
(1966) 03 CAL CK 0021
In the Calcutta High Court
Case No : Award Case No. 241 of 1962

Ramnibas Jhunjhunwalla

APPELLANT

Vs

Benarashi L. Jhunjhunwalla

RESPONDENT

Date of Decision : 16-03-1966

Acts Referred:

Arbitration Act, 1940 — Section 6
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 6

Citation : AIR 1968 Cal 314

Hon'ble Judges : S. Datta, J

Bench : Single Bench

Advocate : Shroff, for the Appellant; Tibrewal, for the Respondent

Judgement

S. Datta, J.—This is an application by one Probhu Dayal Jhunjhunwalla, one of the heirs and legal representatives of the original petitioner Ramnibas Jhunjhunwalla, since deceased, for inter alia recording the death of Ramnibas Jhunjhunwalla and Benarasilal Jhunjhunwalla, the original respondent setting aside the abatement, if any, of the judgment upon award matter and recording the names of the heirs and legal representatives of the deceased Benarasilal Jhunjhunwalla and Ramnibas Agarwalla for necessary and incidental orders.

2. In or about March 1961, the arbitrators entered into the reference. On April 10, 1961 the award was made and signed by the arbitrators. On the 28th May 1963, the award was filed in Court. On or about July 6, 1962 an application was made by Ramnibas Jhunjhunwalla for inter alia taking the award off the file and alternatively setting it aside. On the 16th July, 1962 the judgment upon award matter appeared in the list.

3. On the 18th day of April 1965, Benarashilal Jhunjhunwalla died. On 12th day of July 1965 Ramnibas Jhunihunwalla died

4. The heirs and legal representatives of both the original petitioner and respondent are mentioned in paragraph 8 of the petition

5. In the petition sufficient cause was sought to be shown for not taking steps to have the judgment upon award not pronounced by alleging that there were negotiations between the applicant and his brother after the death of Ramnibas Jhunjhunwalla on or about 12th day of July, 1965 and the respondent so long as he was alive and after his death on 13th April, 1965 between the applicant and his mother on the one hand and the eldest son of the respondent on the other. There were no particulars indicating when the negotiation for settlement started and when it ended. There are again no particulars as to whether any proposal was made by either party and so what was the result thereof. This case of negotiation was denied by the respondent in this application. In my opinion, on the materials before me it is difficult to hold that there were negotiations for settlement though there are circumstances which indicate the parties were minded to carry on negotiations for settlement. The circumstances are that the respondents in this application after the death of their father have not taken any steps to bring themselves on the record. The further circumstance is that the parties are near relations and that the parties have not taken steps for years to bring the application and the judgment upon award matter to a hearing.

6. Hence, the application as an application for setting aside the abatement fails. Mr. Shroff, learned counsel appearing for the applicant, however, sought to support the application on purely points of law on a different basis entirely. He firstly submitted that it was unnecessary in an arbitration proceeding to make an application for setting aside the abatement, for Order 22 of the CPC does not apply to arbitration proceedings. He secondly submitted that even if it does apply, Rule 6 of Order 22 is applicable to the facts of this case and here the abatement need not be set aside.

7. The Arbitration Act is a consolidating Act in certain respects. Be that as it may Section 41 of the Arbitration Act, however, makes the provisions of the Code of Civil Procedure, 1908 applicable to arbitration proceedings. The relevant portion of Section 41 is as follows:--

"Subject to the provisions of this Act and of rules made thereunder:

(a) the provisions of the CPC 1908 shall apply to all proceedings before the Court, and to all appeals under this Act."

8. Therefore, the first question for consideration is whether having regard to the provisions of the Arbitration Act and Rules made thereunder, Order 22 can at all be applied to arbitration proceedings.

9. Order 22 is expressly applicable to suits and appeals. It proceeds on the basis that on the death of one or more of the parties, in some cases the cause of action survives and in some cases the cause of action is extinguished. A suit is commenced by the presentation of a plaint in a Court of law where the plaintiff rightly or wrongly feels that he has a cause of action. The duly constituted Courts of the land subject to the provisions of law applicable to it hear and try the suit. The hearing results in a judgment which embodies decisions of the Court and the

judgment is followed by decrees preliminary and final or only one decree. If the suit is dismissed, the aggrieved party cannot again successfully file a suit on the same cause of action in the same Court or any other Court. There is often an appeal from the decree. If the unsuccessful party files an appeal and fails there is an end of his claim on cause of action. If the plaintiff succeeds before the trial court and fails in the appeal court he cannot file another suit or application on the same cause of action.

10. The fountain of an arbitration proceeding is an agreement between the parties an arbitration agreement u/s 8 of the Arbitration Act is not discharged by the death of a party thereto. This is followed by a reference when a claim or cause of action arises, and it is further followed by the appointment of an arbitrator or arbitrators or umpire as the case may be.

11. The proceedings from the beginning until the award is passed take place not before a Court of law but before a Tribunal chosen by the parties subject to the control which has been vested in the Court under the Arbitration Act in certain circumstances. The arbitrator or arbitrators or even the umpire, as the case may be ultimately embodies its decisions in a document which is described as the award. Rule 7 of Schedule I of the Arbitration Act provides that the award shall be final and binding on the parties and the parties claiming under them respectively. At this stage the arbitrator becomes functus officio except that he is required to file it in Court: *Rikhabdas Vs. Ballabhdas and Others*, . The qualifications to this rule that the arbitrator becomes functus officio are stated in *Juggilal Kamlapat Vs. General Fibre Dealers Ltd. (And Connected Appeal)*, . Then a new chapter, in the proceedings takes place upon the filing of the award in the proper Court. The Court is then cast with the duty to issue notices to the parties or persons claiming through them u/s 14 of the Arbitration Act. In an ordinary case a judgment upon award and a decree in final thereof follows after a month of the service of the notice by the Court which is again followed by a decree. At this stage, the award blossoms into a full-fledged judgment and decree which can be executed in a Court of law. There may be no appeal against an award but there are provisions which enables the aggrieved opposite party to make an application to set it aside on certain limited grounds. If the application for setting aside succeeds then the award is set aside. This may again lead to an appeal u/s 39 of the Arbitration Act. This may again fail. This, however does not necessarily mean that there is an end of the agreement which was the foundation of the reference and the appointment of the arbitrator or even the end of the reference, though, in my opinion, it means ordinarily the end of the arbitrator whose award had been set aside. Therefore, in such a case where the award is set aside a party can again agitate the same claims or question in another arbitration proceeding

12. Hence, in my opinion, the nature of an arbitration proceeding is so different in some essential features from a suit that Order 22 cannot be applied without violence to the provisions of Order 22 itself and the provisions of the Arbitration

Act.

13. There is no decision on the point In any event, none was cited before me. A somewhat similar question arose in a case under the Land Acquisition Act of Abdul Karim and Another Vs. State of Madhya Pradesh, .

14. Section 53 of the Land Acquisition Act provided as follows:--

"Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the CPC shall apply to all proceedings before the Court under this Act."

15. Hence, on the death of one of the parties a question arose whether Order 22 was applicable in view of the provisions of the Land Acquisition Act. Their Lordships after considering Sections 18, 20, 21, 22, 23, 26 and 53 and Order 12 of the CPC came to the conclusion that the provisions of Order 22 cannot be applied to a proceeding under the Land Acquisition Act. Tn course of the judgment their Lordships observed inter alia as follows;---

"Section 53 cannot be read as creating a friction for deeming the proceedings before the Court under the Act as proceedings in any suit."

16. In my view the observation is equally applicable to a proceeding under the Arbitration Act. In an Maharajadhiraja of Darbhanga Vs. Commissioner of Income Tax, , which is a little more remote than the other case a somewhat similar point arose. There their Lordships observed that the provisions of Order 22 do not apply.

17. The next question for consideration is a more limited one, that is to say whether Order 22 of the CPC is applicable to an award which has already been filed in Court and where notices have already been issued to the parties.

18. It is now well established that Order 22 does not apply to a preliminary decree or to a final decree or if there is only decree, to the said decree on the around that the rights and obligations of the parties are crystallised in the decrees. Award partakes the character of a judgment and decree though it in not a judgment and decree for it is not a nullity and is binding on the parties even though no judgment upon award is pronounced which is taken by a decree Hence. Order 22 is not applicable to an Award.

19. The arbitration proceeding results in an award. The arbitrator or umpire becomes functus officio as soon as the award is made Once the award is made, the duty of the arbitrator is to file the award which is in the nature of an administrative or ministerial act, as will be evident from Section 14 of the Act.

20. Once the award is duly filed, the arbitrator disappears from the scene and this Court becomes active. It is the Court which has to give the notice to the party or parties claiming under them and not the arbitrator or arbitrators or umpire not the parties.

21. Hence, there is no question of survival of a cause of action or otherwise for it has reached a stage beyond that where the rights and obligations have merged in the award. The mere fact that a judgment upon award has not been pronounced or a decree has not been passed does not make the award no less binding on the parties though upon the pronouncement of a judgment upon award and a decree the award is clothed with greater efficacy and is placed in the same position as a judgment and decree of the Court, See Rule 7 of the Second Schedule and the case of Rikhabdas Vs. Ballabhdas and Others, . In this connection, again, some of the observations made in the case of Abdul Karim and Another Vs. State of Madhya Pradesh, subject to certain modifications are applicable to the present situation. Hence, again in my opinion, Order 22 is inapplicable to an award which has already been filed.

22. Therefore, I uphold the contention advanced on behalf of the petitioner. In my opinion, even if Order 22 was applicable to an arbitration proceeding, Rule 6 would have been applicable in this case. There cannot be abatement under Rule 6 after the hearing is closed far less after an award has been made and filed in Court. In my opinion neither Rule 6 of Order 22 or Rule 6 of Order 21 are applicable in terms. Hence, in my opinion, the Court can bring the heirs on record in its inherent jurisdiction, more particularly, having regard to Section 6 of the Arbitration Act and Rule 7 of the 1st Schedule. It may be noticed that this point was not taken in the petition. Mr. Tibrewal, learned Counsel who was appearing for the respondent, when asked by Court stated that he was prepared to meet the point without any further opportunity being given to him. The parties when brought on the record will be competent to pursue the matter on the grounds stated in the petition or opposition and reply as the case may be.

23. In the result then will be orders in terms of prayers (a), (c) and (d). In my opinion at this stage no order should be passed in terms of prayer (e), for in my opinion a fresh application is necessary. In view of the fact that the points of law on which Mr. Shroff has succeeded were not taken in the petition or in the reply in my opinion the respondent should get costs of this application, for if the objection was pressed that no such point can be taken on this application it may have been that I would have dismissed this application and directed the filing of another application. Certified for Counsel Order accordingly.