
(1949) 09 MAD CK 0004
In the Madras High Court
Case No : Second Appeal No. 1741 of 1946

Sayyaparaju Surayya

APPELLANT

Vs

Nekkanti Anandayya and Others

RESPONDENT

Date of Decision : 06-09-1949

Acts Referred:

Arbitration Act, 1940 — Section 14, 31, 32, 33
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1951 Mad 525 : (1942) 55 LW 777 : (1950) 2 MLJ 313

Hon'ble Judges : Raghava Rao, J

Bench : Single Bench

Advocate : V. Parthasarathy, for the Appellant; P. Suryanarayana, for P. Somasundaram, for the Respondent

Final Decision : Dismissed

Judgement

Raghava Rao, J.—This second appeal arises out of a suit for recovery of possession, which has been dismissed by both the Courts below.

The suit was laid on the basis that there was an alienation by a limited estate holder, in favour of the plaintiff which was quite valid and binding upon

the defendant, who happened to be reversioner to the estate. There was, in fact, a small cause suit on a prior occasion by this very plaintiff against

this very defendant, who at the time occupied the position of a lessee, for recovery of rent. During the time the small cause suit was pending there

was a reference to arbitration, not through Court but outside. The award that resulted from the arbitration declared that the present defendant was

a reversioner to the estate of the last male-holder and that the plaintiff had no title to the property, which had been the subject-matter of the

alienation by the widow of the last male holder. After the award, curiously enough there was still a decree passed in the small cause suit, apparently

because the award was not sought to be relied upon by the defendant in answer to the claim for rent made in that suit. In this suit, which thereafter came to be instituted, questions were raised with reference to the binding character of the alienation in question and also with reference to the maintainability of the suit so far as it craved the relief of injunction against any interference by the defendant with the plaintiff's possession. The latter of the questions depended for its decision upon the fact of the plaintiff's possession on the date of the suit or upon the contrary of it. These questions are questions of fact on which there are concurrent findings, which I do not find myself able to touch in spite of the very able argument of Mr. Partha-sarathy for the appellant.

2. Two interesting questions have been further raised, in the course of the hearing one at the instance of Mr. Parathasarathi for the appellant and the other at the instance of Mr. Surya-narayana for the respondents on both of which questions I must say I have listened to very able and interesting arguments. I have, after a careful consideration of what has been said by counsel on both sides in regard to both these points come to the conclusion that while the appellant's counsel is right in his submission that an injunction should have issued, at any rate, with reference to a half of the property in his client's possession, the learned counsel for the respondent is also right in his contention that it is not open to the present plaintiff to question the validity of the award that was made during the pendency of the small cause suit as above referred to.

3. The point taken for the appellant with reference to the question of injunction which I have indicated just now is this: that since it has been found by both the Courts below that, the present defendant is only one of two reversioners entitled to the estate of the last male holder, there is no reason why the plaintiff should be denied any injunction in restraint of any interference by the defendants, at any rate, with reference to a half of the suit property, which must undoubtedly be regarded as hers by title, defeasible only at the instance of the other reversioner, who has not chosen to impeach it so far and quite valid so long as such an attack by that reversioner has not taken place. It is well settled law that an alienation by a widow is voidable at the instance of the reversioners, and if one of two reversioners has chosen to attack the alienation and succeeded in

establishing the ground for an attack, then it is only to the extent of his share of the property that he can succeed, because the rights of the two

reversioners are the rights of tenants-in-common and no decree can be passed in favour of one reversioner, who has not chosen to challenge the

alienation because of the challenge that has been made to it at the instance of the other reversioner.

4. While this is the position that I am prepared to accept in favour of the appellant on the argument advanced by his learned counsel with reference

to the question of injunction, I feel greater difficulty, I must say, in accepting the argument advanced by him by way of answer to the point which

has been taken by Mr. Suryanarayana for the respondent, that so long as the award stands, unchallengeable by the other side, although unfiled, it

must betaken to debar the present plaintiff from maintaining his suit. The soundness of the argument of the respondents, or of the reply of the

appellant to it really depend upon the effect of Sections 31 to 33, Arbitration Act of 1940. Section 31 provides inter alia that an award may be

filed in any Court having jurisdiction in the matter to which the reference relates and also that all questions regarding the validity, effect or existence

of an award shall be decided by the Court in which the award has been or may be filed and by no other Court. Section 32 which like Section 33 is

even more material to the present discussion, acts as a bar to suits contesting the existence, effect or validity of an award. In the full terms in which

it is couched it runs as follows :

Notwithstanding any law for the time being in force, no suit shall lie on any ground whatever 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.

Section 33 provides that:

Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement

or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits.

The proviso to Section 33 is not material and I, therefore, do not reproduce it. On these sections there is a recent decision of this Court in Surya-

narayana Reddi v. Venkatareddi, I. L. R. (1949) Mad. 111 : A. I. R.1948 Mad. 436 in which Happell and Govindarajachari JJ. held that neither

these sections nor any other provision of the Indian Arbitration Act precludes a defendant from putting forward an award which has been fully

performed by him, but which was not filed u/s 14 and according to which judgment was not pronounced or a decree given u/s 17 of the Act, in

answer to the plaintiff's claim which was the subject-matter of the reference and the award. This decision is undoubtedly in favour of the

respondents, who is entitled to say on the basis of it that in the present case the unfiled award operates as a bar to the present action. But, says

Mr. Par-thasarathy for the appellant, the decision in that case presupposed the existence of a valid award, an award of a finished character, as he

calls it, which was subjected before it became finished to the procedure provided for by the Act for testing its validity and passing a judgment or

decree in accordance with it. He contends that in the present case there was no award of that finished character, as he calls it, which can operate

to render the present suit unmaintainable.

5. The other contention of Mr. Parthasarathi in answer to the decision is that there was the small cause suit, the result of which happened to go in

favour of the present plaintiff, because the defendants did not put forward the award in question in answer to that suit. The learned counsel

accordingly contends that it is not open to the defendants in the present case to rely upon the award in question. He also points out that the attitude

taken up by the defendants in relation to the award in the small cause suit by not seeking to rely upon it was in fact responsible for his own client

not taking any steps so far for getting the award set aside.

6. To take up first the first answer attempted by the learned counsel for the appellant, I am of opinion that it was competent to the plaintiff after the

award had been passed to take proceedings for getting it filed in Court and afterwards for getting it set aside on any such valid ground as he might

have. The appellant did not avail himself of the procedure created by the Act for getting the award set aside and it is not open to him now to

dispute the validity of that award in this proceeding. In my opinion, the Indian Arbitration Act, which is a consolidating enactment must be

understood, with reference to the sections now under consideration, as requiring

that unless a party aggrieved by an award coming within the purview of the Act takes the necessary steps provided by the Act to have the award set aside, it is not competent to him to dispute it in any later proceeding. I am not satisfied that the decision in *Suryanarayana Reddi v. Venkatareddi*, I. L. R. (1949) Mad. 111 : A. I. R. 1948 Mad. 436 is inapplicable to the present case on the ground that there no question of the invalidity of the award was raised for consideration, whereas in the present case such a case has been actually raised. As I read Section 32, the object of the Legislature in enacting it is that no suit should be allowed to be instituted for a decision upon the existence, effect or validity of an award and no party to an award should be allowed to have it set aside, amended, modified or in any way affected otherwise than as provided in that Act. Mr. Parthasarathi contends that here the suit which his client has instituted is not really a suit for a decision upon the validity of the award and therefore ia outside the mischief of the first part of Section 32. Likewise he contends that the suit of his client cannot be regarded as a suit for setting aside, amending or modifying or in any other way affecting the award. It is rather a suit, as he says, by his client for recovering possession by seeking to get away from an award, which he attacks as invalid on its own face, because it proceeded on the basis that there was only one reversioner to the estate, whereas in fact, the record, if examined, would show that there were two persons entitled to the estate as reversioners of whom one no doubt is the present defendant 1. This ground of attack against the award is, in my opinion, not certainly such as could be raised in the present suit, not having, been made the subject-matter of any application for challenging its validity as is contemplated by Section 33, That section provides, as I read it, that the validity of the award can only be contested by an application to the Court and not, as is attempted to be done here, by means of an independent suit of the kind with which we are concerned in the present case. That section is obviously mandatory because it says that any party desiring to challenge the validity of an award shall apply to the Court and the Court shall decide the question on affidavits, subject of course to the provision in the proviso for other evidence for the taking of which the Court may pass appropriate orders. The clear implication of the section is that that is the procedure, which must be

adopted by any party seeking to question the validity of the award and that it is not competent to any party to the award to question it otherwise.

7. It is said in this connexion by Mr. Partha-sarathi that there is a recent decision of this Court in C.M. Mathu Kutty Vs. Varee Kutty, , which

assists him to get over the trouble created in his way by the decision in Suryanarayana Reddi v. Venkatareddi, ILR (1949) Mad. 111: A. I. R.

1948 Mad. 436. The decision in C.M. Mathu Kutty Vs. Varee Kutty, , however, on examination is found to deal with the question whether a

Court called upon to deal with an application u/s 34, Arbitration Act, can avoid the necessity of going into the objections on the basis of which the

arbitration agreement is attacked by saying that the only procedure for attacking such an arbitration agreement as provided by the Act is the

procedure enacted u/s 33. The learned Judge who decided the M.L.J. case observes that the very foundation of the jurisdiction of the Court on the

application u/s 34 to order stay or not to order stay necessarily depends upon a finding that the Court ought to make with reference to the ground

of invalidity that is urged against the arbitration agreement. The learned Judge, therefore, holds that although the procedure enacted in Section 33

may not have been adopted by a party to the agreement, it will be open to him to make out, by evidence that he is entitled to adduce in connexion

with the application u/s 34, that the arbitration agreement is either unreal or invalid on account of fraud, misrepresentation or undue influence or the

like. The learned Judge holds relying upon a Bombay case decided by Kania J. (as he then was) in Bhagwandas Atmasing Vs. Atmasing Jessasing,

that the proper view to be taken of Section 34 is that the matter of objections to the arbitration agreement made in answer to the application for

stay must be gone into on the application it-self. The learned Judge also observes that, if necessary, he would be prepared to treat the memo. of

objections filed by the party opposing the application for stay as an application of the kind contemplated by Section 33, Arbitration Act.

8. From these remarks that I have made on the decision in the M. L. J. case it is apparent that that decision has no application to the case on hand.

It is true that in the head-note, as it is to be found in the M. L. J. report as also in one sentence of the judgment itself, it is stated that Section 33 of

the Act gives an independent right to a person, who wishes to challenge the existence or validity of an arbitration agreement or award and to

anticipate the other side and to initiate proceedings to have those questions determined before hand. It does not prohibit the Court acting u/s 34 of

the Act from deciding a question, which is raised before it for its decision and the decision on which alone would de-pend the exercise of its

jurisdiction. The word *award*? which I have underlined (here italicised) in the sentence I have quoted from the head-note, and from the body of

the judgment may seem to lend some support to the contention of the learned counsel for the appellant that, if in the case of an arbitration

agreement, the right u/s 34 is a right altogether independent of Section 33, there is no reason why in the case of an award alao it should not partake

of the character of a right independent of Section 33. The substance of the decision of the learned Judge who decided the C.M. Mathu Kutty Vs.

Varee Kutty, is, however, to be understood as being no more and no less than this : that if a party applying for stay under s, 34 is opposed by the

other side on the ground that the arbitration agreement itself is invalid, the jurisdiction u/s 34 cannot properly be exercised at all by the Court in

which the application for stay is made unless it investigates the grounds of objection taken by the party opposing the application for stay. That

being the true state of facts in connexion with which the decision in C.M. Mathu Kutty Vs. Varee Kutty, has to be understood, I have no hesitation

in holding that that case cannot be of any assistance to tbe learned counsel for the appellant for meeting the point taken for the respondents.

9. The second line of argument adopted by Mr. Parthasarathi for meeting the argument of the learned counsel for the respondents is that on

account of the conduct of the defendant in the small cause suit, wherein he did not put forward the award at all as an answer to the claim for rent, it

would not be open to the defendants to make a point of the fact that the award, although unfiled, is outstanding and is a bar to the present action of

the plaintiff. The learned counsel also urges that an unfiled award is more or less in the nature of a judgment of Court and where there are two

decisions of mutual repugnancy, one earlier and the other later, the law of res judicata has it that the two decisions must be treated as canceling

each other and that the matter must be treated as set at large. I am not satisfied that this line of argument can be reasonably accepted, because the

decision of the arbitrators, which was ren-dered outside Court during the pendency of the small cause suit, cannot be strictly likened to a decision

of Court, nor am I satisfied that there is any constructive res judicata arising in the way of respondent 1 on account of his failure to rely upon the award in the former litigation. The small cause suit was concerned purely with a claim for recovery of rent and it was not decreed with reference to any adjudication on any question of title whether arising on the award, or unconnected with it. No argument of actual or constructive res judicata can, in any opinion, be built upon what happened in the small cause suit.

10. In this view of the matter I am clearly of opinion that notwithstanding the argument of the learned counsel for the appellant on the question whether an injunction may not well issue with reference to the half share of the reversioner other than defendant 1--an argument which I am prepared to accept--the appellant is bound to fail on the point with reference to the bar arising from the award, which has been urged by the learned counsel for the respondents in the course of his argument before me.

11. In the result the second appeal fails and is dismissed with costs. No leave.