Amiteshwar Dayal and Others Vs Shambhu Dayal and Others

Court: Patna High Court

Date of Decision: March 27, 2012

Acts Referred: Arbitration Act, 1940 â€" Section 17, 3, 32
Civil Procedure Code, 1908 (CPC) â€" Order 32 Rule 7
Criminal Procedure Code, 1973 (CrPC) â€" Section 107
Hindu Succession Act, 1956 â€" Section 22
Limitation Act, 1908 â€" Article 114, 91
Limitation Act, 1963 â€" Article 59
Specific Relief Act, 1963 â€" Section 16(3), 42
Transfer of Property Act, 1882 â€" Section 44

Citation: (2012) 4 PLJR 168

Hon'ble Judges: Mungeshwar Sahoo, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Mungeshwar Sahoo, J.
Both the First Appeals are heard together because the result of First Appeal No. 1206 of 1971 is dependent on

the result of First Appeal No. 65 of 1967. The First Appeal No. 65 of 1967 was filed by the original plaintiff, Tarkeshwar Dayal against the

judgment and decree dated 19.01.1967 passed by Sri Harishanker Prasad Choudhary, Additional Subordinate Judge 2nd Court, Patna in Title

Suit No. 58 of 1954/20 of 1965 whereby the learned court below dismissed the plaintiff"s suit for declaration that the decree dated 13.02.1950

passed in Title Suit No. 8 of 1950 is null and void and not binding on the plaintiff and for partition of half share in the joint family properties. During

the pendency of the appeal, the original plaintiff-appellant, Tarkeshwar Dayal died and has been substituted by his legal representatives. The said

plaintiff-appellant had filed First Appeal No. 1206 of 1971 against the judgment and decree dated 16.07.1971 passed by Sri Dipti Prasad

Mukherjee, 2nd Additional Subordinate Judge, Patna in Title Suit No. 115 of 1963/43 of 1970 whereby the learned court below dismissed the

plaintiff"s suit for pre-emption and in the alternative, for specific performance of contract.

2. During the course of argument, it is submitted by the learned counsels appearing on behalf of both the parties that if it is held that there had been

no partition between the original plaintiff and original defendant no. 1, then only the question of pre-emption will arise and, therefore, the result of

this first suit is dependent on the result of the second suit giving rise to First Appeal No. 1206 of 1971. In such circumstances, both the appeals are

heard together and are being disposed of by this common judgment with the consent of the parties. The original defendant no. 1, Chandeshwar

Dayal also died during the pendency of the appeal and has been substituted by his legal representatives.

3. The original plaintiff, Tarkeshwar Dayal filed aforesaid Title Suit No. 58 of 1954/20 of 1965 giving rise to First Appeal No. 65 of 1967 for

declaration that the decree dated 13.02.1950 passed in Title Suit No. 8 of 1950 is null and void and not binding on the plaintiff. The plaintiff also

prayed for partition of the joint family properties mentioned in detail in Schedule-1(A) of the plaint, after adjudication of the aforesaid decree as

null and void. The plaintiffs claimed the said relief alleging that Sri Shiveshwar Dayal, Advocate, father of plaintiff and defendant no. 1 and husband

of defendant no. 4 died on 03.08.1932 leaving behind the suit property. At the time of death of their father, the plaintiff and the defendant no. 1

were minors. So, in Guardianship Case No. 90 of 1932, Kameshwar Dayal, Advocate was appointed as guardian of the person and the property

of both the minor sons and one minor sister also. In Guardianship Case No. 30 of 1934, the defendant no. 4, Sarswati Devi, mother of plaintiff and

step mother of defendant no. 1 was appointed as guardian of plaintiff and Lakshmi Devi. In the said guardianship case, the defendant no. 1,

Chandeshwar Dayal filed an application on 10.10.1947 stating that he has attained majority and then he obtained moveable and moneys from the

step mother. On 01.02.1949, it was held by the District Judge that the mother of defendant no. 4 had ceased to be the guardian of the plaintiff as

one of the coparceners became major and karta of the family. Thereafter on 30.03.1949, the defendant no. 4 who is mother of the plaintiff on

behalf of the plaintiff entered into registered agreement of arbitration with defendant no. 1 in order to refer to arbitration, the claim of the defendant

no. 1 as well as the claim of the plaintiff over the joint family properties for partitioning the same. By this arbitration agreement, Hon''ble Justice

B.P. Sinha who was subsequently became the Hon''ble Chief Justice of India was appointed as sole arbitrator to divide the joint family property by

metes and bounds. The award was given on 09.08.1949 which was registered on 12.08.1949. On 20.01.1950, the defendant no. 1,

Chandeshwar Dayal filed Title Suit No. 8 of 1950 along with the registered award dated 12.08.1949 before the Subordinate Judge 1st Court,

Patna and prayed for making the award a rule of the court. With the plaint, a consent petition dated 09.11.1949 of defendant no. 4 for herself and

on behalf of the plaintiff as mother and natural guardian was filed. On 07.02.1950, another application was filed by the mother of the plaintiff

seeking permission to allow her to compromise on behalf of the plaintiff. Thereafter, the Subordinate Judge 1st Court, Patna accordingly decreed

the suit on 07.02.1950 and the award was made rule of the court. The decree was sealed and signed on 13.02.1950. It may be mentioned here

that the plaintiff attained majority on 13.03.1951. After attaining majority, the plaintiff repudiated the partition award and retained possession of the

immovable properties against the terms of the award. The defendant no. 1 sold some properties to defendant no. 6 on 06.12.1951 and defendant

no. 1 again entered into an agreement with the plaintiff for the sell of a house for a sum of Rs. 30,000 on 13.07.1952 but that negotiation failed.

Defendant no. 1 executed a mortgage by conditional sell in favour of the defendant no. 5 and gave possession of portion of item no. 8 for a sum of

Rs. 10,000 for a period of five years. This property was being possessed by the plaintiff as owner repudiating the terms and conditions of the

award. The defendant no. 5 attempted to interfere with the possession. 107 Cr.P.C. proceeding was then started wherein the plaintiff was directed

to approach the civil court. Hence, the suit for declaration has been filed.

4. The defendant no. 1, step brother of plaintiff along with his wife and minor children are the first set defendant. Defendant no. 4, the mother of

plaintiff is defendant second set. Defendant no. 5 is third set whereas the defendant no. 6, another purchaser from defendant no. 1 is fourth set.

The defendant no. 4 filed supporting written statement and also she claimed that her 1/3rd share may be separated from the suit property. The

defendant nos. 5 and 6 filed contesting written statement. The defendant no. 1 also filed contesting written statement.

5. The defence of the contesting defendants in short is that the decree passed in Title Suit No. 8 of 1950 is legal, valid and operative. The plaintiff

never repudiated the same rather they came in separate possession of the properties allotted to them in the award made by Hon"ble Justice B.P.

Sinha. The plaintiff instead of repudiating in fact, accepted the award and the decree. On 13.07.1952, the plaintiff and the defendant no. 1 entered

into a registered deed of agreement whereby the defendant agreed to sell Block "B" and "C" to the plaintiff. The plaintiff also took on rent a

portion of the house allotted to the defendant no. 1 and he also filed a petition for fixation of fair rent of that house taken on rent. The plaintiff also

filed mutation petition in Patna Municipal Corporation in terms of the award. After executing mortgage, the defendant no. 1 gave possession to the

defendant no. 5 and defendant no. 5 is in possession of the mortgaged property.

6. On the basis of the aforesaid pleadings of the parties, the learned court below framed the following issues:

1. Is the suit barred by principle of waiver, acquiescence, estoppel and resjudicata?

2. Is the suit barred u/s 42 of the Specific Relief Act?

3. Is the decree of T.S. No. 8 of 1950 of the court of Sub Judge I, Patna null and void?

3(a) Have the parties accepted the award and the decree and they are in possession of terms thereof?

4. Has the property been properly valued and is the court fee paid sufficient?

5. Whether the agreement dated 30.03.1949 entered into between defendant no. 1 and defendant no. 4 on her behalf as also as guardian of the

plaintiff (then a minor) did not confer any lawful jurisdiction on Hon''ble Mr. Justice B.P. Sinha to arbitrate and partition the properties belonging

jointly to the plaintiff and defendant no. 1 and defendant no. 4?

6. Whether the arbitration award of Hon''ble Mr. Justice delivered on 08.09.1949 and registered on 12.08.1949 was without jurisdiction in view

of the provisions of Section 3 Schedule I, item no. 3 of the Arbitration Act, 1940?

7. Is the plaintiff entitled to partition? If so, in respect of what share and in what property?

8. Whether the plaintiff is entitled to any other relief and if so what relief?

9. Is the suit maintainable?

10. Is the suit barred by limitation?

7. After trial, the learned court below found that the Arbitrator, Hon''ble Justice B.P. Sinha had the jurisdiction to give the award on the basis of

the arbitration agreement and the decree passed on the basis of the award is legal, valid and binding on the plaintiff and dismissed the plaintiff''s

suit.

8. So far the First Appeal No. 1206 of 1971 is concerned, the plaintiffs filed a suit praying for a decree for pre-emption in respect of the suit

property of the said suit on plaintiffs depositing the necessary consideration money within the time allotted by court to the credit of defendant no. 5

and also prayed for eviction of defendant no. 5 from the property sold in his favour by defendant no. 1. The plaintiff in the alternative, prayed for

decree for specific performance of contract against the defendant nos. 1 to 5. Besides taking all the pleas pleaded in the earlier suit giving rise to

First Appeal No. 65 of 1967, it is pleaded that on the basis of the award, ex-parte decree was passed on 07.02.1950 in Title Suit No. 8 of 1950.

But the decree in terms of the award was never acted upon. The plaintiff was in possession over Schedule-A properties in spite of the fact that the

said property was allotted in favour of defendant no. 1 in the award. In December 1951, defendant no. 1 sold one double storied building to one

Dr. Swami Charan. From him the plaintiff came to learnt that Block ''A'', ''B'' and ''C'' was being negotiated by defendant no. 1 to sell and then

through intervention of Dr. Swami Charan, a registered document dated 19.07.1952 was entered into between the plaintiff and defendant no. 1

whereby the defendant no. 1 agreed to sell the house to the plaintiff for Rs. 30,000 compromise within Block "B" and "C". Sale deed was to be

executed by the defendant no. 1 within 28.08.1952. Subsequently, because of illegal demand by the defendant no. 1 against the terms of the

agreement which would have amounted to legalize the terms and conditions of award, the plaintiff did not agree. On 09.07.1954, the defendant no.

1 executed usufructuary mortgage in favour of defendant no. 5 and thereafter the plaintiff filed the Title Suit No. 58 of 1954 giving rise to First

Appeal No. 65 of 1967. On 21.06.1962, by written agreement executed by defendant no. 1 in favour of the plaintiff, the defendant no. 1 agreed

to sell the plaintiff the property covered by mortgage for a consideration of Rs. 30,000 and, therefore, the previous agreement dated 19.07.1952

was revived. However, subsequently the defendant no. 1 sold the same to the defendant no. 5 on 07.11.1962 but the plaintiff had already

perfected his title by adverse possession on the said property. Defendant no. 5 is not a bonafide purchaser for value without notice. The plaintiff

demanded the resale of the property from defendant no. 5 and declared his intention to pre-empt the property and hence, the suit was filed.

9. The defendant no. 5 contested the suit. His defence in short is that the decree passed in Title Suit No. 8 of 1950 is legal, valid and binding on

the plaintiff. The plaintiff was not in possession of any portion of the property sold to the defendant no. 5. By the agreement dated 19.07.1952, the

plaintiff agreed to pay sum of Rs. 30,000 for the purchase of Block "B" and "C" from the defendant no. 5 within 28.08.1952 and paid Rs. 3,000

as earnest money to the defendant no. 1 but the plaintiff subsequently did not pay the balance amount of consideration money within the stipulated

period. So sale deed could not be executed. Thereafter, the defendant executed the mortgage of conditional sell and put the defendant in

possession over the properties. After the mortgage, the plaintiffs filed the Title Suit No. 58 of 1954. In the mortgage deed, it has clearly been

stipulated that in case the defendant ever wanted to transfer by sell, the defendant no. 5 should be given first preference and on his failure only, the

property may be transferred to others. Subsequently, for legal necessity, the property was transferred to the defendant no. 5 on 07.11.1962 and

the defendant no. 5 became absolute owner thereof. The Title Suit No. 95 of 1962 filed on behalf of defendant no. 1 for redemption has been

dismissed. The plaintiff then filed Title Suit No. 194 of 1962 for declaration that the sale deed in favour of the defendant no. 5 is not binding. The

alleged agreement between the plaintiff and defendant no. 1 dated 21.06.1962 is collusive, fraudulent and antedated document which is not binding

on the defendant. All other allegations were denied.

10. On the basis of the aforesaid pleadings, the following issues were framed by the court below:

1. Is the suit as framed maintainable?

2. Has the plaintiff any cause of action for the suit?

3. Is the suit barred by limitation?

4. Is the unregistered agreement dated 21.06.1992 executed by defendant no. 1 in favour of the plaintiff valid, genuine and binding on the

defendants and whether it has the effect of renewing and revalidating the registered agreement dated 19.07.1952 executed between plaintiff and

defendant no. 1?

5. Is the plaintiff entitled to a decree for pre-emption in respect of Schedule A property in suit and in the alternative for a decree for specific

performance of contract?

6. Is the defendant no. 5 a bonafide purchaser of Schedule A property for value and without notice?

7. Is the plaintiff entitled to any relief if so for what?

11. After trial, the learned court below found that it creates doubt about the genuineness of the agreement of the year 1962. The agreement of the

year 1952 entered into between the plaintiff and the defendant no. 1 lost its validity and came to an end. Ultimately, at paragraph 30, the learned

court below came to the conclusion that the agreement dated 21.06.1962 is not a valid and genuine document which is not binding on the

defendants and it has not the effect of renewing and revitalizing the registered document dated 19.07.1952. The learned court below also found

that there is no clog on equity of redemption or the purchase by defendant no. 5 was malafide and defendant no. 5 is a bonafide purchaser. The

learned court below ultimately came to the conclusion at paragraph 44 that the plaintiff is not entitled for pre-emption in respect of the suit property

nor in alternative, the plaintiff is entitled for a decree for specific performance of contract.

12. The learned counsel for the appellant, Mr. Vaidyanath Thakur raised only the questions of law with regard to First Appeal No. 65 of 1967. So

far the facts alleged and mentioned above and mentioned in the judgment are concerned, no dispute is raised. So the admitted fact remains that the

father of plaintiff and defendant no. 1 died when both of them were minors. The mother of plaintiff entered into an arbitration agreement with the

defendant no. 1, i.e., the step brother of plaintiff. At the time of agreement, the plaintiff was minor. So, his mother who was defendant no. 4

entered into agreement and the dispute was referred to arbitrator for partitioning the joint family property. The Arbitrator gave the award which

was registered on 12.08.1949. Thereafter, title Suit No. 8 of 1950 was filed by defendant no. 1 praying for making the award rule of the court.

Along with this title suit-plaint, a consent application of defendant no. 4 was filed. The defendant no. 4 also appeared and filed an application for

compromising the case and on the basis of the consent of the parties, decree was passed on 13.02.1950 and the award was made rule of the

court. The plaintiff attained majority on 13.03.1951 and thereafter has filed this present suit on 24.09.1954.

13. According to the learned counsel for the appellant, the award of the arbitrator was itself a void award and illegal therefore, could not have

been made a rule of the court. According to the learned counsel, when the plaintiff was minor, the defendant no. 4, i.e., the mother of the plaintiff

could not have entered into an agreement without taking leave of the District Judge because the guardianship case was pending and, therefore, the

arbitration agreement itself was illegal. Secondly, that the arbitrator gave the award after 4 months of entering into reference and, therefore, the

award given by the arbitrator is null and void because after lapse of statutory period of 4 months, the jurisdiction of the arbitrator seized when the

time was not extended by the court. Thirdly, the learned court below passed the decree on the basis of award without awaiting 30 days as

provided u/s 17 of the Arbitration Act, 1940 and, therefore, also the decree passed by the court below is illegal and void and fourthly, the learned

court below has not considered the evidence of the plaintiff to the effect that the arbitrator entered into the reference on the date of execution of the

arbitration agreement and, therefore, wrongly came to the conclusion that the arbitrator entered into reference on the date when arbitration

agreement was registered. According to the learned counsel, since the award itself was void, there is no limitation for setting aside the same. On

these grounds, only the appellant assailed the judgment and decree passed by the court below.

14. So far First Appeal No. 1206 of 1971 is concerned, the learned counsel submitted that in view of Section 22 of the Hindu Succession Act and

Section 44 of the Transfer of Property Act, the plaintiff has got a preferential right, i.e., a right of pre-emption to purchase the undivided share

particularly when there had been no partition of the joint family property as the decree and award of the arbitrator is not binding on the plaintiff. In

the alternative, the plaintiff is entitled for a decree for specific performance of the contract of the year 1962. The learned counsel for the appellant

relied upon various decisions which shall be considered later on.

15. On the contrary, the learned senior counsel appearing on behalf of the respondents, Mr. Shivanandan Roy in First Appeal No. 65 of 1967

submitted that the suit itself was barred u/s 32 of the Arbitration Act, 1940. According to the learned counsel, the correctness or otherwise of the

award cannot be examined in a suit. Even if now the decree passed by the court below is set aside then also, the award cannot be set aside in the

suit in view of provision of Section 32 of the Arbitration Act, 1940. The learned counsel further submitted that the plaintiff"s suit itself was barred

by law of limitation because admittedly, the plaintiff attained majority on 13.03.1951 whereas the suit has been filed on 24.09.1954. In view of

Article 91 and 114 of Limitation Act, 1908, the limitation for setting aside the decree was only 3 years from the date of passing of the decree.

Admittedly, the suit was filed beyond 3 years. The learned counsel next contended that so far giving of award after 4 months is concerned, there is

no reliable evidence on behalf of either parties and in fact, the agreement was executed on 02.04.1949. At the instance of the arbitrator, it was

registered on 03.05.1949. Therefore, the arbitrator gave the award within 4 months from the date of 03.05.1949. According to the learned

counsel, the plaintiff himself participated before the arbitrator in the arbitration proceeding and, therefore, he cannot be allowed to say that the

award was filed after 4 months. The decree was passed with consent of the parties. The award was filed by defendant no. 1 in the court with the

consent application and subsequently, the mother of plaintiff being the natural guardian filed the application seeking permission of the court to

compromise and thereafter the court made the award rule of the court. Since there was no objection to the award, the court had no option but to

make the same rule of the court.

16. The learned counsel further submitted that pursuant to the award, the parties came in possession of their respective properties and thereafter

on attaining majority, the plaintiff instead of repudiating the award accepted the same and entered into an agreement with the defendant no. 1

whereby the plaintiff agreed to purchase from defendant the house property and for that he has filed suit for pre-emption also. The plaintiff also

took on rent some portion of premises from the defendant no. 1 and has filed application before the rent controller for fixing fair rent. In 107

Cr.P.C. proceeding, he admitted the award and allotment of land and possession of the defendant. In such view of the matter, at one stage in one

proceeding, the plaintiff admitted the legality of the award and acted upon it and then in another proceeding, he is repudiating on frivolous grounds.

In other words, the plaintiff cannot be allowed to aprobate and reprobate. So far waiting of 30 days by the court prior to making the award rule of

the court is concerned, the learned counsel submitted that when all the parties were present and filed compromise and no objection was raised,

there was no question of passing the award after 30 days arises. On these grounds, the learned counsel submitted that the appeal is liable to be

dismissed with cost.

17. So far the First Appeal No. 1206 of 1971 is concerned, the learned counsel submitted that since there had already been partition between the

parties by the arbitration proceeding and the award which was made rule of the court neither Section 22 of the Hindu Succession Act nor Section

44 of the T.P. Act is applicable in the present case and, therefore, the pre-emption suit is liable to be dismissed outrightly. So far relief for specific

performance of contract is concerned, the plaintiff has not adduced any evidence regarding his readiness and willingness to perform his part of the

contract and, therefore, he is not entitled for that relief also. On these grounds, he has submitted that the First Appeal No. 1206 of 1971 is also

liable to be dismissed.

18. In view of the above rival contentions of the parties, the points arise for consideration is as to:

1. Whether the judgment and decree passed in Title Suit No. 8 of 1950 is liable to be set aside in the present suit and whether the plaintiff is

entitled for partition of his half share and whether the judgment and decree passed by the court below is sustainable in the eye of law?

2. Whether the plaintiff is entitled for decree for pre-emption and in alternative the decree for specific performance of contract?

Point no. 1

19. So far this point is concerned, it relates to First Appeal No. 65 of 1967. The fact stated above is not in dispute. As submitted by the learned

counsel, Mr. Vaidyanath Thakur, he is not disputing the fact nor is challenging the decree of Title Suit No. 8 of 1950 on the ground of fact. He is

challenging the decree only on the question of law. Admittedly, the arbitration agreement was entered into between the mother of the plaintiff for

self and on behalf of minor and the defendant no. 1 referring the dispute to the arbitrator for dividing the suit property into half and half. It is

admitted fact that both the parties, i.e., the plaintiff and the defendant no. 1 had half and half share in the joint family property. The first point raised

by the appellant is that on the date of the arbitration agreement entered into by the defendant nos. 1and 4 he was minor so it is not binding on the

minor plaintiff because no leave was obtained from the District Judge when the Guardianship Case No. 30 of 1934 was pending. According to the

learned counsel, the agreement was executed on 02.04.1949 whereas the guardianship case was disposed of on 12.09.1949. On the basis of this

fact, the learned counsel for the appellant submitted that the arbitration agreement itself was illegal as no permission was obtained from the District

Judge, the award is vitiated. So far this question of law is concerned, it may be mentioned here that the guardianship case was disposed of holding

that the defendant no. 1 attained majority on 06.09.1947 and as soon as he attained majority, he became the karta of the family being the

coparcener and, therefore, he was the guardian of the minor plaintiff also. It appears that there was some dispute between the parties and,

therefore, they entered into the arbitration agreement. Since the dispute was between the plaintiff and defendant no. 1, the defendant no. 1 could

not have acted as guardian of the plaintiff and, therefore, the mother being the natural guardian of minor plaintiff entered into the arbitration

agreement with the defendant no. 1. In such circumstances, it cannot be said that the arbitration agreement is illegal as permission from District

Judge was not obtained. It is not denied that the mother was not representing the minor plaintiff. Admittedly, she is the natural guardian of the minor

and it is not the case of the plaintiff that her interest was adversed to the interest of the minor plaintiff. Therefore, there was no necessity for

obtaining permission from District Judge.

20. The learned counsel for the appellants relied upon the case of Kaushalya Devi and Others Vs. Baijnath Sayal and Others, . It appears that in

that case, partition suit was filed and on the basis of compromise, a preliminary decree was drawn up by the trial court which was challenged

before the Lahoure High Court. It was held by the High Court that all parties have not joined in the compromise so, the preliminary decree could

not be sustained and the decree was set aside. On remand again a consent decree was passed. Minors again filed appeal before the High Court on

the ground that at the time of passing the decree, the court had failed to comply with mandatory provision of Order 32 Rule 7 C.P.C. The appeal

was dismissed. The Hon''ble Apex Court held that the effect of the failure to comply with Order 32 Rule 7 C.P.C. which says that any such

agreement or compromise entered into without the leave of the court so recorded shall be voidable against all the parties other than the minor. The

rule really means that the impugned agreement can be avoided by the minor against the parties who are major and that it cannot be avoided by the

parties who are major against the minor. It is voidable and not void. In the present case, no suit was pending between the parties. An application

for guardianship was filed and it cannot be termed as suit and moreover, there was conflicting interest of defendant no. 1, the karta of the

coparcenery family and the minor plaintiff so, the mother who was representing the person and property of minor plaintiff being the natural guardian

entered into the agreement of arbitration. Moreover, as has been held by the Apex Court, it is only voidable and not void. After attaining majority,

the plaintiff never tried to avoid the said agreement rather from the facts of the case stated above, it appears that the plaintiff participated in the

arbitration proceeding. In his evidence, he has stated that he was attending the arbitration proceeding before the arbitrator. So, this decision is not

applicable.

21. The learned counsel next relied upon Mathura Singh and Others Vs. Deodhari Singh and Others, . A Division Bench of this court has held that

when a matter is pending before a court and the natural guardian acts as guardian of a minor, his power to compromise that suit on behalf of the

minor is controlled by the provision of Order 32 Rule 7 which are imperative. If without the permission of the court, the guardian enters into

compromise, the minor can avoid it by appropriate proceeding. In the present case as stated above, so far entering into arbitration agreement is

concerned, there was no requirement for obtaining permission from the court. In the decision cited, a suit was pending wherein the minor

defendants were not parties to the compromise. Therefore, I find no force in the submission of the learned counsel for the appellant and on this

ground that arbitration agreement is illegal, it cannot be said that the award was vitiated.

22. Section 32 of the Arbitration Act, 1940 provides that 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 then as provided in this act. The decisions relied upon by the appellant is

therefore, not helpful to the appellant. When the plaintiff attained majority, he could have avoided the same by initiating appropriate proceeding but

in view of section 32, he cannot challenge the validity or existence or illegality of the arbitration agreement. As stated above, no case has been

made out that in any way he is being prejudiced by the arbitration agreement.

23. The next point raised by the appellant is that the agreement was executed on 02.04.1949 and the arbitrator entered into the reference on the

same date. According to Section 3 read with Schedule 1 Rule 3 of Arbitration Act, 1940, the arbitrator should have made the award within 4

months but the arbitrator made the award on 09.08.1949 which was registered on 12.08.1949. The learned counsel, Mr. Thakur appearing on

behalf of the appellant submitted that the plaintiff in his evidence categorically stated that the arbitrator entered into reference on the date of the

execution of the agreement. It may be mentioned here that this plea was not mentioned in the plaint. It appears that on recall, only the plaintiff

deposed to this effect. Except this one line statement, there is nothing on record to show that in fact on the date of execution of the agreement itself,

the arbitrator entered into the reference. On the contrary, it appears that the arbitrator directed the parties to get the agreement registered. This fact

has been admitted by the mother of the plaintiff in the written statement. It is admitted fact that on the request of arbitrator, the agreement was

registered on 03.05.1949. Therefore, even if it is held that the arbitrator entered into reference from the date of registration of the agreement, the

award has been filed within 4 months. The learned counsel for the appellant submitted that it is not the requirement of law that arbitration

agreement should be registered. So far this is concerned, it is not the case of any party that agreement should be registered but it is the case of the

parties that the arbitrator required that the agreement should be registered therefore, there can never be any presumption that the arbitrator after

entering into reference directed the parties to get the agreement registered. Therefore, on the basis of only one line statement made by the plaintiff

in his evidence on recall that the arbitrator entered into reference on the date of execution of the agreement i.e. 02.04.1949 is not reliable.

24. The learned counsel for the appellant next submitted that the court below should have passed the decree on the basis of the award only after

completion of 30 days but in the present case, the Title Suit No. 8 of 1950 was filed on 20.01.1950 and the award was made rule of the court on

07.02.1950, i.e., within 30 days and the decree was sealed and signed on 13.02.1950. In such circumstances, the decree is void decree. So far

this submission is concerned, it may be mentioned here that P.W. 2 at paragraph 59 has clearly stated that the award was filed by the defendant

no. 1 along with petition to make the award rule of the court. Exhibit-B/A is a petition by defendant no. 4 seeking permission to compromise on

behalf of the plaintiff as it is for the benefit of the plaintiff. Therefore, when all the parties were present before the court, it was not necessary for the

court to await for 30 days. The provision as contained in Section 17 of the Article do not provide that even after appearance of the parties, the

court is required to await for 30 days particularly when no objection is filed rather a compromise application was filed praying for making award

rule of the court. Therefore, the court below has rightly made the award rule of the court on 07.02.1950. Since the compromise application was

filed by the mother, i.e., the natural guardian of the plaintiff and the court passed the award, it will be presumed that the permission was accorded

by the court to the defendant no. 4 to compromise. Therefore, on this ground, it cannot be said that the award is vitiated.

25. The next ground taken by the learned counsel for the appellant is that the Lower Court has not considered the evidences. As stated above, it

may be mentioned here that only on the question of law, the judgment has been assailed. So far fact is concerned, the only evidence that has been

raised by the appellant that the plaintiff in his evidence stated that the arbitrator entered into reference on the date of execution of agreement should

have been considered by the court below. So far this submission is concerned, as discussed above, even if it is considered and I have considered

above, no finding can be recorded that the arbitrator entered into reference on the date of execution of the arbitration agreement.

26. In this case, the plaintiff, P.W.2 in his evidence himself admitted that deliberation was made on 4 days and he appeared on all the 4 days

before the arbitrator and the award was given with his consent. The plaintiff himself admitted that an agreement was executed by the plaintiff and

the defendant no. 1 whereby the defendant no. 1 agreed to sell some property to the plaintiff. This agreement is dated 13.07.1952. On the basis of

this agreement, the plaintiff has filed the Title Suit No. 115 of 1963 for pre-emption and specific performance of contract.

27. Exhibit-B/2 has been produced by the defendant to show that the plaintiff filed a petition on 24.06.1953 before the rent controller for fixation

of fair rent of a portion of the premises which was allotted to the defendant. This Exhibit-B/2 proves that the plaintiff admitted himself to be a tenant

under the defendant no. 1 on portion of the properties allotted to defendant no. 1 by the award. The defendants have also produced Exhibit-G

which is a show cause filed by the plaintiff on 09.02.1953 before the S.D.O. in 107 Cr.P.C. proceeding wherein he has admitted the award. In

view of these documentary evidences, it can safely be held that the award was acted upon.

28. It is admitted fact that the plaintiff attained majority on 13.03.1951 whereas the suit has been filed on 24.09.1954. According to the plaintiff,

he was minor. In view of Article 91 read with 114 of Limitation Act, 1908 = Article 59 of the Limitation Act, 1963, the plaintiff was required to

file the suit within 3 years from the date of his attaining majority. As has been held by the Apex Court in the decisions relied upon by the appellant

himself, the plaintiff could have avoided the award or the decree within 3 years from the date of his attainment of majority. Three years from the

date of his majority was completed on 13.03.1954 and that was the last date for filing the suit but the suit has been filed much after 6 months. The

learned counsel for the appellant submitted that this question was not raised before the trial court by the respondent. So far this question is

concerned, in view of Section 3 of the Limitation Act irrespective of the fact that the defence has been taken by the defendant or not, it is the duty

of the court to dismiss the suit if it is barred by law of limitation. The learned counsel for the appellant submitted that the plaintiff has filed the suit for

partition. Therefore, it cannot be said that suit for partition is barred by law of limitation. So far this submission is concerned, no doubt, in case of

partition suit the cause of action is recurring day to day cause of action but here, the fact is otherwise. If there had already been partition between

the parties through the arbitrator as far back as in 1949, the same cannot be reopened now. Therefore, unless the award is set aside the plaintiff is

not entitled for a decree for partition.

29. In view of Section 32 of the Arbitration Act, the plaintiff cannot challenge the arbitration agreement or the award by filing suit. The civil suit is

barred. As has been stated above, since the award was filed by the defendant in the court with a consent application of the defendant and

subsequent to that the defendant no. 4 being the natural guardian of plaintiff filed a petition seeking permission to compromise, the court had no

option but to make the award rule of the court and, therefore, the learned court below has rightly made the award rule of the court. Now, in view

of Section 32, if the plaintiff cannot challenge the award how can he be allowed to challenge the decree after 3 years. The decree passed by the

court below is consent decree. There was no objection to the award. In suit, therefore, the award cannot be set aside. Now, let us see that if the

decree is set aside but then in such situation also, the award of the arbitrator will remain because of Section 32 of the Arbitration Act, 1940. By

filing this suit, the plaintiff has indirectly challenged the legality or otherwise, existence or otherwise of the arbitration agreement or the award which

cannot be permitted. Moreover, the award was acted upon by the parties. The plaintiff admitted to have agreed to purchase a portion of the house

allotted to the defendant no. 1 in the award. This agreement between the parties is clearly indicates that the award was acted upon by the parties.

30. The learned counsel for the appellant in support of his contention, cited various decisions but in my opinion, those decisions are not required to

be gone into here, in view of the above settled proposition of law laid down by the Apex Court referred to above, i.e., the minor on being major

could have avoided the award itself by initiating proceeding under the Arbitration Act within 3 years after attaining majority. In the present case, it

has not been done by the plaintiff. The present suit has been filed after 3 years, therefore, the award and the decree of the court below has attained

its finality. The findings of the court below on these points are therefore, affirmed. In view of my above discussion, I ultimately find that there had

already been partition between the parties through the arbitration and the consent decree was passed by the court in Title Suit No. 8 of 1950

which is binding on the parties. Since there had already been partition, the same cannot be reopened in the present suit. Thus, point no. 1 is

answered against the appellants. Accordingly, this First Appeal No. 65 of 1967 is dismissed with cost of Rs. 10,000 in view of Salem Advocate

Bar Association, Tamil Nadu Vs. Union of India (UOI), wherein the Apex Court has deprecated the practice by the court directing the parties to

bear their own cost. This practice has been disapproved by the Apex Court. The cost of Rs. 10,000 has to be paid by the appellants to the

contesting respondents within two months failing which the respondents are at liberty to realize the cost through process of court.

Point no. 2

31. So far First Appeal No. 1206 of 1971 is concerned, the plaintiff-appellant has filed the same for pre-emption and in the alternative, decree for

specific performance of the contract. Since we have held above that there had already been partition between the parties, Section 22 of the Hindu

Succession Act or Section 44 of the T.P. Act will not apply. In Ram Udar Rai Vs. Ram Chandra Rai and Another , this court has held that after

partition, the aforesaid provisions are not applicable and, therefore, the plaintiff is not entitled for a decree for pre-emption. Since this question is

purely a question of law, therefore, it is not necessary to go into details about the fact and evidences of the parties. As has been admitted by the

parties that the result of this First Appeal is dependent on the finding of the earlier First Appeal regarding partition, therefore, the appellant is not

entitled for a relief for pre-emption.

32. So far decree for specific performance of contract alleged to have been entered into between the plaintiff and the defendant no. 1 in the year

1962 is concerned, except the averment in the plaint no evidence has been adduced by the plaintiff in proof of his readiness and willingness to

perform his part of the contract. No doubt, after amendment, the pleading as required u/s 16(3) of the Specific Relief Act has been introduced but

merely because there is a plea in the plaint, no relief for specific performance of contract can be granted unless the plaintiff by his subsequent

intention and conduct show that in fact, he was ready and willing and is still ready and willing to pay the balance consideration amount. As stated

above, there is no evidence except the pleading. Moreover, the suit itself has been filed after 9 years. The grant of specific performance of contract

is equitable relief and in all circumstances, it is not obligatory on the part of the court to grant the said relief. The plaintiff will be entitled to the said

relief only if he can show that he was ready and willing to perform his part of the contract and is still ready and willing to perform his part of the

contract. Admittedly, an agreement was executed in the year 1952 earlier and the plaintiff agreed to purchase on payment of Rs. 30,000 and Rs.

3,000 was advanced as earnest money but it is admitted fact that the plaintiff failed to pay the balance consideration amount and he never

approached the court of law for specific performance of the said contract. It is the case of the plaintiff in the present case that subsequently,

another written agreement as executed between them in the year 1962 by which the agreement of the year 1952 revised. Therefore, only on the

basis of this pleading, the decree of specific performance of contract cannot be granted that too when relief was sought after 9 years. Thus, the

finding of the learned court below to the effect that there is no evidence of readiness and willingness adduced on behalf of the plaintiff is hereby

confirmed. Thus, this point no. 2 is answered against the plaintiffs-appellants and in favour of the defendants-respondents. Thus, this First Appeal is

also dismissed with cost of Rs. 10,000 to be paid by the appellants to the respondents within two months from today failing which the respondents

are at liberty to realize the said cost through process of the court. In the result, both the First Appeals are dismissed with cost of Rs. 10,000 + Rs.

10,000 = Rs. 20,000 as stated above to be paid by the appellants to the respondents.