

Smt. Kusumlataben D. Kamani Vs Prafulchandra Narbheram Kamani

Court: Bombay High Court

Date of Decision: April 8, 1976

Acts Referred: Arbitration Act, 1940 " Section 17, 2, 30, 31, 32
Registration Act, 1908 " Section 17, 49

Citation: (1977) 79 BOMLR 284

Hon'ble Judges: Vimadalal, J

Bench: Single Bench

Judgement

Vimadalal, J.

This is a Notice of Motion for a decree in terms of the award in which some interesting questions of law have been raised on

behalf of the defendant who has opposed it. Disputes and differences having arisen between the two parties, as representing two branches of the

same family, regarding the estate of the deceased Narbheram, by an arbitration agreement dated June 15, 1973, all those disputes were referred to

the arbitration, of one Rule R.K. Kamani who was respected as the head of the family. The said R.K. Kamani made his award on December 27,

1973, the greater part of which has already been carried out. The said arbitrator filed his award in this Court on February 27, 1975, and the

present Notice of Motion has thereafter been taken out for a judgment being pronounced in accordance with that award and a decree being

passed thereon u/s 17 of the Indian Arbitration Act, 1940. It is the contention of Mr. A.N. Modi on behalf of the plaintiff that the terms of Section

17 are mandatory, and that once the arbitrator files his award in this Court, a decree must be passed by this Court in accordance with that award.

It is his contention that the arbitrator having filed the award in this Court, the plaintiff has no other remedy, but to apply for a decree in terms of that

award, since no petition has been filed to set it aside.

2. As against these contentions of Mr. Modi, Mr. Thakkar has submitted that no decree can be passed by this Court on the award in the present

case for two reasons, viz. (1) this is not the Court in which the award should have been filed, and this Court, has therefore, no jurisdiction to pass a

decree in accordance with that award; and (2) in view of Section 49(c) of the Registration Act, the award, cannot be looked at for the purpose of

passing a decree in so far as it is one which operates to affect rights in Immovable property, and, therefore, requires registration u/s 17(1)(b) of

that Act.

3. It will be convenient at the outset to refer to the relevant sections with which I am concerned in this case. Section 2(c) of the Arbitration Act

defines the term "court" as meaning a civil Court having jurisdiction to decide the questions forming the subject-matter of the reference, if the same

had been the subject-matter of a suit, and Section 31(1) lays down that an award may be filed in any Court having jurisdiction in the matter to

which the reference relates. It is the contention of Mr. Thakkar that Section 2(c) read with Section 31(1) must lead to the conclusion that the

award can be filed only in the Court in which a suit relating to the subject-matter of the reference could have been filed. His further contention is

that Section 17 under which the present application has been made for judgment in terms of the award, itself uses the word "court" which, in the

light of Section 2(c) referred to above, means the Court in which a suit relating to the subject-matter of the reference could have been filed, and it

is only that Court that is empowered to pass a decree in terms of the award. Mr. Thakkar has pointed out that it cannot be disputed that, on the

facts of the present case, a suit relating to the subject-matter of the reference could not have been filed in this Court, since all the properties in

dispute are situated outside its jurisdiction, and the defendant also resides outside the jurisdiction of this Court and the whole cause of action has

arisen outside it. Indeed, that position has not been disputed by Mr. Modi in the course of his arguments before me. Mr. Modi's sole contention

has been, as already stated above, that once the award is filed by the arbitrator in this Court, it is only this Court that can pass a decree in term of

that award, and that there is no other remedy open to the plaintiff. As far as the second part of Mr. Modi's submission in concerned, Mr. Thakkar

has drawn my attention to the decision of this Court in the case of Gulamali Abdulhussein & Co. v. Vishwambharlal (1948) 51 Bom. L.R. 79 in

which a division Bench of this Court has taken the view (at p. 84) that Section 33 of the Arbitration Act does not provide for all kinds of

applications, and that it is open to a party to make any application under that Act with regard to which a suit is barred u/s 32 thereof. That view

has now been confirmed by the Supreme Court in the case of Jawahar Lal Burman Vs. Union of India (UOI), , in which it has been laid down that

Section 32 recognizes the inherent jurisdiction of the Court to entertain applications in matters which fall within the bar of that section. It must,

therefore, be regarded as well-settled that an application under the Arbitration Act can be made in matters other than those which would be

covered by Section 33 of that Act. It is, however, necessary to bear in mind one little limitation which occurs both in the judgment of this Court in

Gulamali's case as well as of the Supreme Court in Jawahar Lal's case, and that is, that an application of any nature can be made under the Act ""in

matters which fall within the bar created by Section 32"". The plain terms of Section 32 show that a suit is barred under that section only for a

decision upon the existence, effect or validity of an arbitration agreement or award, or for an order that an award be set aside, amended, modified

or otherwise affected. It seems to me to be a matter of some doubt whether the ratio of the decisions in Gulamali's case and Jawahar Lal's case

would be applicable to a case like the present one in which, if the defendant's contentions were to be accepted, the application which the plaintiff

would have to make would be to take the award off the file, as that would be an application which neither affects the existence or the effect or the

validity of the arbitration agreement or the award, nor would it be an application to set aside, amend or modify the award or affect it in any manner.

It appears to me that to order that an award be taken off the file is not to affect the award itself in any manner. It is, however, not for me to advise

what the remedy of the plaintiff is, whether it would be by way of an application of an appropriate nature under the Arbitration Act, or whether it

should be by way of a suit or other proceeding. The question as to what is the nature of the remedy available the plaintiff cannot affect the question

as to whether, when an award is filed in a wrong Court, as in the present case, that Court can pass a decree on it, or the question as to whether a

Court can pass a decree on an award which though compulsorily registrable, has not been registered. I will, therefore, proceed to consider those

two questions.

4. Turning to the first of those two questions, it is true that Section 17 uses the word "shall" in connection with the pronouncing of a judgment in

terms of an award and passing a decree thereon, but a division Bench of this Court has laid down in the case of Hastimal Dalichand v. Hiralal

(1953) 56n Bom. L.R. 99 that if an award directs a party to do an act which is prohibited by law, or if it is otherwise patently illegal or void, it

would be open to the Court to consider that patent defect in the award suo motu, and that the words used both in Sections 17 and 30 of the

Arbitration Act are wide enough to include the jurisdiction of the Court to deal with the matters covered by those sections suo motu, though the

Court would exercise that jurisdiction rarely and only where the award may be patently illegal and void. The decision of the division Bench in

Hastimal Dalichand's case is, however, distinguishable in so far as it cannot be said that the award in the present case is invalid in any respect. It is

a perfectly valid award, at any rate, for the purpose of the present Motion in which it was not necessary to go into any grounds that may exist for

setting aside the award since that is not the nature of the application before me. In my opinion, however, it would be a legitimate extension of the

principle of *Hastimal Dalichand*'s case to apply it to a case like the present one. Applying that principle, I hold that, on a Notice of Motion for a

decree in terms of the award, the Court should consider the question whether the award has been filed in the proper Court and whether that Court

has the jurisdiction to pass a decree on the award. Even without any independent application being made to take the award off the file, or for

similar relief, this Court can, and indeed, should, even *suo motu*, go into the question as to whether it has the jurisdiction to pass a decree in terms

of the award. Holding, as I do, that it has no such jurisdiction in the present case, I must, decline to grant the relief sought on this Motion.

5. That brings me to the second ground on which Mr. Thakkar has based his opposition to the present Motion, and that is, that the award in the

present case requires registration, and being unregistered, no decree can be passed in terms of that award. Reference may be made, in that

connection, to two provisions of the Registration Act on which Mr. Thakkar has relied. The first of these provisions is to be found in Clause (b) of

Sub-section (1) of Section 17 of the Registration Act, 1908, which makes it obligatory to register any non-testamentary instrument which, inter

alia, operates to create or declare any right, title or interest of the value of over Rs. 100 to or in Immovable property. Section 49 of that Act lays

down, by Clause (c) thereof, that no document which is required by Section 17 to be registered shall be received as evidence of any transaction

affecting Immovable property of the value of Rs. 100, unless it has been registered. The proposition that an award which affects Immovable

property of the value of Rs. 100 would require registration has not been disputed by Mr. Mody, and it is indeed, too late in the day to do so. He

has, however, contended that the present award does not declare any right in any Immovable property, but merely provides, by Clause 11 thereof,

that a further document by way of a family settlement is to be executed for partition of an Immovable property known as ""Kamani Mansion"" at

Jamshedpur, and it is the contention of Mr. Modi that it is that document which would create or declare rights in the said Immovable property and

would require registration, and not the award which merely provides for the execution of such a document. I do not accept that contention of Mr.

Modi, as, in, my opinion, Clause 11 clearly declares the rights of the parties in regard to that Immovable property in the manner set out in annexure

Ill to the award, Clause 1 of which provides for a partition on certain terms and subject to certain conditions and limitations. In this connection, it is

important to bear in mind that these rights come into existence the moment the award is made declaring those rights, even though the machinery by

way of the execution of a formal document in the nature of a family settlement is intended to follow. There is also Clause 12 of the award which

declares that one Sushila P. Kamani who, it may be stated, was not a party to the Reference is to be absolutely entitled to other Immovable

properties. Rightly or wrongly, the award, therefore, also declares the right in those Immovable properties and would require registration u/s 17(1)

(b) on that ground also as the use of the word "declare" in Section 17(1)(b) as well as the view taken in the cases which I shall presently cite,

show. A provision of the nature that is to be found in Clause 12 which declares a certain person to be entitled to certain Immovable properties

would also require that the award containing the same should be registered. I, therefore, hold that the award in the present case is one which

requires registration u/s 17(1)(b) of the Registration Act.

6. There are three cases which were cited before me on this point to which I will now refer. The first and the most important decision to which I

will refer is the one in the case of Ratan Lal Sharma Vs. Purshottam Harit, in which one of the clauses of the award provided that the factory and

all the assets and properties of a certain industrial concern were "exclusively allotted", to one of the parties who would be "absolutely entitled to the

same" and would pay all its liabilities. It was held that the award, therefore, purported to create rights in Immovable property worth over Rs. 100

and would require registration u/s 17 of the Registration Act, and that the said award not being registered, was "inadmissible in evidence for the

purpose of pronouncing judgment in accordance with it" (para. 3), and the Court "could not look into it" and "could not pronounce judgment in

accordance with it" (para. 6). That view was taken by the Supreme Court apparently in view of the provisions of Clause (c) of Section 49 of the

Registration Act. Whatever be my own view in regard to the question as to whether an award could be said to be received in evidence within the

terms of Clause (c) of Section 49 when the Court is asked to pass a decree according with that award, the view taken by the Supreme Court is

clear on that point and is binding upon me, and I must follow the same. In the case of Chimanlal Girdhar Ghanchi Vs. Dahyabhai Nathubhai

Ghanchi, the view taken by a division Bench of this Court also was that, if an award which is compulsorily registerable, has not been registered,

and the Court in which it is filed makes it a decree of that Court, "it is acting contrary to the provision of Section 49 of the Indian Registration Act

(at p.955). In the case of Anandi Lal v. Keshavdeo [1949] A.I.R also, on an application to set aside the award and/or to have it removed from the

file of the Court, it was held that in the case of an award which dealt with Immovable property, but was not registered, the Court has inherent

power to remove it from the file of the Court (paras. 57-59). Reference may particularly be made to certain observations in the judgment in the

said case to the effect that failure to have the same registered is not a ground on which it could be set aside, but that since there was also a prayer in

the petition in the said case that the award be removed from the file that order had to be granted, as the Court need not wait until execution

proceedings were adopted and an objection taken to the decree on that ground. Following the view taken by the division Bench of this Court in

Chimanlal's case as well as by the Supreme Court in Ratan Lal's case, by which I am bound, I must, therefore, hold that no decree can be passed

on the award in the present case, as it is one which creates, or declares rights in Immovable property and, therefore, requires registration, but has

not been registered. It is impossible to separate the good part of the award from the bad one and, under the circumstances, on that ground also, I

must refuse to pass a decree in accordance with the award.

7. The only other question which survives for my consideration is, what is the form of the order which I should make in this case. One course

which I could follow is merely to dismiss the Notice of Motion and leave the parties to take appropriate proceeding to have the award taken off

the file of this Court and filed in the proper Court. The other course, which is it urged I should follow is, that I should not only dismiss the Notice of

Motion, but should direct, as was done by the Calcutta High Court in Anandi Lal's case, that the award be taken off the file. It is, however,

important to bear in mind that in Anandi Lal's case, there "was an express prayer to that effect, whereas if I were to pass such an order in the

present case, I would have to do so suo motu, without there being any such prayer before me. As already stated above, it is a matter of some

doubt as to what should be the procedure for seeking relief of that nature, whether it should be by way of an application under the Act, or by a

separate suit, or in any other manner. Rather than leave the parties to further litigation on doubtful points of procedure, I think the proper course I

should adopt is to order that this Notice of Motion be dismissed, and to make a further order in the exercise of my inherent power that the award

filed by the arbitrator be taken off the file, with liberty to the arbitrator, or to either of the parties, to take the award back from the Prothonotary's

office for taking such proceedings in regard to the same as they may be advised. I order accordingly. Having regard to the fact that it is through no

fault of the plaintiff that the award has not been filed in the proper Court, I make no order in regard to the costs of the Motion.