Bhawarlal Bhandari

Vs

Universal Heavy Mechanical Lifting Enterprises

Civil Appeals Nos. 6067-6068 of 1998

(S. B. Majmudar, M. Jagannadha Rao JJ)

04.12.1998

JUDGMENT

S. B. MAJMUDAR, J. -

1. Leave granted in both these special leave petitions.

2. By consent of learned counsel for the parties, these appeals were finally heard and are being disposed of by this judgment.

3. A few relevant facts leading to these appeals may be stated at the outset :

> The common appellant as the decree-holder got an award decree on 2-6-1989 from the Court of learned Single Judge of the High Court of Judicature at Calcutta. The said decree was sought to be executed. At that stage, the respondent-judgment-debtor filed objections under Section 47 of the Code of Civil Procedure contending that the decree was a nullity as it was barred by limitation. The objections were overruled by the executing court which resulted in two proceedings by the respondent-judgment-debtor before the Division Bench of the High Court. Both the proceedings were disposed of by the impugned common judgment. The Division Bench of the High Court held that the question of limitation regarding passing of the award decree was required to be examined by the executing court and consequently, passed a remand order directing learned Single Judge to decide the matter afresh. The impugned judgment also observed that the learned Single Judge should decide whether the arbitrator had filed the award suo motu or at the instance of the award-holder in the light of the decision of this Court in the case of Patel Motibhai Naranbhai v. Dinubhai Motibhai Patel ((1996) 2 SCC 585) and other case-law.

4. In order to appreciate the grievance of the appellant-decree-holder in these appeals, it is necessary to look at relevant background facts. The appellant is said to have granted a short-term loan of Rs. 15 lakhs to the respondent on 9-1-1985. The contention of the appellant was that the loan was to be repaid within two months with 24 per cent interest on the principal amount. The respondent disputed the said claim of the appellant and contended that the loan amount was payable after two years and the interest rate was also not 24 per cent. This dispute was referred to the arbitration of a sole arbitrator who after hearing the parties, passed an award on 17-4-1985. It is the case of the appellant that as per the instalments granted in the award, the first instalment of Rs. 2 lakhs was paid by the respondent-judgment-debtor but thereafter it defaulted. It is pertinent to note that before the award was made the rule of the court, the first instalment as per the award was paid by the

respondent. It appears that the award was filed by the arbitrator in the Court on 23-3-1989 for making it a rule of the court. It is also to be noted that though the notice dated 6-4-1989 as to the filing of the award was served by the Court to the respondent-judgment-debtor on 10-4-1989, it did not file any objections to the award under Section 30 of the Arbitration Act, 1940. It also appears that the respondent did not choose to contest the proceedings. Ultimately, the Court passed an ex parte order making the award the rule of the court on 2-6-1989. Thereafter, when the award decree was not complied with by the respondent, execution proceedings were initiated by the appellant. In the execution proceedings, the respondent-judgment-debtor raised a contention by filing an application under Section 47 of the Code of Civil Procedure that the decree was not executable and was a nullity on the ground that the arbitrator had no power or jurisdiction to file the award suo motu in the Court after four years and hence the award decree could not have been passed as the award was filed beyond the prescribed period. The executing court after hearing the parties overruled the objections by holding that such a contention could not be raised in execution proceedings. As noted earlier, the respondent-judgment-debtor carried the matter in appeal and in appeal, the Division Bench of the High Court took the view that the question was required to be re-examined by the executing court and hence remanded the proceedings. That is how the appellant is before us on grant of special leave under Article 136 of the Constitution of India.

5. Shri Kapoor, learned Senior Counsel for the appellant, vehemently contended that the executing court had no jurisdiction to go behind the decree, that the question of limitation was a mixed question of law and fact and even assuming that it was wrongly decided by the Court passing the decree in terms of the award, such a contention would not make the decree a nullity or without jurisdiction and hence the remand order passed by the Division Bench of the High Court was clearly unsustainable and amounted to usurpation of jurisdiction which in execution proceedings, the Court had not got. Reliance was placed on judgments of this Court in support of this contention which we will refer to hereafter.

6. Shri Javali, learned Senior Counsel for the respondent-judgment-debtor, on the other hand, submitted that the award and decree in question appeared to have been obtained in a very curious and surreptitious manner by the appellant, that the dispute was raised within two months of advancement of loan and within a few days, the entire arbitration proceedings were over, that thereafter curiously enough, no attempt was made by the appellant to get the award made the rule of the court and years rolled by, and when after 4 years the arbitrator was made to file the award, that attempt would naturally be at the instance of the appellant, that such late filing of the award by the arbitrator could not have been made the subject-matter of proceedings before the Court for passing a decree in terms thereof and that the proceedings were clearly time-barred and hence the award decree was a nullity. It was also submitted that even after the award decree of 2-6-1989, the execution proceedings were also filed belatedly and that also indicated that the appellant had obtained a mock award and it was a result of the fraud committed by the appellant on the respondent as well as on the Court in snatching such an ex parte award decree. It was lastly submitted that looking to the facts and circumstances of this case, in exercise of its jurisdiction under Article 136 of the Constitution of India, this Court may not interfere with the order passed by the Division Bench of the High Court which is a remand order and which meets the ends of justice inasmuch as the correct legal position can be found out by the trial court after remand. In support of this contention, strong reliance was placed on a decision of this Court in the case of Patel Motibhai Naranbhai ((1996) 2 SCC 585) which, according to Shri Javali, learned Senior Counsel for the respondent was rightly pressed into service by the Division Bench of the High Court.

7. In view of the aforesaid rival contentions, the following points arise for our consideration :

(i) Whether the award decree dated 2-6-1989 was a nullity being barred by limitation.

(ii) Whether the executing court can go behind such a decree.

(iii) Whether any interference under Article 136 of the Constitution, is called for.

8. Having given our anxious consideration to the rival contentions, we find that none of the aforesaid points for determination can be sustained in favour of the respondent-judgment-debtor. The reasons are obvious.

Points (i) & (ii)

9. The award dated 17-4-1985 was filed in the Court on 23-3-1989 by the arbitrator and the Court proceeded to deal with the question whether the award should be made the rule of the court or not. Notice was issued by the Court to the respondent to show cause as to why this award should not be made the rule of the court. There is no dispute that this notice was served on the respondent. Despite such service of notice, for reasons best known to the respondent, it did not think it fit to contest the proceedings nor did it file any objection under Section 30 of the Arbitration Act, 1940. In the result, the Court passed an award decree on 2-6-1989 on account of the absence of any contest by the judgment-debtor. It is true that this award decree was sought to be executed years thereafter. But the said delay on the part of the decree-holder in executing the decree within the permissible period for limitation in execution of such decree cannot give any sustainable right to the judgment-debtor to challenge the execution proceedings on that ground. The contention of Shri Javali, learned Senior Counsel for the respondent that the award was a mock one and was not intended to be enforced cannot be sustained as that stage has gone for the respondent. In execution proceedings, such a contention requiring the executing court to go behind the decree cannot be sustained. The question whether the award decree was filed by the arbitrator on his own or not was a mixed question of law and fact. The Division Bench in the impugned judgment itself has noted that if the award was filed by the arbitrator suo motu, then the award decree cannot be said to be barred by limitation but if, on the other hand, the award was filed by the arbitrator at the instance of the appellant-decree-holder, then the question of limitation would arise. The aforesaid observation of the Division Bench itself indicates that this is a mixed question of law and fact. That was an issue to be raised before the award was made a rule of the court. But such a plea can never make the decree a nullity especially when the respondent for reasons best known to it did not think it fit to file objections under Section 30 of the Arbitration Act, 1940. It is well settled that the executing court cannot go behind the decree unless it is shown that it is passed by a court having inherent lack of jurisdiction, which would make it a nullity. In the case of Itryavira Mathai v. Varkey Varkey (AIR 1964 SC 907 : (1964) 1 SCR 495) a Bench of four learned Judges of this Court speaking through Mudholkar, J. observed that when the question of limitation was not raised before the trial court or before the High Court, it could not be raised for the first time before this Court even in the hierarchy of proceedings arising from the suit when such question of limitation raised before the Court was not a pure question of law but was a mixed question of law and fact. In the case of Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman ((1970) 1 SCC 670 : (1971) 1 SCR 66) J. C. Shah, J. speaking for a three-Judge Bench of this Court made the following pertinent observation in connection with the jurisdiction of the executing court, when called upon to execute the decree and on the question as to under what circumstances the executing court can go behind the decree sought to be executed. The observation at SCR p. 68 of the Report deserves to be extracted in extenso : (SCC pp. 672-73, paras 6-7)

"6. A court executing a decree cannot go behind the decree : between the parties or

> their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.
>
> 7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, 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 : where the objection as to the 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. In Jnanendra Mohan Bhaduri v. Rabindra Nath Chakravarti ((1932) 60 IA 71 : AIR 1933 PC 61) the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction."

10. The aforesaid decision of this Court squarely applies to the facts of the present case. This is not a case in which the award decree on the face of it was shown to be without jurisdiction. Even if the decree was passed beyond the period of limitation, it would be an error of law or at the highest, a wrong decision which can be corrected in appellate proceedings and not by the executing court which was bound by such decree. It is not the case of the respondent that the Court which passed the decree was lacking inherent jurisdiction to pass such a decree. This becomes all the more so when the respondent did not think it fit to file objection against the award which was sought to be made the rule of the court.

11. The decision of this Court on which the Division Bench in the impugned judgment relied upon cannot be of any assistance to Shri Javali, learned Senior Counsel for the respondent-judgment-debtor. In the case of Patel Motibhai Naranbhai ((1932) 60 IA 71 : AIR 1933 PC 61) this Court was concerned with the award decree which itself was sought to be challenged in appeal before this Court in the hierarchy of proceedings meaning thereby that the legality of the award decree itself was on the anvil of scrutiny before this Court. In the facts of that case, it was found that the award was passed by the arbitrator on 26-2-1986. It was sought to be made the rule of the court by the arbitrator's filing the award in the Court 6 years thereafter in 1992 and that too at the instance of one of the parties to the award in whose favour the award was passed. On these peculiar facts of the case, it was held as under : (SCC p. 588, para 9)

> "9. Under sub-section (2) of Section 14, a duty is cast upon the arbitrator to file the award or cause the award to be filed in the court at the request of the party to the arbitration agreement or if so directed by the court. There is no provision which requires the arbitrator to apply to the court for filing of the award and pass a decree in terms of the award. An application for filing the award in court has to be made

within thirty days from the date of service of the notice of making of the award under Article 119 of the Limitation Act. Even if it is held that Article 119 will apply only to an application made by a party and not by the arbitrator, Article 137 will come in the way of the arbitrator's making any application beyond the period of three years from the date of making of the award."

12. It was also observed that a party who is to make application under Section 14(2) of the Arbitration Act would indirectly achieve the same from the court by getting it filed through the arbitrator. In view of this fact situation, this Court allowed the appeal and set aside the award decree. It becomes clear that in the aforesaid decision, the Court was not concerned with the present fact situation where the award decree which was allegedly passed after expiry of limitation was sought to be challenged in collateral execution proceedings if the decree had become final. If the present proceedings had arisen against the award decree, all these questions would have survived for consideration. But in the present case, the Award decree has become final and that too when the respondent-judgment-debtor did not think it fit to contest the proceedings and did not contend that no decree could be passed. He cannot now, in the execution proceedings, contend that the decree should be ignored as being a nullity. The Division Bench, with respect, failed to appreciate the correct scope and ambit of the ratio of the decision in the case of Patel Motibhai Naranbhai ((1996) 2 SCC 585). Consequently, the impugned judgment remanding the proceedings for consideration by the executing court in the light of the aforesaid decision of this Court cannot be sustained.

Point (iii)

13. Then remains the question whether this Court should interfere with the impugned judgment under Article 136 of the Constitution of India. Learned Senior Counsel for the respondent-judgment-debtor, Shri Javali vehemently contended that everything from top to bottom was a mock fight and that the alleged dispute arose between the parties within two months of the advancement of the loan and arbitration proceedings were initiated. They were also disposed of in a couple of days and thereafter up to four years, no attempt was made by the party in whose favour the award was passed to get the award made the rule of the court and that the respondent came to know of the award decree only when the warrant of arrest was issued in the execution proceedings. It is difficult to appreciate this contention. On the facts of this case, it clearly emerges that the judgment-debtor had taken a loan of Rs. 15 lakhs from the appellant on 9-1-1985 as clearly given in writing by the partner of the respondent-judgment-debtor. This loan was supported by a promissory note. It was the case of the appellant that this loan was repayable within two months as it was a short-term loan and was advanced at the rate of 2 per cent per month meaning thereby 24 per cent per year. As the respondent raised a dispute regarding the quantum of interest and the time for repayment of loan which, according to it, would start after two years, the dispute was referred to the sole arbitration of an advocate of standing at Calcutta. It is not in dispute between the parties that in the proceedings before the arbitrator, the respondent's partner appeared and after hearing him, the award was passed. The award in question gave instalments of Rs. 2 lakhs each and that is how the amount was made payable within two years from 15-7-1985 to 15-4-1987. The first instalment of Rs. 2 lakhs was made payable on or before 15-7-1985 with interest at the rate of 2 per cent per mensem till payment. The second instalment of Rs. 2 lakhs was made payable on or before 15-10-1985 with interest as aforesaid till payment and similarly other instalments of Rs. 2 lakhs each were granted. It is interesting to note that on 17-10-1985, the partners of the respondent-firm addressed a letter to the appellant admitting that they had undertaken to repay the instalment due on 15-10-1985 and interest from July to October 1985 by 15-11-1985 and prayed for accommodation for the time being. This clearly indicated that the grant of second instalment of Rs. 2 lakhs which was made payable by the

award on or before 15-10-1985 with interest from the date of first instalment to the date of second instalment was within the knowledge of the partners of the respondent-firm even as early as on 17-10-1985, otherwise they would never have got an idea to pay the instalment due on 15-10-1985. This shows that they were aware of the instalments granted by the sole arbitrator, almost by the same time the award was passed in the year 1985 itself. If that is so, it must be held to be a mere excuse on the part of the respondent when it was contended in the execution proceedings that the respondent's partners had no idea or knowledge about the award or award decree. Under these circumstances, it is difficult to appreciate how the arbitration proceedings were mock proceedings or that any fraud was committed on the respondent or the Court when the award decree came to be passed. These are all afterthoughts and they clearly indicate that the respondent having received the amount of Rs. 15 lakhs under a promissory note as early as in 1985, did not think it fit to pay up the decretal dues as per the award decree and was only interested in delaying the proceedings. Consequently, this is not a case in which it can be pleaded by Shri Javali, learned Senior Counsel for the respondent, that fraud was committed on the respondent by the decree-holder or that there was any equity in favour of the judgment-debtor in not complying with the terms of the award decree or that the execution of the said award decree would result in injustice to the respondent so as to persuade us not to interfere under Article 136 of the Constitution of India with the impugned order of remand. In the fact situation of this case, it must be held that there is no equity in favour of the respondent which would require us not to interfere with these proceedings when under law and also in equity, the appellant-decree-holder is entitled to get the fruits of his award decree especially when despite the award granting instalments and interest at 24 per cent per annum, the award decree grants interest only at 8% per annum from the date of the decree till realisation.

14. In the result, these appeals are allowed, the impugned judgment and order dated 10-2-1998 of the Division Bench of the High Court are set aside and the decision rendered by the learned Single Judge of the High Court dated 23-12-1997 is confirmed. In the circumstances of the case, there would be no order as to costs.