(1989) 02 BOM CK 0017

Bombay High Court (Nagpur Bench)

Case No: Civil Revision Application No. 171 of 1985

Namdeo Gabhane		APPELLANT
	Vs	
Monabai (Smt.) Jadhao and Another		RESPONDENT

Date of Decision: Feb. 3, 1989

Acts Referred:

- Arbitration Act, 1940 - Section 21, 23, 47
- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3

Citation: (1990) 2 BomCR 168 : (1991) 1 MhLj 906

Hon'ble Judges: M.S. Ratnaparkhi, J

Bench: Single Bench

Advocate: S.C. Mehadia, for the Appellant; A. Shelat, for the Respondent

Judgement

M.S. Ratnaparkhi, J.
The decree passed by the Joint, Judge Akola on 20-12-1984 in Regular Civil Appeal No. 303/82, allowing the appeal and remanding the matter to the trial Court for decision according to law, has been challenged in this revision.

2. The facts giving rise to this revision may be briefly stated as follows:

Monabai and Ramkrishna (the present respondent Nos. 1 and 2), instituted Regular Civil Suit No. 98/76 before the Joint Civil Judge, Junior Division, Washim for injunction restraining the defendant (present petitioner) from obstructing their possession over Survey Nos. 347/1 and 462. This suit came to be opposed by the defendant on various grounds with which we are not concerned at this stage. The trial went on. Two witnesses of the plaintiffs were examined on 1-4-1981 and the case was placed for further evidence on 2-4-1981. On 2-4-1981, both the parties filed an application Ex. 63 stating that they are proposing to settle the matter amicably. They requested time from the Court for settling the matter amicably. It appears from the record that the Court adjourned this matter to 6-4-1981. On this day, both the parties filed an

application Ex. 64 stating therein that they want to settle the matter amicably. But as their relations are strained, they cannot talk directly with each other. Hence they have appointed 5 panchas viz. 1. Shri Murlidhar Bansilai Charkha, 2. Shri Premsingh Gulati; 3. Shri Sitaram Kisanlal Sharma; 4. Shri Pundalikrao Arjunrao Ingole and 5. Shri Puranmal Bhagirath Charkha, with their consent. They have further stated in the application that whatever verdict the panchas give, will be acceptable to both the parties. The prayer in the application was to grant an adjournment so as to enable the parties to settle the matter amicably. The Court granted this prayer and adjourned the case to 28-4-1981.

3. On 28-4-1981, both the parties appeared along with their respective Counsel before the Court. The panchas filed before the Court the agreement of arbitration and the decision which they have gave in pursuance of this agreement. These documents can be found at Ex. 77 and Ex. 80 respectively. According to the verdict, the panchas unanimously decided that Survey No. 462 should be given by the plaintiffs to the defendant Namdeo and Survey No. 347 should be given by the defendant to the plaintiffs.

4. On the next day i.e. on 29-4-1981, the plaintiffs filed their objections to the verdict of the panchas. These objections are filed at Ex. 66. This application was presented u/s 30 of the Arbitration Act. The objections were:

(1) That the arbitration was during the pendency of the suit, and therefore, unless the Court made a reference u/s 23 of the Arbitration Act, the panchas could not legitimately decide the dispute;

(2) That the decision given by the panchas is illegal and without jurisdiction and as such the award cannot be given effect to;

(3) That no hearing and sufficient opportunity was given to the plaintiffs by the panchas before, deciding the matter; and

(4) Puranmal-one of the panchas has misrepresented the plaintiffs that the disputes to be resolved by the panchas was in respect of the whole property and not the suit property and as such the verdict is vitiated.

5. The defendant filed his reply denying the allegations made by the plaintiffs in Ex. 66. The reply can be found at Ex. 71.

6. The learned Joint Civil Judge, Junior Division made an enquiry on Ex. 66. On recording the evidence and on hearing both the parties, he negatived the contention of the plaintiffs that there was no valid reference to the arbitrators. He also negatived their contention that the arbitration is vitiated due to misrepresentation by one of the arbitrators. He also negatived their contention that the arbitration proceedings were carried on without hearing them. In view of these findings, he accepted the verdict of the arbitrators and directed that the award Ex. 80 is binding on both the parties and the decree was directed in terms of the award.

7. Feeling aggrieved with this decree the plaintiffs went in appeal before the District Court at Akola. The learned District Judge on hearing both the parties held that there was a proper and legal reference made by the Court. He, however, disagreeing with the trial Court held that the award is not binding on the parties. In view of this finding, he allowed the appeal, set aside the decree passed by the trial Court and remanded the matter for trial before the trial Court to proceed with the case according to law. It is this order which has been challenged in this revision.

8. Mr. Mehadia, the learned advocate for the petitioner strenuously urged before me that the findings recorded by the Appellate Court holding that the award is not binding on the parties and as a consequence, setting aside the decree of the trial Court was apparently wrong. He urged before me that in view of the findings recorded by the trial Court, that there was a proper and legal reference made by the Court, the finding that the award is not binding on the parties, is contradictory. It will not be proper to reiterate the respective cases of the parties because they have already been stated in details in the opening paragraphs of the judgment. Suffice it to point out that the controversy in the suit was restricted only to the two fields and the relief claimed by the plaintiffs was for prohibitory injunction. It is also not disputed that during the pendency of the suit, both the parties came before the Court and expressed that they want to settle the dispute amicably. In the next application Ex. 64 filed on 6-4-1981, they stated before the Court that they had a desire to settle the matter amicably, but as the relations between them were strained, they could not talk face to face. It is only on this background that the appointed five panchas, and undertook to accept the verdict given by these five panchas. We have now to see the exact nature of Ex. 63 and 64. In fact, what the parties wanted was to settle the dispute amicably or in proper term to compromise the matter. Time was taken from the Court to finalise this compromise. As they were not on talking terms with each other, they sought out another method of compromise i.e. by appointing 5 panchas and undertook to abide by the verdict given by these panchas. It is with these words expressly stated before the Court that they had appointed these five panchas. These five persons did deliberate between themselves; they did hear the parties and ultimately they recorded their verdict vide Ex. 80.

9. Mr. Mehadia, the learned advocate for the petitioner contended before me that the parties thus expressed their urge to compromise the claim in suit and they also found out a machinery for exploring this compromise. This machinery was by appointing 5 independent persons and accepting their verdict, whatever way it went. Thus, according to him, this was in fact a compromise itself and not the arbitration as is contemplated under the Indian Arbitration Act. Mr. Mehadia strenuously urged before me that even if the verdict given by the panchas is an award, still it can be legitimately accepted as a compromise and the decree can be drawn in terms of the compromise. In any case, according to him, the decree passed by the trial Court is quite correct and the view taken by the Appellate Court was

incorrect to that effect. This was in short the argument advanced by Mr. Mehadia.

10. Mr. Shelat, the learned advocate for the respondent Nos. 1 and 2 on the other hand urged before me that the plaintiffs applied before the Court on 2-4-1981 and 6-4-1981 merely for adjournment and nothing else. It was his contention that the parties appointed Arbitrators without the intervention of the Court, though the suit was pending, and therefore, the agreement as well as the consequential award is bad in law so that the Court cannot act on it. It is on this rationable that the decree passed by the Trial Court according to Mr. Shelat, was bad.

11. The controversy raised before me thus covers a very narrow compass. What this Court is called upon to decide in this revision, is whether the trial Court could not legitimately pass a decree (as it did), or whether it could legitimately pass that decree.

12. Mr. Shelat, the learned Advocate for the respondents invited my attention to Chapters II and III of the Arbitration Act, 1940 Chapter II speaks about the arbitration without intervention of a Court, whereas Chapter III speaks about the arbitration with intervention of the Court, where there is no suit pending. My attention was also invited to Chapter IV which speaks about the arbitration in pending suits. What Mr. Shalat strenuously urged before me is that the Arbitration Act is a complete Code in itself and if at all the parties want arbitration, they can do it only under the provisions of this Act and nothing else. Expounding his argument on this rostrum, Mr. Shelat strenuously urged before me that the parties wanted an arbitration in a suit which was pending before the Court and of which the Court had already taken a seisin. According to Mr. Shelat, the pendency of the suit being admitted, resort to arbitration could be taken only u/s 21 by following the procedure contemplated u/s 23 of the said Act. Normally, when the parties in a pending suit want an arbitration in a pending suit, resort has to be taken to the procedure laid down in sections 21 and 23. To that extent, Mr. Shelat is correct. The real infirmity contained in the arguments of Mr. Shelat was that according to him, Chapter IV is exhaustive and it admits of no other method of arbitration except that which is positively shown in sections 21, 23 and so on. His argument was that, as the suit was pending the parties ought to have moved the Court u/s 21 and the Court ought to have made a reference to the arbitrators. It is more or less an admitted position in this case that the Court did not make any formal reference to the arbitrators. The trial Court as well as the Appellate Court have made some observations in their judgment that though there was no formal reference, the reference is deemed to have been made and this view can be augmented due to the procedure adopted by the Court. In my view, it is not at all necessary to go into this question. I take it that no formal reference was made by the Court u/s 23 of the Arbitration Act. The question that is germane for the decision of this controversy is, whether the omission to make a formal reference vitiates the whole award. If it vitiates, the matter is quite different. If it does not, the question still remains as to how the Court

should act further.

13. Side by side, it was urged by Mr. Shelat that sections 21 and 23 read together show that this is the only mode in which an arbitration is taken up in the pending suit. Mr. Shelat urged that by necessary implication, it means that in pending suit there cannot be any arbitration without reference by the Court. This view is not accepted by this Court. In Chanbasappa v. Baslingayya, AIR 1927 Bom 565, the Full Bench of this Court held that the remedy in Schedule 2 is not intended to be exhaustive or to prevent parties resorting to arbitration in some manner different from that expressly provided for in Schedule 2. Needless to point out here that Schedule 2 to the CPC is Pari materia similar to sections 21 and 23 of the Arbitration Act. This Court observed:

"So, too, in para 17 it is only permissive and not obligatory on parties to file in Court an agreement for reference. Nor, again, if there has been an arbitration without the intervention of the Court, is it obligatory on the parties to apply under para 20 for the award to be filed. The word there again used is "may" and not "shall".

Thus, the infirmity in the arguments of Mr. Shelat that sections 21 and 23 provided the exhaustive remedy, assumes a considerable importance and because of that infirmity, the arguments cannot be accepted. On the other hand, as the law stands, other methods-other than the remedy provided in sections 21 and 23 are not ruled out. It is permissible for the parties even during the pendency of the suit to resort to arbitration without the intervention of the Court. What will be the effect of the award will be a matter which I have to decide and I will take up that matter a bit subsequently.

14. My attention was invited to Dinkarrai Lakshmiprasad Vs. Yeshwantrai Hariprasad, where this Court took the view that an agreement to refer to arbitration matter in differences between the parties in a pending suit without the order of the Court under paras 1 to 3, Schedule 2 is illegal and cannot be filed under para 17 of the Schedule. The point for decision in that reported ruling was quite different. In that litigation, a suit for accounts was pending before the Court and during the pendency of the suit, the parties agreed to get their dispute settled through the arbitrators. The agreement was so made on 2-8-1927. The arbitrators nominated under the agreement assembled on 27-10-1927. But they could not agree as to the appointment of the Umpire. The time was extended. Thereafter the respondents attorneys refused to consent to any further extension. The agreement, therefore, came to be filed before the Court. The question that was precisely before the Court was, whether the agreement of reference pending the suit between the parties, made without the intervention of the Court can be allowed to be filed in accordance with the provisions of paras 17 Schedule 2 of C.P.C. The Court answered this question in the negative. The reading of the whole report shows that as the agreement of Arbitration was made during the pendency of the suit, that too without reference to the Court, it could not be filed before the Court and Court could

not act upon it. The dispute in the present case is not regarding the filing of the agreement. In the present case before us, nobody wants to file this agreement and nobody wants the action to be taken by the court in pursuance of the agreement and in furtherance of the arbitration. Therefore the ratis laid down in Dinkarrai Lakshmiprasad Vs. Yeshwantrai Hariprasad, would not be of any avail as far as the present case is concerned. On the other hand, the Full Bench of this Court in AIR 1927 Bom. 565 (supra) has taken a very positive view. The question referred to the Full Bench was:

"Where in a suit parties have referred their differences to arbitration without an order of the Court and an award is made, can a decree in terms of the award be passed by the Court under Order 23, Rule 3, or otherwise."

This was a short question referred to the Full Bench and the view expressed by this Court was;

".....the application in question can be made under Order 23, Rule 3, inasmuch as the suit has been wholly adjusted by a lawful compromise. I would, accordingly, hold that the compromise as represented by the agreement for reference and the subsequent award can be recorded and a decree passed in accordance therewith so far as it relates to this suit".

This was the view expressed by Marten C.J., and both the other Judges agreed with this view.

15. The Gujarat High Court in Malek Bavaji Amarkhan Vs. Amirkhan Salimkhan and Others, have taken a similar view. In fact they have relied upon AIR 1927 Bom 565 (supra). The Delhi High Court in Anil Narendra Vs. Virendra and Others, have also taken the similar view. The Delhi High Court has held that a private reference to an arbitration in an identical suit without the knowledge of the Court and without its direction is invalid and an award resulting therefrom, cannot be made a rule of the Court unless all the parties interested in the suit consent to the award being filed into the Court as a compromise or adjustment of the suit. It further held that an agreement to refer a dispute to arbitration when the suit is pending for adjudication of the dispute to arbitration when the suit is pending for adjudication of the dispute is not illegal. The parties are competent to make a valid reference under Chapter II of the disputes in a pending suit if they agree to an arbitration without the supervision of the Court and to withdraw the suit, even if reference is made before the withdrawal of the suit. It would be enough in law that the award is made after the suit is withdrawn when proceedings to obtain judgment in terms of the award can be obtained not in the suit itself under Chapter 2 of the Act. We are somewhat concerned here with the views expressed by the Delhi Court to the effect that a private arbitration in a pending suit is not illegal or invalid.

16. Thus, in view of the ratio laid down in AIR 1927 Bom 565 (supra), there is no scope for the argument that the Court is precluded from proceeding with the suit in

terms of the award. What has been said in Dinkarrai Lakshmiprasad Vs. Yeshwantrai Hariprasad, is that, the agreement without reference of the Court cannot be acted upon by the Court. It does not curtail the right of the party to resort to private settlement.

17. What Mr. Mehadia contended before me was that, the intention of the parties thereto was not to refer the dispute to arbitration. But according to him, the parties all the while expressly stated before the Court that they want to compromise the suit. A compromise may be achieved in more than one ways. Parties may sit together, deliberate and patch up their differences and come to an agreement. There are also other methods when a matter can be compromised. Parties may appoint the persons of their confidence and accept the verdict given by them. This may not technically be called as arbitration, but it can be one of the modes of compromise. Crump, J., in AIR 1927 Bom 565 (supra) observed:

"It is at least clear that an award arrived at in a pending suit without the intervention of the Court is in no sense a nullity whatever may be the precise remedy open to the parties thereto. In this country we have primarily the rule of justice, equity and good conscience". It would be difficult to hold that on that rule parties are precluded from referring dispute to a private arbitration in view of the fact that a suit is pending. It has been said that the explanation of that rule may be sought in cases of doubt in the decisions of the English Courts. Even so, the law in England being what it is, nothing can be deduced from it precluding private reference in pending suits".

It was further observed:

"It is thus, in my opinion, conclusively established that up to date of the Code of 1908 there has been no law which precludes the parties in a pending suit from settling their disputes by a private reference to arbitration. Section 98, Code of 1859, and section 375, Code of 1852, were in my opinion intended to cover such settlements".

What Mr. Mehadia strenuously urged before me was that, the party had a strong urge to compromise the matter and to settle it amicably. That is why they went before the Court and applied for time. As the machinery for talking face to face was not available to them due to strained relations, the link between them was through panchas. They expressly told before the Court that they have appointed five panchas and they are accepting the verdict of these 5 panchas. They wanted compromise in terms of the verdict given by the panchas which both the parties undertook to accept. Thus, in fact what they sought from the Court was the compromise or adjustment of the claim. They never claimed appointment of any arbitrator and a reference for an award from the arbitrator. There appears to be much force in what Mr. Mehadia says. Adjustment or compromise need not necessarily come from deliberations of the parties to the dispute. After the panchas filed their verdict before the Court the only way that was open to the Court was to

record that compromise, because the parties had already put up before the Court two applications. This was the mode of compromise. This Court in AIR 1927 Bom 565 (cited supra) observed:

"But I have no doubt whatever that the words "adjusted wholly or in part by any lawful agreement or compromise" are wide enough to include an adjustment by arbitration followed by a valid award."

18. Mr. Mehadia urged before me that even a proviso to section 47 of the Arbitration Act permits the Court to pass a decree in terms of the award by way of adjustment or compromise. The proviso reads as follows:

"Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

What Mr. Mehadia urged before me was that it may not be acted upon as an award in the technical sense of the term, but it can be accepted as a compromise or amicable settlement which has been arrived at by the parties. Mr. Shelat, however, urged before me that before acting upon this award, there must necessarily be a consent of all the parties and this consent must be not only to the agreement, but also to the award. What he tried to convey was that, there is no tacit consent or otherwise to the award. According to him, as soon as the award was filed before the Court, he lost no time to challenge that award on various grounds, as is evident from Ex. 66. It will be proper at this stage to scrutinise this argument. As far as consent to the agreement is concerned Ex. 63 and 64 clearly show that the parties expressed their keen desire to settle the matter amicably and for the purpose of exploring an amicable settlements, they consented to appoint 5 Arbitrators. There was also actual consent of the parties to the verdict given by the Arbitrators. This is a stage where the parties not only consented in referring the dispute to the panchas privately, but they also consented to accept the verdict whatever it may be. What Mr. Shelat urged before me is that there must be a consent when the award comes before the Court. I find myself unable to agree with this argument. Consent at the time of agreement is enough, if it is coupled with the consent to accept the award. There may not be a fresh consent when the award is filed before the Court. The Gujarat High Court in Malek Bavaji Amarkhan Vs. Amirkhan Salimkhan and Others, observed:
"The consent under proviso to section 47 of Arbitration Act means consent to the reference and also to the award and no further consent to the terms of the award at the time of recording the compromise under Order 23, Rule 3 is necessary".

It will not be out of place to refer to the objection raised. The plaintiffs have nowhere stated in Ex. 66 that the award is not acceptable to them. Their objection is very much limited. According to them, though the panchas have done a tremendous job, they were incompetent because there was no reference from the Court and

therefore whatever they did, must be declared as void. Another objection was that, no full opportunity was given to the plaintiffs and the third objection was that one of the panchas made some misrepresentation to the plaintiffs. These are the only objections to the award. The trial Court has held on facts, that the subsequent two objections have no basis. It has rejected the evidence of the plaintiff that no opportunity was given. It has also negatived plaintiffs case that any misrepresentation was made to them. Thus, in fact there is no objection to the acceptability of the award.

19. In these circumstances, it cannot be said that the District Court was justified in coming to the conclusion that the award was not binding on the parties. It may not be binding on the parties, as an award under the Arbitration Act, but it was definitely binding on the parties as an amicable settlement, a compromise or an adjustment. They craved for it. They appointed the panchas, they undertook to abide by their decision, and therefore, they cannot now say that there is no compromise or adjustment.

20. In result, the view taken by the District Court in appeal is quite erroneous and it has to be corrected at the hands of this Court, with the result that the revision is allowed. The decree passed by the Appellate Court is set aside and the decree passed by the trial Court is restored in its place. Rule is made absolute in terms above. There shall be no order as to costs.