

(1978) 01 GUJ CK 0004
In the Gujarat High Court

State Bank Viram Co-op. Housing So.	APPELLANT
Vs	
Pankaj and Co. and Another	RESPONDENT

Date of Decision : 24-01-1978

Acts Referred:

Arbitration Act, 1940 — Section 17, 17, 39, 39
Bombay Court Fees Act, 1959 — Article 13
Displaced persons (Debts Adjustment) Act, 1951 — Section 40

Citation : (1979) 1 GLR 118

Hon'ble Judges : B.K. Mehta, J

Bench : Single Bench

Judgement

B.K. Mehta, J.—A short but interesting question arises as to what should be the appropriate court-fees which should be paid by a party not only challenging the decree made in terms of the award u/s 17 of the Arbitration Act but also challenging the order of the trial Court refusing to set aside the award u/s 39 of the Arbitration Act. The question arises in the following circumstances:

2. The respondent, who is the original plaintiff, undertook to construct a bungalow on behalf of the petitioner-defendant, and an agreement was effected between the parties. The said agreement contained an arbitration clause and the disputes having arisen between the parties were referred to the arbitrator who made an ex parte award. The arbitrator moved the City Civil Court, Ahmedabad, by his Civil Miscellaneous Application No. 571 of 1972, praying for a decree in terms of the award u/s 17 of the Arbitration Act. The petitioner-defendant also moved the City Civil Court, Ahmedabad, by his application being Civil Miscellaneous Application No. 53 of 1973 for setting aside the said award. After hearing the parties, the learned City Civil Judge dismissed the application of the petitioner-defendant by his order of September 2, 1975. Since he refused the application for setting aside the award, and there was no application for remitting the same, the learned City Civil Judge passed decree in terms of the said award on the same day, that is, September 2, 1975. The petitioner-defendant being aggrieved by the said orders preferred two appeals before this Court, being First

Appeals Nos. 1010 of 1975 and 1011 of 1975 from the order refusing to set aside the award and the decree, respectively. Both these appeals were summarily rejected by a Division Bench of this Court (Coram: J.M. Sheth & C.V. Rane JJ-as they then were) by its order of December 16, 1975. It appears that the office of this Court had raised an objection in First Appeal No. 1011 of 1975 which was preferred from the decree in respect of the adequacy of court-fees. The objection of the office is that the appellant of the said appeal, who is the petitioner before me, should pay ad valorem court-fees since that was an appeal against the decree. The Taxing Officer accepted the objection of the office and ruled that court-fees of Rs. 2200/- was due and payable by the petitioner-defendant and not Rs. 60/- as fixed Court-fees. The petitioner has, therefore, come in this revision before me against the said order.

3. The real question therefore is: what in effect and substance the appeal of the petitioner-defendant was? It is no doubt true that the petitioner had preferred two appeals before this Court since there were two orders of the City Civil Court; one against the order refusing to set aside the award and another against the order -directing a decree to be made in terms of the award which was a necessary consequence of the first order. If there had been a composite order refusing to set aside the award and making a decree in terms thereof, the appeal against such an order would have paid the fixed court-fees as ruled by this Court in *P. Datani and Co. Vs. State of Gujarat*, following the earlier decision of the Bombay High Court in *Taxing Officer, High Court Vs. Jamnadas Dharamdas and Others*, This decision of this Court has been distinguished by the Taxing Officer on the ground that the ratio of that decision would be applicable only if there had been a composite order which is not the case here, and since there are two orders - one against the order refusing to set aside the award and another against the order making a decree in terms of the award -and consequently two appeals, the appellant was justified in paying the fixed court-fees in his appeal against the order refusing to set aside the award but the appellant must pay ad-valorem court-fees in an appeal preferred against the decree.

4. I am of the opinion that this distinction is not well founded. The question is: what essentially the nature of the appeal was? If a party or an arbitrator moves the Court u/s 17 of the Arbitration Act to record the award and grant a decree in terms thereof, the Court has to grant the decree by pronouncing judgment if it does not find any reason to remit the award. A decree made in terms of an award u/s 17 is appealable but the right of appeal is a limited right and the only grounds which can be agitated in such an appeal are that the decree is either in excess of the award or not in accordance with it. However, in a given case, a party aggrieved by the award may move the Court for setting aside the award, and if the Court refuses to set aside the award, the party aggrieved by such a decision has a right to prefer an appeal u/s 39 of the Arbitration Act. In such circumstances, therefore, the real contest in the appeal is the order of the Court refusing to set aside the award, though no doubt incidentally the decree which is granted consequent to the refusal to set aside the award will also be under

challenge in such an appeal. If the Appellate Court accepts the appeal of the aggrieved party and sets aside the award, the decree will automatically fall to the ground and no specific relief is required to be granted (vide: State of Kerala and Ors. v. T.A. Thomas AIR 1976 Ker. 262. and Shmt. Uti Vs. Shmt. Ati and Another,

5. The learned Assistant Government Pleader, appearing on behalf of the State, urged that since the appeal is in pursuance of the decree which has been made in terms of the award, and a separate appeal has been preferred against the said decree, the appellant must pay ad valorem court-fees on that appeal. In any case, he submitted, the real and effective appeal would be against the decree which has been made in terms of the award of the City Civil Court since the Appellate Court shall have to adjudicate whether the decree was properly granted or not. I am afraid this is too broad a contention which can be accepted. If I accept the submission of the learned Assistant Government Pleader, the right of the aggrieved party by an order of the Court refusing to set aside the award u/s 39 would be stultified. It is an independent right granted to a party as compared to the limited right of appeal u/s 17 under which the decree is made in terms of the award. If a decree is made in terms of the award, a party aggrieved by such an order has a limited right of appeal, namely, the right to contend that the decree is not in accordance with the award or in excess of it. On the other hand, a right of appeal u/s 39 is a larger right where an aggrieved party challenges the order refusing to set aside the award. The contention of the learned Assistant Government Pleader is not borne out by the very wording of the said Section 39. The contention of the learned Assistant Government Pleader would have been justified if the right u/s 39 is controlled by the provision of Section 17 of the Arbitration Act in a case where a party moves the Court for setting aside the award and the Court refuses to set aside the award and grants a decree in terms of the award. The real challenge in the appeal is not against the decree alone but in substance and effect against the order refusing to set aside the award. It is no doubt true that if appeal of an aggrieved party is accepted and the award is set aside consequently the decree will fall to the ground and no adjudication would be necessary about the decree itself. In that view of the matter, therefore, the contention of the learned Assistant Government Pleader cannot be accepted.

6. A somewhat similar question arose before the Bombay High Court in *Taxing Officer v. Jamnadas Dharamdas*'s case (supra) as to what is the appropriate court-fees payable on the memorandum of appeal against the decree passed by the Tribunal u/s 40 of the Displaced persons (Debts Adjustment) Act, 1951. Shah J (as he then was) held that an award made by the Tribunal under the Displaced Persons (Debts Adjustment) Act, 1951 cannot be regarded as a decree within the meaning of Schedule II, Article 11 of the Court-fees Act. The Memorandum of appeal u/s 40 of the Act would be governed by the provisions of Schedule II Article 11 of the Court-fees Act and are chargeable with court-fees accordingly. Shah J referred to a Full Bench decision of the Calcutta High Court in *Upadhyay Thakur v. Persidh Singh* ILR 23 Calcutta 723 where a question arose about the

adequacy of Court-fees on an appeal preferred from an adjudication made in proceedings for settlement of rents under the Bengal Tenancy Act, and quoted the passage which reads as under:

...this proceedings for settlement of rents cannot be regarded as a suit. The proceedings are u/s 104(2) and the Government Rules initiated not by a plaint; but by an application and this application is not subject to an ad valorem court-fee duty, as suits for money are subject under the provisions of Section 7(1), Court-fees Act, but according to a notification of the Government of India, No. 5086 S.R. published at p. 157. Part IA of the Calcutta Gazette of 17-10-1894 to a Court-fee of 8 annas.

If then, the case is not a suit at its initiation and need not be commenced by a plaint, why should it be a suit and why should a memorandum of appeal be required to be presented in it at a later stage?... None of the rules framed by Government under the Tenancy Act lays down that such a proceeding shall be a suit. Rule 30 (b) merely prescribes that the proceeding shall be dealt with as a suit, that is to say, in respect of its "procedure" which is all that the provisions of Section 189 Clause (1). allow Government to regulate by means of a rule-

For the same reason Section 17 of the Act is also inapplicable; so that neither one fee of Rs. 10 nor as many fees of Rs. 10, - as there are tenant-defendants in the proceeding should be paid on the applicants' memorandum of appeal to the Special Judge. We can find no Article of the Court-fees Act expressly applicable to the applicants' memorandum of appeal to the Special Judge.

But if the proceeding be not a suit, then the memorandum of appeal is nothing more or less than an application and, consequently subject to one fee of eight annas only under Article (1) Clause (b), (2) Schedule II, Court-fees Act.

7. Shah J. then proceeded to observe that if the adjudication made on an application for adjustment of debts by a displaced creditor are called decrees, and the same expression is used to designate adjudication of the Tribunal when a claim made by a displaced creditor against a non-displaced debtor, there is no reason for making a distinction in the matter of court-fee payable on appeals against an adjudication made u/s 9 and adjudication u/s 13 of the Act. It is not in dispute before me that the proceedings before the City Civil Court when an arbitrator or a party approaches before it praying for a decree in terms of the award commences with an application which bears a fixed court-fee under Schedule II Article 13 of the Court-fees Act, 1959. Merely because the court being enable to remit the award; grants a decree in terms of the award, the nature of the proceedings does not change from what they had been at the initial stage, and more so when a party aggrieved by the award moves the Court for setting aside the award, as is the case before me. In other words, in such proceedings what is challenged in appeal is essentially the order refusing to set aside the award or to remit the award and not the decree. In that view of the matter, therefore, I am of the opinion that the order of the Taxing Officer should

be set aside and the petitioner should be directed to pay fixed court-fee under Schedule II Article 13 of the Bombay Court-fees Act, 1959.

8. The result is that this revision is allowed. The order of the Taxing Officer is set aside. Rule is made absolute accordingly with no order as to costs.