
(1926) 09 BOM CK 0011
In the Bombay High Court
Case No : First Appeal No. 247 of 1925

Swamirao Konher Nadgir

APPELLANT

Vs

Channappa Uppina Hubli

RESPONDENT

Date of Decision : 27-09-1926

Acts Referred:

Citation : AIR 1927 Bom 237 : (1927) 29 BOMLR 301 : 101 Ind. Cas. 398

Hon'ble Judges : Shah, J;Fawcett, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Shah, J.—The plaintiffs in this case sued the defendants for the amount due to them in respect of transactions which had been effected between them and defendants Nos. 1, 2 and 3 from February 15, 1918, to December 26, 1919. It appears that soon after the transactions between the parties there was a reference to arbitration. That reference was signed by defendant No. 1 Swamirao and the plaintiffs. The arbitrators provided in their award that the amount of Rs. 18,623-1-3 was the balance due by Swamirao to the plaintiffs on December 26, 1919; but they allowed remission as regards the excess over Rs. 15,000, and provided that Rs. 4,000 should be paid by a certain date, and that the present defendants Nos. 1, 2 and 3 should convey the family property to be enjoyed by the plaintiffs for ten years and that the debt should be treated as satisfied at the end of that period. If they did not act according to the award, the whole sum claimed was to be payable by Swamirao. It appears that the properties were not conveyed to the plaintiffs as contemplated in that award. Certain bales were handed over to the arbitrators with the intention that the sale proceeds might be appropriated towards the sum of Rs. 4,000, which was provided in the award to be paid up by a certain date. But those bales were not found by the arbitrators to be sufficient to cover that sum and they remained unsold until they were sold after the present suit was filed.

2. The plaintiffs filed the present suit on the basis of their original transactions,

and in the alternative on the basis of the award. Defendant No. 1 and the other defendants Nos. 2-6 filed separate written statements, but in effect they pleaded that the transactions of the plaintiffs were with Swamirao only, and that neither defendant No. 2, the brother of Swamirao, nor defendant No. 3, the son of Swamirao, nor defendants Nos. 4 to 6, the minor sons of defendant No. 2, were liable for the amount claimed. It was also contended that the suit was not maintainable because of the award, and it was also contended that the award was not binding upon defendants other than defendant No. 1.

3. It may be mentioned that the defendants pleaded that they were agriculturists. They were found by the trial Court to be agriculturists. On the remaining issues in the case arising on the pleadings, the learned trial Judge found that the suit was maintainable in spite of the award; that having regard to the terms of the award, the award had ceased to be operative ; and he also found that the transactions between the plaintiffs and defendants Nos. 1, 2 and 3 were really transactions for and on behalf of the whole joint family of which Swamirao was the manager. He held the alleged dealings between the parties proved, and also found that the dealings were carried on for the benefit of the joint family and with the consent of the other adult members of the family.

4. The plaintiffs had claimed interest at the rate of eighteen per cent, on the basis of an agreement. The learned trial Judge found that the agreement was proved as to the rate of interest, and ultimately the Court passed a decree for Rs. 22,448-12-6, and made the amount payable in ten equal yearly instalments.

5. The defendants have appealed from this decree, and several points have been argued in support of this appeal. I shall first deal with the point which relates to the award to which I have alluded. It has been urged by Mr. Coyajee for the plaintiffs that that award is binding upon the defendants. In view of the terms of the award, however, it seems that the ultimate result was that according to the award the plaintiff would be entitled to recover from Swamirao, defendant No. 1, the amount of Rs. 18,623-1-3 which the arbitrators determined in the award to be due to the plaintiffs. It would be difficult on the terms of this award to justify the decree in favour of the plaintiffs against all the defendants. But the real answer to the point relating to the award is that made by the trial Court, namely, that the parties did not act according to the award, and that the parties were really relegated to their position on the original transactions. I do not see in the circumstances how it could be said that the plaintiffs are prevented from suing on their original cause of action.

6. In coming to this conclusion I have not overlooked the principle accepted in *Laldas v. Bai Lala* (1908) 11 Bom. L.R. 20. It is true that there is the award ; but I have already stated the terms of the award; and ultimately if neither Rs. 4,000 were paid nor the family lands were conveyed for ten years, the defendant No. 1 was to pay the full amount claimed by the plaintiff. Defendant No. 1 has not pleaded performance of the award ; so the plaintiff could sue on the original cause of action. The rule is thus stated in *Russell on Arbitration* (11th Edn.) at p.

494 :-

In short the question is whether the award has replaced the original rights of the parties, in which case the award is of itself a good defence to an action based on those rights, or whether the award has merely ascertained and defined those rights, in which case not only the award but also its performance must be established to complete the defence.

The ratio decidendi of *Allen v. Milner* (1831) 2 Cr. & J. 47. would apply to the present case and the decision in *Commings v. Heard* (1869) L.R. 4 Q.B. 669. would not govern a case like the present. The ground upon which *Allen v. Milner* is distinguished in this case at p. 673 of the report applies to the present case. The defendants in this case including defendant No. 1 have not relied upon the award as a bar to the action in the argument before us. But I have dealt with this point at some length to show that the case of *Laldas v. Bai Lala* is distinguishable from the present case as in that case as a result of the award the suit during the pendency whereof the parties referred the matter to arbitration was allowed to be dismissed. It may be that no further action was taken on the award by the parties. But it cannot be said that the award was not acted upon in that case at all. Further, the English rule as to the plea of performance when the award is set up as a bar to an action was not considered in that case ; at any rate it is not referred to in the judgment of Chandavarkar J. I think, therefore, that on the facts of the present case the award is not a bar to the present action, as there is no allegation of its having been acted upon, and as there is no clear indication that the award has replaced the original rights of the parties. It is not necessary on the facts of this case to consider the point whether the proof of a positive agreement that the parties were restored. to their original position is essential in order to allow or require the plaintiffs to proceed on their original cause of action. It may be mentioned that the English rule on this point does not proceed on these lines; and the necessity for proof of an agreement between the parties adverted to by Chandavarkar J. may refer to cases in which otherwise it is clear that the award has replaced the original rights of the parties. [The remainder of the judgment is not material for this report.]

Fawcett, J.

8. I agree.