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Court : Rajasthan

Decided On : Aug-05-1971

Reported in : AIR1972Raj155; 1971(4)WLN267

Judge : J.P. Jain, J.

Acts : [Arbitration Act, 1940](#) - Sections 13 and 16; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 and 151

Appeal No. : Civil Revn. No. 96 of 1970

Appellant : Hemraj

Respondent : Surajmal and ors.

Advocate for Def. : Chitranjan Kumar, Adv.

Advocate for Pet/Ap. : S.K. Mal Lodha, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

J.P. Jain, J.

1. This is a revision application under Section 115 of the Code of Civil Procedure by one Hemraj challenging the order dated 10th January, 1970 passed by the

Additional District Judge, Ajmer in Civil Suit No. 2/69 by which his application dated 12th May, 1969 under Section 151 of the Code of Civil Procedure was dismissed.

2. The petitioner purchased a house situate in the City of Ajmer for Rs. 20,000/- Non-petitioners Nos. 1 and 2 Surajmal and his mother Smt. Gulab Bai claimed this house by way of pre-emption. With a view to settle the claim out of the Court, the parties agreed to make a reference to arbitration. They mutually agreed to appoint Shri Manakchand Sogani Advocate, non-petitioner No. 3, Shri Kistoorchand Jhanwar Advocate, non-petitioner No. 4 and Shri Mukandram Garg, Advocate, non-petitioner No. 5 as arbitrators. The dispute was referred to the arbitrators and the arbitrators gave their award on 2nd November, 1968, The arbitrators by an application dated 2nd December, 1968 submitted the award in the Court of Additional District Judge, Ajmer along with the proceedings drawn by them asking the Court to make the award a rule of the Court. The case was registered as Civil Suit No. 2/69. Notices were ordered to be issued to the parties.

3. On 4-1-1969 Shri Kistoorchand Jhanwar non-petitioner No. 4, one of the arbitrators made an application in the Court of Additional District Judge, Ajmer stating that the award submitted by them earlier has not been registered by accidental slip and the arbitrators do not intend to add or vary the award except to get it registered by the Sub-Registrar, Aimer. It was prayed that the award may be got registered by any official of the court or it may be handed over back to them to get it registered. Hemraj who was the vendee of the house was given notice of this application. He was represented by his counsel Shri S. S. Deedwania. The learned Additional District Judge heard the arguments of the parties and by bis order dated 27-1-1969 the application of Shri Kistoorchand Jhanwal was accepted and the award was returned to him. The learned Judge placed reliance on Champalal v. Mst. Samrathbai, AIR 1960 SC 629 and the suit was posted on 5-2-1969.

4. Shri Hemraj filed objections against the award on 3-2-1969. Non-petitioners Nos. 1 and 2 filed their reply to the said objections on 28th March, 1969. As all the arbitrators could not be present before the Sub-Registrar, the award could notbe registered finally, and the Sub-Registrar, Ajmer referred the award to the Registrar

for registering it.

5. On May 12, 1969, Hemraj petitioner submitted an application under Section 151 of the Code of Civil Procedure before the Additional District Judge, Ajmer stating that the award had not till then been registered and the order passed by the Court on 27th January, 1969 was not warranted by any law. The learned Additional District Judge, after having heard the parties, dismissed the application by his order dated 10th June, 1970 and he held that the order dated 27-1-1969 was passed after hearing the petitioner's counsel and if he was not satisfied with the order, he could have challenged the same before an appropriate authority. It is against this order that the petitioner Hemraj has come to this Court under Section 115, C. P. C. and wants this Court to set aside the orders dated 10th January, 1970 and 27th January, 1969 returning the award to the arbitrators for purposes of registration.

6. I have heard Shri S.K. Mal Lodha on behalf of the petitioner and Shri Chitranjan Verma on behalf of non-petitioners Nos. 1 and 2, Arbitrators have not appeared in this Court.

7. The first contention of learned counsel for the petitioner is that the order dated 27-1-1969 returning the award was not covered by Section 13(d) of the Arbitration Act in which the lower Court has purported to return the award. He has also contended that the provisions contained in Section 16(1)(c) of the Act are also not attracted and under this provision also the award could not be returned for getting it registered. According to him, the order passed on 27-1-1969 being contrary to law, the learned Judge should have recalled the said order under Section 151, C. P. C. In not recalling the order, the lower Court has failed to exercise jurisdiction vested in it by law. On the other hand, Shri Verma, learned counsel for the non-petitioner submitted that the order returning the award was passed after having heard the petitioner. It was open to the petitioner to have challenged the validity of the order in the High Court and since it was not done, it was not open to the petitioner to reagitate the matter by an application under Section 151, C. P. C. Apart from this, it was submitted by him that the lower Court did not act without jurisdiction or in excess of jurisdiction in returning the award to the arbitrators for

getting it registered. The provisions of the Arbitration Act do not prohibit the return of the award for this purpose. It is also urged on behalf of the non-petitioners that in dismissing the application under Section 151, C. P. C. the lower Court has not acted without jurisdiction. It was open to the Court to exercise its discretion and the same was exercised. And once that discretion has been exercised, the order is not open to revision under Section 115, C. P. C.

8. Shri Lodha has placed reliance on Rikhabdass v. Ballabhdas, AIR 1962 SG 551. In the case before the Supreme Court the award submitted was unstamped and unregistered. On an objection being taken, the trial Court passed an order remitting the award to the arbitrator for submitting it to the Court on a duly stamped paper and after getting it registered. Against this order, the High Court at Nagpur was moved in revision. The learned single Judge who heard the case referred the matter to a larger Bench after framing three questions for decision:--

'(a) Is the award made on a reference by the Court on an application under Section 20 of the Arbitration Act chargeable to stamp duty?

(b) Is such an award compulsorily registrable when it relates to partition of immovable property of the value of one hundred rupees and upwards?

(c) Has the Court powers under Section 16(c) of the Arbitration Act of 1910 or otherwise to remit an award to the arbitrator or umpire to get it stamped and/or registered?'

9. The Division Bench of the High Court did not require to answer the first question as it was agreed by both the parties that the award required to be stamped. As regards the second, it did not think it necessary to answer at that stage. The answer to the third question was in the affirmative. This matter went before the Supreme Court. The only question raised before the Supreme Court was whether the answer of the Division Bench to the third question was correct. Their Lordships of the Supreme Court observed as follows:--

'We think that the Division Bench of the High Court was clearly in error. Under Section 16 of the Arbitration Act an award can be remitted to the arbitrators only

for reconsideration. When it remitted for rewriting it on a stamped paper, it is not remitted for reconsideration. Reconsideration by the arbitrators necessarily imports fresh consideration of matters already considered by them. Now they can only consider and give a decision upon matters which are referred to them under the arbitration agreement. It follows that the reconsideration can only be as to the merits of the award. They reconsider nothing when they re-write the award on a stamped paper.'

Their Lordships of the Supreme Court also quoted with approval the following observations of the Calcutta High Court in *Nani Bala Saha v. Ram Gopal Saha*, AIR 1945 Cal 19.

'That clause (c) means this and nothing more: namely that where the Court finds an error of law in the award itself or in some document actually incorporated thereto on which the arbitrator had based his award, that is to say, finds the statement of some erroneous legal proposition which is the basis of the award, it can remit the award to the arbitrator for reconsideration and want of registration is a defect de hors the award or the decision of the arbitrator, and so in our judgment is not covered by Clause (c) of Section 16(1), Arbitration Act of 1940.'

10. Their Lordships further observed in para 9 as follows:--

'Lastly, Mr. Pathak tried to support the order under Sections 13(d) and 15(b) and (c) of the Arbitration Act. A bare perusal of the provisions mentioned would show, that the order made in this case cannot be based on any of them. Section 13(d) deals with correction of clerical mistakes or accidental slips in the award, neither of which we think an omission to stamp, is. Furthermore, Section 13 is only an enabling section giving certain powers to the arbitrator. The arbitrator cannot be compelled to exercise these powers. Section 15 deals with a Court's power to modify or correct an award. In the present case, the Court did not purport to exercise that power.'

11. Their Lordships finally held as observed by them as follows:--

'We, therefore, think that the Division Bench was in error in thinking that an order could be made remitting the award to the arbitrator with a direction to re-write it on a stamped paper and resubmit it to Court. That is the only point that we decide in this case.'

12. In view of the observations quoted above, it is clear that Section 33(d) and Section 16(1)(c) could not be invoked for the return of the award to the arbitrators for registration. But this does not decide the question before me. It can at best be said that the order passed on 27-1-1969 was not a correct order and could not have been passed within the meaning of Section 13(d) of the Act.

13. The question that faces me in this case is whether the learned Judge was bound to exercise his jurisdiction under Section 351 of the Code of Civil Procedure. The petitioner had full notice of the application of non-petitioner No. 4 and he was represented by a senior lawyer Mr. S.B. Deedwania. He had full opportunity to address the Court on the propriety of returning the award to the arbitrators for the purpose of registration. The learned Judge decided the matter, may be wrongly, after having heard the parties. This order was not challenged by the petitioner. He chose to make an application on 12-5-1969 stating that the order passed by the Court on 27-1-1969 was not in accordance with law. The learned Judge thought that the point could not be reagitated and did not choose to recall the order. Learned counsel for the petitioner strenuously urged that even if he did not-challenge the order dated 27-1-1969 in revision, he could move the Court under Section 151, C. P. C. and the Court was bound to recall the order in its inherent power. He has placed reliance on B. V. Patankar v. C. G. Sastry, AIR 1961 SC 272. In that case the trial Court held the lease to be binding for the first period of ten years, that is, upto May 1, 1951 and the condition of option to renewal was held to be void and unenforceable for uncertainty. The decree for possession was passed to be operative after May 1, 1951. On July 9, 1951 the decree-holder took out the execution of the decree and obtained possession on July 22, 1951. The order of delivery of possession was made without notice to the judgment-debtor. On August 13, 1951, the respondent moved the Executing Court under Sections 47, 144 and 151 of the Code of Civil Procedure for setting aside the ex parte order of delivery and for redelivery of the possession of the house to

him. The District Judge dismissed the application. The High Court held that the Executing Court had no jurisdiction to order delivery of possession in view of the provision of the Mysore House Rent and Accommodation Control Order, 1948 which was in operation on the date of eviction and directed the decree-holder to return the possession of the house in dispute to the judgment-debtor. This case went to the Supreme Court by special leave to appeal. Their Lordships of the Supreme Court by a reference to the provisions of the House Rent Control Orders of 1945 and 1948 came to the conclusion that a tenant in possession of the house could not be evicted in execution of a decree or otherwise except in accordance with the provisions of the Act. They upheld the order of the High Court and observed that any possession given under the ex parte order passed in execution of such a decree could be set aside under Section 351, C. P. C. It was also observed that Section 47/151 C. P. C. would be equally effective to sustain the order of redelivery made in favour of the judgment-debtor. The facts of this case clearly show that the order under Section 151, C. P. C. was made where the statutory provisions prohibited dispossession of a tenant in possession whether in execution of a decree or otherwise except in accordance with the provisions of the House Rent Control Order. The Mysore House Rent Control Order was in operation on the day when the execution of the decree was taken out and the lessee was sought to be evicted. Section 9 of the Mysore House Rent and Accommodation Control Order, 1948 clearly forbade the dispossession of the tenant.

14-15. Another case that has been relied upon by learned counsel for the petitioner is Labharam v. Kuberdas, 1957 Raj LW 598. In this case the suit was dismissed under Order IX, Rule 3 of the Code of Civil Procedure. Both the parties were absent. The suit was restored under Order IX Rule 4 of the Code of Civil Procedure on the application of the plaintiff. No notice was given to the defendant after restoration of the suit. And soon after the suit was restored, the plaintiff's evidence was recorded and the suit was decreed. After the defendant came to know of the decree against him, he moved the Court under Section 151 of the Code of Civil Procedure to set aside the decree. The trial Court exercised its discretion under Section 151 of the Code of Civil Procedure and set aside the decree. The learned Judge of this Court upheld the order in revision.

16. Next case relied upon by the learned counsel is *Konathala Briramulu v. Board of Revenue* (C. T.), AIR 1965 Andh Pra 395. In this case the Court ordered the refund of the Court-fee. On application made under Section 151, C. P. C. it found that apart from the matters mentioned in Sections 63 to 66 of the Andhra Court-fees and Suits Valuation Act (7 of 1956) the Court had no inherent power to sanction refund of Court-fee. Accordingly, the Court set aside the order passed by it earlier. The Andhra High Court has placed reliance on AIR 1961 SC 272, which I have referred to above.

17. On the basis of these authorities, the learned counsel for the petitioner submits that the learned Additional District Judge could recall his order which was passed apparently against law. I am unable to accept the contention of learned counsel that the present case was one in which the Additional District Judge was bound to recall the order. As I have noticed above in *B. V. Patankar's case*, AIR 1961 SC 272, the order of delivery of possession was passed ex parte. The judgment-debtor was not heard when possession was ordered to be delivered to the decree-holder. Similarly in *Labhuram's case*, 1957 Raj LW 598 after the suit was restored, no notice was given to the defendant and he had no opportunity of being heard. In the present case, the petitioner had full notice and his learned counsel was heard. It cannot therefore be said on the analogy of the above cases relied upon that the learned Additional District Judge failed to exercise jurisdiction vested in him by law. In my opinion, the authorities referred above are of no help to the petitioner.

18. The contention of learned counsel for the non-petitioner that there is no provision in the Arbitration Act which prohibits the return of the award for registration is not without force. While accepting that under Sections 13 and 16 of the Arbitration Act, the award could not have been returned to the arbitrators for the purpose of registration, there is no provision existing in the Arbitration Act which forbids the return of the award for this purpose. Something which has not been provided in the Act cannot be taken to have been prohibited and unless something is prohibited, it can be considered to be permissible. The order dated 27-1-69 can by itself be considered an order under Section 151, C. P. C. I cannot therefore hold that the order passed by the learned Additional District Judge was wholly without jurisdiction. The order may have been erroneous but it was in

proper exercise of jurisdiction and an erroneous decision in proper exercise of of jurisdiction is not the same thing as 'exercise of jurisdiction not vested by law'.

19. I will now consider the case, AIR 1960 SC 629 on which reliance was placed by the Additional District Judge while passing the order dated 27-1-1969. In this case an unregistered award was submitted to the Court for making a rule of the Court. At the request of Mst. Samrathbai the award was handed over back for getting it registered. When it was presented for registration to the Sub-Registrar, it was returned by the Sub-Registrar on the ground that it was not accompanied by a list and the particulars of the property covered by the award. The list and the particulars were accordingly prepared and the attorney holder of two out of three arbitrators signed the same and it was re-presented for registration. The award was registered in regard to two arbitrators, but it was refused qua the third arbitrator. The matter was referred to the Registrar who registered the award in regard to the third arbitrator as well. The return of the award for the purpose of registration was not questioned. One of the points raised was that the unregistered award could not have been filed. Their Lordships of the Supreme Court held that the filing of an unregistered award which requires registration is not prohibited under Section 49 of the Registration Act. What is prohibited is that it cannot be taken into evidence so as to affect immovable property falling under Section 17 of that Act. The learned trial Judge presumably in view of the facts of this case thought that the award could be returned for registration. But as a matter of fact, the propriety and legality of the order returning the award was not decided.

20. I am unable to find any error falling within the ambit of Section 115, C. P. C. in the order dated 10-1-1970. The learned trial Judge cannot be said to have failed to exercise jurisdiction vested in him by law. I do not find as well any illegality and material irregularity in the order passed by him. As regards the order dated 27-1-1969 it is obvious that the petitioner failed to challenge the order and he cannot now challenge the said order by making a fresh application.

21. Accordingly, I dismiss the revision application. The petitioner will pay costs of this Court to non-petitioners Nos. 1 and 2.

