BOMBAY HIGH COURT

Hastimal Dalichand Bora

Vs.

Hiralal Motichand Mutha

A. F. O. No. 23 of 1951 and C. R. A. No. 986 of 1950, Ahmednagar in Special Suit No. 60 of 1948

(Gajendragadkar and Chainani, JJ.)

21.07.1953

JUDGMENT

Gajendragadkar, J.

1. This appeal from order and revisional application have been filed by the defendants against orders passed by the learned Civil Judge, Senior Division, Ahmednagar, in suit No. 60 of 1948. It appears that there was an agreement between the plaintiff and the defendants in regard to the transfer of house No. 2665 at Ahmednagar. A dispute arose between the parties as to the nature of this agreement. The plaintiff alleged that it was an agreement to sell the property, whereas according to the defendants they had merely agreed to mortgage the property. This dispute was referred by the parties to arbitration on January 25, 1948. The arbitrator then made his award. He was of the opinion that the agreement between the parties was one of mortgage and not of sale and on that footing the award purports to direct defendants Nos. 1 to 3 to pay the plaintiff Rs. 8,500 and interest at the rate mentioned in the award. This amount was made payable by six monthly installments of Rs. 1,000 each. The award then goes on to direct that if defendants Nos. 1 to 3 did not pay the amount to the plaintiff as directed, the plaintiff should proceed to recover that amount by sale of the property mortgaged through Court. If the sale-proceeds were not enough to pay the plaintiff the amount due to him, the plaintiff should proceed to recover the balance from the other properties of defendants Nos. 1 to 3. The award also provides for a default clause, but it is unnecessary to refer to this clause in detail. After the award was thus made, it was filed in Court and notice was served to the parties under Section 14(2) of the Arbitration Act. On June 15, 1949, the defendants were served. On October 27, 1949, they filed their written statement, in which they raised several contentions. The principal contention with which we are concerned in the present appeal was that the arbitrator had no jurisdiction to pass a virtual decree on the mortgage as he has purported to do. The defendants' argument was that the parties had referred to the arbitrator the decision of the dispute as to whether the transfer of the defendants'

properties should take the form of a sale or mortgage and nothing more :
It was wholly outside his jurisdiction to direct not only that the mortgage deed should be executed by the defendants in favor of the plaintiff but that in certain contingencies the plainti ff would execute the award itself and recover the amount by sale of the mortgaged properties. The defendants, therefore, claimed that the award should be set aside. The learned Judge was not impressed with this plea; he held that the reference made to the arbitrator included the power to pass an award on a mortgage, if the arbitrator held that the agreement between the parties was to have a deed of mortgage by the defendants for the amount received by them; so he directed that a decree in terms of the award should be drawn. In the course of his judgment the learned Judge has observed that he saw no reason to set aside the award, though the final order merely directed that the award is ordered to be filed and that the decree in terms of the award should be drawn up. Treating this judgment as amounting to an order refusing to set aside the award, an appeal from order has been preferred by the defendants. In the alternative, against the decree which was subsequently drawn in terms of the award a revisional application has been preferred by them. That, in short, is the genesis of the two matters which have come before us for decision today.

2. It has come to our notice in several cases that though the Arbitration Act was passed in 1940. Courts below do not seem to take judicial notice of the change which has been effected ay the passing of this Act. Very often when awards are filed, proceedings are taken pursuant thereto as though the provisions of Schedule II to the Civil Procedure Code were still in force. In the present case the learned Judge has virtually adopted the same procedure. Otherwise, the first question to which he would have addressed himself would have been as to whether the defendants were entitled to raise the contention that the award should be set aside in view of the fact that they had not taken any proceedings by way of an application as they were bound to do under Section 33 of the Arbitration Act within the period prescribed by Article 158 of the Indian Limitation Act. It is common ground that the written statement has been filed by the defendants in the present proceedings beyond the limitation prescribed by Article 158, and it is conceded by Mr. Kotwal that Section 5 of the Limitation Act has not been made applicable and the Court has no jurisdiction to condone delay which a party may make in filing an application under Section 33. In other words, even if the Court was inclined to treat the written statement of the defendants as an application made under Section 33 of the Act, the difficulty created by the delay would be insuperable and the Court would have no jurisdiction to consider the contentions raised in such an application when it has been filed beyond time; and yet, without considering this point, the learned Judge has proceeded to deal with the merits of the contentions, though it is true that in the end he has rejected them.

3. That is why Mr. Tarkunde for the respondents has raised a preliminary objection that the appeal from order preferred by the defendants is incompetent. Mr. Tarkunde says that under Section 39 of the Arbitration Act, no doubt an appeal lies against an order refusing to set aside an award. But in the present proceedings it would be impossible to hold that any order refusing to set aside an award as such had been made, because no application had been made before the

learned Judge for that purpose under Section 33. On the other hand, Mr. Kotwal argues that even if the defendants had made no application to set aside the award, it was competent to the Court to consider whether any circumstance for which the award should be set aside was present in the case of this award, and if the Court found that there was no such circumstance and, therefore, refused to set aside the award, the order of the Court would amount to an order refusing to set aside an award and it is appealable under Section 39. In dealing with these contentions we must first decide if the Court has jurisdiction to consider 'suo motu' the question as to whether a decree should be passed in terms of the award or not.

4. The scheme of the Act relevant for the purpose of this question is to be found in Sections 16, 17, 30 and Section 3 of the Act. Section 16 deals with the power of the Court to remit an award. Sub-Section (1) of this section provides that the Court may from time to time remit the award or any matter referred to arbitration to the arbitrators for reconsideration where the conditions mentioned in sub-Clause (a), (b) or (c) of the said sub-section are satisfied. It would be noticed that this subsection does not in terms require that an application must be made, to the Court to enable it to remit the award. Section 17 provides that where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow. Looking at the words of this section, it is fairly clear that it is open to the Court to see whether there is any cause to remit or set aside the award apart from the application which a party may make for the purpose of getting the award remitted or set aside. The section clearly lays down that if an application is made, it has to be decided on the merits, and if the application is rejected, a judgment is to be pronounced in accordance with the award. If the application is allowed, the award would naturally be remitted or set aside, in which case other appropriate orders would have to be passed. While making this provision the section does seem to contemplate that the Court may proceed to consider the question whether the award should be remitted or set aside even though an application may not have been made before it by any party to the award. In such a case if the Court; 'suo motu' sees any cause to remit or set aside the award, the Court may make that order. If the Court sees no cause to remit or set aside the award, even so, the Court must wait until the period for making an application under Section 33 has expired, and, if an application is made, until the application is refused. It would, therefore, be clear that on a fair and reasonable construction of the words used in Section 17, the Court has jurisdiction to consider the question of remitting or setting aside the award 'suo motu'.

5. Section 30 lays, down that "An award shall not be set aside except on one or more of the following grounds" and three grounds are mentioned in this section. The provision contained in, this section is put in the negative form; but even so it would not be correct to assume that the jurisdiction conferred under this section can be invoked only at the instance of a patty making an application under Section 33. It would be legitimate to infer from the wording of this section that

even if an application is not made by any of the parties for that purpose, the Court may set aside an award if it is satisfied 'suo motu' that any of the grounds mentioned in Section 30 vitiates the award.

6. Section 33 deals with the applications to be made by the parties. Before we consider the provisions of this section, it may be relevant to point out that Section 32 enacts a bar to suits contesting arbitration agreements or awards. In other words, all questions with regard to the existence or validity of an arbitration agreement or an award must be determined by the Court in which the award under the agreement has been or may be filed under the provisions of the Arbitration Act and the decision of the Court in these proceedings is final and cannot be challenged by a separate suit. This marks an important departure from the provisions relating to awards contained in Schedule II of the Code of Civil Procedure, 1908. Section 33, therefore, requires parties to make applications if they wish to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined, and it lays down the procedure for dealing with applications which are made under this section. Article 153 of the Limitation Act prescribes a limitation of thirty days for the purpose of applications made for remitting or setting aside an award. It is perfectly true that if a party to an award wants to challenge the validity of the award on any ground and desires that the award should either be remitted or set aside, he has to make an application in that behalf under Section 33 within the time prescribed by Article 158. It may be that if an application is made by a party raising some contentions against the award, the effect of which is not to have the award either remitted or set aside, the provisions of Article 158 may perhaps not apply to such an application. In the present appeal we are not called upon to consider that point. It is admitted before us that the contentions which the defendants sought to raise before the learned trial Judge fell within the mischief of Article 153. But from the fact that a party is precluded from challenging the validity of the award on the ground that he has not made a proper application within the limitation prescribed by Article 158, it would not follow that the Court cannot; 'suo motu' consider the same question in a proper case. If the award directs a party to do an act which is prohibited by law or if it is otherwise patently illegal or void, we think it would be open to the Court to consider this patent defect in the award 'suo motu', and when the Court acts 'suo motu', no question of limitation prescribed by Article 158 can arise. In our opinion, the words used both in Section 17 and Section 30 are wide enough to include the jurisdiction of the Court to deal with matters covered by those sections 'suo motu'. It would appear that under the English law the Court has a similar power to set aside an award, apart from the motion made by the parties in that behalf. For Russell, while dealing with the power of the Court to remit or set aside the award, observes :

> "The Court has further an inherent power to set aside an award which is bad on its face : either as involving an apparent error in fact or law, or as not complying with the requirements of finality and certainty. The inherent power to set aside also extends to an award which exceeds the arbitrator's jurisdiction, and possibly to cases where fresh evidence has become available." (Russell on Arbitration, 15th edn., p. 263).

7. Our attention has, however, been drawn to the decision of Mr. Justice Blagden in - *'Umadutt Nemani v. Chandrao[1]',* In this case Mr. Justice Blagden held that where a party has debarred himself by lapse of time from applying to the Court to set aside an award, he cannot, on an application made by the other party for judgment in terms of the award, take the plea that the award should be set aside on the grounds mentioned in Section 17 of the Indian Arbitration Act. In this particular case the party impeaching the validity of the award made several allegations against the genuineness of the award itself; and Mr. Justice Blagden held that it was not open to him to take such pleas, because in deciding the merits of the said pleas it would be necessary to take evidence and that course the party in question was not entitled to ask the Court to adopt by reason of the fact that he had not taken the remedy which was available to him within time. In the course of his judgment Mr. Justice Blagden has pointed out that in the scheme which has been adopted

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under the Arbitration Act, speed appears to be of the essence, and so if within the narrow period prescribed by Article 158 a party does not make an application to the Court, then he will not be entitled to agitate the matter on grounds covered by Section 33 any longer. With respect, we agree with this part of the learned Judge's conclusions. In the course of his judgment Mr. Justice Blagden has observed that (p. 95) :

> ".....If the Court could see, on the face of the award, that it is obviously and totally invalid, it would, of its own motion, set it aside under Section 30 rather than remit it under Section 16."

And he cited the example of "....an award reciting the fact of a dacoity and a reference to the arbitrators, the arbitrators then taking upon themselves the burden of deciding the matter and making a partition of the spoils between the dacoits;....." (p. 95).
The learned Judge added (ibid.) :

> "..... no doubt, in such a case an award might be set aside, and direct action taken against the arbitrators."

At the end of his judgment, however, when the learned Judge considered the effect of the provisions of Section 17, it appears that he was impressed by the argument that the words used in this section do seem to confer upon the Court jurisdiction to act 'suo motu'; but he rejected the argument on the ground that the said words must be treated as surplus age. He felt that if this power was recognized in the Court, Article 153 of the Limitation Act would be rendered nugatory. With respect, we are unable to see how Article 153 would be rendered nugatory if it is held that the Court has inherent jurisdiction to act under Section 17. Article 158 deals with applications made by parties, and if parties wish to be heard in support of their contention that the award is invalid, they have to apply within the period prescribed by Article 158. The fact that the limitation prescribed by the said article would not affect the Court's jurisdiction does not in our

opinion make the said article nugatory at all. Again with respect, it is somewhat difficult to reconcile the view expressed by Mr. Justice Blagden about Section 17 with the conclusion that he has recorded in respect of Sections 16 and 30 in the earlier part of his judgment.

8. We are disposed to think that the jurisdiction which is conferred on the Court under Section 30 to act 'suo motu' is similar to that conferred on the Court under Section 17. It is obvious that Courts would exercise this jurisdiction rarely and only where the award may be patently illegal and void. It the award directs a party to do what is prohibited by law or, as the illustration taken by Mr. Justice Blagden suggests, if the award proceeds to divide the booty obtained by the commission of an offence, the Court can exercise its jurisdiction though no application may have been made by either party to set aside the offending award. In the very nature of things, such awards are not likely to be made and so occasions to use this jurisdiction may arise rarely if at all. But that is not to say that the Court is powerless to set aside awards even though they are illegal and void in the sense that they direct the commission of an act which is prohibited by law.

9. But even though the Court may, in a proper case, exercise its jurisdiction under Section 17 or Section 30 'suo motu' that does not assist Mr. Kotwal in the present appeal in repelling the objection that no appeal from order lies in the present case. Unfortunately, the learned Judge has entertained these proceedings and has raised issues on the pleas made by the defendants without regard to the provisions of the Arbitration Act; and it may be pointed out in fairness to Mr. Kotwal that on one issue he has dealt with Mr. Kotwal's contentions and ended by saying that he saw no reason to set aside the award. Indeed, it is this part of the observations made by the learned Judge which Mr. Kotwal treats as a refusal to set aside the award. We do not think that we would be justified in treating the judgment under appeal as amounting to a refusal to set aside the award. In substance and in effect what the learned Judge must be deemed to have done is that he saw no reason to set aside the award; and, in our opinion, if the learned Judge had properly considered the question in the light of the provisions of Section 39 of the Indian Arbitration Act and if he had come to the conclusion that there was no reason to set aside the award, he would merely have said "Decree to follow in terms of the award." That is how the present judgment must, we think, be construed. The fact that the present judgment has been delivered by the learned Judge as though he was dealing with a matter under the provisions of Schedule II of the Code of Civil Procedure would not justify Mr. Kotwal's contention that the present order should be taken as amounting to an order refusing to set aside the award within the meaning of Section 39(1)(vi) of the Indian Arbitration Act. It seems to us clear that if it was the inherent jurisdiction of the Court under Section 17 which was being invoked, then his decision can mean no more than this, that there was no ground made out and the decree must follow in terms of the award. Prima facie, an order refusing to set aside an award can be made on an application made by the party for that purpose. The Court is given jurisdiction to set aside the award 'suo motu'. If the Court does not exercise that jurisdiction, then the award can be set aside only if an application is made by a party for that purpose, and it is in that context that an order refusing to set aside an award which is appealable can be passed. Therefore, in our opinion, the preliminary objection

raised by Mr. Tarkunde that the appeal from order is incompetent must be upheld. The appeal accordingly fails and is dismissed on the ground that it is incompetent. Appellants to pay the costs.

10. The position with regard to the revisional application filed by Mr. Kotwal is no better. Mr. Kotwal concedes, as he must, that under the provisions of Section 17 of the Arbitration Act an appeal lies against a decree which has been drawn in accordance with the judgment pronounced on the award only on the grounds that the decree is in excess of or is not otherwise in accordance with the award. No other ground can legitimately be urged in an appeal against a decree which has been passed under Section 17. Mr. Kotwal, however, contends that though an appeal may have been provided for under this Act only on two specific grounds and the jurisdiction of the appellate Court may thereby have been limited, our revisional jurisdiction remains unimpaired and it would be open to us to consider questions of jurisdiction or questions of material irregularity on which he may rely. We find it very difficult to accede to this argument. If the Legislature has provided that once a decree is drawn in terms of the award the decree can be challenged before the appellate Court only on two specified grounds, it seems to us illogical to hold that the jurisdiction of the; revisional Court should be wider than the jurisdiction of the appellate Court. But, apart from that, even if it was open to us to entertain a plea of jurisdiction in a revisional application against such a decree, we do not see how a plea of jurisdiction can properly be raised under Section 115 in the present revisional application, because the plea is no more than this, that the arbitrator has exceeded his jurisdiction in making the award which he has made. This point was specifically raised before the learned Judge and he has held that the arbitrator has not exceeded his jurisdiction. Clearly, the decision of the learned Judge that the arbitrator has not exceeded his jurisdiction cannot itself import any question about the jurisdiction of the learned Judge himself in the present revisional application. Assuming in Mr. Kotwal's favour that the view of the learned Judge that the arbitrator acted within jurisdiction is wholly wrong, that would not be enough to justify Mr. Kotwal's argument that the learned Judge's order is without jurisdiction, and calls for interference at our hands under Section 115. The learned Judge had jurisdiction to consider the point raised before him; indeed it was his duty to decide it; and he has decided it in the light of the terms of reference agreed upon between the parties. All that Mr. Kotwal can say at the highest is that the learned Judge has misconstrued the said terms; but that cannot obviously import any question of jurisdiction. Therefore, we must hold that the revisional application also is incompetent and the preliminary objection raised in that behalf must be upheld.

11. Rule is accordingly discharged with costs.
Rule discharged.