

CASE NO.:
Appeal (civil) 3117 of 1999

PETITIONER:
Shanmugasundaram and Ors.

RESPONDENT:
Diravia Nadar (D) by Lrs. and Anr.

DATE OF JUDGMENT: 11/03/2005

BENCH:
D.M. Dharmadhikari & G.P. Mathur

JUDGMENT:
JUDGMENT

Dharmadhikari, J.

The appeal is directed against the order of the High Court of Madras. By the impugned order, the High Court in exercise of its revisional jurisdiction has set aside the order of sub-ordinate Judge, Tuticorin whereby the latter had allowed substitution of the deceased arbitrator on the panel of seven arbitrators appointed by the parties under the arbitration agreement. The case is governed by the Arbitration Act, 1940 (hereinafter referred to as 'the Act' for short). The property which is the subject matter of arbitration agreement, is the land in occupation of the appellants as a tenant and on which by building a superstructure he is carrying on his business of Coffee House.

It is not in dispute that the land involved has been inherited by two brothers (respondents herein) and three sisters. It is reported that one of the sisters is dead and had left behind her heirs. The sisters and heirs of deceased sister are not parties to either the Arbitration proceedings or the proceedings which arose from them in the Court.

A few more facts giving rise to this appeal may now be stated as under:-

The two brothers wanted to sell the entire property involved to the appellants. They entered into a written agreement with the petitioner and for deciding the rate at which the property would be sold, they agreed for arbitration by a panel of seven named arbitrators. On 27.7.1977 a unanimous award was passed by arbitrators fixing the price of land at Rs. 1000 per Cent. "The appellants, who were vendees under the sale agreement, filed an application in the civil court for making the Award the Rule of the Court and passing a decree thereon.

The two brothers filed a counter case by an application for setting aside the award. The civil court on the application of the parties filed pursuant to the award, came to the conclusion that the arbitrators misconducted themselves by collecting information from outside source without disclosing it to the parties and without giving them opportunity of hearing. According to civil court the award was vitiated as principles of natural justice were violated by the arbitrator in fixing the price. The civil court set aside the award.

According to learned counsel appearing for the appellants-vendees, the civil court had set aside the award only on the ground of breach of principles of natural justice as the arbitrators failed to hear the parties to the agreement before taking decision on fixation of price for sale of the land.

On the other side, learned counsel appearing for the respondents i.e. two brothers, contend that the order of the civil court dated 29.12.1980 properly understood, by reading it with other relevant parts of his

judgment, indicate that the award was set aside specifically on two grounds mentioned below :-

1. In fixation of price the arbitrators did not allow participation and hearing to the parties;
2. The sisters had 3/5th share in the property and the two brothers, who had only 2/5th share together, could not have agreed for sale of the entire property. The enforceability of the award being 'open to question' it was set aside.

Against the order setting aside the award the appellant preferred an appeal to the High Court under the Act which was dismissed on 21.8.1987. According to the appellant, as the award was set aside but the arbitration agreement was not superseded, he made an application on 22.11.987 to the civil court for reconstitution of the panel of arbitrators by substituting one arbitrator for the arbitrator who, in the intervening period, had died.

On 9.3.1990 the civil court allowed the aforesaid application and directed substitution of another arbitrator for the deceased arbitrator. The newly constituted panel of arbitrators made a second award on 25.6.1990 and again fixed price at the rate of Rs. 1000 per cent for sale of the property. According to the appellant, the invalidity in the first award was merely of not hearing the parties on price fixation. In the subsequent arbitration proceedings, before passing of second award, the parties were duly heard by the arbitrators and thereafter price fixation was done.

The present appellant filed an application for making the second award a rule of the court. The respondents did not file any application to set aside the second award but filed a civil revision petition against the order of civil court made on 9.3.1990 by which substitution in place of the deceased arbitrator was allowed and arbitration was revived.

By the impugned order passed in the revision petition filed by the respondents, the High Court has taken a view that the first award was set aside both on the ground of breach of principles of natural justice as also on the ground that as the sisters were not parties to the arbitration agreement, the award was unenforceable. The High Court has held that the arbitration agreement cannot be allowed to be reinvoked for revival of the arbitration proceedings.

The main submission of the learned counsel appearing for the appellant vendee is that the High Court misconstrued the earlier order of the civil court by which it had set aside the first award. The High Court erred in holding that the first award was set aside both on the ground that the arbitrators had failed to hear the parties before fixing price as also on the ground that the sisters being not parties to the arbitration proceedings, the eventual award would be unenforceable. The learned counsel further argues that as the first award was set aside solely on the ground that the arbitrators did not disclose to the parties the source from which information was collected for fixation of price and the arbitration agreement having not been superseded, it could again be invoked by seeking reconstitution of the panel of arbitrators and reference of the dispute.

Reliance is placed on *Juggilal Kamplapat v. General Fibre Dealers Ltd.*, [1962] Supp 2 SCR 101.

As an alternative argument the counsel submitted that although sisters were not parties to the arbitration agreement, the brothers represented them as their agents. Reliance is placed on *Dhannalal v. Kalawatibai*, [2002] 6 SCC 16 and *India Umbrella Manufacturing Co. v. Bhagabandei Agarwalla*, [2004] 3 SCC 178.

Learned counsel did not carry further his argument of brothers being parties to the agreement acting as agents of the sisters, on realizing that

all brothers and sisters were co-owners of the property inherited by them. Neither concept of coparcenery nor agency can be applied in their inter se relationship.

The next contention advanced is that subsequent arbitration and the second award passed thereon should have been upheld leaving the parties to work out their rights to the extent possible. It is submitted that in any event, the two brothers who are signatories to the arbitration agreement would be bound by the award. It is argued that it is a matter of guess whether ultimately the sisters, on the aforesaid price fixated by the arbitrators, would agree to join in the sale or object to it. In either of these eventualities, the award could not be held to be completely unenforceable or invalid in law.

Learned counsel for the appellant vendee further submitted that based on the second award, the appellant can seek specific performance of agreement of sale to the extent of share of the brothers in the property. Such a relief in relation to part of the property involved can be granted under Section 12 of the Specific Relief Act.

It is contended that enforceability of the award for non-joining of three sisters in the sale agreement could not be prejudged at this stage. Merely on a possible eventuality of the sisters not agreeing to join for sale of entire property, the arbitration proceedings and the award could not have been held to be bad in law which in any event was binding on the brothers.

Opposing the appeal, learned counsel appearing for the respondents supported the order of the High Court by submitting that the first award had been set aside both on the ground of breach of natural justice as also its invalidity because of sisters being not made parties to the agreement. It is submitted that the order setting aside the first award was challenged in the High Court but it was confirmed and has attained finality as no further appeal was brought to this Court. Principle of res judicata bars second arbitration. Reliance is placed on Satyadhan v. Smt. Deorajin Debi, AIR (1960) SC 941. The argument advanced is that as the first award was set aside on the ground of invalidity of the arbitration agreement as well, the arbitration could not have been revived under the same agreement and a second award made. The High Court, it is submitted, therefore, rightly came to the conclusion that although the arbitration agreement was not expressly superseded, the arbitration could not be revived by allowing reconstitution of panel and substitution of new arbitrator for the deceased arbitrator. Reliance is placed on Chhabba Lal v. Kunna Lal, AIR (1946) PC 72; Deep Narain Singh v. Mt. Dhaneshwari, AIR (1960) Patna 201 and Draupadibai v. Narayan Masanu Sutar, AIR (1985) Karnataka 258.

The first question which has arisen on the rival contentions advanced for the learned counsel for the parties is whether the first award was set aside merely on the ground of breach of principles of natural justice or it was set aside also on the ground that sisters were not parties to the arbitration agreement. To appreciate the contention and to understand the ratio of the judgment of the civil court which had set aside the first award, its relevant parts need to be reproduced :-

"Therefore, when there is nothing to show that the parties agreed that the arbitrators can fix the price after making such enquiries as they deemed fit without reference to the parties and without giving any opportunity to them to put forward their case, the contention of the petitioner in this regard cannot be accepted. The decision relied upon by the respondents clearly supports the contention of the respondents that the arbitrators have legally misconduct themselves in fixing the price without giving an opportunity to the respondents to put forth their case with regard to the price. Therefore, even though the respondents have agreed to be bound by the price fixed by them the award passed by the arbitrators has to be set aside in as much as the arbitrators are not entitled to fix it arbitrarily but in accordance with the rules of natural justice.

Another point put forward by the respondents is also that the property does not belong to the respondents only but also to two of their sisters and the heirs of the other deceased sister. They claim that they (respondents) are entitled only to 2/5 share in the properties, while, the remaining 3/5 share belongs to their two sisters and the heirs of the other deceased sister. But, the contention of the petitioner is that the property was purchased by the grandfather of the respondents, and therefore on the death of their (respondents) father Arunachala the respondents got it by survivorship. But the death Register extract in respect of Arunachala shows that he died in the year 1971. Therefore, the respondents only could not have become entitled to the property by survivorship. Each of the respondent would be entitled to a 1/3 share as co-parceners and the remaining 1/3 belonging to his father would have devolved upon his heirs including his daughters. Therefore, it is evident that the respondents 1 and 2 only are not the owners of the entirety of the property in question. Therefore, how far the award can be enforced as against the other owners is also open to question. The other owners are also not before the court. They are not parties to the agreement Ex. A4 or the arbitration proceedings. Therefore, in these circumstances, I find that the award has to be set aside and that it cannot be made the rule of the court."

[Emphasis supplied]

Reading together the above two portions of the judgment of the civil court it is not possible to accept the contention advanced on behalf of the appellant that the first award was set aside only on ground of breach of principles of natural justice. It is clear that both breach of natural justice and absence of three sisters as parties to the agreement, were grounds to set aside the award.

Learned counsel for the appellant laid over-emphasis on one sentence in the last portion of the order in which the learned judge of the civil court has observed thus :-

"Therefore how far the award can be enforced as against the other owners is also 'open to question."

The aforesaid sentence read in isolation does indicate that the learned judge has not expressed any final opinion on the enforceability of the award in the absence of all the co-owners being parties to the arbitration agreement. The subsequent sentence -

"They are not parties to the agreement Ex.A-4 or the arbitration proceedings, therefore, in these circumstances, I find that the award has to be set aside and that it cannot be made a rule of the court."

is a clear conclusion based on legal view that all the owners being not parties to the agreement, the award is invalid.

Unfortunately, for the appellant, the second ground of invalidity of the first award was not expressly challenged in the appeal preferred to the High Court against the order setting aside the said award. The High Court has confirmed judgment of the civil court setting aside the first award and the same has attained finality. It would operate as *res judicata* between the parties. (See the following observations in *Satyadhan v. Smt. Deorajin Debi*, AIR (1960) SC 941) :-

"The principle of *res judicata* is based on the need of giving finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again. Primarily, it applies as between past litigation and future litigation. When a matter, whether on a question of fact or on a question of law, has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies,

neither party will be allowed in a future suit or proceeding to canvass the matter again. This principle of res judicata is embodied in relation to suits in section 11 of the Code of Civil Procedure; but even where section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided in a matter one way will not allow the parties to reargue the matter again at a subsequent stage of the same proceedings.

But an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken can be challenged in an appeal from the final decree or order."

In the subsequent proceedings initiated on the same arbitration agreement, therefore, it is not open to the appellant to contend that the first award was set aside only on ground of breach of natural justice and not on the ground of its invalidity that the sisters were not parties to the arbitration agreement and not bound either by agreement of sale or fixation of price at the instance of the brothers. [See Chhabba Lal v. Kunna Lal, AIR (1946) PC 72; Deep Narain Singh v. Mt. Dhaneshwari, AIR (1960) Patna 201; Patanjali v. Rawalpindi Theatres Pvt. Ltd., AIR (1970) Del 19; Narsing Das v. Gogan Ram Lachmi Narain, AIR (1955) Punj. 31 and Draupadibai v. Narayan Masanu Sutar, AIR (1985) Karnataka 258].

The decision of Judicial Commissioner, Peshawar in the case of Diala Ram v. Mt. Nihali Bai, AIR (1936) Peshawar 96 on which reliance has been placed on behalf of the petitioners is distinguishable on facts and the statement of law made therein cannot get our approval. There reference to arbitration for partition of property was sought by some of the joint owners and the award was not disturbed on the ground that other co-owner who was not party to the agreement could come forward and claim his share without upsetting the partition made through arbitration.

Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak and Anr., AIR (1962) SC 406 is the decision which has come to our notice taking a view that even though one of the interested persons in the property is left out in the arbitration agreement, forum of arbitration chosen by the parties to the agreement can be allowed to be invoked.

The decision, however, in that case seems to have been based on the nature of dispute involved with regard to the right of cutting trees in forests in which the parties had proprietary share. There were two agreements and to the first agreement, the party left out in the second agreement was a party. The nature of dispute which arose under the partnership agreement for cutting trees in the forests was found to be such which could have been decided even without one of the co-sharers being a party to the second agreement. It is on the above facts, it was held that arbitration award eventually made would not be unenforceable. This Court, therefore, in that case took a view that such an arbitration agreement which leaves out one of the parties interested can still be ordered to be filed under section 20 of the Act for the purpose of initiating arbitration proceedings.

The facts in present case are distinguishable. Admittedly, the property has been jointly inherited by two brothers and three sisters. As heirs under the Hindu Succession Act, they inherited the property as co-owners. In the absence of partition between them, the two brothers together had undivided share in the property and they could not have agreed for sale of the entire property. They were competent to execute agreement to the extent only of their undivided share in the property. In the event of sale of such

undivided share, the vendee would be required to file a suit for partition to work out his right in the property. The left out three sisters as co-owners having undivided share in the whole property, the two brothers are incompetent to abide by the award.

Learned counsel makes a reference to Section 12 of the Specific Relief Act 1963 and submits that arbitration agreement and consequent award should be allowed to be enforced to the extent of share of two brothers leaving the vendee to work out his right, if necessary, in case the sisters object to the sale, by a suit in accordance with Section 12 of the Specific Relief Act.

Section 12 of the Specific Relief Act, in our considered opinion, would be of no assistance in the situation obtaining here. In the absence of sisters being parties to the agreement, the vendee can at best obtain undivided interest of two brothers in the property. Section 12 of the Specific Relief Act can not be invoked by the vendee to obtain sale of undivided share of the two brothers with a right to force partition on the sisters who were not parties to the agreement of sale. Such a relief under section 12 cannot be obtained by a vendee, on purchase of an undivided share of the property of some of the co-owners, against other co-owners who were not parties to the sale agreement.

Validity or otherwise of an arbitration agreement or award has to be judged by the court on the facts and situations on the date of its consideration for being made a rule of court. An award, which is found unenforceable and invalid on the date it is sought to be made a rule of court, cannot be upheld on possibilities and eventualities which might occur in future. An award cannot be upheld on guess and speculations.

The civil court was, therefore, justified in setting aside the first award on the ground that all the co-owners of the property being not parties to the arbitration agreement, both the agreement and the consequent award were unenforceable and hence invalid. Clause (c) of section 30 of the Arbitration Act allows court to set aside an award if it is found to be 'otherwise invalid'. In our view, by ignoring the two grounds of setting aside the first award, the civil court could not have allowed revival of arbitration proceedings on the same agreement, by permitting substitution of another arbitrator to the panel in place of the deceased arbitrator. The High Court was, therefore, fully justified in reversing the order of the civil court and coming to the conclusion that the arbitration could not have been revived.

In view of the aforesaid conclusion, this appeal fails and is dismissed. In the circumstances, we direct the parties to bear their own costs.