 of the CPC including the power of sale and also prayed for injunction till the disposal of the suit.

3. The plaintiffs have in support of their case, placed reliance on the documents pertaining to the Arbitration Petition being Arbitration Petition No. 96 to 99 of 1992 and the Execution Application being No. 21 of 1995 filed in the High Court as well the partnership deed of firm of M/ s. Valiram Sons, M/s. Valsons Dyeing Bleaching and Printing Works Ltd., M/s. Valtex Silk Mills and M/s. R.V. Sons and the agreement on reference to arbitration dated 27th May 1993 and the award dated 31st December 1993. In the list of documents attached to the plaint also shows that the plaintiffs relied upon the papers pertaining to the proceedings in respect of Civil Suit No. 1145 of 1990 pending in the Court of Civil Judge, J.D., Gandhidham and correspondence prior to the filing of the suit and papers and proceedings in petition for letters of administration being No. 209 of 1974.

4. Mr. D.M. Haresh was appointed as a Sole Arbitrator as per agreement dated 21-5-1993 and the matter was referred to him. As highlighted in the plaint, it is the case of the plaintiff that in or about 1983, the plaintiffs migrated to U.S.A. and since then they are residing in U.S.A. and only occasionally they visit India. Thus the plaintiffs were not associated with the day-to-day management, accounts, taxation etc., of the Indian firm and or properties and trust. In or about 1991, the plaintiffs suspected that the first defendant and immediately family members have betrayed the trust and confidence reposed in them and even siphoning and misappropriating the huge sum from the firms and manipulating the accounts. In view of the above and dispute in respect of the said firm and certain foreign corporate bodies in which they were concerned, the plaintiff invoked the arbitration clause contained in the deed of partnership in respect of the partnership firm and called upon the defendants to refer the dispute relating to the said partnership firm to arbitration and pending the appointment of Arbitrator, the plaintiffs filed four arbitration petitions in the High Court being Arbitration Petition Nos. 96 to 99 of 1992 u/s 41 of the Indian Arbitration Act, 1940. In the said proceedings, as per the order dated 12th May 1992, the Court Receiver was appointed in respect of four firms with the direction that the defendant No. 1 was appointed as an agent of the Court Receiver.

5. In this motion, the plaintiffs have prayed that till the disposal of the suit, the implementation of the award of the sole Arbitrator and the decree passed in terms of award dated 31-12-1993 be stayed and plaintiffs have further prayed for appointment of Court Receiver in respect of estate and business of the firm of M/s. Valiram Sons, M/s. Valsons Dyeing, Bleaching and Printing Works Ltd., M/s. Valtex Silk Mills and M/s. R.V. Sons, including the properties described in the plaint with all powers under Order 40, Rule 1 of the CPC and by way of injunction, the plaintiffs have prayed that till the disposal of the suit the defendants and their agents be restrained by an order of injunction from in any manner disposing of or alienating, selling, transferring, parting with the

possession, inducting the third party and entering into any agreement in respect of or creating of other right, title and interest in favour of any third party in respect of assets, business of firm of M/s. Valiram Sons, M/s. Valsons Dyeing Bleaching and Printing Works Ltd., M/s Valtex Silk Mills and M/s. R.V. Sons as described in plaint.

6. This motion is opposed on behalf of the defendant Nos. 1 and 4 and they have filed their detail affidavits and alongwith the affidavits, they have relied upon the documents which were attached to the said affidavits.

7. During the hearing, with the help of learned Counsel appearing in the matter, I was taken through the motion and the affidavits dated 21st October 1997, 2nd September 1998, 27th August 1998 and 10th September 1998 as well as the plaint and the documents attached thereto including the award under challenge and documents attached to the affidavit filed on behalf of the defendants opposing the prayer for appointment of Court Receiver as well as for injunction.

8. As per the order dated 12th May 1992, the Court Receiver was appointed in respect of each four firm with the direction that the defendant No. 1 was appointed as an agent of the Court Receiver. The plaintiffs have also relied upon the said order of the Court dated 12th May 1992. Pursuant to the order passed by the Court appointing the Court Receiver, the Court Receiver took formal possession of the firm and defendant No. 1 was appointed as an agent of the Court Receiver. As per the agreement of referring the dispute before the Sole Arbitrator, the defendant No. 1 has submitted statement of accounts as well as objections and queries raised by the plaintiffs and defendant No. 4. It is the case of the plaintiffs in the plaint that till 29th December 1993, the accounts of four firms were not settled and plaintiffs relied upon letter dated 29th December 1993, letter from the advocate to the arbitrator and letter dated 16th November 1993, and 30th November 1993 from defendant No. 4 to the arbitrator.

9. As per Exhibit H-I, the arbitrator Mr. D.M. Haresh had submitted his award and in the said award the arbitrator has given various dates where the hearing has taken place starting from 21st June 1993 to 31st December 1993. The time for submitting the award was extended by consent of the parties upto 31st December 1993. As per his award, he has passed separate award in respect of various disputes referred to before him and he has declared his award on 31st December 1993.

10. The learned Counsel for the plaintiffs has referred to the letters issued by the plaintiffs to the Arbitrators, dated 13th November 1993 and 29th December 1993 and as per the said letters, the Arbitrator has without considering the accounts declared the award and in view of the above, the plaintiffs prayed for setting aside the said award of the Sole Arbitrator dated 31-12-1993 as the said award was declared without considering the accounts and the same is not binding on the plaintiffs.

11. In the affidavit filed by the defendant No. 1 Metharam R. Khiani, he has

denied the allegations made by the plaintiffs and he has given detail reply by annexing documents. One of the contentions taken by the defendant No 1 in his affidavit is about the maintainability of the present suit and he has prayed for dismissal of the suit. In his affidavit, he has further averred that present suit filed by the plaintiffs is dishonest praying for setting aside the award of the Sole Arbitrator dated 31-12-1993 in respect of other four partnership firms and in respect of estate of late Rijhumal Khjani the father of plaintiffs No. 1 and defendant No. 4. The award passed by the Arbitrator was accepted by all the parties including the present plaintiffs. It is only the plaintiffs who have obtained the decree in terms of the award in or about 11th October 1994 and as per the said decree, the plaintiffs have received and taken possession of the estate awarded to them and the monies are lying with the Court Receiver. The defendant No. 1 has also highlighted the correspondence as well as the order passed in execution in Chamber Summons No. 841 of 1996 dated 24th December 1996 and the Order passed by the Division Bench dated 20th February 1998 in Appeal No. 682 of 1987 as well as the order passed by the Apex Court in SLP No. (Civil No. 10442 of 1998) dated 21st July 1998. I was also taken through the said order of the learned Single Judge as well as the order passed by the Division Bench and the order passed by the Apex Court.

12. On considering the case of the plaintiffs and as averred by the plaintiffs in the plaint, it is the case of plaintiffs that the Sole Arbitrator has declared and published four separate awards dated 31st December 1993 in terms of settlement arrived at between the parties and all the parties concerned have signed the said four awards giving their consent as per the award Exhibits H-2 to H-4, it is the case of the plaintiffs that after the said awards were made and published, a meeting was held before the learned Arbitrator on or before 24th January 1994 in order to proceed with the finalisation and settlement of the accounts of four firms as agreed between the parties and it is the defendant No. 1 and Shri Kirit Damania, in breach of their promise, pleaded that the learned Arbitrator had become functus officio as the time to make and publish the award had expired and hence, he could not act as Arbitrator any longer.

13. As can be seen from the letters issued through advocate dated 17th October 1994, and 6th January 1995, the defendants were called upon to perform their obligation under the award. The plaintiffs have also averred that as per letter dated 8th February 1995, on behalf of defendant Nos. 1 to 3 through their Counsel, raised objections in performing their obligation under the decree. The plaintiffs have further expressed their willingness to hand over two plots at Gandhidham on getting consent from the heirs of Rijhumal Valiram and further the-defendants did not point that there was any impediment in his award in handing over the said two plots of land to the plaintiffs. It is the case of the plaintiffs that defendant Nos. 1 to 3 refused to perform their obligation under the decree on frivolous grounds. The plaintiffs have also filed execution application of the said decree in terms of the award and in the said proceedings defendant Nos. 1 to 3 took out Chamber Summons praying for setting aside the said execution

application and also sought for relief in respect of jewellery which were in possession of plaintiffs and defendant No. 4. The said Chamber Summons was dismissed subject to the direction that Court Receiver should retain the valuation of the said jewellery. It is also the case of the plaintiffs that defendant No. 1 is an administrator of estate through Rijhumal Valiram and managing the estate including two plots at Gandhidham allotted to plaintiffs and said two plots were encroached upon due to gross negligence of the defendants and it is, only after when the Court has directed the defendant to file affidavit in relation to the said plots, for the first time, the defendant has disclosed in his affidavit about the litigation pertaining to the said plot.

14. Without expressing anything in detail and considering the prayer sought for the plaintiffs in this motion, wherein the plaintiffs have prayed for appointment of Court Receiver as well as prayed for injunction and when the plaintiffs, have while filing the suit, sought for declaration for setting aside the award in respect of the property, this Court is not required to ignore the fact that as per the award passed by the Arbitrator as per the decree in terms of award of the Arbitrator, at the instance of the plaintiffs, an execution application is filed wherein the plaintiffs have sought for execution of the decree passed in terms of award and further as per the Chamber Summons taken out by the defendants in the said execution Application No. 814 of 1996, the Court has while discussing the contentions raised before it, in paragraphs 10 and 11 of the said order, the Court has observed which I reproduce hereinbelow:

"So far as the award is concerned, I am constrained to observe that the applicants are not entitled to seek any reliefs in terms of prayers (a) to (d) as, the awards having been passed and being made decree of the Court, the applicants are restrained from seeking any direction with regards to the taking accounts of the partnership firms of (1) M/s Valson Dyeing, Bleaching and Printing Works, (2) M/s Valtex Silk Mills, and (3) M/s. Valiram Sons, neither have the applicants been in a position to make out any cause for the appointment of the Commissioner to take accounts of the partnership firms. The award has been passed on 31st December 1993. Although it has been vehemently urged on behalf of the applicants herein that the accounts were not settled and it was agreed between the parties that the parties will approach the learned Arbitrator with their accounts and the same would be finalised, it is the case of the applicants herein that after the award was passed, the applicants did make an application before the learned Arbitrator, but so far as this application is concerned, it has been urged on behalf of the respondents that as the learned Arbitrator has declared his award, he has become functus officio and therefore, he is not entitled to look into the matter. Curiously enough, according to the case of the applicants this application was made in January 1994, but this contention of the applicants is not recorded by any correspondence. On the contrary, the applicants herein has filed the petition and have sought decree in terms of the award. Even at the time of filing this petition, no application has been made on behalf of the applicants herein to remand the matter back to the learned

Arbitrator before passing a decree and determining the question pertaining to the settlement of the account. It is vehemently urged on behalf of the applicants herein that the accounts were not settled or finalised as the applicants has raised objection to the accounts filed. In so far as the foreign awards are concerned, a perusal of the foreign award reveals and reflects that the amounts have been quantified. Even so far as the Indian award, which is an award in respect of which the applicants have taken out this Chamber Summons, the said award also in terms quotes various amounts being due and payable to the parties. However, so far as the question of accounts of firms are concerned, the same is silent on this issue.

The chamber summons has been taken out seeking these reliefs in August 1996, almost after a lapse of two years of the decree having been passed in terms of the award, A perusal of the award will reveal at paragraph (9) of the award that as regards the partnership firm of M/s Valtex Silk Mills, Jaya, i.e. the applicant's wife shall retire from the said firm as on 31st December 1993 and Metharam and Sanjay, i.e. Respondent Nos. 1 and 3, will take over the said firm as a running concern together with goodwill and all the assets and liabilities as reflected in the balance sheet as on 12th May 1992 and also the right of use and /or ownership of the assets mentioned therein,"

15. Against the said order of the learned Single Judge, the plaintiffs had preferred the appeal and Division bench has after considering the order under challenge and on considering the contentions raised by the plaintiffs, dismissed the appeal. The said order of the Division Bench was challenged by preferring SLP before the Supreme Court and the Apex Court has while disposing of the said SLP observed that the Court will not influence by the observations made by the Division Bench while dealing with the merits of the suit filed by the plaintiffs.

16. The learned Counsel appearing on behalf of the defendants has also placed the reliance upon the decision in the matter of K.K. Modi Vs. K.N. Modi and Others, . In para Nos. 47 and 48, the Supreme Court has observed as under:

"In the present case, the learned Judge was of the view that the appellants had resorted to two parallel proceedings, one under the Arbitration Act and the other by way of a suit. When the order of interim injunction obtained by the appellants was vacated in arbitration proceedings, they obtained an injunction in the suit. The learned Single Judge also felt that the issues in the two proceedings are identical, and the suit was substantially to set aside the award. He, therefore, held that the proceeding by way of a suit was an abuse of the process of Court since it amounted to litigating the same issue in a different forum through different proceedings.

This perception of the learned Judge may be substantially correct though not entirely so. Undoubtedly, if the plaint in the suit is viewed as challenging only the arbitration award, a suit to challenge the award would be re-litigation petition. The suit would also be barred u/s 32 of the Arbitration Act, 1940. Section 32 of

the Arbitration Act, 1940 provides that 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."

17. Considering the submission made before me by the respective learned Counsel and on considering the case put forward by the parties, at this juncture, without expressing anything on the merits, as one of the contentions is raised on behalf of the defendants is about maintainability of the suit and further the fact that at the instance of the plaintiffs after the award was passed, the execution application was filed for execution of the decree and in the said execution proceedings, the award of the Arbitrator is implemented and the fact that plaintiffs have received the possession of the flat and further that the money is lying with the Court Receiver and as per the award the property granted in favour of defendant No. 4 has already taken charge and further that the plaintiffs have not sought for any challenge in respect of other awards. In the present suit, the parties to the suit have to lead evidence during the trial in support of their case and considering the relief sought for in the main suit wherein the plaintiffs have prayed for setting aside the award as well as decree passed in terms of said award, it will be difficult for this Court at this juncture, to entertain this motion for the prayer for appointment of Court Receiver as well as for the prayer for granting injunction. As observed earlier, parties have to lead evidence in support of their case during the trial.

18. In view of the above, I am not inclined to grant any reliefs as prayed for by the plaintiffs and accordingly, this notice of motion is dismissed. However, there will be no order as to costs.

19. Notice of Motion dismissed.