

SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE MUNIB AKHTAR

MR. JUSTICE SHAHID WAHEED

Civil Appeal No.23-Q of 2017

(On appeal against the judgment dated 11.09.2017 passed by the High Court of Balochistan, Quetta in Regular First Appeal No.47 of 2012)

Haji Shinkai

... Appellant

VERSUS

Abdul Shakoor & others

... Respondents

For the Appellant : Mr. Shams-ud-Din Achakzai, ASC

For Respondent No.1 : Mr. Kamran Murtaza, Sr. ASC
(via video link from Quetta)

Respondent Nos.2 to 9 : Ex-parte

Date of Hearing : 19.10.2023

JUDGMENT

Shahid Waheed, J. The unsuccessful plaintiff has brought this appeal before us. He is discontent with the decree drawn up under Section 96 of the Code of Civil Procedure, 1908, following the judgment dated 11th of September, 2017, of the High Court of Balochistan. He pleads with us that the decree issued to him in his suit by the Trial Court be restored.

2. The moot question in this appeal is whether, by reason of the provisions of the Arbitration Act, 1940, the plaintiff could have been precluded from putting forward the award (Ex.P.8) to found his claim of ownership over the defendants' land, which was neither filed under Section 14 nor the judgment in terms thereof was pronounced under Section 17 of the Act.

3. In the suit, which is the subject of this appeal, the plaintiff alleged that defendant No.1 had approached him for the

supply of tyres, which were supplied to him, and thus, he was liable to pay him Rs.3,800,000. Defendant No.1 had given him five cheques (Ex.P.2, Ex.P.4 to Ex.P.6) to discharge this liability, but they were dishonoured on their presentation; afterwards, defendant No.2 stood as surety and sought time for payment. Defendant No.2 did not keep his word. The parties, subsequently, agreed to refer the matter to arbitration by an agreement dated 15th of March, 2000 (Ex.P.7). The arbitrators inquired into the matter and, by their award (Ex.P.8), decided that defendant No.2 would give possession of his two acres of land to him. Defendant No.2, accepting the award (Ex.P.8), handed over the possession of his land to him and promised to effectuate its transfer in the revenue records. However, he took considerable time to transfer his land, and in the meanwhile, the National Highway Authority started acquiring adjacent land to construct the bypass road, which resulted in an increase in his land value. And seeing the value increase, defendant No.1, along with the other defendants, started interfering with his possession. Based on these facts, the plaintiff instituted a suit for a decree declaring him the owner of the land, directing the defendants to transfer their land to him, and restraining the defendants from interfering with his possession.

4. Defendant No.1 countered the plaintiff's claim by filing his written statement. He said that the plaintiff was not a businessman but a moneylender. However, he admitted that he had taken from him a loan of Rs.2,200,000. He categorically denied the execution of any agreement to refer any matter to arbitration and the existence of any award. He, thus, prayed that the suit be dismissed.

5. The other defendants, by their joint written statement, reiterated the stand of defendant No.1 and raised a preliminary objection that the suit for enforcing an award under Section 32 of the Arbitration Act, 1940, was not maintainable and, thus, liable to be dismissed.

6. The divergent pleadings of the parties led the Trial Court to frame issues and record evidence thereon. On reviewing the evidence brought on record, the Trial Court held that the bar

of Section 32 of the Arbitration Act, 1940, was not attracted to the facts of this case, and it, being a court of ultimate jurisdiction, could take cognizance of the matter. It found all the facts in favour of the plaintiff and passed a decree accordingly. But in appeal, the High Court came to hold that unless the award (Ex.P.8) was acted upon in whole or in part, it could not be given effect by a suit because of the bar provided under Section 32 of the Arbitration Act, 1940. As a result, the suit was found to be incompetent. However, the High Court, taking into account the defendants' admission, moulded the relief and held that the plaintiff was entitled to recover Rs.2,200,000 from the defendants, subject to deposit of *ad valorem* court fee within one month.

7. Now, the plaintiff's principal argument is that the law prohibits the raising by the defendants of such a plea as they had raised in this case. Relying upon the case of *Ch. Muhammad Saleem v. Muhammad Akram and others*,¹ *Abdul Karim v. Bashir Ahmed*,² and *Bibi Najma and others v. Abdul Rehman*,³ it is argued that where an award is given without intervention of a Court and the said award is accepted and acted upon by the parties to the award, in such a case, a party, relying upon such an award, could file a suit based on such award. Elaborating on this assertion, it is submitted that the defendants, partially acting upon the award (Ex.P.8), had given him possession of their land. Yet, later, the increase in the value of the land made the defendants more greedy, and then they tried to dispossess him. To fortify this fact, reference has been made to the application (Ex.P.6/2) made by the defendants before the Additional Sessions Judge, under Section 22-A Cr.P.C., in which it was alleged that the plaintiff was in illegal possession of their land. The plaintiff clarifies that the application, though lacking bona fide, nevertheless proves that prior to the filing of the suit, he had obtained the possession of defendants' land, and as such, the defendants could not be heard saying that the suit was not competent.

¹ Ch. Muhammad Saleem v. Muhammad Akram (PLD 1971 SC 516)

² Abdul Kareem v. Bashir Ahmad (PLD 1974 SC 61)

³ Bibi Najma v. Abdul Rehman (1998 SCMR 1304)

8. All the above brings us to consider the scheme of arbitration provided under the Arbitration Act, 1940. So we do that. In regard to arbitration without the intervention of the Court, as in the present case, the Arbitration Act, 1940 lays down the procedure for the successive stages from the commencement of the arbitration to the passing of a decree in terms of the award. Sections 8 to 12 provide for the appointment or removal by Court of arbitrators or umpire in some instances. Section 13 confers certain powers on them. The award is required to be signed by the arbitrators or umpire, and notice in writing to the parties of the making of the award is enjoined by Section 14(1). If any party so desires, the arbitrators or umpire are directed by Section 14(2) to file the award in Court and to give notice to the parties of such filing. The power of the Court to modify the award or to remit it is dealt with in Sections 15 and 16. If the Court sees no cause to set aside an award or remit it, it shall, under Section 17, proceed to pronounce judgment according to it, after the time for making an application to set aside has expired or if such application has been made, after refusing it. Upon the judgment so pronounced a decree shall follow.

9. The material sections, however, on which the point raised in this appeal turns are Sections 31, 32 and 33 which have to be set out in full:

31. **Jurisdiction.** (1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in

force, where in any reference any application under this Act has been made in a court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.

32. Bar to suits contesting arbitration agreement or award. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

33. Arbitration agreement or award to be contested by application. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

10. Section 31 lays down certain rules and imposes certain restrictions as to the Court to which applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings may be made or in which an award may be filed. Sub-Section (2) of Section 31 provides, inter alia, that all questions regarding the validity, effect or existence of an award shall be decided by the Court in which the award has been, or may be, filed and by no other Court. There can be no doubt that Section 31 merely regulates the forum, and we notice that it only defines the jurisdiction.

11. Turning to Sections 32 and 33, it must be observed that while Section 33 provides for an application by a person desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined, Section 32 makes it a condition that no suit shall lie for a decision upon the existence, effect or validity of an arbitration agreement or award. It is thus clear that the main object of these

provisions of the Arbitration Act, 1940 is to expedite and simplify arbitration proceedings and to obtain finality.

12. Mindful of the above-stated position of law, we take up the moot question and proceed to examine the maintainability of the plaintiff's suit. Before we go any further it is important to state at this juncture that it is not necessary to discuss whether the evidence brought on record proves the existence or validity of the agreement and award or otherwise, as that exercise is not required. The question before us here can be determined without examining the evidence. So, we limit ourselves to the pleadings. The plaintiff himself sets out in the plaint, that the dispute regarding recovery of Rs.3,800,000 from the defendants was referred to arbitration, and as a result, an award (Ex.P.8) was made declaring that the defendants, for the liquidation of their liability, would give their two acres of land to the plaintiff. He further states that though he was given possession of the land under the award (Ex.P.8), the mutation was not recorded in the revenue records. Based on these facts, he wanted the Court to declare him to be the owner of the land. In sum, it is clear that his suit was, for all intents and purposes, to enforce the award (Ex.P.8). It may be noted that it is now well settled that the expression "effect of the award" employed in Section 32 of the Arbitration Act, 1940 is wide enough to cover a suit for enforcement of an award.⁴ The defendants, on the other hand, denied the arbitration agreement (Ex.P.7) and maintained that the award (Ex.P.8) was invalid and inoperative. Upon these pleadings, it is manifest that the instant suit raised the question as to the existence, effect or validity of the award (Ex.P.8) and such a suit is expressly prohibited by Section 32 of the Arbitration Act, 1940.⁵ It would be apposite to state here that if the plaintiff wanted to enforce the award (Ex.P.8), the proper procedure for him would have been first to get the award to be

⁴ Narbadabai & Ors. v. Natverlal Chunilal Bhalakia (AIR 1953 Bombay 386)
Abdul Karim v. Bashir Ahmad (PLD 1967 Lah 365)

⁵ Moolchand Jothajee v. Rashid Jamshed Sons (AIR 1946 Madras 346)
M. Gulamali Abulhussein 4 Co.v. Vishwambharlal (AIR 1949 Bombay 158)
Ramchander Singh & 4 others v. Munshi Mian (AIR 1950 Patna 48)
Kanhyaalal Vishweshwarlal Mahjan v. Ramchandra Shankarrao Holkar (AIR 1959 Madhya Pradesh 415)
Abdur Rehman v. Hamid Khan (1988 SCMR 1146)
Awan Industries v. Executive Engineer, Lined Channel Div. (1992 SCMR 65)

made a rule of the Court and then to enforce or execute the decree which might be passed on the basis of the award. He could not resort to the procedure of filing a separate suit in disregard of the special procedure provided in the Arbitration Act, 1940.

13. Apart from the above, there is another settled principle of law pointed out by the plaintiff on which he contends that his suit is maintainable. That principle is that where the parties accept an award made in arbitration out of the Court, and it is acted upon voluntarily, and a suit is after that sought to be filed by one of the parties, then the objection that the suit, in terms of Section 32 of the Arbitration Act, 1940 is not maintainable, cannot be allowed to be raised. The correctness of that principle is not disputed, but to apply it to the circumstances of this case, we have to examine whether the parties to the award voluntarily acted upon it in whole or in part. The plaintiff contends that in the implementation of the award (Ex.P.8), the possession of the land was given to him by the defendants, and his possession is confirmed by the application (Ex.P.6/2) of the defendants, which they made to the Additional Sessions Judge under Section 22-A Cr.P.C. We do not agree with this contention of the plaintiff for three reasons. First, it is stated in the said application (Ex.P.6/2) that the plaintiff was in illegal possession of the land. This indicates that the possession of the land was not taken with the free consent of the defendants; secondly, the application (Ex.P.6/2) does not even prove that the possession of the defendants' land was given to the plaintiff under the award (Ex.P.8); and thirdly, the application (Ex.P.6/2) was filed on 24th of May, 2010, while the alleged award (Ex.P.8) was made on 21st of October, 2000, and thus, did not prove the actual date when he came into possession of the land. There is another startling feature of this case. During the trial, a Commission was issued to Mr. Muhammad Sharif, Advocate to inspect the suit land and to submit a report as to whether the land mentioned in the award (Ex.P.8) and the land stated in the plaint were the same. On inspection, the Commission found the two lands to be different. None of the parties challenged the report of the Local Commission. In the context of the

report of the Local Commission, the oral evidence adduced by the plaintiff regarding the handing over of the possession of the defendants' land became highly doubtful. Therefore, the same did not merit to be taken into account. In our view, the plaintiff should have produced a relevant revenue record or a revenue officer to establish that the defendants voluntarily acting upon the award (Ex.P.8) had handed over the possession of their land to him, but he did not do so. In these circumstances, it can be justifiably held that the defendants' objection is valid, and as such, the plaintiff cannot be allowed to take advantage of the said principle. The conclusion is that suit was barred by law.

14. After having found the answer to the moot question in the negative, it is to be seen whether, in an incompetent suit, relief could have been moulded, and the plaintiff could have been awarded that relief which he did not even pray, and in which he was not interested. We have noticed that the High Court, taking into account the assertion made by defendant No.1 in his written statement that he had only obtained a loan of Rs.2,200,000 from the plaintiff, modified the decree of the Trial Court and held that the plaintiff was entitled to the recovery of the amount from defendant No.1, subject to deposit of court fee within one month. The plaintiff neither sought this relief in his plaint nor was it the subject matter of issue No.5, which was to the effect "whether the plaintiff is entitled to the relief claimed for?". So, it could not be granted, particularly when it was found that the suit was not maintainable. Nevertheless, to our satisfaction, we asked the plaintiff's counsel whether the plaintiff, in compliance with the judgment of the High Court, had provided the Court fee within time, to which he replied in the negative and said that the plaintiff was not interested in the recovery of the amount. In such a situation, a modification made by the High Court was not justified. We need not formally set aside the modification made by the High Court in the decree of the Trial Court as it has already lost its effect and existence due to non-payment of court fee within the time allowed by the High Court.

15. The result is that the present appeal is dismissed with no order as to costs.

Judge

Judge

Judge

B-III
Islamabad, the
19.10.2023
"Approved for reporting"
Sarfraz Ahmad & Agha M. Furqan, L.C/-