

Bhawarlal Bhandari vs Universal Heavy Mechanical Lifting ... on 4 December, 1998

Equivalent citations: AIR 1999 SUPREME COURT 246, 1999 (1) SCC 558, 1998 AIR SCW 3761, (1999) 1 APLJ 25, 1999 (2) ALL CJ 809, 1999 (1) ARBI LR 355, 1999 SCFBRC 68, 1999 ALL CJ 2 809, 1999 (2) SRJ 225, 1998 (6) SCALE 417, 1998 (9) ADSC 335, 1999 (1) UJ (SC) 215, (1998) 8 JT 393 (SC), (1999) 1 CAL HN 18, (1999) 2 SCJ 3, (1999) 35 ALL LR 248, (1999) 1 MAD LW 247, (1999) 1 ARBILR 355, (1998) 9 SUPREME 234, (1999) 1 RECCIVR 278, (1999) 1 ICC 317, (1998) 6 SCALE 417, (1999) 1 CALLT 92, (1999) 2 CIVLJ 461, (1998) 4 CURCC 135

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Bench: S.B. Majmudar, M. Jagannadha Rao

CASE NO.:

Appeal (civil) 6067-6068 of 1998

PETITIONER:

BHAWARLAL BHANDARI

RESPONDENT:

UNIVERSAL HEAVY MECHANICAL LIFTING ENTERPRISES

DATE OF JUDGMENT: 04/12/1998

BENCH:

S.B. MAJMUDAR & M. JAGANNADHA RAO

JUDGMENT:

JUDGMENT 1998 Supp(3) SCR 331 The Judgment of the Court was delivered by S.B. MAJMUDAR, J. Leave granted in both these Special Leave Petitions.

By consent of learned counsel for the parties, these appeals were finally heard and are being disposed of by this judgment.

A few relevant facts leading to these appeals may be stated at the outset.

The common appellant as the decree holder got an award decree on 2.6. 1989 from the court of learned Single Judge of the High Court of Judicature at Calcutta. The said decree was sought to be executed. At that stage, the respondent-judgment debtor filed objections under Section 47 of the Code of Civil Procedure contending that the decree was a nullity as it was barred by limitation. The

objections were overruled by the executing court which resulted in two proceedings by the respondent-judgment debtor before me Division Bench of the High Court, Both the proceedings were disposed of by the impugned common judgment. The Division Bench of the High Court held that the question of limitation regarding passing of the award decree was required to be examined by the executing court and consequently, passed a remand order directing learned Single Judge to decide the matter afresh. The impugned judgment also observed that the learned Single Judge should decide whether the arbitrator had filed the award suo motu or at the instance of the award holder in the light of the decision of this Court in the case of Patel Motibhai Naranbhai and Anr. v. Dinubhai Motibhai Patel and Ors., reported in [1996] 2 SCC 585 and other case law.

In order to appreciate the grievance of the decree-holder appellant in these appeals, it is necessary to look at relevant background facts. The appellant is said to have granted a short-term loan of Rs. 1.5 lacs to the respondent on 9.1.1985. The contention of the appellant was that the loan was to be repaid within two months with 24 per cent interest On the principal amount. The respondent disputed the said claim of the appellant and contended that the loan amount was payable after two years and the interest rate was also not 24 per cent. This dispute was referred to the arbitration of a sole arbitrator who after hearing the parties, passed an award on 17.4.1985. It is the case of the appellant that as per the instalments granted in the award the first instalment of Rs, 2 lacs was paid by the respondent-judgment debtor but thereafter it defaulted. It is pertinent to note that before the award was made the rule of the Court, the first instalment as per the award was paid by the respondent. It appears that the award was filed by the arbitrator in the Court on 23.3.1989 for making it a rule of the Court. It is also to be noted that though the notice dated 6.4.1989 as to the filing of the award was served by the court to the respondent-judgment debtor on 10.4.1989, it did not file any objections to the award under Section 30 of the Arbitration Act, 1940. It also appears that the respondent did not choose to contest the proceedings. Ultimately, the court passed an ex parte order making the award rule of the Court on 2.6.1989. Thereafter, when the award decree was not complied with by the respondent execution proceedings were initiated by the appellant. In the execution proceedings the respondent-judgment debtor raised a contention by filing an application under Section 47 of the Code of Civil Procedure that the decree was not executable and was a nullity on the ground that the arbitrator had no power or jurisdiction to file the award suo motu in the court after four years and hence the award decree could not have been passed as the award was filed beyond the prescribed period. The executing court after hearing the parties overruled the objections by holding that such a contention could not be raised in execution proceedings. As noted earlier, the respondent-judgment debtor carried the matter in appeal and in appeal the Division Bench of the High Court took the view that the question was required :to be re-examined by the executing court and hence remanded the proceedings. That is how the appellant is before us on grant of special leave under Article 136 of the Constitution of India. Shri Kapoor, learned senior counsel for the appellant vehemently contended that the executing court had no jurisdiction to go behind the decree, that the question of limitation was a mixed question of law and fact and even assuming that it was wrongly decided by the court passing the decree in terms of the award such a contention would not make the decree a nullity of without jurisdiction and hence the remand order passed by the Division Bench of the High Court was clearly unsustainable and amounted to Usurpation of jurisdiction which in execution proceedings, the Court had not got. Reliance Was placed on judgments of this Court in support of this contention which we will refer to hereafter Shri Javali, learned senior counsel for the

respondent-judgment debtor on the other hand submitted that the award and decree in question appeared to have been obtained in a very curious and surreptitious manner by the appellant, that the dispute was raised within two months of advancement of loan and within a few days the entire arbitration proceedings were over, that thereafter curiously enough no attempt was made by the appellant to get the award made rule of the court and years rolled by, and when after 4 years the arbitrator was made to file the award, that attempt would naturally be at the instance of the appellant, that such late filing of the award by the arbitrator could not have been made the subject matter of proceedings before the court for passing decree in terms thereof and that the proceedings were clearly time barred and hence the award decree was a nullity. It was also submitted that even after the award decree of 2.6.1989 the execution proceedings were also filed belatedly and that also indicated that the appellant had obtained a mock award and it was a result of the fraud committed by the appellant on the respondent as well as on the Court in snatching such an ex parte award decree. It was lastly submitted that looking to the facts and circumstances of this case, in exercise of its jurisdiction under Article 136 of the Constitution of India, this Court may not interfere with the order passed by the Division Bench of the High Court which is a remand order and which meets the ends of justice inasmuch as the correct legal position can be found out by the trial court after remand. In support of this contention strong reliance was placed on a decision of this Court in the case of Patel Motibhai Naranbhai & Anr. (Supra) which, according to Shri Javali, learned senior counsel for the respondent was rightly pressed in service by the Division Bench of the High Court.

In view of the aforesaid rival contentions, the following points arise for our Consideration ; -

- (i) Whether the award decree dated 2.6.1989 was a nullity being barred by limitation.
- (ii) Whether the executing Court can go behind such a decree,
- (iii) Whether any interference under Article 136 of the Constitution is called for.

Having given our anxious consideration to the rival contentions, we find that none of the aforesaid points for determination can be sustained in favour of the respondent-judgment debtor. The reasons are obvious.

Point Nos. (i) & (ii) :

The award dated 17.4.1985 was filed in the court on 23.3.1989 by the arbitrator and the court proceeded to deal with the question whether the award should be made rule of the court or not. Notice was issued by the court to the respondent to show cause as to why this award should not be made rule of the court. There is no dispute that this notice was served on the respondent. Despite such service of notice, for reasons best known to the respondent, it did not think it fit to contest the proceedings nor did it file any objection under Section 30 of the Arbitration Act, 1940. In the result, the court passed an award decree on 2.6.1989 on account of absence of any contest by the judgment debtor. It is true that this award decree was sought to be executed years thereafter. But the said delay on the part of the decree holder in executing the decree

within the permissible period for limitation in execution of such decree cannot give any sustainable right to the judgment-debtor to challenge the execution proceedings on that ground. The contention of shri Javali, learned senior counsel for the respondent that the award was mock one and was not intended to be enforced can not be sustained as that stage has gone for the respondent. In execution proceedings such a contention requiring the executing court to go behind the decree cannot be sustained. The question whether the award decree was filed by the arbitrator on his own or not was a mixed question of "law and fact. The Division Bench in the impugned judgment itself has noted that if the award was filed by the arbitrator suo motu then the award decree cannot be said to be barred by limitation but if, on the other hand, the award was filed by the arbitrator at the instance of the appellant-decreeholder then the question of limitation would arise. The aforesaid observation of the Division Bench itself indicates that this is a mixed question of law and fact. That was an issue to be raised before the award was made a rule of Court But such plea can never make the decree a nullity especially when the respondent for reasons best known to it did not