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Court : Madhya Pradesh

Decided On : Sep-12-1966

Reported in : AIR1969MP7; 1969MPLJ125

Judge : S.P. Bhargava, J.

Acts : [Arbitration Act, 1940](#) - Sections 32 and 34

Appeal No. : Civil Revn. No. 821 of 1965

Appellant : Mst. Manmati and ors.

Respondent : Mohan and ors.

Advocate for Def. : A.P. Sen, Adv.

Advocate for Pet/Ap. : Ramkumar Verma, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

S.P. Bhargava, J.

1. The plaintiff-non-applicant Mohan instituted a suit in the trial Court against Balaram, whose legal representatives on record now are applicants Nos. 1(a) to (e), and the other three applicants Raspalsingh, Mansaram and Nanki. In the suit

the plaintiff-non-applicant impleaded his sons Mahajanlal and Lilaprasad also as defendants. They are non-applicants 2 and 3. The plaintiff instituted the suit claiming general partition of the joint family property and separate possession thereof. The joint family property comprised of agricultural lands in seven villages including the village Jajang and five houses which are situate in two of these seven villages.

2. The plaintiff's case was that the plaintiff and the first defendant Balaram constituted a joint Hindu coparcenary and held the properties which are described in paragraph 4 of the plaint as their joint family properties since the death of their father Sobharam; that the defendant Balaram was the manager of the joint family after the death of Sobharam and that he acquired lands and constructed two residential houses which are mentioned in schedule B attached to the plaint. It was urged that all these properties constituted joint family properties though the acquisitions thereof were made in the names of different members of the family. In para 7 of the plaint it was averred that the plaintiff orally demanded partition and separate possession of his share in April 1954. The matter was referred to panchas by the parties but the decision was not accepted by the defendant No. 1. The defendant No. 1 ultimately refused to give plaintiff's 1/8th share saying that the interest of the minor sons of the plaintiff will suffer adversely in the month of June 1956.

3. Balaram denied the plaintiff's claim for partition and in reply to the above quoted allegations of para 7 of the plaint stated the following in para 7 of his written statement: 'It is denied that the plaintiff ever demanded any partition. In fact he has no right, title or interest in the property of the defendants. The plaintiff raised disputes in the lands obtained by the defendant No. 1 under the will of his aunt Mst. Suhawan. The Gountia of Bakeli accepted the defendant as the exclusive owner of the said lands. The plaintiff demanded share in that land. The land 50.54 acres at Jajang acquired in the names of 4 sons of the defendant 1 and 2 sons of Mohan the plaintiff have not been partitioned into specific shares, although year after year the produce of those lands used to be divided among the sons of the plaintiff and those of the defendant No. 1. These disputes were referred to the arbitration of Balakram Gountia of Turekela and some more Panchas to be

nominated by Balakram. At no time Balakram took down the statements of the parties or took the statements of other persons nor has he nominated any Panch so far. Under some pretext or the other he has obtained this defendant's signature on a stamp paper without disclosing its contents to him. The defendant No. 1 is an illiterate man. He knows only to sign his name. It is further submitted that in view of the plea in para 7 of the plaint, that reference had been made to an arbitration and some Award has been given, the plaintiff's suit is barred under Section 32 of the Indian Arbitration Act and therefore, it is not maintainable'.

4. The defendants 2, 3 and 4 (applicants 2, 3 and 4) raised the same contentions as Balakram. The non-applicants 2 and 3 supported the plaintiff's claim for partition in their written statements. The contention with which we are concerned in this revision is as to whether the lower appellate Court has rightly come to the conclusion that the plaintiff's suit is not hit under Section 32 of the Arbitration Act. The trial Court had dismissed the plaintiff's suit on the ground that Section 32 operated as a bar to the said suit. The other issue tried by the trial Court was whether a written submission was made to arbitrators. The trial Court held that there was a written submission made to the arbitrators regarding a part of the property in suit, i.e. with respect to the properties situate at village Jajang. The appellate Court came to the conclusion that it was not clear that any written submission to arbitration was made. Differing from the trial Court it held that the suit of the plaintiff was maintainable and Section 32 of the Arbitration Act did not constitute a bar to the tenability of the suit.

5. The contention advanced by the learned counsel for the applicant is that the lower appellate Court has misdirected itself in law about the provisions of the Arbitration Act, specially Sections 32 and 34 of the Act, and that has resulted in a decision which cannot be supported in law. The learned counsel further relies strongly on the observations made by the Division Bench of this Court, of which I was a member, in *Shyamsingh Jaswantsingh v. Pralhadsingh Tikaram*, 1961 MPLJ 745 : (AIR 1962 Madh Pra 66). In that case the view taken is that a suit for a declaration that an arbitration agreement or award did not exist or that it was invalid is barred under Sections 32 and 33 of the Act, and that even if any of the reliefs expressly mentioned in Sections 32 and 33 is not directly claimed in the

suit, still the suit would be barred if it in any way involves enforcement, or amendment or modification, or setting aside of an award.

6. Having given my earnest attention to the arguments advanced on behalf of the applicant, I am of the view that there is no substance in this revision and it must be dismissed. In the first place, it may be pointed out that it is not even pleaded that the arbitration agreement referred to the entire property of which partition is claimed in the suit. The subject matter of the suit, as already stated, consists of lands of seven villages and five houses. The alleged arbitration agreement, on the other hand, is said to relate to the agricultural lands at the village Jajang only. Under the Hindu Law every coparcener has an inherent right to ask for the partition of the joint family property. It is open to members of a coparcenary to divide some items of the joint family property and to keep the other properties as their joint family properties. Any agreement in respect of one property alone can in no way adversely affect the right of a coparcener to claim the general partition and separate possession of either all of the properties or at any rate of the other properties which are not the subject-matter of any arbitration agreement. In my opinion, the suit can be hit by the provisions of Section 32 only if the arbitration agreement is admitted or proved to relate to the entire subject-matter of the suit but not otherwise. In the context of Section 34 of the Arbitration Act, the Supreme Court held in *Gaya Electric Supply Co. Ltd. v. State of Bihar*, AIR 1953 SC 182 that the legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. Where, however, a suit is commenced as to a matter which lies outside the submission, the Court is bound to refuse a stay. This reasoning, in my opinion, fully applies for considering the bar of suits under Section 32.

7. In the second place, the plaint does not make it clear in the instant case that the matter was referred to the arbitration, of panchas by written agreement, nor is there anything in the plaint to suggest that there was a written award made by the arbitrators. In the absence of the necessary averments in the plaint, the allegations made in para 7 of the plaint cannot be held to be sufficient to support a conclusion that a reference to arbitration in writing was made and a written award was made

by the arbitrators. Actually the appellate Court found that the plaintiff had acquiesced in the first defendant's non-acceptance of the award, if any; that it has not even been alleged by the plaintiff to be a written award; that even according to the defendant-applicants not even a panel of arbitrators had been constituted as was agreed to in the alleged arbitration agreement and that the arbitrators who were to be nominated by Balakram had not been nominated. It further held that it was for the contesting defendant to plead the necessary facts in support of the bar set up by them. See Abdul Quddoos v. Abdul Gani, AIR 1954 Nag 332; Bansidhar v. E. B. Sukhia, AIR 1957 Madh Pra 24 and Mohammad Yusuf v. S. Hajee Mohammad Hussain, AIR 1964 Mad 1 (FB). The appellate Court is very correct in observing that instead of pleading such a bar the plea of the defendant itself indicates that the panel of arbitrators was never formed.

8. The important point for consideration in this case is as to whether the plaintiff's suit has been brought for the purpose of a decision upon the existence, effect or validity of an arbitration agreement or award. If it is such a suit, the jurisdiction of Court to entertain the suit would be barred. The relief sought in the suit is one of partition and separate possession. None of the reliefs envisaged in Section 32 of the Act has been prayed for in the suit. The suit as instituted does not in any way involve enforcement or amendment or modification or setting aside of an award, and therefore Shyamsingh's case, referred to above, does not help the applicants. It is very pertinent to note that the defendant did not positively plead that an award was made by the panchas but only stated in the witness-box that his signatures had been obtained on a stamp-paper and it was not disclosed to him as to what the contents were. The Appeal Court was correct in commenting upon the pleadings of the defendant that they were not unambiguous.

9. For these reasons, the revision application is dismissed with costs and the order of the Appeal Court dated 22-7-1965 is confirmed. Counsel's fee Rupees 50/- if certified,