

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.23 of 2000****Judgment reserved on :26.10.2018****Judgment delivered on: 14.11.2018**

1(i) Smt. Anusuiya Bai aged 35 years Wd/o late Shri Yuvraj

1(ii) Ku. Monika aged about 18 years, D/o Late Shri Yuvraj

1(iii) Ku. Jiya aged about 16 years, D/o late Shri Yuvraj

1(iv) Bhism aged about 14 years, S/o Late Shri Yuvraj

(iii) and (iv) through natural guardian mother Smt. Ansuiya Bai

2. Smt. Sahodra Bai aged about 70 years Wd/o late Uderam

All R/o-Gundardehi Tahsil-Gundardehi, District-Balod (CG)

---- Appellants**Versus**

1.(i) Somnath aged about 35 years, S/o late Sitaram Sonkar R/o Gunderdehi, Police Station Gunderdehi, District Durg (CG)

1.(ii) Smt.Usha Bai aged about 34 years W/o Poshan Lal R/o Balod, Police Station Khursipar, District Durg (CG)

1.(iii) Smt. Janki Bai aged about 33 years, W/o Shri Mahesh, R/o Kagdehi, District Raipur (CG)

1(iv) Smt. Mayabai aged about 32 years W/o Mukaddar, R/o Village-Chhatrega, Police Station Raipur, District Raipur (CG)

---- Respondents

For Appellants	:	Mr.G.S.Agrawal, Senior Advocate with Mr.Sanjay Agrawal, Advocate
For Respondents	:	Mr.Vimlesh Bajpai, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Judgment**

1. The substantial question of law involved, formulated and to be answered in the defendant's second appeal is as under:-

“Whether the suit was barred by the provision of Section

32 of the Arbitration Act, 1940 ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court].

2. The original plaintiff-Smt.Dewantin Bai, [who died during pendency of second appeal], filed a suit for recovery of possession by mandatory injunction stating inter-alia that her husband has purchased the suit property bearing khasra No.172/1 area 0.20 decimal by registered sale deed dated 9.5.88 from Shambhulal and thereafter constructed house, which was given on license to the defendant, but the defendant did not vacate the suit house after death of her husband and the matter was referred to arbitration. Arbitration award was passed on 11.8.91 (Ex.P/2), but the defendant did not vacate the suit premises leading to filing of suit for possession as stated above.
3. The defendant filed his written statement opposing the plaint averments and by way of amendment dated 11.3.99 also inserted that suit filed was based on arbitration agreement, therefore, the suit is not maintainable. During pendency of the suit, the defendant filed objection that the plaintiff's suit is based on arbitration agreement as referred in para-4 of the plaint, therefore, the suit is not maintainable and is barred by provisions contained in Section 32 of the Arbitration Act, 1940 (hereinafter called as “the Act of 1940”).
4. The trial Court by its order dated 2.7.92 rejected the said objection, which was affirmed by the Additional District Judge, Durg on 8.12.92 by holding that the suit is maintainable. Thereafter, the trial Court by

its judgment and decree dated 21.1.2000 held that the defendant is licensee of the plaintiff and the plaintiff is entitled for possession and also overlooked the objection with regard to maintainability of the suit holding that the suit as framed and filed is maintainable.

5. In first appeal preferred by the defendant, the First Appellate Court upheld the judgment and decree passed by the trial Court and dismissed the appeal.
6. Questioning legality and validity of the judgment and decree passed by the First Appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellant/defendant, in which substantial question of law has been framed by this Court, which has been set-out in opening paragraph of this judgment.
7. Mr.G.S.Agrawal, learned Senior Advocate appearing for the appellants/defendant, would submit that both the Courts below are absolutely unjustified in not holding that the suit is barred by provisions contained in Section 32 of the Act of 1940. He would further submit that para-4 of the plaint would show that the suit is based on arbitration agreement entered into between the parties (Ex.P/2), which is sought to be interfered with by the suit, which is clearly barred by provisions contained in Section 32 of the Act of 1940. Therefore, substantial question of law be answered in favour of the defendant and against the plaintiff and second appeal be allowed.
8. Mr.Vimlesh Bajpai, learned counsel for the respondents/plaintiff, would support the impugned judgment & decree and submit that the

suit was not for enforcement of arbitration award dated 11.8.91, but it is based on title of the plaintiff in which the trial Court has held the plaintiff to be owner and the defendant to be licensee of suit accommodation and thereby granted decree of possession in favour of the plaintiff. He would further submit that identical plea that the suit is barred by provisions contained in Section 32 of the Act of 1940 was taken by the defendant before the trial Court, which was rejected by the said Court and affirmed by the revisional Court, therefore, it cannot be allowed to be taken again in first appeal or in second appeal. He would rely upon the judgment of the Supreme Court in the matter of Satyadhyan Ghosal and others v. Smt. Deorajin Debi and another¹.

9. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

10. The question for consideration is whether the suit as framed and filed by the plaintiff for recovery of possession was barred by Section 32 of the Act of 1940.

11. In order to consider the plea so raised, it would be appropriate to notice the provisions contained in Section 32 of the Act of 1940.

“S. 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 enforced, set aside, amended, modified or any way affected otherwise than as provided

¹ AIR 1960 SC 941

in this Act.”

A close perusal of the aforesaid provision would show that Section 32 of the Act of 1940 is divided into two parts. The first part of the Section bars any suit for a decision upon the existence, validity or effect of an arbitration agreement or award on any grounds whatsoever, whereas the second part prohibits any arbitration agreement or award from being enforced, set aside, amended, modified or in any way affected otherwise than as provided in the Act.

12. The word “enforced” has been inserted in Section 32 by Section 43 of the Specific Relief Act with effect from 16.12.1963. Since this amendment even a suit for enforcement of arbitration agreement or award shall not lie and even the enforcement of arbitration agreement or award has to be done by way of proceedings under the Arbitration Act.

13. In the matter of Kashinathsa Yamosa Kabadi v. Narsingasa Bhaskarsa Kabadi² Their Lordships of the Supreme Court while considering the bar contained in Section 32 of the Act of 1940 have held that where the award is accepted out of court by the parties and thereafter suit is filed by one of the parties ignoring such acceptance, Section 32 is no bar and it was observed as under:-

“22. In S. K. Kuer v. B. N. Sinha, ILR (1952) 31 Pat 886 : (AIR 1953 Pat 42) the Patna High Court held that by virtue of S. 32 of the Arbitration Act, 1940 an award made on a private reference to arbitration is not operative of its own force; it only becomes operative on being made a

² AIR 1961 SC 1077

rule of the court. It was held in that case that an award cannot be set up as a defence to an action unless it is filed in court and a decree is obtained thereon. Similar view was taken in Pamandass v. Manikyam Pillai, AIR 1960 Andh Pra 59, Venkatasubbayya v. Bapadu, AIR 1951 Mad 458 and Firm Gulzarimal Gheesalal v. Firm Rameshchandra Radheshyam, ILR (1959) 9 Raj 515 : (AIR 1959 Raj 162). On the other hand, in Suryanarayana Reddy v. Venkata Reddy, ILR (1949) Mad 111 : (AIR 1948 Mad 436) it was held that Ss. 32 and 33 of the Indian Arbitration Act, 1940, did not preclude a defendant from setting forth an award which had been fully performed by him but which was not filed in Court under S. 14 and on which a judgment was not pronounced or a decree given under S. 17 of the Act, in answer to the plaintiff's claim which was the subject matter of the reference and the award. That view was accepted in Rajamanickam Pillai v. Swaminatha Pillai, AIR 1952 Mad 24. It is not necessary in this appeal to express a considered opinion on this disputed question. It may be sufficient to observe that where an award made in arbitration out of court is accepted by the parties and it is acted upon voluntarily and a suit is thereafter sought to be filed by one of the parties ignoring the acts done in pursuance of the acceptance of the award, the defense that the suit is not maintainable is not founded on the plea that there is an award which bars the suit but that the parties have by mutual agreement settled the dispute, and that the agreement and the subsequent actings of the parties are binding. By setting up a defense in the present case that there has been a division of the property and the parties have entered into possession of the properties allotted, defendant No. 1 is not seeking to obtain a decision upon the existence, effect or validity of an award. He is merely seeking to set up a plea that the property was divided by consent of parties. Such a plea is in our judgment not precluded by anything contained in the Arbitration Act."

- 14.** In the matter of Smt. Rukmanibai Gupta v. The Collector, Jabalpur and others³ the Supreme Court has held that where an express remedy is provided for challenging an award on any of the grounds specified in Section 30 of the Act of 1940 and by filing an application under Section 33 then award cannot be challenged by

³ AIR 1981 SC 479

filing a writ application and it was observed as under:-

“10. Arbitration Act, 1940, is a self-contained and exhaustive code. It provides for filing arbitration agreement to the jurisdiction of court, appointment and removal of arbitrator by court. making award a rule of court, remitting or setting aside an award, etc. Where the arbitrator has made an award it can be questioned under S. 33. Section 32 bars a suit on any ground whatsoever for contesting an award and further provides that no award shall be enforced, set aside, amended, modified or in any way affected otherwise than as provided in the Arbitration Act itself. Thus, Arbitration Act, 1940, is a self-contained exhaustive code. Relief sought by the appellant by invoking extraordinary jurisdiction of the High Court under Art. 226 could have been obtained by proceeding in accordance with the relevant provisions of the Arbitration Act. In this situation, if the High Court declined to entertain the writ petition, no exception can be taken to it. Further the indenture of lease constitutes a contract between the parties. Right to excavate lime stone from leased area and obligation to pay royalty under the relevant Minor Mineral Rules arise from the contract. The contract provided for regulation of dispute arising out of the carrying out of contract. The writ jurisdiction of the High Court under Art. 226 of the Constitution is not intended to facilitate avoidance of obligation voluntarily incurred (see Har Shankar v. The Dy. Excise and Taxation Commissioner⁴).”

- 15.** In the matter of Orient Transport Company v. M/s. Jaya Bharat Credit and Investment Co. Ltd. and another⁵ it has been held by the Supreme Court that every person has a right to bring a suit which is of a civil nature and the court has jurisdiction to try all suits of civil nature under Section 9 of the Civil Procedure Code and that right has not been taken away by Section 32 of the Act of 1940 and such a right can only be taken away by express terms or by necessary implication, but Section 32 does not have that effect because Sections 32 and 33 on a true construction do not purport to

⁴ AIR 1975 SC 1121

⁵ AIR 1987 SC 2289

deal with such suit for declaration that there was never any contract or that contract is void. Thus, the Supreme Court has expressed the view that a suit for declaration that the agreement/contracts executed between the plaintiff and the defendant were not “hire purchase agreement” but were agreements relating to transaction of loan and for injunction restraining the defendant from enforcing them until the decision of the suit is not barred by Section 32.

- 16.** Reverting to the facts of the present case in light of principles of law enunciated by the Supreme Court in the above-stated judgments (*supra*) regarding bar of Section 32 of the Act of 1940, it is quite vivid that the plaintiff filed suit for recovery of possession based on her title over the suit house pleading *inter alia* that the defendant is her licensee, who is not vacating the suit premises despite service of legal notice. Though the plaintiff in the plaint has stated the delivery of award by the *panchas* on 11.08.1981, but the suit was basically based on title of the plaintiff over the suit house, in which defendant was staying as a licensee. The trial Court has framed the issue with regard to title and as to whether the defendant was licensee over the suit house and answered the question in affirmative. It is not a suit for enforcement of the award allegedly passed on 11.08.1981. The defendant in his written statement originally filed did not take any express plea with regard to bar of the plaintiff's suit under Section 32 of the Act of 1940. By order dated 11.10.1993, the defendant amended his written statement to plead that since the suit is based on arbitration agreement, it is not

maintainable and liable to be dismissed. The defendant also filed an application under Section 32 of the Act of 1940 read with Section 151 CPC holding the suit to be barred by Section 32 of the Act of 1940, which was rejected by the trial Court on 02.07.1992 permitting the defendant to raise a plea in written statement to be filed by him, which was challenged in revision by the defendant. The revisional Court by its order dated 08.12.1992 affirmed that order passed by the trial Court.

17. In the considered opinion of this Court, the present suit filed by the plaintiff was a suit for recovery of possession based on her title, it was not a suit for enforcement of the award dated 11.08.1991, as such, the plaintiff was not precluded from bringing the suit and therefore, the suit was neither barred under Section 32 of the Act of 1940 nor under Section 9 of the CPC.

18. The judgments i.e. Shankar Ramchandra Abhyankar v. Krishnaji Dattatraya Bapat⁶, Champalal Harchand Mahajan v. Kanaklal Devchand Mahajan⁷, Kamal Pushpa Enterprises Appellant v. D. R. Construction Company⁸ and K. V. George Appellant v. The Secretary to Govt., Water and Power Dept., Trivandrum and another⁹ cited by Mr. Agrawal learned Senior Counsel are clearly inapplicable and distinguishable to the facts of the present case in view of finding recorded hereinabove.

6 AIR 1970 SC 01

7 1994 MPLJ 140

8 AIR 2000 SC 2676

9 AIR 1990 SC 53

19. As a fallout and consequence of the above-stated discussion, both the Courts below are absolutely justified in holding that the suit as framed and filed by the plaintiff was not barred by Section 32 of the Act of 1940. The substantial question is answered accordingly. Concludingly, the instant second appeal deserves to be and is accordingly dismissed. No cost(s).

20. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-