

## RAJASTHAN HIGH COURT

Ram Chander

Vs.

Jamna Shankar

Civil Revn. No. 261 of 1955

(Jagat Narayan, J.)

23.09.1960

### ORDER

#### **Jagat Narayan, J.**

1. This is a revision application by the defendants in a suit which was referred to arbitration through the intervention of the court against an order of the Civil Judge Sojat pronouncing judgment and granting decree according to the award under section 17 of the Arbitration Act, 1940 on the ground that no notice as contemplated under section 14(2) was given and they were consequently deprived of an opportunity of filing objections against the award.

2. The application was contested on behalf of the plaintiffs. A number of preliminary objections were taken. But before going into them it is necessary to state the facts.

3. The plaintiffs are members of a joint Hindu family. The defendants also constitute a joint Hindu family, Jassulal defendant No. 1 being the father of Mangilal, Shyamlal and Ramchander defendants Nos. 2 to 4. It is not disputed now that Jassulal as manager of the family of the defendants borrowed money from time to time from the plaintiffs on the security of houses and ornaments. The case of the plaintiffs is that a settlement of accounts took place in Sm. 2002 and a sum of Rs.10,101/- was found due to the plaintiffs from the defendants. Some further sums were advanced thereafter and payments were also made.

It was claimed that a sum of Rs.4598/4/- remained due as principal and Rs.2561/1/- as interest for the recovery of which the present suit was instituted in the court of the Civil Judge Sojat on 24-10-49. Jassulal filed a written statement on behalf of himself

and his minor son Ramchander who was aged 13 years at that time. Another written statement was filed by Shyamlal. Later on Mangilal appeared. Both the parties referred the suit to arbitration through the court. The arbitrators filed their award on 23-12-54 in the court of the Civil Judge Sojat. The impugned judgment and decree were passed by the learned Civil Judge on the same date. The order-sheet of 23-12-54 runs as follows:

"Plaintiff No.3 present along with Shri Maya Shanker Vakil.

Defendant Shyamlal present. The arbitrators filed the award today. The parties present in court have no objection to make against the award. A decree is accordingly passed in favor of the plaintiffs against the defendants in accordance with the award."

4. On 4-3-55 two applications were filed - one on behalf of Mangilal and Shyamlal and another on behalf of Ramchander - in which it was alleged that no notice of the filing of the award was served on them; that they had no opportunity of filing objections against it, and that the decree passed on the basis of the award was without jurisdiction and praying that it may be set aside. Ramchander's application purported to be under Order 9 Rule 13 and section 151.

5. The applications were opposed on behalf of the plaintiffs. The learned Civil Judge rejected them on 19-10-55 on the ground that the decree could not be set aside on an application under Order 9 Rule 13 and that the proper remedy of the defendants was to go to the High Court in revision. The present revision application was then filed on 11-11-55 against the judgment and decree which the learned Civil Judge passed on 23-12-54 on the basis of the award.

6. Shyamlal has alleged in the revision application that he was not present in court on 23-12-54. In support of the allegation it is urged that his signatures do not appear on the order-sheet of that date. Order-sheets are not invariably signed by all the parties present in court on a particular day. The order-sheet dated 23-12-54 shows that it was carefully scrutinised by the presiding officer before he signed it. At first it was written in the order-sheet that all the defendants were present along with their Vakil Shri Karan Raj. This was scored out and initiated by the presiding officer and it was recorded that only Shyamlal defendant was present. I accordingly hold that Shyamlal was present on 23-12-54 in court when the award was filed and that he told the presiding

officer that he did not want to make any objection against it.

7. So far as Mangilal and Ramchander are concerned they were neither present personally nor through counsel on 23-12-54 and it cannot be said that notice under section 14(2) was given to them.

8. The preliminary objections taken on behalf of the plaintiffs are as follows :-

(1) that the order dated 23-12-54 passing judgment and decree on the award without giving an opportunity to the defendants to file objections against it amounted to a refusal to set aside the award and an appeal lay against it under section 39(1)(iv) of the Arbitration Act. No revision application is therefore competent in view of the ruling of this Court in *Swarup Narain v. Gopinath*,<sup>1</sup>

(2) that the decree purporting to have been passed under section 17 was not a legal decree and an appeal lay against it. A revision application was consequently not competent;

(3) that an application lay under Order 9 Rule 13 for setting aside the ex parte decree passed on 23-12-54 and the order of the learned Civil Judge Sojat refusing to set it aside was appealable under Order 43 Rule 1(d). No revision application consequently lies in the present case as the matter could have been brought before this Court by filing an appeal against the order dated 19-10-55 as held in *Swarup Narain's case*, 1953 Raj LW 629 (FB);

(4) that the revision application against the order dated 23-12-54 filed on 11-11-55 is grossly belated;

(5) that substantial justice has been done in the case and even if there is any technical illegality this Court should not interfere in the exercise of its discretionary jurisdiction under section 115 C.P.C.

Taking the first preliminary objection first the reply on behalf of the applicants is that no objections having been filed against the award the order dated 23-12-54 cannot be treated as an order refusing to set aside an award. In *Swastika Scientific Engineering Co. v. Union of India*<sup>2</sup> which was relied upon by the respondents in support of this objection the facts were these. There was an arbitration agreement between the parties. A suit was nevertheless instituted in the court of the Subordinate Judge Ambala by one of the parties as a dispute had arisen. The other party filed an application under section 34, Arbitration Act and on this application proceedings were stayed. Proceedings were commenced before the arbitrators at Delhi and time for filing the

award was extended by the Subordinate Judge of Delhi. The suit in question could be instituted either in the court of the Subordinate Judge Ambala or In the court of Subordinate Judge Delhi The umpire gave his award on 5-12-48 at Delhi dismissing the plaintiff's claim. On 7-12-48 he informed the parties of his award. The plaintiff filed objections agaigst the award in the court of the Subordinate Judge Ambala on 7-1-1949. A reply to the objections was filed by the opposite party in which it was alleged that the Ambala court had no jurisdiction to decide the objections as the matter was not referred to arbitration by that court and as no award had been filed in that court. On 26-10-49 the Subordinate Judge dismissed the plaintiff's suit holding that the Delhi court alone had jurisdiction under section 31(4) to go into the matter of the award, that application for filing the award in Ambala was barred by time, that the cause of action had merged in the award and there was no independent cause of action and that the award was a bar to the suit. The plaintiff treated this order as one refusing to set aside an award and preferred an appeal under section 39 of the Arbitration Act against it. A preliminary objection was taken before the High Court that the appellat should have filed a regular first appeal under section 96 Civil Procedure Code This preliminary objection was overruled. It was held that an application under section 34 having been made in the Ambala court that court gained control over the arbitration proceedings and the plaintiff became entitled to file objections against the award in the Ambala court. Further relying on the observations made by Chagla, J. in *Ratanji Virpal and Co. v. Dhirajlal Manilal*,<sup>3</sup> the learned Judge was of the opinion that the plaintiff was entitled to file objections in the court at Ambala even before the award had been filed in that court and that the court was bound to decide them on merits. It was in these circumstances that the learned Judge observed-

"I now come back to the original objections of the respondent that to appeal lay under Section 39, Arbitration Act. The words of the section are quite clear. An appeal lies against an order setting aside or refusing to set aside an award. Application was made on 7-1-1949, for setting aside the award. Whatever the reason for the court not setting aside the award, the Order still remains an order refusing to set aside the award and an appeal lies under Section 39."

9. The above case is distinguishable from the present case inasmuch as no objection to the award was filed in the present case before the decree dated 23-12-54 was passed. I am of the opinion that as no objection against the award was filed by the defendants before 23-12-54 the order of that date cannot be treated to be an order refusing to set aside the award. If objections are filed and overruled or if the objections are filed but

are not gone into then alone the court can be said to have refused to set aside the award. If no opportunity to file objections is given, it cannot be said that there was a refusal to set aside the award.

10. In support of the second preliminary objection the learned counsel for the respondents relied on *Najum-ud-din Abmad v. Albert Puech*,<sup>4</sup> The suit in this case was referred to arbitration through the intervention of the court. The award was filed on 14-11-1905. Notice was given to the parties and 25th November was fixed for disposal of the case. The defendant applied for a copy of the award on 23rd November, but had not obtained it when the case came up for disposal on 25th November. He applied for an adjournment, but this was not granted and a decree was passed upon the award. The defendant filed an appeal but his appeal was dismissed by the District Judge. The defendant thereupon appealed to the High Court. It was allowed on the following reasoning:-

"It is settled by the decision of a Full Bench of this Court in the case of *Ibrahim Ali v. Mohsin Ali*<sup>5</sup> that an appeal will lie in a case where an application to set aside an award on the ground of misconduct of the arbitrator was made and the court passed its decree without considering the application, or where the court has not allowed sufficient time to the parties to file objections to the award. This ruling followed an earlier ruling of the Privy Council in *Joymungul Singh v. Mohun Ram*,<sup>6</sup> and other cases of a similar nature..... When a decree has been regularly passed upon an award under the provisions of section 522, no appeal lies from the decree except in so far as the decree is in excess of, or not in accordance with, the award. But before such a decree can be passed it is necessary for the Court to stay its hand until the time for making an application to set aside the award has expired. The Court is not to pass a decree upon an award until the time within which an application to set it aside has expired. .... It is clear, therefore, in the present case that the time, within which the defendant appellant could have applied to have the award set aside, had not expired when the decree was passed. The decree was, therefore, premature, and consequently, notwithstanding the provision in section 522 that no appeal shall lie when a decree is in accordance with, and not in excess of, an award, the decree not being a legal decree, it is open to the party aggrieved by the action of the Court to maintain an appeal."

The above ruling was dissented from in *Krishnamma v. Chennayya*,<sup>7</sup> and with this latter decision I am in respectful agreement.

11. In the Privy Council case, 23 Suth WR 429, relied upon by the Allahabad High Court a decree was passed On the basis of an award, but the award was signed by the arbitrators separately and ten days time for filing an objection was not granted. All the same a decree in terms of the award way passed. The matter was taken in appeal to the High Court and the High Court set aside the decree and remanded the case to the Zillah Judge. The award was then properly signed and after objections were heard and overruled a decree was passed on the basis of the award. Upon that there was a final appeal to the High Court which was dismissed on the ground that the decree being in accordance with the award no appeal lay against it. Against the judgment of the High Court an appeal was filed before the Privy Council. While stating, the facts their Lordships of the Privy Council observed with reference to the procedure adopted by the High Court-

"From that decree there was an appeal to the High Court, and the decree was set aside, and properly set aside, by the High Court, apparently on two grounds: The first was that the Judge had proceeded irregularly, inasmuch as he had passed his decree without allowing the parties the ten days for bringing in objections to an award which the Code of procedure allows them. The other ground, on which the learned Judges of the High Court, or at least. Mr. Justice Norman proceeded, was that the award was altogether informal, inasmuch as it had been signed by the arbitrators separately."

12. Their Lordships did not specifically consider the question whether the appeal was properly entertained in view of tile language of section 325 of the Code of 1859 namely "in every case in which judgment shall be given according to the award, the judgment shall be final." In ILR 18 All 422 (FB) the learned Judges observed with regard to the above case-

"The case before their Lordships of the Privy Council was one in which the Court which had made the order for reference had not allowed sufficient time for the filing of objections to the award. It is obvious from the judgment in that case that their Lordships of the Privy Council considered that if the Court which made an order of reference did not allow sufficient time for filing objections to the award when made, an appeal lay."

As pointed out above the inference drawn from the observations made by the Privy Council is not warranted in the circumstances of that case as their Lordships' attention was not specifically drawn to the language of section 325 of the Code of 1859 which was then in force.

13. The independent reasoning given in Ibrahim Ali's case ILR 18 All 422 (FB) is in the following words:-

"Another condition to a decree under section 522 being unappeasable is that there should have been a judgment in accordance with an award. In our opinion a further condition precedent to the decree is that the Court should hear and determine any objection raised under section 521. Section 522 enables the Court to pass judgment in accordance with the award, if it sees no cause to remit the award, or if no application has been made to set aside the award, or if the Court has refused an application to set aside the award. It follows that if an application to set aside an award is made, the Court cannot proceed to give judgment in accordance with the award until it has refused the application, and the Court is not competent to refuse the application without considering and determining it. So, in our opinion, when an application to set aside an award has been made, and has not been judicially determined, the Court is not competent to proceed under section 522, and if it does proceed under that section and make a decree, there is no prohibition in that section against an appeal from a decree made under those circumstances."

With all respect I am unable to agree with the above reasoning.

14. In support of the third preliminary objection the respondents relied on *Muthukrishnan v. Muthalgiri*,<sup>8</sup> The facts of the case are not quite clear from the report which runs-

"Plaintiff and defendant 3 are the petitioners. Plaintiff instituted original suit No.7 of 1946, for passing a decree in terms of an award, the dispute being between defendants 1 and 2 and defendant 3. This revision petition is against the order of the District Judge of Ramnad allowing an appeal filed by defendants 1 and 2 against the order of the Subordinate Judge of Devakottai

dated 3rd February 1947, dismissing the application for setting aside an ex parte decree passed on 25th February 1946. The application I.A. No.546 of 1946 was filed under provisions of Order 9 Rule 13 and Section 151 Civil Procedure Code for setting aside the ex parte decree passed against defendants 1 and 2 in O.S. No.7 of 1946, the grounds alleged being that they were not served with notice. The learned Subordinate Judge found that notice had been served and dismissed the application. The appellate court..... accepted the evidence of defendants 1 and 2 as against that of the plaintiff and R.W.2 and allowed the appeal."

The contention in the High Court was that the District Judge was not competent to entertain the appeal, as no appeal lay against an order under Order 9 Rule 13 rejecting an application for setting aside the ex parte decree passed in terms of an award. It was observed by the learned Judge-

"It is unnecessary for me to discuss the question as it is governed by a Bench decisions of this Court in *Selvarayan Samson v. Amalorpavanadam*,<sup>9</sup> which followed a decision of the Allahabad High Court in *Nehal Singh v. Khushal Singh*,<sup>10</sup> The learned counsel relied on the words 'in a case open to appeal' under Order 43 Rule 1(d) and argued that in the case of a decree passed in terms of an award except if the decree is in excess or not otherwise in accordance with the award no appeal lay under the provisions of Section 17, Arbitration Act and hence no appeal lay against an order rejecting an application under Order 43 Rule 1(d), Civil Procedure Code. This matter has been specifically raised before the learned Judges who decided AIR 1928 Madras 969 (2) and they hold-with which I respectfully agree- that 'a case open to appeal' means not only a case in which an appeal is always provided, but also a case where appeal is provided on certain grounds. Once it is conceded that an appeal would lie on certain grounds, under Section 17, Arbitration Act, an appeal would certainly lie under the provisions of Order 43 Rule 1(d). I therefore hold that the order of the learned District Judge is correct."

The question whether a decree passed on an award under section 17, Arbitration Act can be considered to be an ex parte decree was not raised in the above case. Both the cases relied upon in the above case were decided before the Arbitration Act 1940 was passed. They were decided on the basis of the law then prevailing. Further in both the cases submission to arbitration was made without the intervention of the court and

section 104(1) (f) Civil Procedure Code was applicable to them under which an order filing an award was also appealable. If such an order can be said to have been passed ex parte an application would lie under Order 9 Rule 13 to set it aside and an appeal would lie against an order refusing to set it aside. In my opinion the decisions in AIR 1928 Madras 969 (2) and AIR 1916 Allahabad 51 could only have applied if at all to cases in which reference was made to arbitration without the intervention of the court. With the passing of the Arbitration Act, 1940 section 104(1)(f) was repealed and an order filing an award is no longer appealable even though the award is made without the intervention of the court. The above decisions ceased to apply even to cases in which the award is made without intervention of the court.

15. On behalf of the applicants *Roshanlal v. Firm Bridhi Chan*,<sup>11</sup> *Rajeshwar Prasad Singh v. Ambika Prasad*,<sup>12</sup> and *Ganeshmal Bhawarlal v. Kesoram Cotton Mills Ltd.*,<sup>13</sup> were relied upon. It was held in these cases that a decree passed under section 17 in arbitration proceedings cannot be regarded as an ex parte decree even though the defendants are not present on the date on which it is passed. In a suit if the plaintiff does not appear no decree can be passed and if the defendant does not appear the plaintiff must prove his case. Either party to an award is entitled to ask the court to pronounce judgment according to the award. Under section 17 a judgment must be pronounced and a decree must follow if the conditions of sections 14 and 17 are complied with. Such a decree even if pronounced in the absence of the parties cannot be said to be passed ex parte.

16. It was also held in the above cases that where a decree is passed in terms of the award under section 17 Arbitration Act the decree cannot be appealed against and it cannot be regarded as one open to appeal within the meaning of Order 43 Rule 1(d). I am in respectful agreement with the decisions in these 3 cases. I am unable to subscribe to the second reasoning given by Piggott J. in AIR 1916 Allahabad 51 that if an appeal against a decree can lie in certain circumstances the decree may be regarded as one open to appeal for purposes of Order 43 Rule 1(d). I have already pointed out above that the first reasoning was only applicable to cases to which section 104(1)(f) applied. The third preliminary objection has also therefore no force.

17. I would however like to observe here that I am in respectful agreement with the view expressed in AIR 1952 Calcutta 10 that the principles of Order 9 Rule 13 should be followed and the judgment and the decree passed under Section 17 should be set

aside on a summary application where such decree was passed without duly giving the notice of the filing of the award or without allowing the time for applying to set aside the award to expire. The court has the inherent power and duty to correct injustice and to set aside a judgment and order passed *ex parte* without notice to the interested parties.

18. Coming now to the next objection that the revision application against the order dated 23-12-54 which was filed on 11-11-55 is grossly belated. The explanation of the applicants is that they moved an application in the trial court on 4-3-55 under Order 9 Rule 13 and section 151 Civil Procedure Code for setting aside the decree which had been passed on 23-12-54, that they *bona fide* prosecuted this application which was dismissed on 19-10-55 and the present revision application was then filed on 11-11-55. One of these applications was filed on behalf of Mangilal and Shyamlal. As has been held above the decree dated 23-12-54 was passed in the presence of Shyamlal. Both Shyamlal and Mangilal were living at Sojat when this decree was passed. Shyamlal must have told Mangilal about this decree. Mangilal has not alleged that he did not come to know about the passing of this decree. The summons in the suit was duly served on Mangilal. The application purporting to have been made under Order 9 Rule 13 and section 151 Civil Procedure Code on 4-3-55 by Shyamlal and Mangilal was grossly belated. if it had been held that such an application was competent it would have been barred by limitation under Article 164 under which the defendant can apply within 30 days from the date of the decree to set it aside. The revision application filed on behalf of these two applicants on 11-11-55 is thus grossly belated.

19. Ramchander alleged in his application dated 4-3-55 that he was not a party to the reference in the suit, that he had no knowledge of the arbitration and that it was for the first time on 10-2-55 that he learnt that arbitrators were appointed in the suit who had given the award and that on the basis of that award the court had passed a decree. Ramchander was a minor when the suit was originally instituted. His father Jassulal was appointed his guardian ad litem. During the pendency of the suit Ramchander attained majority. He put in an appearance in the suit through his lawyer Sri Amar Datt.

20. The application filed in the case praying that the suit be referred to arbitration bears the signatures of Shri Amardatt. In view of this the learned counsel for Ramchander conceded that he was a party to the reference. His case is thus on a

similar footing to that of his other two brothers Shyamlal and Mangilal so far as the application for restoration under Order 9 Rule 13 and section 151. Civil Procedure Code filed on 4-3-1955 is concerned. It was grossly belated as an application under Order 9 Rule 13.

21. It cannot therefore be said that Ramchander, Shyamlal and Mangilal were *bona fide* prosecuting wrong remedy from 4-3-55 to 19-10-55, If they bone fide believed that an application under Order 9 Rule 13 and Section 151 Civil Procedure Code was competent they should have filed it within a month of the decree that is by 23-1-55.

22. Ramchander may have been living in Gulbarga, but his two elder brothers were living at Sojat. Both of them appeared before the arbitrators and made statements before them. It is on the admission of Shyamlal and Mangilal that the award of the arbitrators was based. During the course of the arbitration proceedings Shyamlal stated that he had authority to represent Ramchander in them. There seems to be no reason why Shyamlal should have made a false statement before the arbitrators. It is not suggested that Shyamlal is in any way hostile to his brothers or is in collusion with the plaintiffs. As has been pointed out above Ramchander was a party to the reference and was fully aware of the fact that the suit will be decided by the arbitrators nominated by the parties.

It was admitted before me that Shri Amar Datt who was appearing for Ramchander signed the application for reference to arbitration on the instructions of Ramchander. On this application the court referred the suit to arbitration and directed that the award be filed by 21-12-54. It was stated at the Bar by the learned counsel for Ramchander that he was at Gulbarga at that time. He took no steps to come to Sojat to prosecute the case before the arbitrators. From this conduct also it is clear that he must have authorised Shyamlal or Mangilal or both to represent him before the arbitrators. The balance of Rs.10,100/- was first worked out on the Khata of Section 2000 (Ex.3). This balance was signed by Jassulal.

A fresh Khata Ex.1 for Rs.10,101/- was then executed. This bears the signature of Mangilal. Ex.2 is the document which gives a list of ornaments and documents of title which were mortgaged from time to time in the past. This list is signed by Jassulal and Shyamlal. As has been mentioned above Ramchander was a minor when the suit was brought. His brothers Mangilal and Shyamlal and their father Jassulal alone could have personal knowledge of the, transactions. Ramchander's case about the delay in filing the present revision application is thus in no way on a better footing than that of

his other two brothers. It appears that the defendants were not only aware of the award but were satisfied with it and did not wish to file any objection against it and that the belated application was only filed on 4-3-55 as an afterthought. The revision application is liable to be rejected on the ground that it was grossly belated.

23. Coming now to the fifth preliminary objection raised on behalf of the plaintiffs that substantial justice has been done in the present case and that even if there is any technical illegality this Court should not interfere in the exercise of its discretionary jurisdiction under section 115 Civil Procedure Code reliance was placed on the following decisions:-

*Ghulam Jilani v. Mohammad Hassan*,<sup>13</sup> *Bankey Lal v. Chotey Miyan Abdul Shakur*.<sup>14</sup>  
*Aijaz Ali v. Mt. Zobra*,<sup>15</sup> *Baldeo Sahai v. Abdul Rahim*, *Lakshamma v. G. Appadu*,<sup>17</sup>

It was held in Ghulam Jilani's case, 29 Ind App 51 (PC) by their Lordships of the Privy Council that revision is generally objectionable in cases of awards and on the principles laid down in that case a court should not interfere with an award unless it finds not only an illegality committed but some substantial harm resulting from that illegality. Although the cases cited, on behalf of the plaintiffs on this point are distinguishable on facts the decisions in all of them proceed on the principle that where substantial justice has been done the Court will not set aside an award on the ground of a technical illegality.

24. In Bankey Lal's case, AIR 1931 Allahabad 453 the matter came up before the High Court on an appeal. Only 5 days time had been given in that case to file objection. The learned Judges asked the counsel for the appellant what objection his client could have validly taken to the award if full 10 days time had been given to him. He was not able to point out any such objection which could have, been successfully taken. The Court declined to interfere with the award even in appeal.

25. In Aijaz Ali's case, AIR 1932 Allahabad 76 the award given by the umpire was substantially in agreement with the award of the previous arbitrators, but there was a difference in the two awards as to the amount which the plaintiff should recover from the defendant and there was no opinion of the majority as contemplated by the agreement of reference. The Court declined to interfere on this technical ground on the authority of Ghulam Jilani's case, 29 Ind App 51 (PC).

26. In Baldeo Sahai's case, AIR 1932 Oudh 156 one of the plaintiffs was a minor and

the leave of the Court was not taken by his next friend for referring the suit to arbitration. The Court refused to interfere with the award on the authority of Ghulam Jilani's case, 29 Ind App 51 (PC).

27. In Lakshamma's case, AIR 1932 Madras 157 one of the arbitrators remained absent during part of the hearing. The Court declined to interfere with the award on this ground both on the authority of the Privy Council decision in *Chowdhri Murtaja Hossein v. Mt. Bibi Bechunnissa*,<sup>18</sup> and Ghulam Jilani's case, 29 Ind App 51 (PC).

28. The learned counsel for the applicants was asked as to what objections his clients would have taken if an opportunity of filing objections had been given. He was granted an adjournment at his request in order to take instructions from his clients.

29. There are 3 applicants in the present case. So far as Shyamlal is concerned he was present on the date of the decree and stated that he had no objection to make. He thus waived his right of filing objections against the award. The decree passed against him is perfectly legal and is not liable to be set aside on the ground of even a technical illegality.

30. The learned counsel stated on behalf of Mangilal and Ramchander that they would have taken the following two objections against the award:-

(1) that the arbitrators were not authorized to direct the sale of the immovable property belonging to the defendants the title deeds of which were handed over to the plaintiffs at the time of borrowing the money because-

(i) mortgage by deposit of title deeds was not valid in Marwar, and

(ii) the plaintiffs had only claimed a simple money decree and not a mortgage decree.

(2) that the arbitrators were not authorized to award interest from the date of the award to the date of realization of the money.

Taking up the first objection first I find that in para 3 of the written statement the defendants admitted that they had been borrowing money from the plaintiffs from time to time mortgaging ornaments and immovable properties. The Transfer of Property Act was not in force in Marwar when these transactions took place. There was thus no prohibition against making an oral mortgage of immovable property. In this connection

the decision of the Marwar Chief Court in *Narayandas v. Khema*,<sup>19</sup> may be referred to. From the written statement it is clear that the intention of the parties was to hypothecate immovable properties by delivery of title deeds. A valid simple mortgage of these properties thus came into existence by the voluntary act of parties. A decree for sale could therefore be passed on the basis of this transaction.

31. The actual sale of the immovable properties of the defendants under the award however did not take place in the present case. Before the properties were sold at the court sale the defendants paid up the decretal amount. Even assuming that the arbitrators exceeded their jurisdiction in directing the sale of the immovable properties which had been hypothecated in order to recover the amount which they held to be due from the defendants, this did not cause any injury to the defendants.

32. Coming now to the second objection reliance was placed on behalf of the applicants on the decision of their Lordships of the Supreme Court in *Thawardas v. Union of India*, (5)<sup>20</sup> In that case a contractor entered into a contract with the Dominion of India for the supply of pucca bricks. Delivery was to be at the kiln site. Owing to the default of the Government in not removing the burnt bricks which were ready for delivery according to contract, lacs of katcha bricks were destroyed by rains. The arbitrator awarded interest on the damages which he assessed up to the date of payment. Their Lordships held on the authority of *B.N. Ry. Co. Ltd. v. Ruttanji Ramji*,<sup>21</sup> that interest was not payable as damages. It was suggested that interest from the date of the award could be awarded on the analogy of section 34 of the Civil Procedure Code 1908. It was held that Section 34 did not apply because an arbitrator is not a "court" within the meaning of the Code. On behalf of the plaintiffs it was sought to distinguish that case on the ground that interest was not recoverable in that case on the basis of the contract between the parties. In the present case interest was recoverable under the contract. It is however unnecessary to go further into this matter as in the present case the award was given through the intervention of the court and even if the arbitrators were not empowered to grant pendent lite and future interest the court was competent to do so even if the arbitrators had failed to award pendent lite and future interest till the date of realization. It cannot thus be said that any substantial injury has been caused to the applicants by the award.

33. During the course of hearing the learned counsel for the plaintiffs learnt that the applicants had sold some of the immovable properties which were hypothecated by

them as security for the loan. The applicants admitted that they had sold 2 houses situated in Pali covered by Patta No.51/38-39 dated 29-9-39 for Rs.6,000/-. This was one of the Pattas which was returned to the applicants by the plaintiffs when their decree was satisfied. The plaintiffs were permitted to raise the point that the applicants were by their conduct in selling the above two houses estopped from challenging the decree as it was no longer possible for this Court to restore the parties to the Status quo ante.

34. The learned counsel for the applicants argued that they were not so estopped as the decretal amount could be realized by the sale of the remaining properties which have not yet been sold and that there could be no waiver of their right to challenge the decree by their conduct after the passing of the decree.

35. In my opinion the plaintiffs had a right to retain all the title deeds so long as the money borrowed from them by the defendants was not repaid. Further I think that the right to challenge a decree can be waived even by conduct after the passing of the decree. I have no doubt that by selling away some of the properties the applicants have disentitled themselves to restitution in case the decree were to be set aside. It is not necessary to decide whether or not they are estopped from challenging the decree itself in the present case as I have held above that the present application is liable to be dismissed on other grounds.

36. In the result the revision application is dismissed. In the circumstances of the case, I direct that parties shall bear their own costs.

Revision dismissed.

Cases Referred.

1. 1933 Raj LW 629 (FB)
2. AIR 1953 Punj 129
3. ILR 1942 Bom 452
4. ILR 29 All 584
5. ILR 18 All 422 (FB)
6. 23 Suth WR 429 (PC)
7. AIR 1949 Mad 276

8. AIR 1950 Mad 295
9. AIR 1928 Mad 969
10. AIR 1916 All 51
11. AIR 1924 Pat 603
12. AIR 1956 Pat 28
13. 29 Ind App 51 (PC)
14. AIR 1981 Alla 453
15. AIR 1932 All 76
16. AIR 1932 Oudh 156
17. AIR 1932 Mad157
18. 3 Ind App 209 (PC)
19. 1940 M.L.R 299 (Civil)
20. AIR 1955 SC 468
21. AIR 1938 PC 67