Mattapalli Chelamayya and Another

Vs

Mattapalli Venkataratnam and Another

Civil Appeal No. 428 of 1967

(K. S. Hegde, P. Jagmohan Reddy, D. G. Palekar JJ)

18.01.1972

JUDGMENT

PALEKAR, J. -

1. This is an appeal by Special Leave by the defendants arising out of the judgment of the High Court Andhra Pradesh in O.S. No. 212 of 1962, from the decision of the Subordinate Judge, Kakinada, in original Suit No. 15 of 1956.

2. The plaintiffs who are the respondents before this Court applied under Section 14 of the Arbitration Act for the filing of an award, dated November 10, 1955 and for a decree in terms of that award. The application was registered as a suit being O.S. No. 15 of 1956. The defendants filed their written statements contesting the suit and also applied by I.A. Nos. 597 and 598 of 1956, for setting aside the award under Sections 30 and 33 of the Arbitration Act. Several contentions were raised by the defendants - one of them being that the award being unstamped and unregistered was inadmissible in evidence and hence a decree in terms of the award could not be passed.

3. The learned Subordinate Judge after framing a number of issues considered only the question with regard to the admissibility of the document. In his view the award, dated November 10, 1955, embodied a partition of immovable properties worth more than Rs. 100/- and was, therefore, compulsorily registrable under Section 17 of the Indian Registration Act. Being compulsorily registrable the award could not be admitted in evidence for the purpose of passing of decree. He also held that the award was not duly stamped and for that reason also it was inadmissible in evidence. Accordingly, he dismissed the suit.

4. The plaintiffs went in appeal to the High Court. The appeal was placed before a Full Bench for disposal. The court held that the award was not inadmissible on the ground that it embodied a partition. In its opinion it was admissible in evidence so for as it did not affect immovable property. It further held that a decree could be passed in terms of that part of the award which was severable from any other part of it which was invalid for any reason. As regards the contention that the document was unstamped the High Court held that the document was admissible in evidence on payment of necessary duty and penalty and since the same had been already paid the award was admissible in evidence.

5. Since the other points raised in the Trial Court had not been considered, the case was remanded to the Trial Court to be disposed of in accordance with law in the light of the decision of the High Court. An application for certificate under Articles 132 and 133 of the Constitution of India was filed by the defendants in the High Court but the same was rejected. Thereafter the defendants came

to this Court and obtained special leave.

6. The plaintiffs are brothers and appear to be the nephews of the defendants who are also brothers. They all formed a joint undivided Hindu family which owned many immovable properties and carried on money-lending business. On May 20, 1950, all four of them referred their dispute to three arbitrators by an agreement Ex. A-1. At that time one of them, Venkataswamy, was a minor but he was represented by his uncle Chelamayya as his guardian. The relevant portion of this Arbitration Agreement is as follows :

> "We, the four individuals are members of a Hindu joint family. The first individual of us had been acting as the manager of our joint family. While so, we could not pull on together amicable we entertained the idea of effecting a partition of the family properties. Having separated our mess only, we have been living separately each by himself. We have executed this Panchayat mutchilika in your favour after choosing all the three of you as panchayatdars (Arbitrators) for ascertaining the accounts as to how much amount is remaining with each individual of us, as per the accounts, from out of (Joint) family income, for including that amounts to the common pool and for partitioning the entire movable and immovable properties belonging to our family into four (equal) share with reference to good and bad qualities."

7. It appears that between May 26, 1952 and May 30, 1952, the immovable properties of the family were duly partitioned and the parties were put in possession of the same. But the accounts of the family business were still to be examined and so on October 10, 1954, the four of them entered into a second arbitration agreement, the arbitrators being the same. This second arbitration agreement is Ex. A-2. At the time of this agreement Venkataswamy had attained majority. The relevant portion of this agreement is as follows :

> "At present Mattapalli Venkataswamy has ceased to be a minor and attained majority. Therefore, we have again executed this Panchayat mutchilika in your favour. On May 26, 1952, during the minority of fourth individual (Venkataswamy) of us, the immovable properties, etc., belonging to our joint family had been partitioned. Venkataswamy, the fourth individual of us has also agreed to the said partition. Now we have executed again this mutchilika in your favour requesting you to partition the remaining properties."

This agreement is important in two respects. One is that more than two years before the agreement the immovable properties of the family had been orally partitioned and, secondly, Venkataswamy who had now attained majority accepted the partition of those properties. Then on August 28, 1955, a third agreement was entered into. It is Ex. A-3. The relevant portion of this agreement is as follows :

> "In pursuance of the Panchayat mutchilika executed by us in your favour, we request you to pass as award taking into consideration the chitta balance pertaining to our joint family, the paddy account relating faslis 1347, 1348 and 1349 as per the statements given by us previously and also the records."

What is to be noted is that by this third agreement the parties asked the arbitrators that the award be drawn up after taking accounts.

8. Then on November 10, 1955, the three arbitrators made the award. It says :

> As per the references to arbitrators given by you on May 20, 1950 and October 10, 1954, we have fully examined the accounts of the lands, business accounts as also the statements and answers given by you at the time of enquiry and all the aspects (and considering all the aspects) we give our decision as follows :
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> It is not necessary to reproduce the whole of the award for the purpose of deciding the points before us. On a perusal of the award it will be seen that it falls principally into three parts -
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> (1) Reference to the partition of the immovable properties made between May 27, 1952 and May 30, 1952.
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> (2) A finding with regard to the amount in excess of their share recovered by Chelamayya and Narainamurty and their liability to account for the same to the other two parties namely Venkataratnam and Venkataswamy.
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> (3) Creation of a charge on the immovable properties of Chelamayya and Narainamurty for the payment of the amount found due and payable to Venkataratnam and Venkataswamy.

9. The contention of the appellant was that the award is a nontestamentary instrument which purports or operates to create and declare right title or interest of the value of more than Rs. 100/- in immovable property and hence it is compulsorily registrable under Section 17(1)(b) of the Indian Registration Act. It is submitted that the award not only declares the title of the shares in immovable property of more than rupees hundred and upwards but also creates a charge in immovable properties of more than that value. This submission is only partly correct. The award so far as it refers to the partition of immovable properties does not purport to create or declare any interest or title in immovable property. That is the view taken by the High Court and we are in agreement with it. We have already referred to the fact that the partition of the immovable properties had been effected by the arbitrators between May 26, 1952 and May 30, 1952 and the award merely refers to this fact in the following terms :

> "As per the partition effected by us from May 27, 1952 to May 30, 1952, of the lands, houses and house sites belonging to your joint family and in the possession and enjoyment of your joint family, the lands, etc., mentioned in Schedule B (referred to have come to you) and each of you obtained individual and separate possession of the lands that came to his share and you were in enjoyment peacefully and without any disturbance or dispute."

This recital is consistent with the parties' own admission about the partition in Ex. A-2 namely the second arbitration agreement, dated October 10, 1954. The partition of the immovable properties had been effected in about the middle of 1952 and the parties were since then in possession of the lands, etc., which had been allotted to their share. The recital in the award is no more than a reference to an existing fact and does not purport to create or declare, by virtue of the award itself, right title or interest in immovable property. Therefore, as shown in Kashinathsa Yamosa Kabadi, etc. v. Narsingsa Bhaskarsa Kabadi, etc. ((1961) 3 SCR 792 : AIR 1961 SC 1077 : (1962) 2 SCJ 597), the award cannot be regarded as compulsorily registrable on the ground that it embodies a

partition. So far as the charges in concerned it is created for the first time by the award and it is not disputed that the transaction of the charge would require to be registered. On taking an account of the funds and collections of the family the arbitrators came to the conclusion that Chelamayya had received Rs. 14,050-7-3, in excess of his share and Narainamurty had received Rs. 8,926-3-6, in excess of his share. The arbitrators directed that they should make good the amount which came to Rs. 22,009-7-9. This amount was distributed by the arbitrators between Venkataratnam and Venkataswamy - the former getting Rs. 8,268-11-0 and the latter Rs. 14,708-15-9 and then the arbitrators directed as follows :

> "We decided that for the amounts due to Venkataratnam and Venkataswamy, Chelamayya and Narainamurty should pay interest from August 30, 1955, till the date of award at 0-8-0 per cent. per mensem. It is decided that the amounts noted above have to be paid on the basis of the first charge on immovable properties that came to both and on the basis of the personal liability."

It will be thus seen that Chelamayya and Narainamurty, i.e., the present appellant were made liable to pay certain amounts personally to the plaintiffs-respondents along with interest and this amount was made a charge on the immovable properties in the possession of Chelamayya and Narainamurty.

10. So far as the direction to pay a sum of money by one party to another is concerned there can be no difficulty at all because that creates a personal liability. After accounts were taken it was found that the appellants had received money in excess of their shares from family funds and they are liable to make good the same to the respondents. An award containing such a direction does not require to be registered. The contention, however, is that since the award creates a charge also for the payment of this amount on immovable properties the whole transaction must be regarded as one and unseverable and since the charge requires to be registered, the instrument cannot be read in evidence for want of registration. This contention has been rejected by the High Court and, in our opinion, rightly. Section 49 of the Registration Act deals with the effect of non-registration of documents required to be registered. It provides :

> "No document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall -
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> (a) affect any immovable property comprised therein, or
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> (b).....
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> (c) be received as evidence of any transaction affecting such property.....
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> unless it has been registered."

Since the charge was not registered it will be correct to say that the document will not affect the immovable properties of the appellants sought to be charged. It will not also be received as evidence of any transaction affecting such property that is to say, in this case, as evidence of the charge. It should be noted that the section does not say that the document cannot be received in evidence at all. All that is says is that the document cannot be received as evidence of any transaction affecting such property. If under the Evidence Act the document is receivable in evidence for a collateral purpose, Section 49 is no bar. This construction of the provision which was accepted for a long time by the High Courts has been duly recognised by the Amending Act 21 of 1929, which added a

proviso to the section. The proviso clearly empowers the courts to admit any un-registered document as evidence of a collateral transaction not required to be registered.

11. The direction to pay a sum of money which has been held due and payable by the appellants to the respondents is a direction giving effect to a liability which already existed. It doer not create the liability for the first time but merely works out the liability. But the same thing cannot be said about the charge. The charge is created for the first time. The case, therefore, involves two distinct matters - one is a personal liability to pay a certain amount, and the second is an additional relief to recover that amount from the immovable property of the appellants, should they fail to pay as ordered. It is, therefore, a clear that the two do not form one transaction but two severable transactions. As pointed out long ago by Muttusami Ayyar, J., in Sambayya v. Gangayya (13 Mad 308, 311) : "The test, therefore, is whether the transaction evidenced by the particular instrument is single and indivisible or whether it really evidences two transactions which can be severed from each other, the one as creating an independent personal obligation and the other as merely strengthening it by adding a right to proceed against immovable property. But it should be remembered that it is not enough that there is an obligation to pay a sum of money, but that it is also necessary that the obligation should have an independent existence, and be in no way continent or conditional on the breach of some obligation relating to immovable property created by the same instrument, for the contingency or the condition and the obligation would then be parts of one indivisible transaction". In the present case the document evidences two transactions which can be severed from each other. One transaction creates an independent personal obligation to pay a certain sum of money and the other transaction namely the charge merely strengthens the first transaction by adding a right proceed against the charged property. In our opinion the High Court was right in directing that the second transaction with regard to the charge being a severable transaction can be validly ignored and to the extent that it declares the personal obligation to pay the transaction, not being required to be compulsorily registered, the award was admissible in evidence.

12. It was further contended for the appellants that an award is one and indivisible and to direct that effect be given to a part of the award and not to the whole of the award would amount to modifying the award and that was impermissible. We do not think that there is any substance in this contention also. Where a severable part of an award cannot be given effect to for a lawful reason, there is no bar to enforce the part to which effect could be justly given. See Mst. Amir Begam v. Badr-ud-din Hussain and Others (AIR 1914 PC 105 : 12 ALJ 537 : 16 Bom LR 413), where as a general principle it is laid down that when a separable portion of an award is bad, the remainder to the award, if good, can be maintained. By giving effect to a part of the award in this case no prejudice is caused to the appellants. In fact they stand to benefit. As the award stands, the appellants would have been responsible not only to pay the amounts personally, but also from the property which was charged. Since the charge part is eliminated for want of registration, they are freed from the additional liability. It is true that they should be pronounced according to the award, but that does not bar giving effect to the severable part of the award if it could be justly done. Departure from the award or a part of the award if barred only in those cases where the award or a severable part of it lawful and capable of given effect to.

13. Lastly it was contended that the award was inadmissible in evidence in view of the Section 35 of the Stamp Act. It is true that the award in the original is not engrossed on a stamp paper. What the arbitrators had done at the time of filing the award was to file the original award along with a true copy of it engrossed on a stamp of Rs. 2,865/-. It is not disputed that an instrument of this kind can be admitted in evidence after proper duty and penalty is paid. The High Court has rightly pointed out that the intention of the arbitrators in engrossing a copy of the award on the stamp paper and

producing the same attached to the original award, dated November 10, 1955, was merely to show that the required stamp duty and penalty had been paid. It is not disputed that the actual value of the stamp used covers more than the stamp duty and penalty required for the document and, therefore, there is no difficulty in holding that the award is admissible in evidence and cannot be rejected on the ground that the proper duty and penalty has not been paid.

14. In the result the appeal fails and is dismissed with costs.

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