Supreme Court of India
Prem Sagar Chawla S/O Tara Chand vs Security & Finance (P.) Ltd. And ... on 27 April, 1967
Author: Kapur
Bench: K Hegde, S Kapur, S Andley
JUDGMENT Kapur, J.

(1) The following question has been referred to the Full Bench:-

"Whether an application under Section 33 of the Arbitration Act, 1940, challenging the validity of an award on the ground of non-existence of the arbitration agreement, is governed by Article 119(b) of the Limitation Act, 1963 (previously Article 158 of the Limitation Act, 1908)?"

(2) On June 22, 1962, Shri Kundan Lal, pleader purporting to act as the sole arbitrator made an award whereunder the appellant and his guarantor J.N. Khanna were held jointly and severally liable to pay to Messrs. Security and Finance (Private), Limited, New Delhi, respondent (hereafter referred to as the company) a sum of Rs.15,786.85 paise and were also to return vehicle No. MPE-187 (Commar 1956 Model) or in default to further pay an amount of Rs.10,000 being the assessed market value. The arbitrator filed the award in Court at the instance of the company and notice was given to the parties of filing thereof. The notice was served on the appellant on September 8, 1962, and on October 11, 1962, he made an application under Sections 30 and 33 of the Arbitration Act for setting aside of the award and for its being declared void. Various objections were taken to the award but I am concerned with only one of them, namely, that the arbitration agreement dated August 22, 1957, was a forged document and had never been signed by the appellant. In short, the very existence of the arbitration agreement and consequently the jurisdiction of the arbitrator were challenged. The company pleaded for dismissal of the objections on the ground of limitation and, therefore, the trial Court framed issue No. 10 reading:

"Whether objections under Sections 30 and 33, Arbitration Act, are within limitation? If not, effect?

The learned Subordinate Judge decided in favour of the company and held that the objections having been filed beyond 30 days were time-barred. The trial Court applied Article 158 of the Limitation Act, 1908.

(3) The answer to the question turns on the meaning to be ascribed to the words "to se

158 under the Arbitration Act, Thirty days.
The date of service of 1940(10 of 1940) to set aside the notice
of filing of an award or to get an award the award. Remitted for reconsideration.

(4) The short period of limitation fixed for filing objections does indicate an intention on the part of the Legislature to fix a definite time-limit for challenging the validity of the award and for providing an expeditious method of geeing an award translated into a judgment. There prevails a considerable conflict in the decisions of the various High Courts and I hope in expressing my views on this inartistically drafted statute. I shall not be thought wanting in respect to the various eminent Judges

who have dealt with this point. The various lacunae in the Act appear to be the result of a conflict in the mind of the Legislature arising out of its anxiety to achieve the final disposition of difference between the parties in a faster, less expensive, more expeditious and perhaps less formal manner than is available in Court proceedings and the anxiety to preserve the fundamentals of all quasi-judicial determinations. If I decide that an application for challenging the factual existence of the arbitration agreement and consequently getting an award declared a nullity, is an application for setting aside the award, Article 158 of the Limitation Act would apply, If, on the other hand, my conclusion be that an arbitration award made in pursuance of the purported exercise of power under an arbitration agreement, which factually does not exist, is not to be, and cannot be, set aside but is merely declared null and void, the matter would fall exclusively within the field covered by Section 33 of the Arbitration Act outside the purview of Article 158 of the Limitation Act.

(5) In A.R. Savkur v. Amritlal Kalidas, , a Bench of the Bombay High Court, presided over by Chagla, C.J., decided that Section 30 of the Arbitration Act dealt only with the grounds on which an award could be set aside and the procedure for getting it set aside was laid down by Section 33 with the result that even in the case of an award which is alleged to be a nullity, an application under Section 33 will have to be made within the period prescribed by Article 158, Limitation Act. The Bombay High Court, in coming to that conclusion, was influenced by the fact that accepting the other point of view will result in prescription of two different periods of limitation, one for setting aside an award and the other for having it adjudged void. That would be, according to the Bombay High Court, destructive of the intention of the Legislature reflected in Sec. 17 of the Arbitration Act which enjoins upon the Court to wait only till the period of limitation under Article 158 has expired before passing a decree.

The matter was considered at great length in Saha & co. v. Ishar Singh, . Chakravartti, C.J., Lahiri and P.B.Mukharji, JJ., representing the majority view, held that there was no such thing as an application for either challenging the validity of an award or for having it declared void could be made only under Section 33 that there was nothing in the language of Section 30 and 33 suggesting that the invalidates contemplated by the two sections were mutually exclusive and that the non-existence or invalidity of the arbitration agreement only furnished grounds for setting aside of an award. One exception was, however, reorganized by the majority, namely. The cases where the factual existence of an award was challenged. The first question referred to the Calcutta Full Bench, namely, "Does the Indian arbitration Act, 1940, distinguish between an application for setting aside an award and application for the adjudgment of an award to be a nullity and contemplate that an application of the former kind should be made under section 30 of the Act and an application of the latter kind under Section 33?, was, therefore, answered in the negative. S.R.Das Gupta and Bachawat, Jj, however, took a contrary view. Bachawat, J., held:

" While Section 33 also empowers the court to decide questions of validity of the award all reliefs which may be granted by the court under Sections 15, 16 and 30 by way of setting aside, remitting and modifying the award on account of its invalidity may and must be obtained under those sections and not under Section 33".

1. "The Court cannot set aside an award under Section 30 unless the award is filed in court but the Court may decide under section 33 that no award exists where a document which in fact is not an award is set up as an award though the document has not been filed in Court".

2. "An award which has become void under sub-section (3) of section 16 does not legally exist and the court may so decide under Section 33 but such award cannot and need not be set aside under Section 30"

"The arbitration Act, 1940, recognizes a distinction between awards which are void and a nullity ;and consequently, do not legally exist and awards which are voidable and therefore invalid are liable to be set aside;" and

3. "where the arbitration agreement is void ab initio it may be treated as non-existent and the Court may so decide and adjudicate under Section 33`.

4. In Basant Lal v. Surendra Prasad, , a Division Bench of the Patna High Court differed from the majority ;view of the Calcutta High Court and held- "In my judgment, therefore Section 30 speaks only of invalidity in making the award, and the grounds set forth in Section 30 clearly indicated that these grounds have reference only to proceedings before the arbitrator alone, and not to the anterior proceedings of the Court. The words 'or is otherwise invalid' must, therefore, refer to the invalidity of the award based on any ;ground unconnected with the proceedings of the Court. The words 'or is otherwise invalid' occurring in Clause (c) of Section 30 of the Act, should not, as such, be taken as including the question whether there existed an arbitration agreement, or whether there was a valid reference to arbitration. These words do not include an objection impeaching the existence, or validity, of an arbitration agreement, of reference, upon which the award is founded. Non-existence, or invalidity, of an arbitration agreement, or reference, are not contemplated by, and, included in the words 'or is otherwise invalid in Section 30(c), and are, as such, not grounds, contemplated by, and, within the meaning of section 30, on which an award can be set aside, under it even if the award is based on any invalid and non-existent arbitration agreement, or reference. Without the intervention of the Court. These words Consequently should not be read ejusdem generis with the other cases mentioned in clause (a) and (b), or, in the preceding words in Clause (c) of Section 30. They should be restricted to cases where an award is on one or more of the grounds mentioned in Section 30 or on grounds other than those specifically mentioned in Clauses (a), (b) and (c) of Section 30, relating to the invalidity of the award".

It is unnecessary to multiply authorities but it may be mentioned that Mr. Nayar, the learned counsel for the respondent, relied on United India Fire and General Insurance Co. Ltd. v. Bhagat Singh, Ait 1954 Punj 171; Lal Chand v. Gopi Chand, Air 1+964 Punj 61; and Shafia Begum v. Bashir Ahmed, Ilr 1962 Bom 178. I have not dealt with these judgments in detail for the reason that the difference in the views is sufficiently represented by the ;decision discussed above. There are considerable difficulties in accepting the ;view that for various reliefs contemplated ;by Section 33, (sic) and that the said section is only a procedural provision. The following are some of ;the indications pointing to the contrary:-

There is no provision in the Arbitration Act, except Section 33, conferring aright to challenge an arbitration agreement or to have the effect of such agreement or award determined.

(A) Section 16 of the Arbitration Act empowers the Court to remit the or any matter referred to arbitration to the arbitrators or umpire for reconsideration in prescribed cases. Section 33, on the other hand, does not appear to give any right to an aggrieved party to made an application for relief under Sec. 16 with the result that such relief will have to be sought for nobly by an application under Section 16.

(B) Under section 16(1)(a) a party can apply to the Court for remitting the award for reconsideration inter alia whether the arbitrator determined any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred. But for the provisions of Section 16, in such a case the entire award will have to be set aside. To save that situation a power has been given to the Court to have the award reconsidered without reference to arbitrator. If, on the other hand, a part of the award is upon a matter not referred to arbitration, and such part can be separated from the other part without affecting the decision on matters referred, the Court may under Section 15 modify or correct the award. Such reliefs are not possible on an application under Section 33 but can be obtained only by resorting to Section 15 and 16.

(C)Although Article 158 of the Limitation Act prescribes a period of limitation for an application to get an award remitted for reconsideration, no such application is expressly provided in the Arbitration Act and consequently the only application contemplated by Art. 158 must be an application under Section 16 of the Arbitration Act.

(D) The language of Section 17 of the Arbitration Act is suggestive of the position that the Court may, in certain cases, set aside an award even without an application. If that were not so the words 'or to set aside the award' before the words 'the court shall, after the time for making an application to set aside the award has expired' would have been unnecessary, If the said words 'or to set aside the award' meant 'to set aside the award on an application' then the same result could have been achieved by the Legislature without the said words and by framing the section in the following words. "where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow .....".

(6) In saying that the Court has such a power, I have in mind a case where, on the face of the award, a statement appears that the same is being made in pursuance of an arbitration agreement made between two minors.

(7) Three of the learned Judges in Shaha and Co.'s case, , representing the majority took the view that if the factual existence of the award was challenged, then the prayer would not be for setting aside the award. I am unable to make a distinction between a case where the factual existence of the award is challenged and where the challenge is to the factual existence of the arbitration agreement. The said three learned Judge were of the opinion that after the purported agreement had resulted in

an award a party desiring to challenge the arbitration agreement could make its challenge only by way of advancing it as a reason for impugning the award as invalid. In my opinion, both types of cases fall in the same category. An award must be fully responsive to the authority under which the arbitrators are commissioned and should be CO-extensive with the commission. If the arbitration agreement is non-existent, so must be the award, with the result that there would be nothing to set aside. I am unable to reconcile myself to the view that in cases where the arbitrator makes an award without may arbitration agreement, then a party cannot go to court under Section 33 and ask for a declaration that there was no agreement and consequently, no award. In such cases the challenge to the agreement is independent. There appears to be no justification for limiting the words "challenge the existence..... of an arbitration agreement" in Section 33 to the pre-award stage. The arbitration agreement provides the source of authority to the arbitrator and is the very foundation of his jurisdiction. If there is no arbitration agreement, there is no arbitrator and consequently, there is no award requiring to be set aside. The award falls with the agreement leaving nothing to be set aside. A clue is also provided to this process of thought by Section 16(3) of the Arbitration Act. Where the award has become void under Section 33 but it cannot be set aside under Section 30. A clear distinction has been maintained between the validity and existence of both an arbitration agreement and an award. Section 33 relates to the challenge to both, the existence and validity and validity of an arbitration agreement or an award, while Section 30 touches only the invalidity of an award If the words "otherwise invalid" in Section 30 were comprehensive enough to include cases where the award was alleged to be non-existent or a nullity, then the word "existence" with reference to the award in Section 33 was unnecessary. In other words, if section 33 was only a means to an end provided in Section 30, that is, setting aside of an award, then Section 33 should have confined itself to challenging the validity of an award and not its existence because in that context challenge to the existence of the award would be challenged only to its validity. I entertain no doubt, therefore, that where the challenge to the award is on the ground of factual non-existence of the arbitration agreement, the case would be one of challenge to the existence of the award in Section 33 and not to its validity in section 30, with the result that such an award will not have to be set aside but adjudged as non-existent. An award on the supposition of an arbitration agreement which does not exist would be void ab initio and, therefore, not worthy of notice in the eye of law for the purpose of being set aside. The same appears to be the position where the challenge to the award is on the ground that the arbitration agreement is void by reason of non-compliance with any of the conditions precedent to its validity. The existence and validity of the arbitration agreement , therefore, may be challenged by an application under Section 33 even though an award on the basis of the supposed arbitration agreement has been made, and even though an application under Section 33 is made after the expiry of the time prescribed by Article 158 of the Limitation Act. The same distinction between the existence and validity of an arbitration agreement or award is reflected in Section 32 of the Arbitration Act. I agree with the following, observation of Bachawat, J. in Shaha and Co.'s case : -- I am therefore of the opinion that under the Arbitration Act 1940, (a) an award on an arbitration without the intervention of Court presupposes an arbitration agreement; (b) There can be no arbitration award without the intervention of Court if the alleged arbitration agreement does not exist or is invalid; (c) Non-existence or invalidity of the alleged arbitration agreement is not a ground for setting aside an award without the intervention of Court under Section 30: (d) An application may be made under Section 33 asking for a decision that the arbitration agreement does not exist or is invalid and that consequently the award is a nullity and does not exist: (e) Proceedings

for summary enforcement of an award without the intervention of Court may be defended on the ground that the arbitration agreement does not exist or is invalid and that consequently the award does not legally exist even though no substantive application challenging the award has been made".

(8) The apprehension of the learned counsel for the respondent based on A. R. Savkur's case, , that there would be two periods of limitation appears, to my mind, to be unreal. Once a notice is served on a party about the filing of the award it has to object to the award being made the rule of the Court before a decree is passed. It cannot, therefore, be said that although after the expiry of 30 days the Court may pass a decree under Section 17 yet the period of limitation for challenging the factual existence of the agreement would not have run out with the result that the aggrieved party may still make an application under Section 33. If no objection challenging such existence of an arbitration agreement is filed before the decree is made, the decree will then bind the party and such party's objections regarding the factual existence of the arbitration agreement may be ineffective.

(9) Various anomalies have been pointed out by the learned counsel for the respondent. Which, according to him, must ensue form accepting the afore mentioned point of view. One of those is that in that case no appeal will lie against the order of the Court as Section 39(1)(vi) provides a right of appeal only in the case of setting aside or refusing to set aside an award. This argument overlooks the fact that the same anomaly may arise in the case of orders under Section 16 which are equally important. Similarly, there would be no appeal against an order declaring the award as factually non-existence or pronouncing on the validity or the effect of the arbitration agreement. May be that the words "setting aside" in Section 39(1)(vi) have to be given a wider meaning so as to cover the case where the award is adjudged as null and void, but it is unnecessary to resolve that controversy in the present case. Yet another anomaly pointed out was the effect of Section 37(5) of the Arbitration Act. This anomaly may arise in various other cases, for instance, one of the eventualities in which the time is to be excluded is where the Court orders that the arbitration agreement shall cease to have effect with respect to the difference referred. Such order is contemplated only by Section 19. It may be said that the time will not be excluded where a named arbitrator refuses to act, or does not make an award, or dies and the arbitration agreement does not contemplate the filling in of the vacancy. These anomalies do not call for a decision in this case and may have to be resolved in an appropriate case. Suffice it to say for the purpose of this case that these do not persuade me to take a view different from the one that I have taken regarding the interpretation of the statute. The learned Counsel for the respondent, relying on the aforementioned anomalies, said that Courts cannot so construe an Act as to reduce it to rank absurdity. That may be so but where the words used are plain and unambiguous, the Courts are bound to construe them in the ordinary sense. Modification in words in such a situation may result in the Courts trespassing into the legislative field. Law represents a compromise achieved by competing interests. The statute embodying the agreement made in the strictly political forum of the legislature in clear and unambiguous terns requires only to be interpreted and not modified to bring in the Judge's supposed sagacity or sympathy. My conclusion, therefore, is that non-existence and invalidity of an arbitration agreement are not grounds for setting aside the award under Section 30 and Article 158 of the Limitation Act does not apply where the relief sought is to have the award declared null and void on the ground that there existed no arbitration agreement.

(10) In the result, my answer to the question referred is in the negative. The case would now go back to Divisional Bench for deciding the appeal in the light of the above answer.

Hedge, C.J.

(11) I agree Andley, J.

(12) I also agree (13) Reference answered in negative.