
(1959) 03 AP CK 0006

In the Andhra Pradesh High Court

Case No : Second Appeal No. 1139 of 1954

Sait Pamandass Sugnaram

APPELLANT

Vs

T.S. Manikyam Pillai and Others

RESPONDENT

Date of Decision : 19-03-1959

Acts Referred:

Arbitration Act, 1940 — Section 14, 32
Limitation Act, 1963 — Article 178

Citation : AIR 1960 AP 59

Hon'ble Judges : P. Chandra Reddy, C.J.; Satyanarayana Raju, J; A. Srinivasachari, J

Bench : Full Bench

Advocate : M.S. Ramachandra Rao, for the Appellant; N.V.B. Sankara Rao, for Rao and Chowdhari and K. Rayanna, for the Respondent

Judgement

Srinivasachari, J.—This Second appeal arises out of a suit filed by the appellant herein against the respondent) for the recovery of a sum of Rs. 709/6/- on the foot of a promissory note said to have been executed by them on 29-7-1952, for Rs. 625/-. The first defendant remained ex parte while the second defendant resisted the suit on the ground (a) that the pronote was not supported by consideration and (b), that all the disputes between the plaintiff and the defendants, relating to the claims of the plaintiff as against them were referred to the arbitration of two persons of Kumool under an agreement of reference to arbitration dated 1-11-1953. The defendant further alleged that after due enquiry the arbitrators gave their award on 29-11-1953 holding that only a sum of Rupees 2,500 was due by the defendant to the plaintiff. It was urged that since there was a valid agreement of reference to arbitration in respect of the very claim for which the suit was filed and an award had been passed, the present suit was not sustainable in view of Section 32 of the Indian Arbitration Act.

2. After the institution of the suit, the 2nd defendant filed a petition I. A. 883/53, to direct one of the arbitrators, S. Satyanarayana to file into court the award

passed by him in respect of the suit claim and other claims. A counter was filed by the plaintiff and notice given to Satyanarayana, the arbitrator. The arbitrator filed the award into court on 8-1-1954 together with the acknowledgments of the plaintiff and the defendants dated 1-12-1953 and 3-12-1953 of the notice intimating about the passing of the award.

3. The defendant, as has been stated above, raised the objection to the maintainability of the suit pleading the bar of Section 32 of the Arbitration Act, while the plaintiff attacked the award on various grounds that the very reference to arbitration was invalid because no umpire had been appointed the arbitrators being even in number. It was also urged that the Munsif had no jurisdiction to entertain an application u/s 14 of the Arbitration Act for the filing of the award, as admittedly the matters that were referred to arbitrators were of the value of not less than Rs. 20,000/-. A further ground taken was that the award was signed only by one of the arbitrators which vitiated the award. The Munsif after hearing the respective parties came to the conclusion that it could not be said that the plaintiffs suit was barred. In the result he decreed the suit of the plaintiff.

4. On appeal the District Judge, was of the opinion that the approach by the Munsiff was misconceived and finally he came to the conclusion that the suit filed by the plaintiff was not maintainable in law. He held that the passing of an award pursuant to a valid reference was by itself an answer to the plaintiffs claim. In the end he dismissed the suit. Hence this appeal.

5. Learned counsel for the appellant contended that the lower court had grossly erred in interpreting Section 32 of the Arbitration Act. It was also urged that the value of the subject matter of the claim before the arbitrators was over Rs. 20,000/-and as such the award could not have been filed in the Munsif Court, the value being beyond the pecuniary jurisdiction of the Court. On the basis of these arguments it was urged that the plaintiff was entitled to file a suit on the basis of the promissory note in his favour. On behalf of the defendant-respondents the argument put forward was that Section 32 of the Arbitration Act was a clear bar to the institution of a suit based on the samel claim which formed the subject matter of the reference to arbitration and for this purpose reliance was placed upon a Bench decision of the Madras High Court in Pamudurthi Suryanarayana Reddi and Others Vs. Pamudurthi Venkata Reddi and Others,

6. Section 32 of the Arbitration Act is as follows:

"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."

7. It would appear from the scheme of the Arbitration Act, Act I of 1940 which consolidated the law relating to arbitration that the object of the Act is to prevent parties to an arbitration from reagitating the questions arising for decision before

the arbitrators in any manner other than as provided by the Act. Therefore a question relating to the existence and the validity of an award, is expressly barred by Section 32 of the Act, That all matters relating to the questioning of the award and the setting aside the same should be decided on an application made to the Court as provided in the Act and not by a substantive suit is clear.

8. The question as to the interpretation of Section 32 has been the subject of judicial decisions. While the consensus of opinion is that no suit for getting an award set aside on the ground of invalidity is maintainable and the remedy of a party, seeking to avoid the award is only by way of an application as provided for in the Act, with regard to the question as to whether Section 32 of the Act prohibited a defence being raised in a suit filed on the original cause of action, that a prior arbitration proceeding and the award operated as a bar to the filing of the suit an opinion was expressed by the learned Judges of the Madras High Court in 1948-1 Mad LJ 317: (AIR 1948 Mad 436) that a defendant is not precluded from putting forward an award in answer to the plaintiffs claim, where the claim was the subject matter of a reference and award.

9. It would be useful to advert to some of the decisions in this regard. The Bombay High Court had occasion to consider this matter in the case of Ratanji Virpal and Co. v. Dhirajlal Manilal. ILR 1942 Bom 452: AIR 1942 Bom 101, Chagla, J. (as he then was) while discussing about the scope of Sections 31 and 32 of the Act observed that no party could be prejudiced by the mere existence of an award which has not been filed in Court.

10. The next case is the case of Sia Kishori Kuer and Others Vs. Bhairvi Nandan Sinha and Another, . Herein the learned Judges of the Patna High Court also held as Chagla J. in the case referred to above that in spite of the existence of an award, a party to it may bring a suit on his original title; such a suit would not be barred by the mere existence of an award. The same High Court in the case of Lachhuman Singh v Makar Singh, AIR 1954 Pat 27 while considering the scope of Section 32 of the Arbitration Act, came to the conclusion that if the plaintiff could not bring the suit to satisfy an award, the defendant also could not plead the existence of an award by way of defence in a suit when he had taken no steps under the Arbitration Act, to file the award.

11. In so far as the Madras High Court is concerned, the first case that could be referred to in this connection is the case of Moolchand Jothajee Vs. Rashid Jamshed Sons and Co., wherein the question with regard to the existence and validity of the award was questioned in a regular suit. Leach C. J. and Laxman Rao J., were clearly of the opinion that such a suit was expressly barred u/s 32 of the Act. Subsequently in the case of 1948-1 Mad LJ 317: (AIR 1948 Mad 436) already referred to Happell and Govinda Raja Chart JJ. were of the opinion that the language of Section 32 of the Arbitration Act, did not extend to a defence as opposed to the filing of the suit. It is significant that in this case the award had been carried out and there was no necessity for getting a decree passed in terms of the award.

Under those circumstances the learned Judges held that when both parties to an award were satisfied that the award had been fully carried out, it was not open to one of the parties to subsequently change his mind and enforce the original cause of action. In such a case no doubt the defendant could resist the suit pleading the award as a bar to the suit. In this case, as was observed above, the terms of the award had been carried out by one of the parties. It was not a case where the award had not been filed in court as required by law and the award made a rule of court or a decree passed in terms of the award. We may also advert to two other decisions of the Madras High Court. The first decision was in the case of Sayyaparaju Surayya Vs. Nekkanti Anandayya and Others, .

While discussing the scope of Section 32 of the Arbitration Act the learned Judge after stating that the existence, effect or validity of an award could be questioned only by way of an application and not by way of suit, observed that the fact that the defendant did not put forward the award in an earlier litigation as a bar to the action of the plaintiff did not preclude him from making a point of the fact of the award as a bar to any action that may be brought by the plaintiff subsequently. The latter decision was in the case of Bhimavarapu Venkatasubbayya Vs. Addanki Bapadu and Others, . In this case the learned Judge categorically made it clear that where a defendant who is relying on an award as a bar to the plaintiff's suit did not take steps to have it filed under the appropriate provisions of the Arbitration Act, it was not competent for him to rely upon it in answer to the action by the plaintiff on the original cause of action.

The gist of the decision was that where the award had not been subjected to the treatment prescribed for it by the Arbitration Act, it could not be relied upon in the absence of anything to show the award had been performed by the defendant. We find that the consensus of opinion is in favour of the opinion that the award could not be put forward as a bar to a suit where it has not been filed. There has been a discordant note struck by the learned Judges in 1948-1 Mad LJ 317: (AIR 1948 Mad 436) to say that the provisions of Section 32 of the Arbitration Act do not extend to a defence as opposed to the filing of a suit. As it is a bench decision, we think it advisable that the question is considered by a Full Bench. We refer the following question for the consideration of the Full Bench.

"Whether having regard to the provisions of the Arbitration Act, it is open to a defendant to set up an award as a bar to a suit filed in 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."

(In pursuance of the above order dated 31-1-1958, the Appeal having been posted before the Full Bench consisting of Chandra Reddy, C. J., Satyanarayana Raju and Srinivasachari JJ. The Judgment of the Full Bench was delivered by Srinivasachari J. on 19-3-1959.)

Srinivasachari, J.

12. This case has been referred to the Full Bench in view of the conflict in the

views expressed in two decisions of the Madras High Court, relating to the interpretation of Section 32 of the Indian Arbitration Act 1940.

13. This second Appeal arises out of a suit filed for the recovery of a sum of Rs. 709-6-0 on the foot of a promissory note said to have been executed by two persons. It was stated that the defendants were indebted to the Plaintiff in two other sums of Rs. 3750/- and Rs. 16000 for the recovery of which separate action was being taken. The first defendant remained *ex parte*. The second defendant, however, *inter alia* pleaded that the promissory note was not supported by consideration and that all the disputes between the plaintiff and the defendants relating to the claims of the plaintiff as against them were referred to the arbitration of two persons under an agreement of reference dated 4-11-1953.

It was stated that after enquiry the arbitrators gave their award holding that only a sum of Rs. 2500/- was due by the defendants to the plaintiff. The plea taken was that inasmuch as there was a valid agreement of reference to arbitration in respect of the claim for which the suit was filed, and an award had been passed by the arbitrators, the present suit was not sustainable in law in view of Section 32 of the Indian Arbitration Act. It may be mentioned that after the institution of the suit, the second defendant filed a petition, I. A. 883 of 1953, praying that the arbitrator S. Satyanarayana be directed to file into court the award passed.

Notice was accordingly issued to the said arbitrator and the arbitrator filed the award into court together with acknowledgment from the plaintiff and the defendants about the receipt of the notice intimating about the passing of the award. The plaintiff in the suit attacked the award on various grounds urging that the very reference to arbitration was invalid because no umpire had been appointed, the arbitrators being even in number. He also urged that the Munsif had no jurisdiction to entertain an application for the filing of the award as admittedly the matters that were referred to arbitration were of the value of not less than Rs. 20,000/- beyond the pecuniary jurisdiction of the Munsif. A further ground was also raised that one of the arbitrators alone signed the award which vitiated the award. ,

The Munsif came to the conclusion that the plaintiff's suit was not barred by reason of the award. He held that the reference to arbitration was beyond the pecuniary jurisdiction of the Munsif Court. He also came to the conclusion that there was no enquiry by the arbitrators and as such there could not have been a valid award. Under those circumstances, he held that the plaintiff was entitled to file the suit. Finally he decreed the plaintiff's suit. On appeal the District Judge set aside the judgment of the Munsif and held that the passing of an award pursuant to a valid reference was by itself an answer to the plaintiff's claim. The learned appellate Judge was of the opinion that inasmuch as the plaintiff did not file any application to set aside the award or to remit it the award became final. In the result he dismissed the suit Hence this Second Appeal.

14. The contention raised by the learned counsel for the appellant is that the

Appellate Judge failed to appreciate the correct import of Section 32 of the Arbitration Act of 1940 which prohibited any suit being instituted with regard to the existence, or the validity of any award. The further argument was that the value of the subject matter of the claim before the arbitrators was over Rs. 20,000/- which was beyond the pecuniary jurisdiction of the Munsif and as such the matter could not be enquired into by the Munsif. It was contended that for the above reasons the plaintiff was competent to file a suit for the recovery of the amount due to him and the award could not be put forward as bar to the suit.

15. It would appear from the scheme of the Arbitration Act of 1940, which consolidated the law relating to arbitration, that the object of the Act was to prevent parties to Arbitration from re-agitating the questions which arose for decision before the arbitrators, in any manner other than that provided by the Act. The object of the new enactment was that all matters which are sought to be decided by arbitration, should be settled by simple, cheap and speedy settlement and therefore Section 32 of the Arbitration Act was introduced. It is as follows ;

"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."

16. This Section therefore enjoined the investigation of matters relating to the existence, and validity of the award only by the summary method of an application made in that behalf. All matters relating to the contesting of the award and getting it set aside are also to be determined upon an application presented to the court as provided in the Act and not by a substantive suit. The Act provided that if it was sought to question the agreement of reference to an arbitration or to challenge the award after it was made on the grounds set out in the Arbitration Act, the procedure to be adopted was by an application to the court having jurisdiction over the subject matter of the matters referred to arbitration and the matter was to be decided on affidavits and other evidence if deemed expedient. Section 32 of the Arbitration Act in this respect over-rides the provision in Section 30 of the Specific Relief Act which says that the provisions of Chapter II as to contracts would apply *mutatis mutandis* to awards. But Section 32 of the Arbitration Act says that notwithstanding any law for the time being in force Section 32 would apply.

It would, therefore, follow that where the question relating to the existence and the validity of an award arises, a suit would be barred. This question may be taken to be well settled by judicial decisions. The first case that might be referred to in this connection is the case of AIR 1942 Bom 101. That was a case where a petition was filed to set aside an award made by arbitrators. A preliminary objection was taken that inasmuch as the award made by the

arbitrators had not been filed, a petition to set aside the same would not lie.

While upholding the preliminary objection Chagla J., (as he then was) observed that under the Arbitration Act of 1940, no proceedings could be taken on an award until it had been filed and no party could be said to have possibly been prejudiced by the existence of an award which had not been filed into court. The learned Judge also observed that Section 32 expressly prohibited a suit being filed for a decision upon the existence, effect or validity of an arbitration agreement. If a party apprehended that his interest would be prejudiced by allowing an award to remain, he could file an application u/s 14(2) of the Act to call upon the arbitrators to file the award so that he could take the necessary proceedings for having it set aside.

The remedy open to a party who wants to enforce the award and to a party who wants to get it set aside, is to adopt the procedure prescribed in the Arbitration Act. In the one case the party who wants to rely upon the award could have it filed and made a rule of the court and get a decree passed in terms thereof while the party who wants to avoid the award could call upon the arbitrators to file it into court and get the award set aside by establishing the grounds set out in Section 30 of the Act.

17. The matter came up for consideration before the Madras High Court in AIR 1946 Mad 846. There was a contract between two firms for the sale of a certain quantity of Camphor. The party who was to take delivery of the goods failed to take delivery whereupon the party who sold the goods sold the same in open market and called upon the vendee to pay the difference in price. The contract provided that any dispute between the parties should be referred to the arbitration of the Madras Kirana Merchants' Association and accordingly the matter was referred to arbitration. The arbitrators gave their award. But somehow the award was not filed in court and no action was taken by the party who was interested in enforcing the award.

A suit was filed in the City Civil Court and the prayer was that a decree be passed in terms of the award as the award had become final and conclusive. The defendants denied that there was a valid reference to arbitration and they also pleaded that the award was vitiated by misconduct of the arbitrators and that it had been improperly procured. The plaintiff filed a rejoinder to say that these pleas were not open to the defendants; that inasmuch as the defendants did not seek to get the award set aside, it had become final and conclusive. The trial court rejected the pleas of the defendants and passed a decree in favour of the plaintiffs. But this decision was set aside by Sbmayya, J., in the High Court who dismissed the suit.

A letters patent appeal was preferred and while dealing with the contentions of the respective parties, Leach C. J., and Lakshman Row J., observed that inasmuch as the Arbitration Act prohibited the agitating of question relating to arbitration in any manner other than that provided by the Act, the suit was

barred. The suit to enforce the same, raised the question with regard to the existence and validity of the award and such a suit was expressly barred by Section 32 of the Act. While expressing this view they held that the suit was incompetent and concurred with the view of Somayya J., and dismissed the appeal.

18. Soon after, the matter came to be examined in the case of (AIR 1948 Mad 436). The plaintiff in this case claimed a partition of the suit properties. The plaintiff no doubt mentioned that there was a reference to arbitration with regard to the subject matter of the suit and that an award was passed but they impugned the award on various grounds. The defendants set up the award as an effective bar to the plaintiffs filing a suit for partition. The award, the defendants averred, was registered and also stated that in obedience to the direction in the award a sum of Rs. 10,000/- which the defendants had to pay to the plaintiffs was tendered, but the plaintiffs refused to receive. The trial court found in favour of the defendants: despite this the trial court held that the award could not be pleaded as defence relying upon Section 32 of the Act.

The defendants appealed to the High Court. The learned Judges, Happell and Govindraja Chari JJ., while construing the words "no suit shall lie for a decision upon the existence, effect or validity of an arbitration agreement or award" observed that it was difficult to hold that the words "no suit shall lie" could be read as prohibiting a defence involving a decision upon the existence, effect or validity of an award. According to the learned Judges, the inhibition in Section 32 confined only to a plaint by which a decision as regards the effect or validity of an award was sought, and there was no bar to a defendant setting up an award by way of defence to a suit.

The learned Judges proceeded to observe that there was nothing in the case of AIR 1946 Mad 346 already referred to herein inconsistent with this view. We would like to point out that the scheme of the Arbitration Act of 1940 is to prevent the parties to an arbitration agitating in any manner any question relating to the existence, or, validity of the award otherwise than by the procedure prescribed in the Act. Sections 32 and 33 of the Act read together would amply bear out that an arbitration agreement or award shall be contested only by application; and not by suit. Section 32 is couched in very general terms and deals with all sorts of applications. The applications contemplated are not only applications by way of challenging the existence or validity of (a) an agreement of reference to arbitration and (b) an award, but also applications which seek to get an arbitration agreement or an award confirmed or declared as binding between the parties.

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. The learned (Judges who decided the case of AIR 1948 Mad 436 sought to distinguish the earlier decision of the Madras High Court in AIR 1946 Mad 346 as a case which related to a suit in which the plaintiffs sought to enforce the award. But it may be pointed out that Leach C. J., who delivered the judgment of the Court, while referring to the purpose and scheme of the Act, observed that it was

"to prevent the parties to an arbitration agitating questions relating to arbitration in any manner other than provided by the Act."

Thereby the learned Chief Justice when he used the word "parties" meant to lay down that Section 32 prevented as much a plaintiff as a defendant in a suit to agitate about the existence, validity and enforcement of the award. The facts of the case decided by Happell and Govindaraja Chari JJ., would show that they were dealing with a case wherein the direction in the award had been carried out and the learned judges were loth to hold that it would not be open to a defendant to plead that there was an award in respect of the subject-matter of the suit and that it had been carried out for the learned Judges observe as follows:

"The argument on behalf of the plaintiff would involve our holding that, even in a case where both parties to an award are satisfied with it and it is fully carried out and there is therefore, no need for getting a decree passed in its terms and none is passed, one of the parties can subsequently change his mind and enforce the Original cause of action and the defendant cannot resist the suit. It seems to us that the prohibitions of the Act do not entail such a result." Vide (AIR 1948 Mad Mad 436).

19. The latter decision of Satyanarayana Rao J., in C.M. Mathu Kutty Vs. Varee Kutty, , although it did not relate to a suit, does support the view that the procedure indicated by the Act alone should be followed to get a decision upon the existence, effect or validity of an arbitration agreement or award. The following observations of the learned Judge may be noted:

"Then follows Section 34 which entitles a party to an arbitration agreement or a person claiming under such a party, against whom a legal proceeding by way of suit or otherwise is taken, to apply under the section before filing a written statement....."

What was decided in this case was that where an application for stay of suit is

made u/s 34 of the Act, it would not preclude the other party to set up the defence of the non-existence of the award. He need not proceed by way of a separate application u/s 33. This was a case where the appropriate proceedings had been taken under the Arbitration Act.

20. The object of the Legislature in codifying and enacting a comprehensive Code relating to arbitration was to provide simple, speedy and cheap settlement of differences in the interests of trade and commerce and provide a summary method of disposing of objections to awards. It is with a view to attaining the above objects that the law requires that questions relating to the existence or validity of any award shall be by means of applications within the particular period of time mentioned in Article 178 of the Limitation Act. 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 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.

21. No party can be prejudiced by the mere existence of an award. It does not become operative and enforceable until it has been filed in court and the court adjudicates about its validity.

22. Learned counsel for the respondent argued that after the award was passed in this case the said award operated to merge and extinguish all claims which were the subject-matter of the submission to arbitration and, therefore, once where the claim had been extinguished, it was no longer open to bring a fresh suit on the same cause of action. There can be no doubt that under the law prior to the passing of the Arbitration Act of 1940 a valid award operated to extinguish all claims, which were the subject matter of the reference to arbitration and the award alone furnished the basis by which the rights of the parties could be determined and any action on the original cause of action was barred. The Arbitration Act of 1940 effected a change in that, it prescribed the procedure for getting an award enforceable. The effect of this change was that the passing of the award by itself did not extinguish the rights of the parties until such award was subjected to the process mentioned in the Act. The decisions relied upon by the learned counsel were cases which related to awards prior to the Act of 1940. Those rulings must be held to be not applicable now. They cannot apply to the

present case.

23. For all the above reasons, our opinion is that it is not open to a defendant to set up an award as a bar to a suit filed 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.

In pursuance of the above opinion the appeal having been posted before the Bench (Chandra Reddy C. J. and Srinivasachari J.), the Court delivered the following judgment:}

Chandra Reddy, C.J.

(6-4-1959)

24. Now that the Full Bench has decided that it is not open to a defendant to set up an award as a bar to the suit, the suit could not be dismissed on the ground of the existence of an award. The lower Appellate Court dismissed the suit in the view that the award operated as a bar to the suit without going into the other issues raised in the matter. This matter has to go back to the lower Appellate Court for determining all the other questions arising in the appeal. Costs of this appeal will abide the result. The Court- fee paid by the appellant will be refunded.