

(1961) 02 MP CK 0021

In the Madhya Pradesh High Court

Case No : Letters Patent Appeal No. 28 of 1959

Shyam Singh Jaswant Singh

APPELLANT

Vs

Pralhad Singh Tikaram and Others

RESPONDENT

Date of Decision : 10-02-1961

Acts Referred:

Arbitration Act, 1940 — Section 31, 32, 33

Citation : AIR 1962 MP 66 : (1961) ILR (MP) 532

Hon'ble Judges : P.V. Dixit, C.J.; S.P. Bhargava, J

Bench : Division Bench

Advocate : R.K. Pandey, for the Appellant; A.P. Sen and A.H. Saifi, for the Respondent

Final Decision : Dismissed

Judgement

Dixit, C.J.

This Letters Patent appeal by the plaintiff from a decision of Shrivastava, J. arises out of a suit for specific performance of a contract for sale of certain lands and for damages in the alternative. The suit was dismissed by the Civil Judge, Second Class, Hoshangabad, who tried, it. In appeal the learned Additional District Judge of Hoshangabad gave to the plaintiff a decree for specific performance of the contract. The defendant-respondents thereupon preferred a second appeal in this Court which was allowed by the learned Single Judge and the plaintiffs claim for specific performance of the contract was dismissed. The learned Single Judge, however, gave to the plaintiff a decree for Rs. 600/- as damages against the respondent Pralhad Singh.

2. Briefly stated, the plaintiffs case was that on 8th/9th April 1951 the respondent Pralhad-singh entered into an oral agreement with him for sale of the suit lands for Rs. 2700/-; that on 28th April 1951 he gave to Pralhadsingh wheat of the value of Rs. 1600/- in part payment of the price; that before the execution of the sale deed Pralhadsingh later on sold the property to the respondent No. 4

Shersingh on 4th June 1952; and that Shersingh purchased it even though he was given a notice by the plaintiff on 25th April 1952 not to purchase the lands. The plaintiff claimed a decree against Pralhadsingh, Shersingh and his son Ramsingh for conveyance of the property to him on receiving Rs. 1100/-. In the alternative he prayed that a decree for Rs. 2700/-, made up of Rs. 1600/- paid as part consideration and of Rs. 1100/- as damages against Pralhadsingh be passed. The suit was instituted, on 8th July 1933.

3. The defendants denied any contract for the sale of the property to the plaintiff and the receipt of any wheat from him. They further pleaded that on a dispute arising between the parties regarding this matter, it was referred to arbitration on 17th May 1951; that the arbitrators gave their award on 18th May 1951, disallowing the plaintiffs claim for specific performance; and that they, however, directed the defendants to pay a sum of Rs. 600/- in settlement of all his dues. The defendants raised the objection that the plaintiffs suit was barred u/s 32 of the Arbitration Act, 1940. After the filing of the written-statement by the defendants the plaintiff was allowed to amend his plaint by introducing a new paragraph (No. 7-A) in the plaint containing the following averment:

"That there has been no reference regarding the matter in suit to any arbitration, nor has there been any valid award regarding the same. The award, if any, is not on stamp paper nor is it registered. Hence it is not admissible in evidence nor can it affect the rights of the parties under the original agreements."

4. The trial Court held that the agreement for the sale of the land was not proved; and that the suit was not barred u/s 32 of the Arbitration Act, for, though there was reference to arbitration, it had not been proved that the dispute was finally decided by the arbitrators. Accordingly the suit was dismissed. In appeal the learned Additional District Judge found the contract for the sale of the lands pleaded by the plaintiff to be established. He took the view that the suit was not barred u/s 32 of the Arbitration Act inasmuch as it was not one for obtaining a decision upon the existence, effect or validity of an arbitration agreement or award and that the defendants could not rely upon the award as they did not take any proceedings for the filing of the award u/s 14 of the Act. On these findings, the plaintiff's claim for specific performance was decreed by the learned Additional District Judge.

5. In second appeal the learned Single Judge upheld the finding of the lower appellate Court that there was a contract between the plaintiff and Pralhadsingh for the sale of the land. Relying on *Nathulal v. Beharilal* ILR (1951) Nag 883; (AIR 1952 Nag 65) he further held that as there was a reference to arbitration and an award, the plaintiff was not entitled to fall back on the original cause of action and claim specific performance of the contract; that Section 32 did not preclude the defendant from raising a defence on the basis of the award; and that under that award the plaintiff was entitled to nothing more than Rs. 600/- as damages. On this reasoning the plaintiff was given a decree for Rs. 600/- as damages against Pralhadsingh.

6. The main question that requires consideration in this case is whether when the parties have referred a dispute between them to an arbitrator and the arbitrator has given his award relating to the dispute, it is open to any party to file a suit in respect of the vary subject-matter of the dispute.

The point is directly covered by the decision of a Division Bench of this Court in ILR (1951) Nag 883: (AIR 1952 Nag 65), (Supra). That case lays down that a plaintiff who has been a party to an arbitration agreement and who has pushed the arbitration proceedings to an award in the hope of getting an award favourable to him cannot, after the award is made, get rid of it by filing a suit on the same cause of action by ignoring the award or impeaching its validity. But the learned counsel for the appellant urged that Nathulal's Case (Supra) was distinguishable on facts from the present one and the view taken therein required reconsideration. Learned counsel relied on Pamandass v. Manikyam Pillai AIR 1960 And Pra 59 (FB), and Chandrabhaga Sadashiv and Another Vs. Bhikachand Hansaji, to support the view that Sections 32 and 33 of the Arbitration Act do not bar a suit on the Original cause of action.

7. As at present advised, we are not inclined to differ from the view expressed in ILR (1951) Nag 883; (AIR 1952 Nag 65) (supra). As has been pointed out by the Supreme Court in Hanskumar v. Union of India AIR 1958 SC 917, it is well established that when parties enter into an agreement for settlement of their dispute by arbitration, its effect is to take the lis out of the hands of the ordinary courts of the land and to entrust it to the decision of a private tribunal. Section 21 of the Specific Relief Act expressly says that except as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced, but if any person who has made such a contract and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit. The scheme of the Arbitration Act, 1940, carries out this principle. The object of the Act is to prevent parties to an arbitration from reagitating the very questions in the disputes referred to arbitration in a manner other than as provided by the Act. Sections 32 and 33 of the Act run as follows :

"32. 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.

33. 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:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for

discovery and particulars as it may do in a suit."

These sections provide that an arbitration agreement or award can only be contested by an application and not by a suit. It will be seen that Section 32 prevents not only a suit to challenge the existence, effect or validity of an arbitration agreement or award but also prevents the setting aside, amending or modifying or in any way affecting an arbitration agreement or award otherwise than as provided by the Act. The words "in any way affected" used in Section 32 are important and would seem to preclude any suit the effect of which is to influence in any way an arbitration agreement or award. Section 33 is a corollary to Section 32. It provides a remedy not to the person who affirms the existence or validity of an arbitration agreement but to the person who challenges the same. Thus a party to an arbitration agreement whether he wishes to enforce the award or wants to get it set aside has to follow the procedure prescribed in the Act. If he wishes to enforce the award he must get it filed and made a rule of the Court and get a decree passed in terms of the award. On the other hand, if he wishes to avoid the award he must call upon the arbitrator to file it into the court and get it set aside as provided in Section 30 of the Act.

Now, there can be no doubt that a suit for a declaration, that an arbitration agreement or award did not exist or that it was invalid is barred by Sections 32 and 33. But even if any of the reliefs expressly mentioned in Sections 32 and 33 is not claimed directly in a suit, it would yet be barred if it in any way involves enforcement or amendment or modification or setting aside of an award. A party cannot by dexterous pleading avoid the bar imposed by Sections 32 and 33 of the Act. Whatever the pleadings may be, if the suit is one in essence to enforce an award duly given by arbitration dealing with the very dispute which is the subject-matter of the suit or to get rid of it in any way, it would not be competent.

8. In the present case, the plaintiff-appellant distinctly alleged that there was no reference to arbitration of the subject-matter of the suit; that there was no valid award; and that the award was not admissible in evidence as it was not registered and stamped. These allegations directly raise the questions for decision as to the existence of an arbitration agreement and the award and the validity of the same. In fact, these questions formed the subject-matter of specific issues in the suit and the trial Court gave its findings on them. The plaintiff's suit is thus directly hit by Section 33 of the Arbitration Act. The plaintiff does not cease to be "any party to an arbitration agreement" within the meaning of that expression used in Section 33 merely because of his denial of the factum of the agreement. The expression "any party to an arbitration agreement. . . .desiring to challenge the existence or validity of an arbitration agreement", according to the decision in ILR 1951 Nag 883: (AIR 1932 Nag 65), means a party who is alleged to be a party to the arbitration agreement but who challenges the existence thereof, and the word "existence" has been used in Section 33 not in a restricted sense but in its ordinary and natural meaning,

namely, existence either in fact or in law. The plaintiffs suit is thus on the face of it barred by Sections 31, 32 and 33 of the Act.

9. Here it must be noted that the bar of a suit under Sections 31, 32 and 33 on the original rights of the parties is not the result of any such thing as merger of the original cause of action in the award. The bar is imposed by the specific provisions of Sections 31, 32 and 33. When a dispute is referred to arbitration and an award is made, there are three calculable possibilities. The first is that after the giving of the award the parties may, as provided in the Arbitration Act, obtain a judgment and decree based on it. When the award is thus made a rule of the Court and becomes effective, it operates as *res judicata* so as to preclude a suit on the original cause of action. Again, in proceedings taken under the Act for making the award a rule of the Court it may be declared to be invalid or set aside. In that case, the arbitration proceedings would be abortive and the award would not legally exist. If the award does not legally exist, then there is no bar to the maintainability of a suit under Sections 32 and 33 of the Act. In such a suit the question of the existence or validity of the arbitration agreement or award having already been decided in proceedings under the Arbitration Act would not arise for consideration.

NO doubt, if in such a suit an objection is taken as to the maintainability of the suit it would be necessary to show that according to an order of the Court having jurisdiction under the Arbitration Act in the matter no award is in existence. But that would be quite different from raising a question as to the existence of an award for decision by the Court in which the suit is filed. The question raised in such a suit is not about the existence of an award but is as to whether the competent Court under the Arbitration Act has given a decision as to the existence or non-existence of an award. When after the making of the award the parties to the arbitration agreement take no steps for making it effective or for having it set aside in accordance with the Arbitration Act, a suit on the original cause of action would be barred because of the inhibition in Sections 32 and 33 of the Act. The decision in such a suit cannot but have the effect of enforcing or setting aside or amending or modifying or affecting in some way the award otherwise than as provided in the Arbitration Act, and this is what Sections 32 and 33 of the Act prohibit.

10. On the allegations as they are in the plaint, the plaintiff-appellant's suit did not lie in view of the provisions of Sections 32 and 33 of the Act. When the plaintiff's suit is not maintainable, the question of the admissibility of any plea set up by the defendants to resist the suit cannot arise. The maintainability of the plaintiff's suit has to be determined on the allegations in the plaint and not on the defence put forward. But it must be pointed Out that in connection with the question whether Sections 32 and 33 preclude a defendant from setting up a defence on the footing of the award a distinction must be drawn between a defence that the plaintiff's suit is barred because of the aforesaid provisions and a defence to the merits of the plaintiff's claim. To raise a plea that the plaintiff's

suit raises questions about the existence, effect or validity of an arbitration agreement or award is clearly not to present a question for decision upon the "existence, effect or validity of an arbitration agreement or award". Such a plea does no more than draw the attention of the Court to the fact that the plaintiff's suit is barred under Sections 32 and 33 of the Arbitration Act. If to a suit the provisions of Sections 32 and 33 are attracted, then even without such a plea by the defendant the Court is bound to hold that the suit is not maintainable. The learned Single Judge gave to the plaintiff-appellant a decree for Rs. 600/- as damages on the basis of the award.

In our judgment, the plaintiff was not entitled to any relief at all when his suit was held to be not maintainable. As the defendants have not filed any cross-objections or cross-appeal, it is not necessary to pursue the question whether the award of Rs. 600/- as damages to the plaintiff on the plea raised by the defendants with regard to Sections 32 and 33 of the Act or otherwise, was justified, or to consider the question whether the bar u/s 32 can operate against a defendant whose defence is in reality a claim or a suit prohibited by Section 32 and whether the mere position of the party in the heading of the suit would determine whether he comes within the inhibition laid down in Section 32.

11. Turning to the authorities, the decision in AIR 1960 Andh Pra 59 is one only on the question whether it is open to the defendant to set up an award as a bar to the 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 that case there was no serious contest as to the maintainability of the plaintiff's suit. An incidental argument was no doubt addressed in that case that after the making of the award it operated to merge and extinguish all claims which were the subject-matter of the submission to arbitration and, therefore, it was no longer open to the plaintiff to bring a fresh suit on the same cause of action. The learned Judges of the Andhra Pradesh High Court disposed of this contention by just observing that under the Arbitration Act, 1940, 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. We have already endeavoured to point out that the question whether the plaintiff's suit is barred u/s 32 does not depend on the theory of merger of the cause of action into the award.

The decision in Chandrabhaga Sadashiv and Another Vs. Bhikachand Hansaji, is distinguishable by the fact that in that case proceedings for the filing of the award in accordance with the provisions of the Act had been actually taken in the competent Court and it was held that the award did not legally exist. In the face of this finding of the competent Court under the Arbitration Act the plaintiff's suit on the original cause of action could not clearly be held as not maintainable. What has been said earlier is sufficient to indicate our disagreement with the reasoning given in Sia Kishori Kuer and Others Vs. Bhairvi Nandan Sinha and Another, in support of the conclusion that in spite of the existence of an award a

party to it can bring a suit on his original title. In that case, one of the reasons given was that a party to an award can bring a suit on the original suit title within the period limited by Article 178 of the Limitation Act and when such a suit is filed it is open to the defendant to make an application to get the award filed in Court and to have the suit stayed and thereafter as soon as the award was made a rule of the Court the defendant could plead it as a bar to the suit.

With all due respect to the learned Judges of the Patna High Court, this is begging the question whether the suit is maintainable in view of the prohibition contained in Section 32. In *Moolchand Jothajee Vs. Rashid Jamshed Sons and Co.*, , the plaintiff asked for a relief in terms of an award. He thus sought to enforce the award by a suit which was on the face of it expressly barred by Section 32. The other decisions cited at the bar, namely, *Pamudurthi Suryanarayana Reddi and Others Vs. Pamudurthi Venkata Reddi and Others*, , *Venkatasubbayya v. Bapadu* AIR 1951 Mad 458, and *Sayyaparaju Surayya Vs. Nekkanti Anandayya and Others*, relate to the question whether the provisions of Section 32 of the Arbitration Act extend to a defence as opposed to the filing of a suit. All those cases are distinguishable when the distinction between the raising of a plea that the plaintiff's suit raises a question for decision upon the existence, effect or validity of an arbitration agreement or award and a defence to the merits of the plaintiff's claim resting on the award is borne in mind.

12. For all these reasons, our conclusion is that the plaintiff-appellant's suit was not maintainable in view of the provisions of Sections 32 and 33 of the Arbitration Act, and this appeal must be and is dismissed with costs.