

Mool Chand Vs. Manak Chand

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Court : Rajasthan

Decided On : Jan-28-1970

Reported in : 1970WLN203

Judge : C.M. Lodha, J.

Appeal No. : D.B. Civil Second Appeal No. 31 of 1962

Appellant : Mool Chand

Respondent : Manak Chand

Judgement :

C.M. Lodha, J.

1. This is a second appeal by the plaintiff Moolchand whose suit has been dismissed by the District Judge, Ajmer on the ground that it is not maintainable under the provisions of the Arbitration Act no 10 of 1940.

2. The facts of the case may be stated within a short compass. The respondent Manakchand obtained a decree for Rs. 8000/- against the appellant Moolchand from the Court of Sub Judge, First Class, Beawar on 10-5-1954 on the basis of an award dated 26-4-1254, The decree was subsequently amended on 30-12-1254. The present suit was filed by Moolchand on 9-5-1955 for setting aside the decree dated 30-12-1954 as being fraudelent, null and void. It was alleged in the plaint

that the plaintiff Moolchand had neither executed any arbitration agreement in favour of the alleged arbitrator Shri Jagdish Prasad nor there had been any valid award against him. He stated that he was a servant of the defendant at his shop on a monthly salary of Rs. 35/- and had not borrowed any money from Manakchadd. It was further alleged that he had not appointed Shri Mukand Chandra Ranka as his counsel nor had signed Vakalatnama in the latter's favour nor he had made any application for amendment of the decree. The plaintiff, it is alleged that he had not received notice of the arbitration proceedings nor had ever appeared before the alleged arbitrator Shri Jagdish Prasad. The plaintiff, it is alleged, got knowledge of the decree passed against him on the basis of the award only when he received a notice under Order 21, Rule 66, Civil Procedure Code. In short his case was that a complete fraud had been played upon him and the decree thus obtained by perpetrating fraud not only upon him but on the Court also was liable to be rescinded. The averments made by the plaintiff in the plaint were stoutly denied by the defendant Manakchand in his written statement. After recording the evidence produced by the parties, the learned Civil Judge, Beawar by his judgment dated 30-5-1959 held that decree obtained against the plaintiff Moolchand in civil suit No. 94 of 1954 by the Sub-Judge, First Class, Beawar dated 10-5-1954 and subsequently amended on 30-5-1954 was fraudulent, null and void and was inexecutable against the plaintiff's suit was decreed and a perpetual injunction was granted against the defendant Manakchand not to execute the impugned decree against the plaintiff.

3. Dissatisfied with the judgment of the Civil Judge, Beawar the defendant Manak Chand filed appeal in the Court of District Judge, Ajmer, who as already stated above, held that the plaintiff's suit was not maintainable and in this view of the matter without going into other questions, allowed the defendant's appeal, set aside the judgment and decree of the trial court and dismissed the plaintiff's suit. It is under these circumstances that the plaintiff has come in second appeal to this court.

4. Thus the only point for decision in this appeal is whether the plaintiff's suit is maintainable.

5. Learned counsel for the appellant has urged that the view of the learned District Judge that the suit is barred under Sections 32 and 33 of the Arbitration Act, 1940 (which will hereinafter to be called as 'the Act') is erroneous. In support of his contention he has relied upon *Banwarilal v. Hindu College, Delhi* AIR 1949 East Punj. 165, *State of Bombay v. Adamjee and co*, AIR 1951 Pat. 147, *Mankck Memani v. Shiva Jute Bailing Ltd.* 52 CWN 389 and *Baijnath v. Chhotulal* 52 CWN 397. On the other hand learned counsel for the respondent has strenuously urged that the only course open to the plaintiff Moolchand for avoiding the impugned decree passed on the basis of the award was to have filed an application under Section 33 of the Act as a regular suit for setting aside such a decree is barred under Section 32 of the Act. In support of his contention he has placed strong reliance on *Basant Lal v. Surendra Prasad* : AIR1957 Pat417 , which according to the learned counsel, is on all fours with the present case. He has also placed reliance on *Chaturbhuj Mohanlal v. Bhicam Chand* 53 CWN 410, *Jawaharlal v. Union of India* : [1962]3SCR769 , *Ms. Vallabh Pitte v. Narsinghdas* : AIR1963 Bom157 and *Sambandam v. The General Manager, South Indian Railway* : AIR1953 Mad54 .

6. For a correct appraisal of the arguments of the learned counsel for the parties it would be proper to summarise in same detail the allegations contained in the plaint. It is alleged by the plaintiff that he never appointed Shri Jagdish Prasad as an arbitrator nor signed or subscribed his signature to any deed of reference in favour of Shri Jagdish Prasad, nor he signed any award alleged to have been made on 26- 4- 1954. It has been further stated by him that he did not receive any notice from the arbitrator nor appointed Shri Mukand Chand Ranka as his counsel, nor signed any Vakalatnama in his favour, nor made any application to the Court for amending the decree. It has also been alleged that he was made to sign his signature over a paper on a false representation made to him that his signatures were required for the purposes of writing out an agreement of his service under the plaintiff. It was alleged that the defendant Mankchand had entered into a conspiracy with one Pannalal and the Advocates Shri M.C. Ranka and Bhanwar Lal Ranka and the alleged arbitrator Shri Jagdish Prasad as a result of which the impugned decree was obtained against him by fraud. To put in brief he has alleged fraud from the stage of coming into existence of arbitration agreement upto

the stage of decree being passed against him.

7. At this stage it would be proper to refer to the relevant sections of the Arbitration Act which have been pressed into service by the learned counsel for the respondent in support of his contention, that the suit is barred. Section 32 reads as under;--

32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration, agreement or award be set aside amended, modified or in any way affected otherwise as provided in this Article

Section 33 runs as follows:

33. 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.

8. A bare perusal of Section 32 makes it crystal clear that no suit shall lie on any ground whatsoever for a decision upon the existence effect or validity of an arbitration agreement or award and an arbitration agreement or award can be set aside, amended or modified or affected in any other way only according to the provisions in the Act. Section 33 further provides that if a party to an arbitration agreement or any person claiming under him desires to challenge the existence or validity of an arbitration agreement or an award, he must make an application to the Court which shall decide the question on affidavits or may record other evidence if it thinks fit to do so. Thus there is no doubt that the only remedy provided under the Act for challenging the existence or validity of an arbitration agreement or an award on any ground whatsoever is by an application under

Section 33 of the Act. The position appears to me so very clear that I do not consider it necessary to refer to any case law on the point. But the question which calls for determination is as to what is the remedy if a judgment, or decree is passed on the basis of an award, and the allegation of a party is that the judgment and decree have been obtained against him by practising fraud on him as well as on the Court not only prior to obtaining the award, but even thereafter.

9. However, before I address myself to this question, I may advert to another branch of the argument advanced on behalf of the appellants that the words 'any party to an arbitration agreement' used in Section 33 refer to a party in fact and not the alleged party who denies to have executed an arbitration agreement.

10. In *Manick Lal Memani v. Shiva Jute Bailing Ltd.*, 52 CWN 389 the learned Judge observed as follows:

That section (i. e. Section 33) enjoins that a party to an arbitration agreement desiring to challenge the existence or validity of an arbitration agreement or to have the effect thereof determined must apply to the Court. This section proceeds on the basis of the factual or an apparent existence of an arbitration agreement and contemplates the case of a party to such arbitration agreement coming to Court and seeking to challenge its legal existence on the ground of mistake, fraud, misrepresentation, coercion, illegality or like grounds to be found in Sections 19 to 30 of the Contract Act. The case of *Deokinandan Dalmia v. Basantlal Ghanshyamdass* (45 C W. N. 881 (1941) decided by Lord Williams, J., dealt with such a situation. But a person who alleges that he never entered into an arbitration agreement cannot possibly be said to be a party to an arbitration agreement so as to come within the purview of Section 33.

11. The same view was taken by another Judge of the Calcutta High Court in another case contained in the same volume *Baij Nath v. Chhotulal* 52 CWN 397.

12. This view, however, does not seem to have found favour subsequently with another Judge of the Calcutta High Court in *Chaturbhuj Mohanlal v. Bhicam Chand* 53 CWN 410, and it was observed in the judgment that the words 'any party to the arbitration agreement' should be read in a sense other than in its strict

and literal sense and should be construed to mean party who is alleged to be a party to the arbitration agreement but who challenged the existence thereof. The word 'existence' according to the learned Judge should not be read in a restricted sense but in its ordinary and natural meaning namely, existence either in fact or in law.

13. In *Basantlal v. Surendra Prasad* : AIR1957 Pat417 it was held by the learned Judges of the Patna High Court that the words 'any party' with which Section 33 of the Act opens contemplate and include persons alleged to be parties, though they may not be actually parties, and, therefore, they mean also persons who are not alleged to have entered into the arbitration agreement. Likewise, the word 'agreement' includes a sham agreement, and means factual existence of the agreement, although, it may have or it may turn out to have no legal existence at all.

14. In *M/s Vallabh Pitte v. Narsinghdas* : AIR1963 Bom157 it was observed 'that the words 'any, party to an arbitration agreement' in Section 33 must necessarily include a person who is alleged to be a party to an arbitration agreement and cannot be confined to a person who admits to be a party to an arbitration agreement since it would be in a large number of cases an impossibility that a man who admits to be a party to the arbitration agreement is yet in a position to challenge the existence of such agreement.

15. After having given my careful consideration to the matter, I have come to the conclusion that the words 'any party to an arbitration agreement' used in Section 33 of the Act refer not only to the person who admits to be a party to an arbitration agreement but also to a person who purports to be or is alleged to be a party to an arbitration agreement. Consequently the argument of the learned counsel for the appellant that since Moolchand has denied to be a party to an arbitration agreement. and, therefore, he could not have made an application under Section 33 of the Act has in my opinion no force and Moolchand must be considered to be a party to an arbitration agreement as contemplated by Section 33 of the Act.

16. Now, I revert to the main question whether inspite of being a party to an arbitration agreement as contemplated by Section 33 of the Act, could the plaintiff

maintain the present suit The nearest authority which has been cited at the Bar is *Basantlal v. Surendra Prasad* : AIR1957 Pat417 . The facts of that case were that appellant Basantlal, and, respondents Surendra Prasad and Laliteshwar Prasad purported to have executed in arbitration agreement for referring their differences, with respect to certain lands to the arbitration of Pandit Girindra Mohan Mishra, who gave his award in favour of Surendra Prasad on whose application under Section 14(2) of the Act the arbitrator filed the award in the Court. Notice of the filing of the award were alleged to have been served on Basantlal as well as Laliteshwar Prasad, but none of them appeared to object to the award, and consequently the Court pronounced the judgment in terms of the award on which a decree followed. Notice under Order 21, Rule 37, Civil P.C, in course of execution having been served on the Basantlal, he made an application under Section 33 of the Act for a declaration that the alleged arbitration agreement was invalid, forged and consequently the decree had been fraudulently obtained against him. It was prayed that the decree based on the award be set aside. It was urged on behalf of the opposite party that the award having merged into judgment and decree Basantlal had no locus standi to object to the award on any ground whatsoever without first getting the judgment and decree set aside. The learned Judges held that the arbitration agreement was the sole basis of the reference, award, judgment and decree and as such if the arbitration agreement is found to be nonexistent on the ground that the appellant did not sign it and that he did not join it, the main plank goes and the basis disappears and therefore all the subsequent proceedings taken and based on such arbitration agreement would automatically fall to the ground. It was found that the charge of fraud was established and consequently it was held that the application made under Section 33 of the Act must be allowed.

17. Learned counsel for the respondent wants me to infer from this judgment that since the learned Judges of the Patna High Court had held that the application under Section 33 of the Act was maintainable, no suit would lie for setting aside the judgment and decree based on an award alleged to have been obtained by fraud. After having carefully gone through this judgment I must say that it does not specifically decide the point which has been canvassed at length before me. It was no doubt held in this case that an effect of an award alleged to have been obtained

by fraud and followed by a decree may be determined by an application under Section 33 of the Act. Learned counsel for both the parties expressed their inability to produce a case exactly in point, and, as already stated above, the Patna case is no authority for the point that a suit is not maintainable in such circumstances as exist in the present case and I have, therefore, to answer the question on the interpretation of the relevant sections of the Arbitration Act reproduced above. As already observed in the earlier part of this judgment Section 32 bars a suit for decision upon the existence effect or validity of an arbitration agreement or award. It makes no reference to a decree passed on the basis of an award under Section 17 of the Act. The question whether it would be open to a party to make an application for setting aside the decree obtained by the opposite party under Section 17 on the basis of an award on account of fraud, mistake or duress or on any other equitable ground does not arise in the present case, as no application has been filed under Section 33 and the aggrieved party has filed a regular suit. In these circumstances with all respect to the learned Judges of the Patna High Court for the view they have taken in Basantlal's case it is hardly necessary or desirable for me to express any opinion either way, and I will confine myself to the limited question whether a suit can lie for getting the decree set aside in such circumstances as are alleged in the present case I am clear in my mind that in a regular suit the Court cannot enter into the question of validity or otherwise of the award or the arbitration agreement, but short of that, it will be open to a party to file a suit for declaration that a certain decree was obtained by the opposite party by practising fraud on him as well as on the Court. In the words of their Lordships of the Privy Council in *Rajwant v. Ram Rattan* AIR 1915 P.C. 99 rescission and destruction of a former decree of a competent court can be obtained on the ground of fraud practised on the court.' Thus if a decree is found to have been obtained by fraud, whatever may be the basis of the decree it is liable to be set aside by a regular suit. There is no specific prohibitions contained in Section 32 barring such a suit, nor such a bar can be spelled out from this section as a necessary intendment. In this view of the matter if the plaintiff's allegations regarding fraud having been practised on the Court are found to be correct the decree would be set aside and the parties would be relegated to the same position which they occupied before the passing of the decree under Section 17. It will then be open to

the successful plaintiff to have the proceedings under Section 17 reopened and then press his objections under that section or to file an application under Section 33 to have the effect or validity of the arbitration agreement or the award determined. On a careful reading of Section 32 I have come to the conclusion that it does not bar the filing of a suit for decision upon the validity of a decree alleged to have been obtained by fraud even though the decree is based on an award.

18. The learned District Judge has based his conclusion regarding the maintainability of the suit solely on the basis of *Basant Lal v. Surendra Prasad* : AIR1957 Pat417 and has held that if a declaratory suit of this nature was to be allowed for setting aside the decree passed under Section 17 of the Act then it would clearly contravene the provisions of Section 32 of the Indian Arbitration Act because, in view of the learned District Judge, the effect of such a declaratory suit would in essence amount to setting aside the award itself which would be contrary to the provisions of Section 32 of the Act. As I have already pointed out above, the Patna case does not specifically decide the point in issue in the present case, nor it necessarily leads to the conclusion that the learned Judges of the Patna High Court were of the view that a suit for setting aside a decree on the ground of fraud is not maintainable in case the decree is based on an award.

19. To borrow the language of Lord Chief Justice De Grey:

Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings in Courts of Justice.

In the words of Lord Coke: It avoids all judicial acts, ecclesiastical or temporal'. While dealing with this aspect of the case one must not lose sight of the fact that the plaintiff in the present case has pleaded fraud not only prior to the obtaining of the award but also thereafter. I may point out even at the risk of repetition that it has been stated by him that no notice of the filing of the award was served upon him, and that he had not engaged Shri M.C Ranka Advocate to appear, plead or act on his behalf in the proceedings after filing the award nor he had ever applied or authorised anybody to apply on his behalf for the so called amendment of the decree. Thus he has alleged that the fraud has been practised upon the Court, as well as upon him even after the filing of the award in the Court. An enquiry into this

part of the allegations regarding fraud, in my opinion, does not fall within the ambit of Section 32 or 33, both of which only deal with the question of challenge to the existence or validity of an arbitration agreement or an award.

20. After bestowing my careful consideration on the various aspects of the question agitated before me I have come to the conclusion that the learned District Judge was not correct in throwing out the suit on the ground that it was not maintainable under Sections 32 and 33 of the Act In this view of the matter I allow this appeal, set aside the judgment and decree of the learned District Judge, Ajmer dated 13th November, 1961 and send the case back to him for decision of the appeal on merits on the lines indicated above. In the circumstances of the case I leave the parties to bear their own costs.

21. Learned counsel for the respondents prays for grant of leave to appeal to Division Bench under Section 18 of the Rajasthan High Court Ordinance. Looking to the importance of the question of law involved in the case I hereby grant the leave sought for.

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