

(1988) 02 GUJ CK 0017
In the Gujarat High Court

Vaidya Harishankar Laxmiram Rajyaguru	APPELLANT
Vs	
Pratapray Harishankar Rajyaguru	RESPONDENT

Date of Decision : 23-02-1988

Acts Referred:

Arbitration Act, 1940 — Section 16(5), 16(5), 17
Civil Procedure Code, 1908 (CPC) — Section 9, 9

Citation : (1988) 2 GLR 986

Hon'ble Judges : D.H. Shukla, J

Bench : Single Bench

Judgement

D.H. Shukla, J.—It is saddening to start with the introduction of parties and the back drop of circumstances in which this Revision Application has come up for final hearing before me.

2. The petitioner, Vaidya Harishankar Laxmiram Rajyaguru, is the father of respondent, Pratapray Harishankar Rajyaguru. Respondent is the son of the petitioner. Both of them are established Vaidyas in Rajkot. It is a well-to-do family. Both of them, and particularly the petitioner, are advanced in age. They have been fighting between themselves since more than a decade. I was, therefore, very eager to see that the matter was amicably settled between them. I called both of them before me and intervened in every small item of their dispute to see that once again they may have a real relationship of father and son between them. At one stage, I was hopeful that my sincere attempts may succeed, but in the end, my attempts failed, as both of them could not see eye to eye with each other, both literally and figuratively. They broke the negotiations for compromise before me on an issue relating to their residential house. I still waited in the hope that they may go back to Rajkot, ponder over their disputes to consider settling the same amicably, once and for all, having regard to the higher values of family relationship and peace in the family. My hope is belied by their adamant attitude. I, therefore, now proceed to dispose of this Civil Revision Application on merits.

3. The petitioner and the respondent referred their disputes to one Kantibhai Vaidya (Shri Kantilal Dayaram Jani) who had intervened between them with the good intention to bring their disputes to an end. A copy of the award passed by Shri Kantibhai Vaidya is produced on record. It is stated in the award by the Arbitrator that he had called both, father and son, at his residence on 18-1-1977 at 9-00 p.m. He had discussed the matter with both of them and had warned them that both of them would ruin themselves in the property disputes, if they were not solved amicably. It is specifically mentioned in the award that the entire responsibility of solving the disputes was entrusted to him by the petitioner-father and the respondent had agreed to such entrustment. Accordingly, he had given an award on 18-1-1977. Below the award, both the parties and the Arbitrator have signed. The endorsement reads, when translated in English that the award is agreed to and binding to both the parties and that the entire responsibility of the arbitration will lie on Shri Kantibhai Vaidya, which responsibility Shri Kantibhai Vaidya has undertaken. It is also stated that both of them have signed the endorsement below the award reading and fully understanding it. One would have hoped that the matter should have ended at that stage. The disputes were entrusted by them to their family friend, Shri Kantibhai Vaidya. Shri Kantibhai Vaidya had undertaken the responsibility of giving an award with the good intention of bringing the family-feud to an end. It is a silver-lining in the cloud that neither of them has questioned the bona fides of the Arbitrator all throughout this protracted litigation.

4. However, not only that the disputes did not end with the arbitration-award, but the parties have kept their disputes alive with redoubled vigour as it were and they have fought for all this period of over 10 years. The respondent applied on 20-6-1977 for filing the award and sought judgment in terms of award u/s 17 of the Arbitration Act, 1940. A notice consequent upon the filing of the award was issued to the petitioner. The application was converted into Special Civil Suit No. 84 of 1977. It is stated in the application to file an award, that the petitioner had torn off the award and therefore the respondent was compelled to rely upon a photo-copy of the original award, which was produced with the application.

5. The petitioner filed his objections to the application, but they were not filed within the prescribed limitation of 30 days. A copy of the judgment and order passed by the Joint Civil Judge (S.D.). Rajkot dated 21-3-1978 is brought on record.

6. The trial Judge observed in the course of his judgment that "objection of whatever nature that the party may desire to take it must be taken within the period of 30 days after the knowledge of the party regarding filing of an award and further that there is no prescribed form as to in what manner and in what form the notice may be given to the parties and that party is called upon by institution of a suit, in that case also, it is sufficient requirement under the Arbitration Act". The trial Judge rejected the objections filed beyond the period of limitation and for the reasons that (1) the notice is already given to the party

concerned about the filing of the award, (2) the time for making an application is (sic "to") set aside the award has expired and no such application is made, (3) The award is not set aside u/s 30 and (4) that the award is not remitted u/s 16(5) of the Arbitration Act. He passed the final order to draw a decree in terms of award. A decree in terms of the award was drawn, dated 31-3-1978.

7. May it be noted that the fact that the petitioner had endorsed below the award, that the award was binding on him and that he had signed the endorsement after reading the award and understanding it, he had allegedly torn off the award constraining the respondent to file its photostat copy, and despite such endorsement, the petitioner had preferred a Civil First Appeal against the judgment and decree passed in Special Civil Suit No. 84 of 1977 and had also preferred Civil Revision Application No. 655 of 1978. The First Appeal that was filed did not bear any number, since it only remained at the stage of stamp number. Both these legal proceedings were, however, withdrawn by the petitioner, and thus the judgment of the trial Court in Special Civil Suit No. 84 of 1977 became final. It appears that the First Appeal and Civil Revision Application No. 655 of 1978 filed in the High Court were withdrawn in pursuance of an agreement reached between the parties, dated 14-8-1978, a copy of which is to be found in the paper-book, at Exh. 40. It is signed by the parties as well as by their respective Advocates, Mr. K.S. Nanavati and Mr. S.M. Shah. The agreement is in the form of a letter addressed to the Arbitrator wherein it is stated that both of them had appointed him as an Arbitrator to resolve the disputes between them and that he had given an award dated 20-1-1977 in respect of which award, there had been continued objections but now they have agreed that both of them should abide by the award dated 20-1-1977 and that its interpretation should be left to the Arbitrator himself. It is also categorically mentioned therein that its interpretation by the Arbitrator would be binding on both the parties. It is clear, therefore, that both of them had re-affirmed the acceptance of the award.

8. This letter of 14-8-1978 is replied in the form of a letter dated 4-9-1978, addressed to the petitioner by the Arbitrator, a copy of which is on the record at Exh. 137. It is stated in the reply that the parties had gone to his residence on 3-9-1978, but neither of them had demanded any interpretation of the award from the Arbitrator. It is also stated in the reply that the petitioner had torn off the award, and a decree was made in pursuance of a photostat copy of the award which was filed in the Court, which had been accepted by both the parties and therefore it was not open to him to make any change in the award. Thus, as observed earlier, the arbitration award is twice accepted by the parties. The challenge made to the award by way of an appeal and revision is voluntarily withdrawn. The matter does not rest here. The petitioner had filed a civil suit, bearing Civil Suit No. 364 of 1980 in the Civil Court at Rajkot, to set aside the decree passed in Special Civil Suit No. 84 of 1977 and had also submitted an application (Exh. 5) to obtain interim orders. That application Exh. 5 was decided against him, against which he preferred an appeal/revision but later on, he withdraw the said appeal/revision.

9. During the course of the execution proceedings (Special Civil Execution Application No. 24 of 1978), the petitioner preferred a Civil Revision Application No. 1615 of 1980 against the judgment and order passed by the Civil Judge (S.D.) Rajkot, raising practically all the disputes which have been raised by the petitioner in this Civil Revision Application, and the same Civil Revision Application, came to be rejected summarily on 30-10-1980 by this Court (Coram: A.M Ahmadi, J.).

10. There are two insurmountable impediments in the contentions raised in this Civil Revision Application, namely, acquiescence and estoppel. The Supreme Court has very recently held, in the case of Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, , as under: "Where though a party is aware from the beginning that by reason of some disability the matter is legally incapable of being submitted to arbitration participates arbitration proceedings without protest and fully avails of the entire arbitration proceedings and then when he sees that the award has gone against him comes forward to challenge the whole of the arbitration proceedings as without jurisdiction on the ground of a known disability, the same cannot be allowed. This principle applies both before and after making of the award. The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceeding preclude such a party from contending that the proceeding were without jurisdiction." (Underscoring supplied)

11. The Supreme Court has quoted with approval the following passage from the judgment in Arbn. Jupiter General Insce. Co. Ltd. Vs. Corporation of Calcutta (with Award), , where the then Chief Justice P.B. Mukherji, had observed:

It is necessary to state at the outset that Courts do not favour this kind of contention and conduct of an applicant who participates in arbitration proceedings without protest and fully avails of the entire arbitration proceedings and then when he sees that the award has gone against him he comes forward to challenge the whole arbitration proceedings as without jurisdiction on the ground of a known disability of a party. That view of the Court ably stayed by the Editor of the 15th Edition of Russel on the Law of Arbitration at page 295 in the following terms: Although a party may by reason of some disability be legally incapable of submitting matters to arbitration that fact is not one that can be raised as a ground for disputing the award by other parties to a reference who were aware of the disability. If one of the parties is incapable the objection should be taken to the submission. A party will not be permitted to lie by and join in the submission and then if it suits its purpose attack the award to that ground. The presumption in the absence of proof to the contrary will be that the party complaining was aware of the disability when the submission was made.

The Supreme Court has also referred to therein the following observation of the Judicial Committee in decision in Chowdhury Murtaza Hossein v. Mussumat Bibi Bechunnissa (1876) 3 Ind. App. 209 at page 220:

On the whole, therefore, their Lordships think that the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceedings to make their awards, did submit to the arbitration going on that he allowed the arbitrators to deal, with the case as it stood before them, taking his chance of the decision being more or less favourable to himself, and that is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award.

12. I am conscious of the fact that the Supreme Court was dealing with a different set of facts, but what is necessary is to appreciate the ratio of the judgment. The ratio is that once a party has participated in the arbitration proceedings, despite some disability, which would otherwise render the arbitration proceedings invalid he cannot later on challenge it on the ground of such illegality, since in doing so, he would be barred on the principle of acquiescence. Such acquiescence would come in his way, whether his participation was prior to the award or subsequent to the award and notwithstanding that the disability touches the question of the jurisdiction of the Arbitrator.

13. As noted earlier in the judgment, the petitioner had twice agreed to the award, first by signing an endorsement below the award itself, and secondly, by entering into an agreement with the respondent, which agreement was in the form of a letter addressed to the Arbitrator dated 14-8-1978 (Exh. 40). The agreement was so seriously entered into by both the parties that the petitioner had in pursuance of it, withdrawn his appeal and revision filed in the High Court. Thus, in my view, the petitioner is estopped from raising any dispute in regard to the validity of the decree passed in pursuance of a judgment, wherein the award is made the rule of the Court. The revision also suffers from *res judicata*, inasmuch as the petitioner had challenged the decree by filing a revision as well as an appeal against it, but he withdrew both of them. He had preferred a Civil Revision Application, bearing Civil Revision Application No. 1615 of 1980 which came to be summarily rejected by this Court on 30-10-1980.

14. In view of this conclusion to which I have reached, namely, that the revision is both barred by petitioner's acquiescence as well as by the operation of *res judicata*, it is not necessary for me to discuss the submissions canvassed before me by Mr. D.L. Kothari, the learned Advocate for the petitioner. However, I wish to discuss in this connection a basic question about the jurisdiction, since it appears that Mr. Kothari is entertaining a misconception in regard to the disputes which he has been raising in the Execution Application, time and again. Mr. Kothari's submission, in its ultimate effect, is that if an award is a nullity, no decree can be founded on it, and such a decree, even if passed, is a nullity. It is always open to a party to challenge a decree on the ground of nullity and that it is open to a party to do so even in Execution Application. Mr. Kothari's submissions touching the question of nullity of an award and nullity of the consequent decree are based on the following arguments:

(i) The trial Court had issued a summons instead of a notice u/s 14 of the Arbitration Act.

(ii) The award is unstamped and unregistered and therefore the trial Court could not have looked into it altogether, and the decree is vitiated.

(iii) There was no arbitration agreement entered into, as defined u/s 2(a) of the Arbitration Act and therefore there was no valid appointment of an Arbitrator and the Arbitrator did not have the jurisdiction to declare an award. Award was not properly filed u/s 14 and therefore there was no jurisdiction to take cognizance of award.

15. In respect of these contentions, Mr. Kothari has cited copious judgments, including those of the Supreme Court and of other High Courts. By all these points, he wanted to drive his main point home, that the Arbitrator lacked in the jurisdiction to give an award, and secondly that on this account as well as on the other grounds stated above, the Court did not have the jurisdiction to look into the award. I do not propose to discuss the numerous authorities on which Mr. Kothari relied, for the following reasons:

(1) It is not open to the petitioner to question the award because he has acquiesced into it by participating in it and by accepting the award itself twice.

(2) He is estopped by *res judicata* also since he has raised the disputes about the validity of an award as well as a decree in the legal proceedings, all of which he has withdrawn.

(3) The several legal contentions which Mr. Kothari has raised, which contentions I have outlined above, do not touch the inherent jurisdiction of the Civil Court. It requires to be clearly perceived that there is a marked difference between an inherent lack in jurisdiction and lack of inherent jurisdiction. The points raised by Mr. Kothari touch the inherent lack in the Civil Court to take cognizance of the award, but it can never be said that the Civil Court which passed the decree lacked in the inherent jurisdiction to take cognizance of the award under Sections 14 and 17 of the Arbitration Act and to pass a judgment accordingly. The judgment and decree cannot be assailed on the ground that the Civil Court did not have inherent jurisdiction.

16. In *Rajah Amir Hassan Khan v. Sheo Baksh Singh* (1885) 11 Cal 6 : (1883-84) 11 Ind. App. 237, their Lordships of the Privy Council, as early as in 1884, said. The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, (namely, whether the suit was barred as *res judicata*) and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity. If the trial Judge had the jurisdiction to decide a question, his judgment cannot be challenged in revision on the ground

that he has acted illegally. In the present case, the trial Judge had the jurisdiction to make award the rule of the Court, and if he had that jurisdiction, the judgment and decree cannot be questioned in revision on the ground of their illegality.

17. Jurisdiction means the legal authority to Administer Justice according to means which the law has provided, and such of the limitation imposed by law upon the judicial authority. This jurisdiction is derived from the provisions of law, especially statutory law. Section 9 of the CPC prescribes that "the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or implied "barred". This is the inherent jurisdiction derived by a Civil Court to deal with the matter. The inherent jurisdiction thus derived by a Court may, however, be limited or excluded by specific statutory provisions. The inherent jurisdiction may be vitiated, for example when the Judge has not been legally or validly appointed as such or the Judge, though validly appointed, is disqualified from trying any particular case for reasons of personal or peculiar interest therein or the Judge acts outside the limitation imposed by the law upon his judicial authority, such limitations may be territorial or pecuniary or may refer to the subject-matter of the litigation or the nature of the litigation or the class or rank to which it belongs. When there is an inherent lack of jurisdiction, there is an utter absence of jurisdiction, with the result that the lack of it goes to the root of the competence of the Court to try the case and renders the decree a nullity. When the decree is such a nullity, i.e. to say when it suffers from the vice of a lack of inherent jurisdiction in the Court which passed it, the decree can be challenged at any stage, and even in execution proceedings. However, when there is absence of inherent jurisdiction in a Court, but the lack of jurisdiction arises on account of any vice attached to the passing of a decree, such a vice is due to illegal exercise of the jurisdiction in which case even though it can be said that the Court had no jurisdiction to pass such an illegal decree, the illegality does not touch the inherent jurisdiction of the Court and want of such a jurisdiction in the decree cannot be assailed in execution proceedings. The authority to decide a matter at all is what makes up jurisdiction. When there is jurisdiction over the person and the subject-matter, the decision of all other questions in the matter is only an exercise of that jurisdiction. When there is want of authority or competence to decide a matter and the legal authority decides that matter, the result is a nullity. It is a basic nullity. The judgment reached by such an authority is void ab initio. On the other hand, when the authority exercises the jurisdiction illegally, the result which is reached is again void, but the result does not have the effect of being so void as to be void ab initio.

18. The submissions made before me by Mr. Kothari touch the questions as to the illegal exercise of the jurisdiction. They do not affect the inherent jurisdiction of the Court to take cognizance of the award. The Full Bench of the Supreme Court observed in the case of Seth Hiralal Patni Vs. Sri Kali Nath, as under:

The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seized of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it.

19. In the case of Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, , the Supreme Court observed as under:

When the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. But where the objection as to jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

20. The Revision Application before me is directed against an order of the learned Civil Judge (S.D.) Rajkot in an application Exh. 115 filed in the execution proceedings. I permitted Mr. Kothari to go beyond the contention raised in Exh. 115 and allowed him to cover all the objections that he could raise against the validity of the decree, so that his contentions can be dealt with at the High Court level, once and for all. He raised the contentions before me, which I have stated above, and I have found that none of them can be entertained since they do not touch the inherent jurisdiction of the Civil Court to pass a decree in terms of the award. For the reasons given by me above, the Revision Application is required to be rejected.

21. The trial Judge has lamented about the procrastination of the execution proceedings by citing observations of the Supreme Court in the case of Guru Nanak Foundation Vs. Rattan Singh and Sons, . which run as under:

Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary....

It is deeply regrettable that the petitioner has succeeded in protracting the execution proceedings inordinately. It is in the interest of both the parties concerned that the award is implemented by their willing consent. It is now the

duty of the Court to put its foot firmly on the petitioner's effort to further protract the proceedings.

22. The trial Court has been pleased to award exemplary costs to the respondent by asking the petitioner-father to pay Rs. 1,500/- by way of costs of the application, Exh. 115, to the respondent. The same order of costs, I hereby confirm.

23. In the result this Civil Revision Application is dismissed. The petitioner shall bear his costs and shall further bear a special costs of Rs. 1,000/- of the respondent. Rule discharged. Interim relief vacated.