
(1962) 03 MAD CK 0029

In the Madras High Court

Case No : Civil Revision Petition No. 279 of 1962

Sha Vaktavarmal Seshmull

APPELLANT

Vs

Shah Nainmull Umaji and Co. and Others

RESPONDENT

Date of Decision : 09-03-1962

Acts Referred:

Arbitration Act, 1940 — Section 41

Citation : AIR 1962 Mad 436 : (1963) ILR (Mad) 172 : (1962) 75 LW 351

Hon'ble Judges : S. Ramachanra Iyer, C.J

Bench : Single Bench

Judgement

(1) Shah Nainmull Umaji and Co., the first respondent in the above civil revision petition, entered into contracts individually with 29 persons for the purchase of camphor. The petitioner was one of those persons who entered into a contract, Each of the contracts was made subject to the rules of the Madras Kirana Merchants Association, of which the parties to the contract were members. The rules of the Association provided for reference of disputes between its members to arbitration. in respect of one such contract, a seller, between whom and the first respondent a dispute arose with the permission of the Association filed O. S. No. 1291 of 1959 in the City Civil Court at Madras for recovery of a sum of Rs. 15,000, as damages for breach of con-tract on the part of the latter, the breach complained of being failure to take delivery of the goods contracted to he sold. The 28 remaining persons, each of whom also had similar claims against the first respondent, applied to the Association for nomination of an arbitrator to settle their respective disputes with the first respondent. I am informed that arbitration proceedings have commenced but have not yet been concluded. Their claim exceeded Rs. 1,00,000,. Pending the suit. the

plaintiff in O. S. No. 129V, of 1959 applied for an order of attachment before judgment of the goods owned by the first respondent. An Order was made and certain quantity of camphor was attached. The attached goods were subsequently sold and a sum of about Rs. 1,29,000, was brought into the court and paid to the credit of O. S. No. 1291 of 1959.

The other 28 Merchants, who had claims against the first respondent, but whose claims were the subject matter of arbitration proceedings, applied to the lower court under S. 41 of the Indian Arbitration Act, for detention of the money pending the arbitration proceedings. On 5-2-1960, the court passed an order directing such detention.

(2) It will be convenient, at this stage, to refer to the final portions of the order:

Mr. A. K. Muthuswami Iyer learned counsel for some of the petitioners in these Original petitions suggested that the entirety of the amount that now stands deposited to the credit of O. S. 1291 of 1959 may be distributed and credited to the various original petitions according to the claims made therein. I do not think it necessary to do so at this stage in view of the orders that have been passed. If and when the claims are adjudicated upon, it should not be difficult to make the necessary adjustments.

Mr. A. Abdul Rahim, the learned counsel for the respondent, had certain contentions regarding the maintainability of the applications under Sec. 41 of the Arbitration Act to urge. However, he was willing that the amounts now in deposit, and to be deposited should remain in court till the final disposal of all the disputes and contentions between the parties. In this view, it is not necessary to go into the various questions of maintainability or otherwise of the petitions except to make it clear that the contentions have not been considered, and the orders regarding deposit have been made only to safeguard the interests of all concerned, as also as a test of the bona fides of the respondent.

The petitions were ordered accordingly. O. S. No. 1291 of 1959 came up for hearing subsequently and it was dismissed. The first respondent thereupon applied to the lower court to withdraw the entire amount deposited, viz., not merely the amount covered by the claim in the suit, but also those covered by the orders under S. 41 of the Arbitration Act which had been directed to be detained in court. It will be noticed that this application was in contravention of the undertaking given by Mr. A. Abdul Rahim

for the first respondent who had stated that the amounts Should remain in court till the final disposal of all the disputes and contentions between the parties. Admittedly, the arbitration proceedings, which had already commenced and pending which the orders were made, had not come to a close. It is rather strange that the respondent should have given the go by to the solemn concession made on his behalf by his counsel and filed the application for withdrawing the entire amount.

But what is stranger still is for the learned Assistant City Civil judge to have allowed the entire sum to be withdrawn by the first respondent. The reason, which is given in justification of this order, contrary as it was and also against the specific directions contained in the order referred to

above, is that the applications under S. 41 on which special orders were passed were not maintainable and therefore the order was invalid. The

learned Judge disposing of the applications under S. 41 pointed out, it was practically agreed on the part of the first respondent not to contest the

propriety of the application under S. 41, but that the amounts should remain pending final adjudication of the disputes and contentions between the

parties. Sums of money, which would cover the various claims in the arbitration proceedings, were not set apart to the credit of the various O. Ps.

as the learned judge said that such setting apart could be made after the claims had been adjudicated upon. It has now to be considered whether

the learned City Civil judge is right in his view that there can be no application for attachment before judgment or an order for detention of money

in court pending arbitration proceedings.

According to the learned Judge, S. 41 would only apply if proceedings were pending in the court itself and not when what was pending was merely

arbitration proceedings. This view is directly opposed to the provisions of S. 41, which run as follows:

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

(a) the provisions of the Civil Procedure Code, 1908 shall apply to all proceedings before the court, and to all appeals, under this Act, and

(b) the court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the

matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the court;

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

It will be apparent from a reading of the section that it provides both for the case where arbitration proceedings are pending before a court as well

as for one where such proceedings are not pending before the court but before the arbitrator. Clause (a) refers to proceedings, which are before

the court. That indicates that the provisions of the CPC will generally apply to all such proceedings. Clause (b), on the other hand, relates to

proceedings, which are not before the court, but which are only pending before the arbitrator. If clause (b) also were to apply only to proceedings,

which are pending before the court, it would have been redundant or unnecessary, as the previous clause, clause (a), would be quite sufficient to

meet all contingencies. The second schedule, which is incorporated into the provisions of clause (b) of S. 41 contains five items. This is purely to

prevent a party to the arbitration proceedings secreting the properties pending arbitration proceedings and defeat any award that may be passed

therein. In Subramanian and Others Vs. M.P. Vasudevan Chettiar and Others, , Krishnaswami Nayudu, J. observes that Cl. (b) of Sec. 41 makes

certain provisions of the CPC covered under the Second Schedule of the Act applicable generally to arbitration proceedings, i.e., not to

proceedings before the court, but to proceedings before the arbitrators. I agree with that view with respect. The conclusion of the learned

Assistant City Civil Judge that S. 41 would not apply to proceedings before the arbitrator cannot therefore be sustained.

(3) Mr. N. Panchapakesa Aiyar, who appears for the first respondent, has contended that as the entire sum of Rs. 1,29,000 had been kept to the

credit of O. S. 1291 of 1959 the court would have no right to retain the moneys any longer as that suit has been disposed of. It is unnecessary to

consider this contention in extenso in view of the terms of the order of the court in the application under S. 41, which I have extracted earlier in my

judgment. That order specifically says that the entire amount should be kept to the credit of O. S. 1291 of 1959 purely on account of convenience

and that, later on the money should be allocated appropriate to the various original petitions, which sought for an interim order pending termination

of the arbitration proceedings.

(4) Learned counsel for the first respondent then contended that as more than four months had elapsed since the date of reference the arbitration

proceedings should be held to have become futile and as it was no longer possible for the arbitrator to pass a legal award, the lower court was

entitled to take that circumstance into consideration and direct a refund of the moneys to the first respondent. This point was however not taken

before the lower court. It is not known whether there has been any application for extension of time for the submission of the award; it is however

said on behalf of the first respondent that no such application was ever filed. But whether there is such an application or not, I consider that the

proper procedure for the first respondent will be to apply to the lower court to vacate the order in all the petitions under S. 41, of the Arbitration

Act on the ground that the arbitration proceedings had become infructuous by reason of the fact that the award was not delivered within the period

of four months. If such an application is made to the lower court, the court will then have to consider whether the arbitration proceedings have

been rendered futile and pass an appropriate order for refunding the moneys to the first respondent. I am of opinion that it is not now open to the

first respondent by merely filing an application for refund of the money to obtain the sum without setting aside the orders passed under S. 41.

(5) The result is that the order of the lower court will have to be and is accordingly set aside. Sums representing the claim of the various petitioners

under S. 41 of the Indian Arbitration Act will be retained by the lower court pending awards that may be passed or, at any rate, pending

adjudication of the question whether the proceedings have failed. The balance of the amount will be refunded to the first respondent. The civil

revision petition is allowed, but without any order as to costs.

(6) Petition allowed.