
(1959) 05 CAL CK 0015
In the Calcutta High Court
Case No : Special Suit No. 8 of 1956

Scottish Union and National Insurance Co.	APPELLANT
Vs	
Sm. Saraswati Sajnani	RESPONDENT

Date of Decision : 30-05-1959

Acts Referred:

Arbitration Act, 1940 — Section 17, 41
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5

Citation : AIR 1960 Cal 22 : 63 CWN 800

Hon'ble Judges : Mallick, J

Bench : Single Bench

Advocate : A.C. Bhabra and Tibrewala, for the Appellant; B. Lahiri, for the Respondent

Judgement

Mallick, J.—This is an application for judgment upon award. The award was made on 7-7-1958, and the Insurance Company was directed to pay to the claimants the sum of Rs. 1 Lac being the amount of the claim and Rs. 10,000/- on account of costs. The claim was very much contested in the arbitration proceedings and was argued by very eminent counsel. The costs incurred by the parties in consequence were heavy. The company made an application for setting aside the award. The application was heard by me. After a very spirited fight the company lost the application and by my judgment dated 22-12-1958, I dismissed the application. The judgment on Award matter was on the list and I would have passed judgment on the award but for the objection taken by the company that the claimant had not yet obtained Succession Certificate. The matter was thereupon adjourned to enable the claimants to obtain Succession Certificate. Such a Succession Certificate has now been obtained and filed in Court and the matter has now come for final disposal.

2. Mr. Bhabra appearing for the company has submitted that no judgment should be passed now in view of the fact that my judgment refusing to set aside the award is now under appeal. He has submitted that by reason of the appeal being

filed against the order refusing to set aside the award, this court has lost jurisdiction to pass a judgment till the appeal is finally disposed of. He has further submitted that even if I have jurisdiction, I should not pass a judgment in the circumstances of this case. A third question was also raised that the Succession Certificate was only in respect to the claim and does not cover costs. This last point, however, was expressly abandoned by Mr. Bhabra.

3. Taking the first point first, Mr. Bhabra's argument is that the court u/s 17 is empowered and directed to "proceed to pronounce judgment on award" after the application to set aside the award is refused. The application to set aside the award has no doubt been refused by this court. But the matter is now under appeal and the Appeal Court may set aside the award. It cannot therefore be said, before the disposal of the appeal, that the application for setting aside the award has been finally refused. It must be held that the application to set aside the award is still pending though in appeal and so long long as it is pending the Court is not entitled to proceed to pronounce judgment according to the award. He has cited several decisions in support of his contention that an appeal is a continuation of the suit and the judgment and the decree of the Appeal Court is final and not the judgment and order of the trial court. The cases cited by Mr. Bhabra are: *Kristnamachariar v. Mangammal* ILR 26 Mad 91; *Gurraju v. Venkateswar Rao* AIR 1917 Mad 597; *Gobind Chunder Roy v. Guruchurn Kurmocar* ILR 15 Cal 94; *Nilvaru v. Nilvaru* ILR 6 Bom 110; *Balkissen v. Kishanlal* ILR 11 All 148; *Sheosagar Singh v. Sitaram Singh* 24 Ind App 50; *Setta Goundan v. Muthai Goundan* ILR 31 Mad 268; *Dinonath Ghosh v. Shyama Bibi* ILR 28 Cal 23; *Rasul Shah v. Diwanchand* AIR 1936 Lah 583, *Samed Sheikh v. Naba Nepal* AIR 1914 Cal 614, *Subramannaya Bhatta Vs. Devadas Nayak and Others*, .

4. These are all cases in which the Court held that a judgment will not operate as *res judicata* when the decision is under appeal, that the suit continues for the purpose of applying the doctrine of *lis pendens* till the appeal is finally disposed of and that for applying certain Articles of Limitation Act, the date of disposal of the appeal and not the date of the judgment of the trial court is to be taken into account. It is settled law that for the above purposes, the decree or order of the trial court must not be taken to be final adjudication of the rights of the parties, so as to apply the doctrine of *res judicata*, *lis pendens* and/or for applying certain articles of the Limitation Act. This principle however has hardly any application in the construction of Section 17 of the Arbitration Act which lays down the law as to the manner in which an award in arbitration proceedings is to be made a rule of the court. The scheme of the Act is that after the award is made it has to be filed in court. When it is filed in court, the court dealing with the award is given power to remit or to set it aside and when it sees no reason to remit or to set it aside, it is directed to proceed to pass judgment on award. All these things under the Act are to be done by the court dealing with the award. The court is either to remit or set aside the award and in case when the court finds no reason to do either to pass a judgment in terms of the award. The court is not called upon, in my judgment, under the Act, to wait and find out whether its order refusing to

remit or to set aside the award has become final and unassailable in the sense that the time for appeal is gone or that the appeal if taken is dismissed in order to assume jurisdiction to proceed to pronounce judgment in accordance with the award. The court dealing with the award is not required to look beyond itself and proceed to deal with the matter on the footing that so far as it is concerned there is an order or refusal irrespective of the fact that an appeal might be taken or has been taken against the order or that the order passed by the court might be set aside.

5. The case is analogous to one in which the court is required to pass a preliminary and final decree. A preliminary decree is liable to appeal and very often appealed from and in certain cases the preliminary decree is set aside. But the fact that the preliminary decree is liable to appeal and in fact is appealed from does not disentitle the trial court from taking further proceeding and pass a final decree unless there is an order for stay by the Appeal Court. The point is that the trial court does not lose jurisdiction. Mr. Bhabra however submits that there is an express provision in the CPC to that effect. Order 41 Rule 5 expressly lays down that an appeal shall not operate as a stay. There is no such provision in the Indian Arbitration Act. But Section 41 of the Indian Arbitration Act expressly provides that the provisions of the Code shall apply to all proceedings before the court and to all appeals under the Act. Having regard to this provision it must be held that Order 41 Rule 5 will apply as much to arbitration proceedings and appeals from orders permissible under the Arbitration Act as to appeals from suits and other proceedings. The distinction sought to be made by Mr. Bhabra can therefore hardly be sustained. The language of Section 17 of the Act does not indicate any intention that judgment upon award can only be pronounced after the order refusing to set aside the award has become final. The language on the other hand indicates that the next step to be taken by the court after refusing to set aside the award is to pass a judgment in terms of the award. I find no reason to strain the language of the Statute and to give an extremely artificial construction so as to prevent the court from making the award a rule of the court for an indefinite period of time.

6. Mr. Bhabra next argued that if the passing of the judgment in terms of the award is not stayed and judgment is pronounced in terms of the award and later the award is set aside in the appeal against the order refusing to set aside the award, there will be this difficulty that the judgment on award will remain outstanding even though the award is set aside. Section 17 expressly lays down that no appeal shall lie from the decree based on the judgment except on the ground that it is in excess of or not otherwise in accordance with the award. The judgment being in terms of the award, no appeal can lie and hence the decree cannot be challenged and set aside on appeal. Unless therefore the passing of the judgment on award is deferred till the final disposal of the appeal, the decree will remain outstanding even if the award is set aside by the Appeal Court. The fallacy of this reasoning is that it does not take into account the fact that the moment the award is set aside on appeal the award is gone and the judgment

and decree passed in terms of the award would be not in accordance with the award -- which has become non-existent. The appeal will therefore be competent immediately the award is set aside and the Appeal Court will be competent to set aside the judgment and decree in terms of the award. It is because of this that normally when after setting aside the award the Court passes a judgment in terms of the award that the appeal is taken not merely against the order refusing to set aside the award but also against the judgment in terms of the award and the decree based thereon. The Court not merely sets aside the award but also the judgment and decree in terms of the award.

7. Assuming however that an appeal does not lie against the judgment in terms of the award & the decree based thereon, even then the Appeal Court while setting aside the award in the appeal against the order refusing to set aside the award is empowered to -set aside the decree based on the award even though no appeal has been taken against the judgment on award.

8. In the case of *Talebali v. Abdul Aziz*, a Division Bench of this Court was confronted with a somewhat similar question and referred the question to the Full Bench. The Full Bench decision is reported in *Taleb Ali and Another Vs. Abdul Aziz and Others*, . The Full Bench consisted of Rankin C, J-, C. C. Chose, Buckland, B. B. Ghose and Man-mathanath Mukherji JJ. The questions referred to the Full Bench were:

1. Whether an appeal from a preliminary decree is incompetent if the final decree is made before the appeal is presented?

2. Whether it is necessary for a party aggrieved by a preliminary decree to appeal both from that decree and the final decree, in order to maintain his appeal against the preliminary decree, although the final decree apart from its being based on the preliminary decree may be otherwise correct?

Rankin C. J. with the concurrence of all other Members of the Full Bench answered both the questions referred to the Full Bench in the negative. In his judgment Rankin C. J. made the following observation at p. 1038 (of ILR Cal): (at p. 696 of AIR):

"Again, the doctrine that subordinate and dependent decrees come to nothing when the decree on which they are dependent is set aside must now be viewed in the light of the decision of the Judicial Committee in *Bommadevara's* case, AIR 1923 167 (Privy Council) . *Shama Pursrad v. Hurro Purshad*, 10 Moo Ind App 203 (PC) has for years been taken as extending this doctrine very widely, but the decision of the majority of the Full Bench in *Jogesh Chunder Dutt v. Kali Churn Dutt* ILR 3 Cal 30 has now been overruled. In a case such as the present, however, I see no reason for holding that the final decree is not a subordinate and dependent decree. It is as much subordinate and as much dependent as an order for the execution of a decree is subordinate and dependent on the decree which is being executed. The function of the final decree is merely to restate and apply with precision what the preliminary decree has ordained. The decrees are

in the same suit. The appellate Court, if it has power over the preliminary decree at all -- power to reverse it or vary it -- has power to effect the final decree."

Then again a little lower at p. 1039 (of ILR Cal): (at P. 696 of AIR):

"I would add that when a preliminary decree is set aside, the final decree is superseded, whether the appeal was brought before or after the passing of the final decree and that, in my judgment, an appellate court, when setting aside or varying a preliminary decree, can, and indeed should, give directions for the setting aside or varying of the final decree, if the existence of the final decree is brought to its notice, as in all cases it ought to be."

I am apt to think that in the same way that when the award is set aside in appeal, the judgment and the decree in terms of the award is superseded and the appellate court when setting aside or varying an award can and indeed should give direction for setting aside or varying the decree based on that award. I am therefore, unable to agree with Mr. Bhabra that after the award is set aside in appeal there is no machinery whereby the decree based on the award can be made ineffective.

9. Mr. Bhabra then argued that even though the Court may have the power to pronounce judgment, the Court is not bound to pass judgment on the award. The language used is that the court "shall proceed to pronounce judgment according to the award" which is different from "shall proceed to pronounce judgment in terms of the award." He has cited several decisions in support of this argument that even after the happening of the contingencies referred to in Section 17, the court is not bound to pass judgment in terms of the award. Some of the cases where the court would not pass such judgment have been noticed by P. B. Mukharji, J. in the case of Saha and Co. Vs. Ishar Singh Kripal Singh and Co., . The observation of P. B. Mukharji J. on which reliance was placed by Mr. Bhabra is to be found at p. 519 (of Cal WN): (at p. 339 of AIR). It may be that in exceptional cases the court may refuse to pass judgment even when the conditions laid down in Section 17 are present to enable the court to pass judgment. But in the instant case there is no special circumstance. I do not consider the filing of an appeal against the order refusing to set aside an award as a special circumstance at all which will persuade me from not passing judgment on the award in this case. The mere fact that an appeal is pending which may affect the validity of the award is no ground for not proceeding to pronounce judgment.

10. Lastly Mr. Bhabra has drawn my attention to a decision of Bachawat, J. in the case of Juggilal Kamlapat Vs. N.V. Internationale Crediet-En-Handels Vereeniging "Rotterdam", . In the cited case the learned Judge after dismissing the petition for setting aside the award adjourned the judgment on award matter for a period of time within which the appeal to be preferred against his order refusing to set aside the award was expected to be disposed of. The learned Judge opined that he did not see any useful purpose in passing judgment and at

the same time staying execution of the decree. In the cited case the award holder did not insist on security. The learned Judge seemed to think that there is no difference between staying execution of the decree after passing judgment on award and postponing pronouncement of judgment on award. The attention of the learned Judge was not drawn to Section 29 of the Indian Arbitration Act which empowers the court only to allow interest on the decretal amount from the date of the decree and if the passing of the decree is deferred the decree-holder would lose interest even if the court thinks that interest should be granted. Secondly, when a decree for the payment of money is sought to be stayed the decree-holder may be entitled to ask for deposit of the decretal amount in court as security which the decree-holder might withdraw after furnishing security. In the circumstances of the case and having regard to the willingness of the decree-holder not to insist on security the learned Judge was apt to think that the two things were identical. I am satisfied that the opinion was expressed very casually and was not the considered opinion of Bachawat, J. This in my judgment is not the practice to be followed normally if at all. In the circumstances of the present case I will not be justified in following that practice. This is a claim/ on an insurance policy. I see no reason why the beneficiaries should be made to wait for an indefinite period to get the insurance money. I will not in any way lend my assistance to an insurance company in their attempt to delay payment of insurance money after there has been a proper adjudication of the claim by the private tribunal provided in the company's policy itself and the award of the tribunal has been held to be a proper and valid award by a competent court. In the instant case the company has taken every conceivable objection, every technical plea to delay and defeat the claim. The beneficiaries have been already sufficiently harassed. All equities are against the insurance company and I for one will not assist it in further harassing the beneficiaries.

11. For reasons given above I overrule all the objections raised by Mr. Bhabra and pass a judgment in terms of the award. The decretal amount of Rs. 1,10,000/- will carry interest at the rate of 8 per cent per annum. The award holders will get all the costs of filing the award as also the costs of this hearing assessed at Rs. 250/-.