Parkash Chand Khurana Etc vs Harnam Singh & Ors on 28 March, 1973

Equivalent citations: 1973 AIR 2065, 1973 SCR (3) 802, AIR 1973 SUPREME COURT 2065, 1973 2 SCC 484, 1974 (1) SCJ 413, 1973 3 SCR 802

Author: Y.V. Chandrachud

Bench: Y.V. Chandrachud, S.N. Dwivedi

PETITIONER:
PARKASH CHAND KHURANA ETC.

Vs.

RESPONDENT:
HARNAM SINGH & ORS.

DATE OF JUDGMENT28/03/1973

BENCH:
CHANDRACHUD, Y.V.
BENCH:
CHANDRACHUD, Y.V.
DWIVEDI, S.N.

CITATION:
1973 AIR 2065 1973 SCR (3) 802
1973 SCC (2) 484

ACT:
Practice--Award of arbitrator--Decree in terms of award-Provision for- return of property in default of certain payments--Executability.

HEADNOTE:
The respondent erected a factory on a plot of land allotted to them by the Faridabad Development Board. They agreed to sell their rights in the plot and the factory to the appellants. Disputes having arisen between the parties on certain matters relating to the agreement, they were referred to arbitration. The arbitrator gave an award and a decree was passed in terms of the award. Under the award, the appellants were liable to discharge the liability of the respondents to the Faridabad Development Board in the sumof ab out Rs. 23,000/-. The appellants were to pay this

amount within 1 1/2 years, or, alternatively, to obtain from the Board within that period a complete discharge for the respondents. In default of such payment, the respondents were entitled to take back possession of the plot and factory. The appellants paid only a sum of Rs. 8,000/- to the Board and this sum was shown in the accounts of the Board as if paid by the respondents. As the appellants committed default the respondents took out execution. The appellants opposed the application but the High Court, in Letters Patent appeal, directed execution to proceed.

Dismissing the appeal to this Court,

HELD: (1) There is no support for the contention of the appellants that the default on their part-occurred by reason of the non-cooperation of the respondents. The evidence shows that the appellants were not in a position to make the payment. [807F-G]

(2) By the respondents transferring their entire interest in the property to the appellants there existed a foundation for the creation of privity between the appellants and the Board'; but the Board never agreed to substitute the appellants as its debtors in place of the respondents. Even after accepting the sum of Rs. 8,000/- from the appellants, the Board was entitled to recover the balance from the respondents. [807H; 808 B-D]

Kandarpa Nag v. Banwari Lal Nag and Ors., A.I.R. 1921 Cal. 356(2), Mitha and Ors. v. Remal Dass and Ors., A.I.R. 1937 Lah. 828 and Sheikh Mohidin Tharagan v. Vadivalagianambia Pillai, 22 I.C. 37, referred to.

(3) The recital in the award that on the failure of the appellants to make the payment the respondents were entitled to take back possession of the plot and the factory has to be considered in the entire scheme of the award, and so considered, there is no doubt that it was not merely the possession of the property but the title thereto also would pass to the respondents. [809 C-D]

(4) The appellants' liability to pay the dues of the Board would operate only if the title to the property is vested in them. [809E-F]

(5) The tenor of the award shows that the arbitrator did not intend merely to declare the rights of the parties. It is a clear intendment of the award that if the appellants defaulted in discharging their obligation under the award the respondents would be entitled to apply for execution and obtain possession of the property. [809 F-H]

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(6) The clause in the award providing for the right of the respondents it to obtain possession of the property on the appellants committing default is not in the nature of a penalty against which the appellants are entitled to be relieved. Moreover, the term is contained in a decree passed by the Court in terms of the award and no relief can be granted as against the terms of a decree., The award-decree could not be treated as a consent decree, because,

the award was valid on its, own independently of any decision of the parties not to object to it. [810 A-D]

Kandarpa Nag v. Banwari Lal Nag and Ors., A.I.R. 1921 Cal., 356(2), Mitha and Ors. v. Remal Dass and Ors., A.I.R. 1937 Lah. 828 Sheikh Mohidin Tharagan v. Vadivalagianambia Pillai 22 I.C. 37 and Chanbasappa Gurushantappa Hiremath v. Basalingayya Gokurnaya, 51 I.L.R. Bom. 908, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1866 of 1967.

Appeal by certificate from the judgment and decree dated September 15, 1967 of the Punjab & Haryana High Court at Chandigarh in Letters Patent Appeal No. 139 of 1965. D. V. Patel, G. S. Vohra, R. P. Agarwal and M. V. Goswami, for the appellants.

G. L. Sanghi, C. S. Rao, J. B. Dadachanji, O. C. Mathur and Ravinder Narain, for the respondents.

The Judgment of the Court was delivered by CHANDRACHUD, J.--Plot No. 29-B Industrial Area, Faridabad, was allotted in the year 1952 to the respondents by the Faridabad Development Board. Respondents erected buildings on the plot, installed machinery therein and started a factory in the name and style of "Bharat-Rubber Mills". By an agreement of May, 1955 respondents sold their rights in the plot and the factory to the appellants. Disputes arose between the parties on, certain matters relating to the agreement, which the parties referred to an arbitrator. The arbitrator gave his award on August 4, 1955 and the award became a rule of the court on August 23, 1956. One of the principal terms of the award, broadly, was that the appellants were to pay a certain sum of money to the Board in discharge of the liability of the respondents and on their failure to make the payment, they were to give, back the, possession of the plot and the factory to the respondents. The appellants not having paid the amount, respondents filed a series of execution applications the last of which is dated January 15, 1964. Appellants opposed that application on various grounds which were rejected by the executing court and the execution was directed to proceed. Appellants filed an appeal against the judgment of the executing court, which was allowed by a learned single Judge of the High Court of Punjab and Haryana. Respondents challenge-

ed that judgment in Letters Patent Appeal No. 139 of 1965. That appeal was allowed by a Division Bench on September 15, 1967 and the judgment of the executing court was restored. The High Court has granted to the appellants leave to appeal to this court from its judgment under Article 13 3 (1) (a) and (c) of the constitution.

Under clause 2 of the award, the appellants were liable to discharge the liability of the respondents to the Faridabad Development Board in the sum of Rs. 23,686-6-0. Under clause 7, the appellants were to pay this amount within 1 1/2 years or alternatively, to obtain from the Board within that period a complete discharge for the respondents. It is common ground that within the stated period the appellants had paid a sum of Rs. 8,000/only to the Board. In addition, they had forwarded to

the Board for its acceptance verified claims in the sum of Rs. 10,000/which they held under the Displaced Persons (Compensation and Rehabilitation) Act, 1954. The Board was evidently disinclined to accept the verified claims in discharge of the liability of the respondents. Assuming, however, in favour of the appellants that 'the verified claims constituted a valid payment, they had still not paid to the Board the full amount which they were liable to pay under clause 2 of the award, within the period mentioned in clause 7.

As the appellants committed default in the payment of the aforesaid amount, the consequence prescribed by clause 7 of the award would follow, namely, that the respondents would be entitled to take back possession of the property from the appellants. Learned counsel appearing for the appellants, however, argues that the respondents refused to co-operate with the appellants and in the absence of such co-operation the appellants, though ready and willing to pay the amount, were unable to do so. They cannot. therefore, be visited with the penal consequences provided for by clause 7 of the award.

Our attention has been drawn to the bulk of the correspond- ence that transpired between the appellants and the Board on the ,one hand and the appellants and the respondents on the other but we see therein no support for the contention that the default on the part of the appellants occurred by reason of the non-cooperation of the respondents. Appellants created impediments in their own way by asking the Board to accept verified claims in discharge of the liability of the respondents. The Board was under no legal obligation to accept the verified claims, not at any rate without proper scrutiny. and such scrutiny could notoriously take longer than the period of 1 1/2 yearsprovided for by clause 7 of the award. It was for the appellants to find ways and means to satisfythe dues of the Board in a form acceptable to it but they failed to do so. The co-operation of the respondents had no place in this, picture.

Clause 7 of the award, in so far as is relevant on this aspect,. reads thus :

> "In case the second party does not make payment to the Faridabad Development Board as mentioned in clause No. 2, mentioned above, for a period of 1 1/2 years or does not take the liability of the Development Board on itself as a result whereof the liabilities of the first party do not come to an end, as mentioned in clause No. 2, ... 1..... the first party shall be entitled to take back the possession."

It is clear that the appellants, had a two-fold option under this clause. They had either to make the payment to the Board within the stated period or they had to enter into an arrangement with the Board in order, effectively, to terminate the liability of the respondents to the Board. The first option was not availed of by the appellants. But the appellants drew our attention to the correspondence between the concerned parties in an effort to establish that by accepting part payment of the amount from the appellants, the Board had agreed to substitute the appellants as its debtors in place- of the respondents, thereby terminating the liability of the respondents.

The agreement between the appellants and respondents, where- by the latter sold their interest in the property to the appellants was executed in May, 1955. The correspondence began with a letter

Ex. J.D. 12, dated May 20, 1955 and continued at least till the early part of 1957. By their letter Ex. J.D. 12, the appellants informed the Administrator, Faridabad Development Board, that they had decided to make payment of all the amounts due to the Board. By a letter Ex. J.D. 13 dated October 5, 1955, the appel- lants informed the Administrator that they had purchased the factory from the respondents and they inquired of the Administrator whether, the verified claims held by them in respect of the property which they owned in Pakistan could be accepted in satisfaction of the liability of the respondents. Further correspondence ensued between the parties and on January 16, 1956 the Administrator wrote to "M/s. Bharat Rubber Mills, Faridabad" asking them to pay a sum of Rs. 27,325-9-0 which had accrued due on account of premium, ground rent and house rent. Appellants place strong reliance on this letter in order to show that the Board looked to them for meeting the liability of the respondents, which according to the appellants, must effectively discharge the respondents from their liability to the Board. We are unable to read the letter as having any such effect. The Administrator used to address all correspondence to "M/s. Bharat Rubber Mills, Faridabad", because it is they who were liable to pay the dues of the Board. The letters, though not specifically intended for the appellants, naturally fell into their hands because under an agreement with the respondents they had purchased the "Bharat Rubber Mills" and were in possession thereof. The particular letter, therefore, would be inadequate to establish that the Board had recognised the transfer in favour of the respondents or that it had agreed to substitute the appellants as its debtors, in place of the respondents.

Reliance is then placed on 5 letters : Exhibits J.D. 20, 21, 22, 25 and 23 dated April 10, 1956, October 25, 1956, November 15, 1956, January 7, 1957 and January 30, 1957 respectively, ,for showing that by accepting the payment of Rs. 8,000/- from the appellants the Board had recognised the appellants as its debtors, discharging thereby the respondents from their liability. By Ex. J.D.20, the appellants informed the Board that they had purchased the property from the, respondents and that they were ready and willing to pay the entire dues of the Board according to the terms of the award. The Board did not send a reply to this letter and that abstention, though not commendable in a publicbody, militates against the inference that the Board had recognised the appellants as its debtors in place of the respondents.

Along with the letter Ex. J.D.2 1, appellants enclosed 7 cheques ,of Rs. 1,000 each and agreed to pay the balance in monthly instalments of Rs. 1,000. By their letter Ex, J.D.22 the appellants requested the Board to deposit the aforesaid 7 cheques in the bank, not all at once but one per week. It appears that in course ,of time, the Board realised the amount sent by the appellants through the 7 cheques. By their letter Ex. J.D.25, the appellants requested the Board to send an official receipt in respect of the ,sum of Rs. 7,000. Finally, by. the letter Ex. J.D. 23 the appellants ,sent to the Board yet another cheque in the sum of Rs. 1,000 along with true copies of verified claims in the sum of Rs. 10,000. The cheque for Rs. 1,000 was cashed by the Board in course of time ' but the verified claims, though not returned, were at no stage ,accepted. It seems to us difficult from the tenor of this correspondence to 'hold that the Board had accepted the appellants as their debtors in substitution of the respondents, thereby releasing the letter from their primary liability. The Board was interested in recovering its dues and the circumstance that payments made by the appellants were accepted by it cannot have the effect of releasing the respondents from the undischarged liability. Normally, a public authority like the Board would not agree to substitute a new debtor in place of

the old without at least a formal inquiry into the solvency of the former. There seems no evidence of such an inquiry. The argument of the appellants that by paying a part of the amount due to the Board they had obtained a valid discharge for the respondents in regard to the entire claim of the Board overlooks that even after accepting the sum of Rs. 8,000 from the appellants, the Board would be entitled to recover the 'balance from the respondents, who were primarily liable to pay the amount. It would be wrong to hold, in the absence of a formal recognition of the appellants by the Board as its debtors, that the liability of the respondents had come to an end.

In fact, by their letter Ex. J.D. 3 dated February 6, 1957 the Board wrote to the appellants in answer to their letter of January 30, 1957 that the payments made by them were "credited to the account of M/s. Harnam Singh and Tarlok Singh, Proprietors, Bharat Rubber Mills, Faridabad"

> and that the Board could not recognise the appellants as transferees of the plot unless and until the entire sum due from the respondents was paid. Harnam Singh and Tarlok Singh are respondents to this appeal. On March 20, 1960 the Assistant Settlement Commissioner in the Ministry of Rehabilitation, Government of India, wrote a letter Ex. J.D. 5 to the appellants that the transfer in their favour was never recognised by the Board. It would appear that in the meanwhile, the appellants had sent 3 cheques to the Board but those cheques were returned by the Assistant Settlement Commissioner along with letter Ex. J.D. 5. These two letters were undoubtedly written by or on behalf of the Board after February 4, 1957 when the period of 1 1/2' years prescribed by clause 7 of the award expired, but it would be wrong to ignore these letters on the supposition that the Board had entered into a conspiracy with the respondents in order to defeat the title of the appellants. Such on inference was pressed upon us but there is no basis for it. The attitude of the Board rather shows that it was interested in recovering its dues and had waited long enough to enable the appellants to make the payment. The truth of the matter, as held by the Division Bench of the High Court, seems to be that the appellants were not in a position to make the payment.
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> It is interesting to note that the appellants had themselves stated in paragraph 8 of their Objections to the execution application filed by the respondents, that they wanted to make the payment of the entire amount to the Board but that the Board had refused to recognise them and that the payment of Rs. 8,000 made by them was shown in the accounts of the Board as if it were made by respondents. It is clear from this statement that the appellants were conscious that the Board had refused to recognise them as its debtors, in place of the respondents.
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> In this view, it is unnecessary to consider whether the letter Ex.D.H. 7 dated February 17, 1956 alleged to be written by the respondents to the Board. is genuine or not. The decisions, in Nochulliyil Euzhuvan Theethi's son Thethalan v. The Eralpad Rajah Styled Flaya Rajah Avargal of Patinhara Kovilagam & Ors., (1) Saradindu Mukherjee v. Sm. Kunja Kamini Roy and Ors., (2) and Krishna Bhatta v. Narayana Achary and Anr.,(3) on which the appellants' counsel relies can be of no assistance. It was held in

Nochulliyil's case that the mortgagee with possession from the lessee is not liable to the lessor for rent as there is neither privity of estate nor privity of contract between them. It is undoubtedly true that the respondents had transferred their entire interest in the property to the appellants and therefore there existed a foundation for the creation of a privity between the appellants and The Board. However, as indicated above, the Board never agreed to substitute the appellants as its debtors in place of the respondents. In Saradindu Mukherjee's case, it was held that an express or implied recognition by the lessor of a transferee from the original tenant would be effective to discharge the liability of the tenant. In the instant case the evidence of such recognition is lacking Krishan Bhatta's case is distinguishable for the same reason. It is then contended that on the appellants defaulting, the respondents would at the highest be entitled to recover possession of the property from them but their title will not pass with such parting of possession. Clause 7 of the award on which the appellants' counsel relies in support of this argument provides that if the appellants committed default in payment of the amount, the respondents "shall be entitled to take back the possession". This term, torn from the rest of the award, may lend plausibility to the appellants' contention but for a true construction of that term. one must have regard to the entire scheme of the award. Clause 7 itself contains. a specific recital that until such time as the Board's dues remain unsatisfied or the liability of the respondents remains undischarged, the appellants "shall not be competent to transfer the rights of Bharat Rubber Mills in the factory, site, building, and machinery etc., in any manner by means of mortgage, sale or to remove the same" and that the possession of the appellants during the interregnum ,hall be deemed to be "in trust". This' recital leaves no 'doubt that if the appellants committed default in discharging their obligations under the award, not merely possession of the property but the title thereto would pass to the res- pondents; or else, it was meaningless to put restraints on the power of the appellants to deal with The property as owners and to provide (1) 40 T.L.R. Madras III 1. (2) A.T.R. 1942 Cal. 514. (3) A.T.R. 1949 Mad. 618.

that so long as they did not discharge their obligations they would be in possession as trustees. Such a trusteeship can, in the circumstances, enure for the benefit of the respondents alone.

If the appellants, on defaulting, were liable to handover mere possession to the respondents, it would, be difficult to work out the consequent rights and obligations of the parties. There is no provision in the award as to the further period within which the appellants must discharge their obligations, nor indeed is there any provision as to whether the respondents, after getting back possession from the appellants, would be free to deal with the property in the ordinary course of business. If the title to the property was to remain vested in the appellants and the respondents were to obtain the mere husk of possession, the appellants might contend for recovering from the respondents the entire fruit of their labour, after discharging the obligations under the award at their leisure and convenience. We are therefore clear that on failure of the appellants to, discharge their obligations under the award within the stated period, the possession of the property and along with it the title thereto must pass to the respondents'.

There is no sense of realism in the apprehension of the appellants that after recovering possession from them, the respondents could still insist that they should pay the sum of Rs. 23,000,/and odd to the Board. Clause 3 of the award which, along with clauses 2 and 7, makes the appellants liable to pay the dues of the Board would operate only if the title to the property is vested in the appellants. The liability to pay the dues of the Board is ancident of ownership and would therefore pass with the title to the property. , The next contention of the appellants is that the award is merly declaratory of the rights of the parties and is therefore inexecutable. This contention is based on the wording of clause 7 of the award which provides that on the happening of certain events the respondents "shall be entitled to take back the possession". We are unable to appreciate bow this clause makes the award merely declaratory. It is never a pre-condition of the executability of a decree that it must provide expressly that the party entitled to a relief under it must file an execution application for obtaining that relief. The tenor of the award shows that the arbitrator did not intend merely to declare the rights to the parties. It is a clear intendment of the award that if the appellants defaulted in discharging their obligations under the award, the respondents would be entitled to apply for and obtain possession of the property.

The last contention of the appellants is that the particular term of clause 7 of the award providing for the right of the respondents to obtain possession of the property on' the appellants committing 4-1,797Sup.CI/73 default is in the nature of a penalty, against which appellants are entitled to be relieved. One answer to this contention is that it is impossible to treat the particular term as in the nature of a penalty. Secondly, the term is contained in a decree passed by the court in terms of the award and no relief can be granted as against the terms of a decree stands on the same footing as a consent decree because both the parties expressly agreed that the award should be made a rule of the court. The failure of the respondents to object to the award may stem from several considerations, including the one that an award can be set aside only on the grounds specified in section 30 of the Arbitration Act, 1940, and none of those grounds may have been available to them. We, therefore, see no warrant for the view that the award decree should be treated as a consent decree. The award of the arbitrator did not get its efficacy by reason of the fact that the parties agreed to it. The award was valid on its own, independently of the decision of the parties not to object to it. On the other hand, the validity of a compromise decree flows from the consent of the parties. The decisions in Kandarpa Nag v. Banwari Lal Nag and Ors.,(1) Mitha and Ors. v. Remal Dass & Ors., (2) and Ana Sheikh Mohidin Tharagan v. Vadivalagianambia Pillai(3) relate to penal clauses in compromise decrees and are therefore distinguishable. The Full Bench decision in Chanbasappa Gurushantappa Hiremath v. Basalingayya Gokurnaya Hiremath & Ors., (4) can also have no application because that case is an authority for the limited proposition, prior to the enactment of the Arbitration Act, 1940, that where in a suit parties have referred their dispute to an arbitration without an order of the court and an award is made, a decree in terms of the award could be passed by the court under Order XXIII, Rule 3, of the Code of Civil Procedure. In the instant case, parties agreed to refer their disputes to arbitration when no suit was pending and the award subsequently became a rule of the court.

For these reasons we confirm the judgment of the High Court and dismiss the appeal with costs.

V.P.S. Appeal dismissed.

(1) A.I.R. 1921 Cal 356 (2).

(2) A. I.R. 1937 Lab. 828.
(3) 22 1. C. 37.
(4) 51 1. L. R. Bom. 908