

RAJASTHAN HIGH COURT

Firm Gulzarimal Gheesalal

Vs.

Firm Rameshchandra Radhyeshyam

Second Appeal No. 76 of 1954

(I.N. Modi, J.)

17.02.1959

JUDGMENT

I.N. Modi, J

1. This is an appeal by the defendant firm Gulzarimal Gheesalal against the judgment and decree of the Civil Judge, Kishangarh, in a suit for recovery of damages.

2. The suit out of which this appeal arises was brought by the plaintiff firm Ramchandra Radheshyam on the allegations that it did business as commission agent at Madanganj, and that the defendant was a joint Hindu family firm of which Gheesalal was the manager, and that the said firm did business in the name of Gulzarimal Gheesalal at Nasirabad. It is admitted that there were dealings between these two firms. It is unnecessary to give particulars of the dealings between the parties in any detail, because the only dispute between them, so far as the present litigation is concerned, centers round the transaction relating to purchase and sale of 200 maunds of Gur. The case of the plaintiff was that it had purchased for the defendant 200 maunds of Gur on 29-1-1949, for a sum of Rs. 3350/- at the rate of Rs. 16/12/-per maund and sold the same for the defendant later as a result of which it suffered a loss of Rs. 16,000/-.

Certain other incidental charges were also claimed amounting to Rs. 38/10/6 and allowance was made for the money which the defendant firm had to its credit with the plaintiff, and thus the plaintiff filed the present suit for Rs. 1083/14/3. The plaintiff also mentioned in paragraph four of the plaint that both parties had referred their dispute with respect to the transaction in question to certain arbitrators and that the said arbitrators had decided by their award (Ex. 1) dated 11-7-1951, that the defendant

should settle this transaction at the rate of Rs. 16/- instead of Rs. 16/12/- as claimed by the plaintiff, or, in other words, the transaction was decided to be settled by paying Rs. 150/- less than what the plaintiff had claimed.

The plaintiff further mentioned in paragraph 11 of the plaint that it had called upon the defendant to comply with the award of the Panchas but the latter replied that the Panchas had neither given any notice to it to appear before them, nor had they given it any opportunity to lead evidence, and, consequently, the said award was not acceptable to it. The plaintiff, therefore, claimed a decree for Rs. 1083/14/3 on the basis of the original dealing between the parties, and, alternatively, it also claimed a decree in accordance with the award of the Panchas referred to above.

3. The defendant resisted the suit. It denied that the plaintiff had ever purchased the 200 maunds of Gur for it or at its instance. The defendant admitted that the dispute between the parties had been referred to arbitration but it was contended that the Panchas had misconduct themselves, and, therefore, the award given by them was not binding on it. Certain other pleas were also raised; but it is unnecessary to make any particular mention of them for the purposes of the present appeal.

4. The trial court found that the award was illegal and that the suit was maintainable on the original cause of action, and it gave a decree for Rs. 162/12/- in favor of the plaintiff.

5. Both parties went in appeal from, the aforesaid decision to the Civil Judge, Kishangarh. The learned Civil Judge held that the transaction in question relating to the sale and purchase of 200 maunds of Gur had been proved. Further, although the learned Judge did not give any finding as regards the validity or otherwise of the award, he held that the suit of the plaintiff should be decreed at the rate of Rs. 16/- per maund, and in this view of the matter, he gave a decree to the plaintiff for Rs. 933/14/3. The defendant has now come up in appeal to this Court.

6. It is strenuously contended before me by learned counsel for the defendant that the plaintiff's suit is not maintainable inasmuch as it is virtually a suit to enforce an award. Learned counsel relied on Sections 32 and 33 of the Indian Arbitration Act, 1940 (Act No. X of 1940), which came into force in this State sometime in January 1950.

7. It may be pointed out at the very outset that this ground of defense had not been

taken up by the defendant at any earlier stage of the suit. This ground was not taken in the written statement, nor was it made the subject-matter of any issue, nor has it been discussed in the judgments of the courts below. The question, therefore arises whether this ground should be allowed to be raised in this Court in the circumstances pointed out above.

Having given my very careful and anxious consideration to this aspect of the case, I have come to the conclusion that the ground sought to be raised is, in the first place, a matter of pure law, I and, secondly, that it goes to the very root of the case. What I desire to say is that if the contention put forward by learned counsel for the defendant turns out to be well-founded in law, the inevitable conclusion must be that the court below had no jurisdiction to entertain the suit.

In this view of the matter, I am of opinion that opportunity to the defendant to raise this ground should not be refused, and I have, therefore, permitted this ground to be raised in this Court for the first time.

8. I may point out in this connection that almost a similar situation arose in *Narmadabai v. Natverlal*,¹ and Chagla, C.J., who delivered the judgment of the court in that case made the following observations which may usefully be quoted here :

"Whatever the parties may understand, whatever the parties may agree to, if the Court has no jurisdiction, the absence of jurisdiction cannot be made good by any understanding between the parties. Therefore, if we are right in the view we take as to the interpretation of Section 32, then it is clear that Shah, J., with respect, had no jurisdiction to try a suit which in substance and in effect was a suit to enforce an award. The result, therefore, is that the suit must fail on the preliminary ground that the suit is not maintainable, the suit being one to enforce an award duly given by arbitrators appointed by the parties and also because the award deals with the very disputes which are the subject-matter of the suit."

(These observations fully apply to the case in hand, and with respect I adopt them.)

9. Now, two questions seem to me to arise in this appeal. The first question is whether a suit on the original cause of action can lie where the plaintiff comes forward with a case that the very dispute between the parties had been referred to an arbitration and that an award was given. The second question is whether a suit to enforce an award is

competent apart from the provisions of the Arbitration Act. I take up the first question to start with.

10. It seems to me that even before the Arbitration Act of 1940 was brought into force in this country, the general consensus of judicial opinion was that a valid award operates to merge and extinguish all claims embraced therein and once such an award has been made, the submission and the award furnish the only basis by which the rights of the parties can be determined and they constitute a bar to any independent action on the original cause of action.

11. In *Krishna Panda v. Balaram Panda*,² the facts were that certain disputes arose in a joint Hindu family, and the parties submitted the question of partition to arbitrators who passed an award. Both parties objected to the award, and it was never carried into effect. It was held that the award was equivalent to a final judgment and that to give effect to it, the subsequent consent or approval of neither party was required, and that in order that parties should be remitted to their previous rights, there must be positive evidence that both parties agreed that the former state of things should be restored. On this view, the suit for partition was thrown out.

12. Again in *Bhajahari Saha Banikya v. Behary Lal Basak*³ it was held that if an award is valid, it is operative even though neither party has sought to enforce it by regular suit or by the summary procedure, and it was further held that this conclusion was based upon the elementary principle that, as between the parties and their privies, an award was entitled to that respect, which was due to the judgment of a Court of last resort and was conclusive upon the merits of the controversy submitted, unless possibly the parties had intended that the award shall not be final and conclusive. Putting the matter in another way, the learned Judge observed that a valid award operates to merge and extinguish all claims embraced in the submission, and after it had been made, the submission and award furnished the only basis by which the rights of the parties could be determined, and that independent action on the original demand was barred.

13. The same view appears to have been almost unanimously taken by the High Courts in India after the Arbitration Act of 1940 came into force. Reference may be made in this connection to *Natlmlal v. Behariki*,⁴ and *Narmadfibai v. Natverlal*⁵ which has already been referred to above.

14. A discordant note seems to have been struck in *Sia Kishori v. Bhairvi Nandan*,⁶

Reuben, C.J., who delivered the judgment of the Court in this case held that in spite of the existence of an award, it was open to a party to bring a suit on his original title and that such a suit would not be barred by the mere existence of the award. In this connection, the learned Chief Justice posed the question whether a suit on the original title filed by a party to an award within the period limited by Article 178 of the Indian Limitation Act was maintainable. This question was answered by saying that it could be, and the reasoning on which the answer was based was that in such a case it would be open to the defendant to make an application to get the award filed in court and pending the disposal of that application he could ask for a stay of the suit, and thereafter as soon as the award was made a rule of the Court, it would be available to the defendant as a bar to the suit. With respect, I find it extremely difficult for me to accept this reasoning as correct. For, there is over-whelming authority for the proposition that once the subject-matter of a dispute between the parties has culminated in an award, the original cause of action is extinguished and becomes merged in the award. The existence of the award presents an effective bar or impediment in the way of an action on the original cause of action. I may also point out in this connection that if this were not the correct view, the fundamental object of the Legislature in enacting Section 32 and Section 33 of the Indian Arbitration Act of 1940 (to which I propose to refer in greater detail hereafter) would be rendered more or less completely illusory. For the reasons mentioned, I am, therefore, clearly of the opinion that the general rule is that whenever a dispute between the parties has become the subject-matter of a submission to arbitration and has resulted in an award and such an award is pleaded by the plaintiff it is not open to him to bring a suit on the original cause of action. I hold accordingly.

15. The next question is whether a suit lies to enforce an award, for the plaintiff in the present case has also molded his suit in an alternative form and has prayed for relief on that footing also.

16. This brings me to a consideration of Sections 32 and 33 of the Arbitration Act. These sections are in the following terms :

"32. Bar to suit contesting arbitration agreement or award.-

Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set 'aside

amended, modified or in any way affected otherwise than as provided in this Act.'

"33. Arbitration agreement or award to be contested by application.-

Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

17. Now before I deal with the import and effect of the sections quoted above, I wish briefly to refer to certain other sections of the Act. The Act deals with arbitration under two main heads : (1) arbitration without intervention of the Court and (2) arbitration with the intervention of the Court.

18. Now taking up the first category of arbitration, Section 4 provides that the parties to an arbitration agreement may agree that any reference there under shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or by his office. Section 5 then provides that the authority of an arbitrator so appointed shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement. The next important section to which reference may be made is Section 11 which provides that the court may on the application of any party to a reference, remove an arbitrator who fails to enter on the reference and to make an award with all reasonable dispatch. Section 12 then provides that in such a case, the Court may appoint an arbitrator, and the award made by such a person will be deemed as if it had been made by a person appointed in accordance with the arbitration agreement. Then comes Section 14 which lays down that where the arbitrators have made their award, they must sign it and must give a notice in writing thereof to the parties concerned. It also provides that the arbitrators, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the court, cause the award to be filed in court. Section 15 enacts that, in certain contingencies, the court may modify or correct an award. By Section 16 it is further provided that the court may remit the award to the arbitrator under certain circumstances. Then comes Section 17 which clearly lays down that

where the court sees no cause to remit the award for re-consideration or to set it aside the court shall, after giving time to the parties for making an application to set aside the award and the prescribed time has expired or after objections thereto have been refused, proceed to pronounce judgment in accordance with the award and pass a decree in conformity with the judgment. It is further provided in this section that no appeal shall be from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award. These provisions clearly show that the object of the Legislature is to lay down a comprehensive procedure to enable the parties to a dispute once they have decided to have such disputes resolved by a forum of their own choice to have their disputes decided by this method and a finality to such a decision has been given by the provisions referred to above in that no appeal can lie from a decree following upon such an award except on very limited grounds, namely, that either it is in excess of or not otherwise in accordance with the award.

19. Turning now to an arbitration with the intervention of the court, it may be pointed out that the Act contemplates two sub-divisions as to this class of arbitration : (1) where there is no suit pending and (2) where there is a suit pending. Section 20 deals with the former class of cases and Sections 21 to 25 deal with the class of arbitration falling under the remaining sub-division. It may be pointed out that the general scheme of the Act, appearing from the sections referred to in some detail above, is not in any way affected and the arbitration after certain, preliminaries which have been particularly prescribed to be taken in connection with these classes of arbitration is required to be proceeded with and is broadly speaking governed by the very provisions of the Act to some of which reference has already been made above.

20. I now turn to Sections 32 and 33 which have been set out above. Section 32 lays down in the first place that no suit shall lie on any ground whatsoever in order to decide upon the existence, effect or validity of an arbitration, agreement or award. In the second place, it also lays down that no arbitration agreement or award can be set aside or amended, modified or in any way affected otherwise than as provided in the Arbitration Act. The opening phrase "notwithstanding any law for the time being in force" requires to be carefully noted. From the language of the section it is manifest beyond any manner of doubt that not only a suit which seeks a decision upon the existence, effect or validity of an arbitration agreement or an award, is barred, but even a defence, which has such an effect is also barred, and the only remedy of a person, seeking to enforce an award or to have a decision, as to its existence or

validity or effect is to proceed by way of an application under the next following Section 33.

21. Before proceeding further, it may be pointed out that as the law stood previous to the enforcement of the Arbitration Act of 1940, it was generally held that a person could either seek to enforce the award by means of an application under Schedule II of the Code of Civil Procedure or he could bring a suit. Reference may be made in this connection to the decision of Mookerjee, J., in ILR 33 Cal 881. The Act of 1940 has however clearly changed the position. In the first place, by enacting Section 32, it has put a ban on the filing of a suit or the raising of a defense in a suit by which the existence, effect or validity of an arbitration agreement or award is sought to be determined. Secondly, the Act provides that any party to an, arbitration agreement or his privy thereto if he challenges the existence or validity of the arbitration agreement or award or seeks to have their effect determined, must raise such questions by an application to the court having jurisdiction in the matter to which the reference relates and it is for such court to decide the question on affidavits, or where it deems just and expedient, it may hear other evidence also and then decide the questions raised before it.

22. That being the true effect of Sections 32 and 63, I have not the slightest hesitation in coming to the conclusion that, where an award is pleaded by the plaintiff, it is not open to him to file a suit to enforce the award, and his only remedy is to file an application under Section 33 of the Act and have the award enforced according to the procedure laid down in the Act itself.

23. The point which I wish to emphasize, even at the risk of repetition, is that the Arbitration Act of 1940 was intended to consolidate and amend the law in India so far as it related to arbitration matters, and the scheme of the Act unmistakably is to lay down a comprehensive and self contained procedure in matters relating to arbitration and at the same time provide a cheap and expeditious remedy for the enforcement of an award or for otherwise determining the true effect of an arbitration agreement or an award, by means of an application under the Act itself and not by way of a separate suit. In other words, the object of the Legislature clearly is to prevent the parties to an arbitration to agitate questions relating thereto in any manner other than that provided under the Act. See *Moolchand v. Rashid Jamshed Sons and Co.*,⁷ *Ramchander Singh v. Munshi Mian*,⁸ *Radha Kishen v. Gangaram*,⁹ *Kamal Singh v. Sekhar Chand*,¹⁰

Seethamma v. Annaprnamma,¹¹ and *Narmadabai v. Natverlal*,¹²

24. This disposes of the second question propounded above, and the conclusion at which I arrive is that where a plaintiff seeks to enforce an award, the only manner in which he can do it is by procedure laid down in Section 33 of the Arbitration Act and not by filing a suit, as the plaintiff has done in the present case.

25. The only decision in which a contrary view appears to have been taken is *Nanhelal Anandilal v. Singhm Gulabchand*,¹³ In this case a learned single Judge of the Nagpur High Court held that it would be open to any person interested in an award either to apply to the court that the award be filed in court or to sue for the enforcement of the award. The view taken by the learned Judge is clearly contrary to the plain language and effect of Sections 32 and 33 of the Act as discussed above, and with all respect, I am unable to accept it as correct.

26. It must follow from the discussion made above that the plaintiff having himself admitted in the present case that the dispute between the parties had been referred to an arbitration and had further resulted in an award could not have sued on the original cause of action and the only cause of action available to him thereafter was the award itself, and further the only lawful manner in which he could have sought to enforce the award was by way of an application. Under the Arbitration Act and not by a separate suit as he has done. To use the words of Chagla, C.J., in *Narmadabai's* case, AIR 1953 Bombay 386, quoted above, the courts below had no jurisdiction to try a suit which in substance and in effect was a suit to enforce an award. I would add that the objection of the defendant that the award was invalid and not binding on it does not and cannot make any difference to the conclusion at which I have arrived above. I say this for two reasons, the first being that the question of jurisdiction must on principle be decided on the allegations made in the plaint itself and not in the written statement, and secondly, even a defense like that can only be adjudicated upon a proceeding under the Act itself - by virtue of the language of Sections 32 and 33 of the Act and not otherwise. I would also point out that a suit like the present can only be permitted in plain violation of the provisions of the Arbitration Act of 1940 as applicable to this State and that cannot possibly be allowed.

27. I have no alternative under the circumstances but to dismiss the suit as non-maintainable in law.

28. The result is that I allow this appeal, set aside the judgment and decree of the Court below, and dismiss the plaintiff's suit. In all the circumstances of the case, I would, however, leave the parties to bear their own costs throughout.

Appeal allowed.

Cases Referred.

1. AIR 1953 Bom 386
2. ILR 9 Mad 290
3. ILR 33 Cal 881
4. AIR 1952 Nag 65
5. AIR 1953 Bom 386
6. AIR 1953 Pat 42
7. AIR 1946 Mad 346
8. AIR 1950 Pat 481
9. AIR 1951 Pun 121
10. AIR 1952 Cal 447
11. AIR 1953 Mad 544
12. AIR 1953 Bom 386
13. AIR 1944 Nag 24