Bisnath Vs. Bastimal

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Court : Madhya Pradesh

Decided On : Oct-07-1966

Reported in : AIR1968MP208; 1968MPLJ122

Judge : P.K. Tare, J.

Acts : Arbitration Act, 1940 - Sections 47; Code of Civil Procedure (CPC) , 1908 - Order 23, Rule 3

Appeal No. : Civil Revn. No. 131 of 1966

Appellant : Bisnath

Respondent : Bastimal

Advocate for Def. : A.T.A. Malik, Adv.

Advocate for Pet/Ap. : J.N. Sinha, Adv.

Disposition : Revision dismissed

Judgement :

Tare, J.

1. This is a revision by the defendant against the order, dated 20-11-19R5, passed by the Additional District Judge, Rajnandgaon in civil appeal No 12-A of 1965. reversing the order, dated 29-4-1965, passed by the Civil Judge Class II,

Khairagarh in civil suit No. 40-A of 1964, passing a decree in terms of an award as a compromise under Order 23. Rule 3, Code of Civil Procedure.

2. The respondent filed a suit for possession of certain agricultural lands. Duringthe pendency of the suit, the parties, without reference to the Court, agreed to refer their dispute to the arbitration of certain Panchas who delivered an award on 23-10-1964. The award was signed by the respondent with an endorsement that he was accepting the same. The petitioner merely put his signature without any endorsement of acceptance or refusal. Subsequently the petitioner filed his written statement in Court on merits and thereafter prayed that the award, which had been consented to by the parties, should be made a rule of the Court by treating it as a compromise between the parties under Order 23, Rule 3, Code of Civil Procedure. That suggestion was opposed by the respondent, and the trial Judge held that it could be recorded as a compromise. However, the learned appellate Judge took the contrary view and remanded the case to the trial Court for trial on merits.

3. This case involves the interpretation of the proviso to Section 47 of the Arbitration Act, 1940. It may be pertinent to reproduce the Section itself which is as follows:

'Subject to the provisions of Section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder: Provided that an arbitration award otherwise may with the consent of all the parties be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending'.

As regards consent, there are differing views expressed in some cases which I propose to refer to presently. But as the wording of the proviso indicates, the consent of all the parties interested must be for taking the award into consideration as a compromise or adjustment. Mere consent to the award is not material for purposes of the said proviso.

4. In this connection, it may be relevant to refer to a Full Bench case of the Madras High Court, namely, Abdul Rah-man v. Muhammad Siddiq, AIR 1953 Mad 781 (FB) wherein the learned Judges constituting the Full Bench, upon a consideration of the case law cited before them, propounded the following proposition:

'We are accordingly of opinion that under the proviso to Section 47, an arbitration award obtained otherwise than in proceedings taken in accordance with the Act cannot without more be recognised as a compromise or adjustment of the suit; that no decree can be passed thereon under the provision of Order 23 Rule 3; and that the decision in Arumuga Mudaliar v. Balasubramania Mudaliar, AIR 1945 Mad 294 should be overruled. But if, after an award is made, the parties thereto agree to accept it, that will be a compromise anda decree based thereon could be passed under Order 23 Rule 3'.

Therefore, according to the Full Bench,what is necessary is that there should be subsequent agreement accepting the award. In that event only, it can be considered to be a completed compromise or adjustment so that it could be recorded as such under Order 23, Rule 3, Code of Civil Procedure. The Full Bench case does not lay down anything more than that whether consent at what stage is necessary.

5. This question came up for consideration before Bachawat J. in Jugaldas Damodar Modi and Co. v. Pursottam Umedbhai and Co., AIR 1953 Cal 690. In that case, the learned Judge, while interpreting the proviso, made the following observations:

'On a plain grammatical construction of the proviso, it is not confined to an award on matters in difference in suit without an order of reference by the Court, but is applicable to all arbitration awards otherwise obtained which may be taken into consideration as a compromise or adjustment of a pending suit.

The proviso enables the consideration of the award as a compromise or adjustment of the suit with the consent of all the parties interested by the Court before which the suit is pending and by no other Court. Consent of the parties to the submission is not sufficient if there are other parties interested. The joint

consent of all parties interested is necessary at the point of time when the Court is to take the award into consideration as a compromise or adjustment. Antecedent consent is immaterial just as antecedent invalidity does not debar the Court from recognising it as compromise by common consent. The proviso does not render the award valid nor does it make it enforcible as an award proprio vigore. The proviso enables the recognition of the award for a limited purpose by consent. Where such consent is withheld, as in this case, it cannot be recognised even for that limited purpose'.

The implication of the observations of the learned Judge is that the consent must be for taking into consideration the award as a compromise which necessarily means that the consent must be before the Court which is required to consider that question. According to the learned Judge, any antecedent consent is of no avail. At this stage, I might observe that the view expressed by the learned Judge is fully in consonance with the wording of the proviso itself which speaks of consent for taking into consideration the award as a compromise or as an adjustment. As such, according to the wording of the proviso, the consent must be at the stage and at the time when the Court is required to consider whether the award should be taken into consideration as a compromise or adjustment and any anterior consent will not be of anyavail. That appears to be the obvious and clear meaning of the proviso as was observed by the learned Judge. However, I find that slightly differing views have been taken in some later decisions.

6. This question came up for consideration before a Division Bench of the Andhra Pradesh High Court presided over by Subba Rao C. J., as he then was, and Srinivasachari J. in Gaddipatti Laxminarayana v. Ganginani Venkata Subbiah, AIR 1958 Andh Pra 679, wherein the learned Judges constituting the Division Bench, following the view of the Full Bench of the Madras High Court in AIR 1953 Mad 781 (FB) (supra) made the following observations:--

'The next point to be considered is whether an award obtained in execution proceedings could be regarded as operating as an adjustment of the decree falling under Order 21, Rule 2 or a compromise coming under Order 23, Rule 3, Civil Procedure Code. The relevant provision of the Arbitration Act which may be

regarded as lending support to this view is Section 47 of the Arbitration Act which reads as follows':--

After reproducing the Section, the Division Bench in that ease made the following observations:--

'The proviso makes it clear that the award may be regarded as a compromise or adjustment of a suit, if all the parties interested consent to the award. The consent that is required is consent at the time when the award comes up for consideration; the fact that originally the reference to arbitration was made by consent of the parties interested would not satisfy the requirements of the proviso.

The consent referred to in the proviso must be something other than the consent to refer the matter to arbitration in order that the award may be taken into consideration as a compromise or an adjustment of a suit. It must be acquiesced in or agreed to be treated as an adjustment. The consent of all interested parties is a sine qua non to acting upon the award and recording it as a compromise or adjustment of the matter in dispute.'

According to the observations of the learned Judges, the consent must be there at the time when the award comes up for consideration. Any anterior consent will not be of any avail.

7. In Bidhichand v. Darshanlal, AIR 1956 Madh Bha 115 a Division Bench of that Court, presided over by Dixit and Khan JJ., observed that there would be a material distinction between an award made by the arbitrators and subsequent agreement between the parties accepting the award. Such a subsequent agreement accepting the award cannot be ruled out of consideration as a compromise for purposes of Order 23, Rule 3, Code of Civil Procedure. Therefore, what the learned Judges laid down in that case was that the consent tothe award was immaterial, but what was necessary was some subsequent agreement accepting the award. It may not be confined to a specific agreement, but there may be an implied agreement where the parties acting on the award have done something in pursuance of it. That may also indicate a subsequent implied agreement. But what is necessary is some subsequent act and not merely the

consent to the award.

8. In Tulsabai v. Jagannath, 1957 MP C 649, a Division Bench of this High Court consisting of Dixit J., as he then was, and Samvatsar J., made the fallowing observations;--

'The consent spoken of by the proviso to Section 47 of the Arbitration Act is the consent of the parties to the award being taken into consideration as a compromise or adjustment of the suit. The proviso does not say that the consent of the parties must be to the award itself. The proviso, as its language shows, is applicable only to those cases where there is an award obtained otherwise than in accordance with the provisions of the Arbitration Act but which has not been accepted by the parties. If it is proved that subsequent to the award the parties agreed to accept it and abide by it and thus made it a compromise, then obviously the question of the award being taken into consideration as a compromise, that is to say, being weighed on merits to determine whether it should or should not be treated as a compromise, cannot arise. If the parties have already agreed to accept it as a compromise, then there is no occasion for an enquiry into the question whether the award should or should not be treated as a compromise.'

However, the Division Bench, in that view of the matter, thought that it was not necessary to discuss the decisions cited by the learned counsel for the appellant dealing with the question whether the consent referred to in the proviso would be the consent of the parties at the initial stage when they consented to refer the dispute to arbitration or whether it would be the consent subsequent to the making of the award. It is therefore clear that the Division Bench dealing with this point left the matter open for consideration on some subsequent occasion as to at what stage and relating to what matter consent is necessary.

9. In Raghunandan Rai v. Sukhlal Rai. AIR 1952 Pat 258, a Division Bench of that Court laid down that even if the parties to a suit may have consented to the dispute being settled by arbitration during the pendency of a suit without obtaining the sanction of the Court, the consent of all parties interested would be necessary for making It a rule of the Court; and if without such consent the award were to be made a rule of the Court, the Court would be acting without jurisdiction.

10. In Jumman Khan v. Mujibul Hasan Khan, 1957 All LJ 192, Beg J., as he thenwas expressed the opinion that in order to attract the proviso to Section 47 of the Arbitration Act, consent subsequent to the delivery of the award would be necessary for recognising the same and for taking any action on the basis of it as a compromise. However, the learned Judge was not required to consider the question whether the consent in Court would be necessary for taking into consideration the award as a compromise or adjustment.

11. In Rameshwar Lal v. Mangi Lal, AIR 1964 Pat 374, Untwalia J., however, expressed the opinion that where parties to a suit agreed out of Court to get their dispute referred to arbitration and consent to the award given by the arbitrator, the award could be treated as a compromise between them and a decree could be passed on the basis of such compromise even though one of the parties backed out from the compromise before the Court. For that pro-position, reliance was placed on the Full Bench case of the Madras High Court, namely, AIR 1953 Mad 781 (FB) (supra). The learned Judge expressed the opinion that the consent within the meaning of the proviso to Section 47 of the Arbitration Act would mean not only the consent before the Court, but also a consent given outside the Court. The learned Judge was probably referring to the need of a compromise being finalised and the consent outside Court was probably with reference to that aspect. Thus, a question may arise as to for what matter the consent of all parties interested is necessary. As has been pointed out by the Division Bench of the Andhra Pradesh High Court in AIR 1958 Andh Pra 679 (supra) as also by a Division Bench of this Court in 1957 MPC 649 (supra), the consent should be for taking into consideration the award as a compromise or adjustment of a suit and it would necessarily mean that the consent must be at that stage, that means before the Court. Of course, if all the interested parties Rive their consent in court, then only it may be open to the Court to consider whether the award should be treated as a compromise or adjustment of the suit While considering that question, the Court may also be required to decide whether it was a completed compromise or a completed adjustment. For that it must be shown that all the parties subsequent to the award had consented to it, or in the other sense had accepted it. That acceptance may be by words or in writing or through action. The cases referred to above deal with the different aspects of consent at two stages. Therefore, the

consent necessarily refers to the stage when the Court considers the question whether the award should be recorded as a compromise or adjustment. There is no question of consent at any anterior stage. Subsequent to the delivery of the award, what would be necessary is an acceptance of the award either in words or hi writing or in deeds. If thatacceptance is to be interpreted as consent, that may be all right from one point of view. But the consent mentioned in the proviso iswith reference to the stage when the Court considers the question and it does not speak of any consent in the shape of acceptance of the award. That consent outside Court in the shape of acceptance of the award would also be necessary in order to make it a completed compromise or adjustment without which it can never be recorded.

12. Therefore, I am of opinion that two things would be necessary in order to attract the proviso to Section 47 of the Arbitration Act. One is consent at the stage when the Court takes into consideration the question whether the award should be recorded as a compromise or adjustment, and also consent or acceptance at the earlier stage, but subsequent to the delivery of the award showing that the parties have accepted it. This is how I would understand the Full Bench case of the Madras High Court in view of the specific, wording used in the proviso itself. I may observe that the second aspect of it has been specifically considered by the Orissa High Court in Indramoni Mohapatra v. Nilamoni Moharana, AIR 1950 Orissa 169. Slightly different views were probably expressed with reference to the emphasis laid on consent as also on the necessity of acceptance of acquiescence in the award as a compromise. But there can be no doubt that the consent referred to in the proviso is necessarily the consent before the Court when the Court considers the question and it does not refer to any anterior consent. The Division Bench of this Court has kept the question open and some slightly different views have been expressed in the cases mentioned above. But I do not think that a reference to a larger Bench is necessary in view of the fact that the opinion expressed by Bachawat J. in the Calcutta case and by the Division Bench of the Andhra Pradesh High Court in AIR 1958 Andh Pra 679 (supra) would clarify the matters so that any confusion would be avoided.

13. Applying this test to the present case, it is to be found that at the time of delivery of the award the present respondent had specifically recorded his acceptance of the award, but the petitioner had merely signed it which by itself would not be an indication of acceptance or rejection of the award. The signature can be taken to be merely in token of acknowledging the fact that the award had been delivered by the arbitrators. Nothing more can be read out of that signature. When the respondent himself had made a specific endorsement about his acceptance of the award, there was nothing to prevent the present petitioner from making a similar endorsement or from expressing his approval to the endorsement of the respondent. Thus, what is proved is that the present respondent was a consenting party to the delivery of the award, but it is not established that the present petitioner was a consenting party. Thereafter, there is nothing to indicate that there was any subsequent consent or agreement between the parties accepting the award with the result that the said award might be treated to be a completed compromise. Therefore, this award can under no circumstances be treated to be a completed compromise or adjustment as the necessary consent or acceptance on the part of both the parties is lacking. Subsequently also when the parties appeared in Court, the present petitioner was a consenting party, while the respondent was not a consenting party to the consideration of the question whether the award should be recorded as a compromise or adjustment. Such consent in Court would be necessary and an anterior consent or acceptance would also be necessary. As both are lacking in the present case, I do not think that the learned appellate Judge was in error in refusing to record it as a compromise under Order 23, Rule 3, Code of Civil Procedure and the learned Judge rightly remanded the case to the trial Court for a decision on merits.

14. As a result of the discussion aforesaid, this revision fails and is accordinglydismissed but as the question was not freefrom doubt and as both the parties changedtheir stand on different occasions, I directthat there shall be no order as to coststhroughout which shall be borne as incurred.