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Court : Rajasthan

Decided On : Apr-28-1978

Reported in : AIR1978Raj134; 1978(11)WLN113

Judge : M.L. Joshi, J.

Acts : Limitation Act, 1963 - Schedule - Article 119; Limitation Act, 1908 - Schedule - Articles 158 and 181; Arbitration Act, 1940 - Sections 30, 31 and 33

Appeal No. : Civil Revn. No. 506 of 1976

Appellant : Devendra Singh

Respondent : Kalyan Singh

Advocate for Def. : M.D. Kalla, Adv.

Advocate for Pet/Ap. : P.K. Bhansali, Adv.

Disposition : Revision dismissed

Judgement :
ORDER

M.L. Joshi, J.

1. This is a defendant's revision application directed against the order dated 11th of August, 1976 passed by the Additional Civil Judge, Jodhpur whereby he

dismissed the application of the defendant-petitioner for declaring the award passed in Civil Original Suit No. 125/1976 as nullity.

2. The material facts relevant for the disposal of this revision application, briefly stated, are as follows:--

An application was moved by one Shri Kalusingh son of Shri Mukan Singh Bhati claiming to be the Arbitrator under Section 14(2) of the Indian Arbitration Act, 1940 for filing the award given by him on 20th of May, 1973 in a dispute between the defendant-petitioner and the plaintiff-non-petitioner, praying therein for making the award the rule of the court. The notices were issued to the concerned parties in regard to the filing of the award which were duly served upon the concerned parties for the date of hearing on 2-9-1973. Thereupon, the defendant-petitioner moved an application purporting to be under Section 33 of the Act. The application was, inter alia, based On the grounds that the said award was vitiated, as it was passed without giving opportunity to the petitioner of being heard, that the arbitrator had mis-conducted himself, as he was an intimate friend of the non-petitioner and was, therefore, partial to the non-petitioner; and that there was no valid arbitration agreement in existence referring the dispute to Shri Kalusingh, the alleged arbitrator. It was on these grounds that the defendant petitioner prayed that the award dated 20th of May, 1973 has no legal sanctity and does not exist in the eye of law and it should be declared accordingly. The plaintiff non-petitioner contested this application, amongst others, mainly on the grounds that the application was barred by time, as the same was presented beyond 30 days of the passing of the award.

3. The trial court upheld the contention of the plaintiff and rejected the application as barred by time. Hence this revision.

4. The short controversy before me is whether the application of the defendant for obtaining declaration that the award was a nullity is governed by Article 158 (now 119) of the Indian Limitation Act or under Article 181 of the Act.

5. In order to consider the point germane to the controversy, it would be appropriate to make mention of Sections 30, 31 and 33 of the Act. They read as

under:--

'30. Grounds for setting aside an award. -- An award shall not be set aside except on one or more of the following grounds, namely:

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after the arbitration proceedings have become invalid under Section 35;

(c) that an award has been improperly procured or is otherwise invalid.'

'31. Jurisdiction. (1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be filed, and to no other court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.'

'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.'

5-A. Section 30 deals with the grounds for setting aside an award. Under this section, the Court may set aside the award, if an arbitrator or umpire has misconducted himself, the award has been made after the arbitration agreement has been superseded; or if an award has been improperly procured or is otherwise invalid. Section 31 contains non-obstante clause whereby it has been enjoined that notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement shall be decided by a Court in which the award under the agreement has been, or may be, filed and by no other Court. Further Sub-section (3) of Section 31 lays down that all applications regarding conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed and to no other Court. Section 33 provides the mode as to how the arbitration agreement or award is to be contested. It has been provided by this section that any party to 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. However, if the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and may pass such orders for discovery and particulars, as it may do in a suit.

6. From the survey of the above provisions, it will appear that the Act contemplates that all applications challenging the award must be made under Section 33 irrespective of the ground of the challenge and that they must be the applications

for setting aside the award. The non-existence or invalidity of the reference may be the ground of application for setting aside the award passed on such invalid or non-existent reference including the cases of award in an arbitration proceeding. Section 33 clearly and unmistakably points out that the Indian Arbitration Act does not distinguish between an application for setting aside an award and an application for the adjudication of an award to be a nullity. This section does not contemplate that an application of the former kind should be made under Section 30 of the Act and an application of the latter kind under Section 33 of the Act. The reason is obvious. Section 30 does not prescribe the procedure how the effect or existence of the award is to be contested. It only sets out the grounds for setting aside the award. If we look into Section 33 carefully, it will be dear that the application will have to be made for setting aside the award on the grounds mentioned in Section 30 under Section 33 of the Act only and no other section. There is nothing in the language of Sections 30 and 33 to suggest that the in validities contemplated by the two aforesaid sections are mutually exclusive and that the invalidity for which a party may challenge the award under Section 33 of the Act cannot be the invalidity for which the party could apply to the Court for setting aside the award under Section 30. But the matter cannot be judged merely on the use of the words 'invalidity' and 'invalid' occurring in Sections 30 and 31 respectively. The reason is furnished by the scope and effect of Sections 31, 32 and 33 which are mutually interlinked and not exclusive. It may be pointed out here that the jurisdiction given to the Court as an arbitration court by Section 33 of the Act is the jurisdiction to decide questions relating to the existence, validity or effect of awards. The jurisdiction to set aside awards under Section 30 must be included within the jurisdiction and since Section 33 also speaks of applications by persons desiring to challenge the existence or validity of an award or to have its effect determined, such applications which throw the challenge to an award must also include applications for setting aside an award under the powers conferred by Section 30, Section 31(2) and Section 33 of the Act. To my mind, the Indian Arbitration Act uses the expression 'set aside' in a wide sense and requires that whenever the award is found fit to be removed, it must be set aside. The non-existence or invalidity of an agreement must be equally challenged by means of an application under Section 30 and if it is not urged by such application within the

time limited by law, then the consequences laid down by Section 17 are to follow. In other words, if the application is not made in the time prescribed for challenging the award, the challenge to the award will be disallowed as barred by time. The argument that the words 'otherwise invalid' occurring in Section 30 should be read ejusdem generis with the words preceding in clause (c) of Section 30 of the Act, does not appeal to me. These words, in my opinion, are independent words and there is no reasonable justification to read the words 'otherwise invalid' ejus-dem generis with the clauses preceding them.

7. There is, of course, conflict of judicial opinion on the interpretation of the words 'otherwise invalid' occurring in clause (c) of Section 30 of the Act. In Golnur Bibi v. Abdus Samad, AIR 1931 Cal 211, Shah and Co. v. Ishar Singh Kirpal Singh and Co. AIR 1954 Cal 164, Basant Lal v. Surendra Pra-sad AIR 1957 Pat 417, Prem Sagar Chawla v. Security and Finance (P) Ltd. AIR 1968 Delhi 21 (FB), Durga Charan v. Gauga Dhar AIR 1931 Cal 109, M. I. Shahbad v. Mohammad Abdullah Mir, AIR 1967 J & K 120 it has been held that the words 'or is otherwise invalid' occurring in clause (c) of Section 30 of the Act refer to the invalidity of the kind referred to in the preceding clauses. The reason given is that the expression 'or is otherwise invalid' occurring in Section 30 of the Act must be interpreted ejusdem generis and does not embrace in its fold the case of a challenge to an award based on the ground of jurisdiction or any other ground which is not analogous to those mentioned in the preceding clauses. According to these cases, the challenge to the invalidity of the award on the ground of non-existence of an arbitration agreement cannot come within the purview of Section 30 of the Act.

8. On the other hand, there are a catena of decisions which take the view that there is no scope of applying the principle of ejusdem generis while interpreting the expression 'or is otherwise invalid' occurring in Section 30. Reference may be made in this connection to A.R. Savkur v. Amritlal Kalidas AIR 1954 Bom 293, Lakshminarayana Tantri v. Ramchandra Tantri AIR 1919 Mad 1029, Madho Ram v. Sita Ram AIR 1939 Lah 69, U. Sein Win v. Central Plumbing Co. Ltd. AIR 1935 Rang 94. Balak Ram v. Ramjiwan Lal AIR 1936 Oudh 1, Kishin-chand Changomal v. Takhitram Tulsidas AIR 1939 Sind 241 (FB), Ismail v. Hansraj AIR 1955 Raj 153, Abdul Razaq v. Dhoop Chand 1976 WLN (UC) 287 and Lutawan Kubar v.

Lachiya AIR 1914 All 446 (FB). In all these cases the Court took the view that the expression 'or is otherwise invalid' covered all objections to award on the ground of invalidity from any cause whatsoever. The preponderance of judicial opinion lies in favour of the view that all objections to an award on the ground of invalidity from any cause whatsoever are to be taken under Section 30 read with Section 33 of the Act. This view appears to be more in consonance with the combined reading of Sections 30, 31 and 33 of the Act It may be pointed out here that the present case raises an objection in regard to the validity of the award itself. Once the award is passed it has to be undone or set aside, as contemplated under Section 30 of the Act. It may be apt here to extract the observations of Chakravarti C. J. in Saha & Co. v. Ishar Singh Kri pal Singh & Co. AIR 1956 Cal 321 (FB), which represented the majority view in that Full Bench case as under:

'I do not consider that view to be sound It is true that Section 33 provides for a separate and independent challenge to an arbitration agreement. If no arbitration proceedings have yet been had and no award has been made, a party may undoubtedly challenge by means of an application made to the Court.

But I am of opinion that after an award has been made, a party, if he desires to challenge the validity of an arbitration agreement, can make his challenge only by way of advancing it as a reason for impugning the award as invalid. No independent application against the agreement would at that stage be maintainable. It follows that if a party desiring to challenge an arbitration agreement has not done so by way of asking the award to be set aside on that ground and has allowed a decree to be passed on the award, he cannot thereafter launch an attack against the agreement.

The true view to take appears to me to be that alter an award has been made, all grounds of objection to the award, including grounds of the non-existence or invalidity of the agreement or reference, and all other grounds of nullity must be taken in an application for setting aside the award and that no ground, not so taken, can be available after the time for making such application has expired. All grounds not so taken must be deemed to have been waived.' Hon'ble Shri Lahiri and P. B. Mukerji JJ. concurred in that view, although S. R. Das Gupta and

Bachawat JJ. expressed a contrary view. Be that as it may, the Division Bench of this Court has approvingly quoted this paragraph in Abdnl Razaq v. Dhoop Chand, Supra. To the same effect is the view taken by Modi J. in Ismail v. Hansraj, supra. The view taken by Modi J. is in conformity with the decision of the Calcutta High Court in Saha & Co. v. Ishar Singh Kripal Singh & Co., supra. These cases are on all fours on the case in hand. Having examined all the cases, I have also no hesitation to express my concurrence with the view taken in the Rajasthan cases and the Full Bench case of the Calcutta High Court and accordingly hold that the application filed by petitioner defendant for declaring the award nullity is barred by time. I therefore, do not feel inclined to refer the case to the larger bench as urged by the learned counsel for the petitioner at the bar.

9. In the result, I do not find much force in this revision application. The same is dismissed with costs.

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