

(1922) 09 BOM CK 0021
In the Bombay High Court
Case No : Second Appeal No. 778 of 1921

Sakharam Maruti

APPELLANT

Vs

Rajmal Girdharlal Marwadi

RESPONDENT

Date of Decision : 12-09-1922

Acts Referred:

Dekkhan Agriculturists Relief Act, 1879 — Section 43, 45

Citation : AIR 1923 Bom 173 : (1923) 25 BOMLR 52 : 79 Ind. Cas. 179

Hon'ble Judges : Lallubhai Shah, J;Crump, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Lallubhai Shah, Kt., Acting C.J.

1. The question of law in this second appeal relates to the validity of the award upon which the suit is based. The facts are these. The defendants represent the original owners of the property. The original owners effected a mortgage in favour of one Birdichand on November 3, 1890. He assigned his rights to the present plaintiff on July 27, 1910. The plaintiff applied on July 30, 1910, to the conciliator under the Dekkhan Agriculturists' Relief Act for a certificate. On November 28, 1910, apparently the parties agreed before the conciliator that the matter should be settled through arbitration; and they appointed the conciliator as their arbitrator, who made an award on the same day. On the same date the plaintiff made an application to the Court of the Subordinate Judge at Parner for filing the award, and for a decree in terms of the award. The written statement of the defendants was filed on the same date, whereby they agreed that the plaintiff's application should be allowed, but the Subordinate Judge was not satisfied with that statement, and on notices being issued to the defendants, a fresh written statement was filed by them on December 21, 1910, in which they repudiated the award. The Court rejected the plaintiff's application and refused to file the award, on April 10, 1911, on the ground that the claim on the original cause of action would be time-barred at the date of the award, It appears that

the plaintiff again applied, on January 28, 1913, for the restoration of the suit in view of Bombay Act XIII of 1912; but that application was rejected. Ultimately he filed the present suit on November 25, 1916, claiming to enforce his rights under the award of November 28, 1910.

2. The trial Court dismissed the suit in December 1917. In the appeal by the plaintiff to the District Court, it was held that the suit was barred by *res judicata*. The plaintiff appealed to this Court, and in Second Appeal No. 427 of 1919, it was held by this Court that the plaintiff was entitled to a decision on the merits, and that his claim was not barred by the plea of *res judicata*. See *Rajmal Girdharlal v. Maruti Shivram* ILR (1920) 45 Bom. 329 : 22 Bom. L.R. 1377

3. After the remand by this Court, the appeal was decided by the learned District Judge on the merits. He held that the award in question was a legal and valid award, and accordingly decreed the plaintiff's claim in terms of the award on August 8, 1921.

4. The defendants have now appealed to this Court; and it is urged on their behalf, first, that the award is not legal, because there was no reference to the arbitrator in writing; and, secondly, that the agreement between the parties as represented by the award does not represent a just and legal agreement under the circumstances. On the other hand, it is urged by Mr. Desai for the respondent that Section 43 of the Dekkhan Agriculturists' Relief Act does not require any reference in writing, and that the award is not open to the objection which is now urged that it does not represent a legal and equitable agreement finally disposing of the matter.

5. I have stated the respective arguments on both sides as they were advanced. But as a result of these arguments, the principal point that arises for our consideration is whether in view of the provisions as to conciliation in Chapter VI of the Dekkhan Agriculturists' Relief Act, and particularly in Sections 43-45, the award in question can be held to be valid. After a careful consideration of the provisions of the Dekkhan Agriculturists' Relief Act, and of the arguments urged before us, I have come to the conclusion that this award cannot be treated as a valid award.

6. As regards the first point, it is true that u/s 43 of the Act after the matter is once before the conciliator, if the parties come to any agreement finally disposing of the matter, such agreement shall be forthwith reduced to writing. In the present case what happened before the arbitrator must be considered, in my opinion, to be an agreement finally disposing of the matter between the parties within the meaning of Section 43. It was open to the parties to arrive at an agreement between themselves or through arbitration so as to dispose of the matter finally. There is no reference to the arbitrator in writing: but it need not be in writing. It is sufficient if the agreement finally disposing of the matter is reduced to writing. The award, which is assented to by the parties, is in writing, and that is the agreement which purports to dispose of the matter finally. The

argument as to the absence of any writing relating to the reference to the arbitrator was based upon the provision in the section about an agreement to refer to arbitration. I do not treat what happened in fact before the arbitrator on November 28, 1910, as merely an agreement to refer to arbitration, but as a completed arbitration resulting in effect in an agreement between the parties disposing of the matter finally. The provisions of Section 45 refer to the procedure to be followed when there is an agreement to refer the matter to arbitration, and have an application to the present case. The absence of any writing referring the matter to arbitration does not affect the validity of the agreement evidenced by the award.

7. The next question is whether the award which was made by the conciliator while the conciliation proceedings were pending before him, is a valid award which gives the parties a fresh cause of action in supersession of the original cause of action between the parties, If the provisions of Section 44 are carefully examined it would appear that if there was an agreement between the parties finally disposing of the matter, the conciliator would have to adopt the procedure laid down in that section, namely, to forward the agreement in original to the Court of the Subordinate Judge, and to deliver to each of the parties a written notice to show cause before such Judge, why such agreement ought not to be filed in such Court; and if the proper procedure had been followed, the Court would have scrutinized the agreement : and if the Court thought that the agreement was legal and equitable finally disposing of the matter, and that it had not been made in fraud of stamp or registration laws the Court might have ordered it to be filed, and then it would have taken effect as a decree of the said Court.

8. Even assuming for the sake of argument without admitting it that the application made by the plaintiff producing the award before the Court was practically a submission to the Court by the conciliator of this agreement between the parties finally disposing of the matter, and that the matter was substantially before the Court, though not in the manner provided in Section 44 it was still obligatory upon the Court to consider whether it was a legal and equitable agreement between the parties-and unless the Court was satisfied on that point it could not have given effect to it. For one reason or other the Court refused to give effect to the agreement evidenced by the award and it seems to me that it is not open to the plaintiff now to treat this award as affording a distinct and separate cause of action to be dealt with according to the ordinary rules applicable to a suit based on an award. The fundamental difficulty of the plaintiff seems to me to be that it was obligatory upon the parties to adopt, the procedure laid down in the Dekkhan Agriculturists' Relief Act if anything which was in the nature of an agreement finally disposing of the matter before the conciliator was to be given effect to by the Court after determining whether it was a legal and equitable agreement. By adopting any other procedure the plaintiff cannot get rid of the necessity to submit the agreement to the Court as required by Section 44. In fact what happened before the conciliator on

November 28, 1910, seems to have been misconceived by the plaintiff and he has treated the award as an ordinary private award through an arbitrator appointed by the parties without the intervention of the Court. Once the matter was before the conciliator, that procedure, it seems to me, was not open to them, They had either to come to an agreement finally disposing of the matter, in which case Section 44 would apply, or to agree to refer the matter to arbitration in which case the provisions of Section 45 would apply; and if neither of these things was done, the plaintiff was entitled to a certificate as provided in that Chapter which would enable him to prosecute the suit in a regular way on the original cause of action. The question is not so narrow as the learned District Judge seems to have thought, namely, whether it was open to the arbitrator to decide the point of dispute between the parties according to law or not. If this were treated as a private award, it does not matter whether the decision was according to law or not. If it is viewed in the light of an agreement between the parties, as I have indicated it should be viewed, then it seems to me that the non-compliance with the procedure laid down in Section 44 is fatal to the suit based on the award.

9. I would, therefore, allow the appeal, reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court on the plaintiff. The cross-objections are dismissed with costs.

Crump, J.

10. I agree, and in view of the possible importance of the point, I desire to add my reasons shortly. It appears to me that when, on July 30, 1910, the plaintiff applied to the conciliator, it must be taken, defendants being agriculturists, that the subsequent proceedings were to be governed by the provisions of the Dekkhan Agriculturists' Relief Act. The conciliator being thus seized of the matter, it was not, in my opinion, open to him to act otherwise than is provided by the special legislation. To hold that he could do so, would be to frustrate the object of the Legislature in enacting those provisions for the benefit of agriculturists-defendants. It follows, therefore, that when the matter came before the conciliator, there were two courses open to him, and only two. If conciliation was to be effected, he could, u/s 43, persuade the parties to come to an agreement disposing of the matter, or an agreement to refer the matter to arbitration. There was no third course, such as was suggested in the argument before us. Now if either of those results was achieved, then the further steps were subject to the sanction of the Court. Without the sanction of the Court, anything done by the conciliator could have no final effect. Whether the agreement in the present case is regarded as finally disposing of the matter or as an agreement to refer to arbitration, the result is in either case the same. The next step in the former case would be that the Court would deal with the matter u/s 44. In the latter case, the Court would deal with the matter u/s 45. But in either case the final word lay with the Court. Apart, therefore, from any minor defects in the procedure, such as the absence of a writing or of the failure of the

conciliator himself to forward the agreement to the Court, it appears to me there is a fatal defect in the plaintiff's present case, because the Court in dealing with this matter refused to give effect to that which had been done before the conciliator. The Court apparently regarded this agreement as one finally disposing of the matter, and that is, I think, the correct view. But taking that view, the Court said that it was not an equitable agreement and, therefore, refused to give effect to it. The only course then open to the plaintiff in accordance with the provisions of the Act was to obtain a certificate from the conciliator and to file a suit if so advised. This he did not do. Neither, on the other hand, did he take any steps which might have been open to him to challenge the decision of the Court. Therefore, it seems to me impossible to argue, having regard to the provisions of the Dekkhan Agriculturists' Relief Act, that we have in this case anything which could be termed a valid award. If that is so, the basis of the present suit fails, and it must necessarily be dismissed.