(1941) 10 AHC CK 0004

Allahabad High Court

Case No: F.A. No. 294 of 1939

Sagar Mal and Another		APPELLANT
	Vs	
Parshottam Das and Others		RESPONDENT

Date of Decision: Oct. 29, 1941

Hon'ble Judges: Collister, J; Bajpai, J

Bench: Division Bench

Advocate: Mr. C.B. Agarwalas, for the Appellant; Mr. Hamandan Prasad for Respondents, for the Respondent

Final Decision: Allowed

Judgement

Collister and Bajpai, JJ.
This is an appeal by Sagar Mal and Brij Mohan Das, who were Defendants Nos. 1 and 2 to the suit and who are the sons of one Jai Dayal.

2. There is a pedigree at page 7 of our paper-book, which shows that a man named Prag Das had four sons. One of them is Harji Mal, who was Defendant No 3 to the suit. Defendant No. 4 is Rameshwar Das, who is the adopted son of Bakhshi Ram, a deceased brother of Harji Mal. Defendant No. 5 is Mst. Kamla Bahu, wife of Rameshwar Das. The Plaintiffs are Parshotam Das and Narotam Das, who are the minor sons of Rameshwar Das. Narotam Das has been adopted by Bishriaih Prasad, a deceased son of Harji Mal Bishnath Prasad''s widow is a lady named Mst. Kishuni Bahu.

3. The following facts are admitted by Learned Counsel.

4. This family used to do business at Benares and other place, as a firm under the name of Bakhshi Ram-Rameshwar Das and they owned property, including a building at Benares known as the Rameshwar Theatre Hall. We will call them firm No. 1. The family of the Defendants Appellant also carried on business at Benares

and elsewhere under the name of Jai Dayal Madan Gopal. We will call them Farm No. 2 These two firms also carried on a separate business in partnership with each other and we will call this Firm No 3. In July, 1923, Firm No. 1 sold one hall of the Rameshwar Theatre Hall to Firm No. 2; and in 1928 Firm No. 1 executed a simple mortgage bond for Rs. 53,000 in favour of Firm No. 2 in respect to the other half of the Theatre Hall as well as other property. In 1936 Firm No. 2 was dissolved and then disputes arose between the parties, one of the disputes being as to whether the Krishna Mill at Benares were the exclusive property of the original firm Jai Dayal Madan Gopal, ie, Firm No. 2. or whether they were the property of the partnership firm, i. e Firm No. 31, which had now become disrupted. The Appellants claimed that the assets of Firm No. 2 had vested in Jai Dayal, whom they now represented.

5. As a result of these disputes a series of suits were instituted. Suit No. 66 of 1936 was instituted by Parshottam Das and Narotam Das, the two minor sons of Rameshwar Das, fur a declaration that the mortgage bond of 26th September, 1928, was not binding upon them This suit was d smissed.

6. The Appellants sued upon their mortgage and claimed a sum of Rs. 96,860. This was suit No. 69 of 1936, and it was decreed.

7. Then Parshottarn Das and Norotam Das instituted Suit No. 77 of 1936, for a declaration that the sale-deed of the 23rd July, 1923 in respect to one half of the Theatre Hall was not binding on them and they also claimed Rs. 70,000 as mesne profits. This suit was dismissed.

8. Suit No. 85 of 1936 was instituted by the Appellants against Harji Mal, Rameshwar Das, Parshotam Das and Narotam for recovery of Rs. 64,864 as being due to Firm No. 2 from Firm No. 1 and there was also a claim for rendition of accounts and lor a declaration that Firm No. 1 had been a partner in the profits and losses only of Firm No. 3 and not in the capital, This suit was decreed in respect to the claim for Rs. 64,864, but was dismissed in respect to the other claims.

9. Suit No. 6 of 1937 was instituted by Rameshwar Das alone against the Appellants and others, including Harji Mal and the two minor sons of Ramesh war Das, for a declaration that the Plaintiff to the suit and his two minor sons and Harji Mal were the owners in their partnership capacity of the Krishna Mills and their appurtenances to the extent of 4 annas; 6 pies. This suit was decreed.

10. We may mention that in each of the aforementioned suits Patshotam Das was represented by Mst. Kaala Bahu as next friend or guardian ad litem as the case might be and Narotam Das was similarly represented by Mst. Kishuni Bahu.

11. All these suits were disposed of on one and the same date, namely the 1st June, 1937.

12. Thereafter the parties began to contemplate the filing of appeals, and the Appellants preferred an application for review in respect to suit No. 6 of 1937; but

meanwhile they decided that the better course would be to refer their disputes to arbitration. An agreement was accordingly drawn up and executed by the parties on the 20th July, 1937, under which the parties referred the various matters in dispute among them to the arbitraiion of a gentleman named B. Banarsi Das. In this agreement also Mst Kamla Biha acted as guardian of Narotam Das The arbitrator appears to have acted with unusual and commendable expedition, for he gave his award on the 12th August 1937, and we may mention that the award also covered a matter which was under litigation at Calcutta (Suit No. 1511 of 1936). This award was signed by all the parties. So far as this appeal is concerned, it is only necessary to state the terms of the award in respect to suit No 6 of 1937. The arbitrator held that Firm No. 1 had no partnership title in respect to the Krishna Mills and that Sugar Mal and Brij Mohan Das, the Appellants before us, owned the entire properties of these mills, including the "outstandings", title and "good-will". The award was filed in Court that very same day by Harji Mal, Rameshwar Das, Parshotam Das under the guardianship of Mst. Kamla Bahu and Narotam Das under the guardianship of Mst. Kishuni Babu, and they prayed that the award be made a rule of Court. A separate application was made in respect to each suit, and the application in respect to suit No. 6 of 1937 was numbered as suit No. 46 of 1937. The Appellants filed a written statement admitting the award, and that Same day, that is to say the 12th August, 1937, the learned judge passed the following order:
The award has been filed. The opposite-party accepts the award and there is no contest in respect of it. The suit is decreed in terms of the award.

13. Thereafter, on the 16th and 17th August applications were preferred in respect to the various suits praying for amendment of the decrees according to the terms of the award.

14. On the 3rd January, 1938, the two minor sons of Rameshwar Das, namely Parshotam Das and Narotam Das, instituted the suit out of which this appeal has arisen, praying for a declaration that the award dated 12th August 1937 and the decree passed upon it in suit No. 46 of 1937 is null and void and ineffectual as against the Plaintiffs and also as against Defendants Nos. 3 and 4, that is to say Marji Mal and Rameshwar Das, and that the decree which has been passed in suit No. 6 of 1937 held good. A number of issues were framed, and the last issue which is issue No. 8 was as follows:

Are the Plaintiffs entitled to the declaration sought? Is the award inadmissible and void, not being registered?

15. The learned Judge only tried the last mentioned issue and has held that having regard to Section 17 (1) (e) of the Registration Act the award is invalid, being unregistered. He has accordingly decreed the suit.

16. Learned Counsel for the Defendants Appellants challenges this decision on two grounds. In the first place he pleads that the suit has been decided on a ground

which gave the minor Plaintiff no right of suit. In the second place he contends that the award did not require registration.

17. As regards the first point, his contention is that the Plaintiffs were not dom-patent to have a suit for avoidance of the decree on the ground that the learned judge had committed an error of law in passing a decree upon an award which had not been registered Learned Counsel for the Plaintiffs Respondent contests this plea, co tending that a decree passed upon an unregistered award in respect to immoveable property is without jurisdiction, and he has called in aid a Full Bench decision of this Court in Mariam v. Amina. 1936 AWR 1223 (F. B.) In that case it was held that paragraph 1 of the Second Schedule of the Civil Procedure Code, is subject to the provisions of O. 32, r. 7, Civil Procedure Code,. and that the omission on the part of the next friend or guardian ad litem to obtain leave of the Court renders an order of reference and the award and the decree based upon it voidable at the option of the minor as against all the parties ; and such order of reference and the award can be assailed by the minor either in the suit itself or by a separate suit. That case is obviously distinguishable in as much as in the case which is now before us there is no statutory provision in favour of the minors. Their Learned Counsel concedes that, if the Plaintiffs had been sui juris, they would have had no right of suit upon the ground which is the basis of the lower, court''s decision, but he vaguely invokes the indulgence which the Courts extend towards minor litigants. We put the following propositions to him. Supposing a suit is decreed on the basis of a martgage band, would a minor Defendant have a right to sue for avoidance of the decree on the ground that the mortgage bond had not been registered, as required by law ? Learned Counsel had to concede that in such a case the minors would have no right of suit. We can see no difference in principle between a decree based on an unregistered mortgage bond and a decree based on an unregistered award.

18. The Plaintiffs could have appealed u/s 104 (f) C. P C. against the filing of the award, but they have no right of suit on the ground that the award which is the basis of the decree is unregistered, or in other words on the ground that the Court had committed an error of law in decreeing the suit upon a document which required registration.

19. Learned Counsel for the Plaintiffs then advanced another plea, and it is this. He says that on the 5th July, 1937, the Defendants-Appellant had filed a review application in respect to suit No. 6. The agreement to refer to arbitration was executed on the 20th July 1937 and the award was made and was presented to the Court on the 12th August, 1937, and judgment was passed upon it. On the 24th August, 1937, says Learned Counsel, the review application was dismissed for want of prosecution. He accordingly pleads that since a review application was pending in the Court, a reference to arbitration could only be made through the intervention of the Court and that where a reference is so made the leave of the Court is necessary

quoad the minors under O. 32, r. 7, Civil Procedure Code,.

20. This plea was not raised in the plaint of the suit. It is true that this is a question of law, and Learned Counsel for the Plaintiffs, therefore, contends that he is entitled to raise it even in appeal. But though a question of law, it depends on facts, and these facts are admittedly not disclosed in the plaint or any where in our paper-book. IN the circumstances we do not think that the plea is enter-tainable at this stage.

21. Even if a contrary view be held, we are of opinion that, there is no merit in the plea. Learned councel''s argument is that, since the review application was pending, it was not open to the parties to refer the matters in dispute to arbitration without the intervention of the Court and therefore the leave of the Court should have been obtained under O. 32, r. 7, Civil Procedure Code, ; and this admittedly was not done. We are referred to paragraph 1 of the Second Schedule and to the definition of "judgment" in Section 2 (9) Civil Procedure Code,. Paragraph 1 (1) of the Second Schedule reads as follows:

Where in any suit all the parties agree that any matter in difference between them shall be referred to arbitration; they may at any time before judgment is pronounced apply to the Court for an order of reference

22. Section 2 (9) defines "judgment" as "the statement given by the Judge of the grounds of a decree or order. " Learned Counsel for the Plaintiffs emphasises the word "order" and be argues that in paragraph 1 of the Second Schedule the "word" at any time before judgment is pronounced will apply to an order upon an application for review. But it is clear that the judgment contemplated is a judgment in a suit; and review proceedings are not a suit. Paragraph 1 predicates the pendency of a suit; but no suit was pending between the parties on July 20th, 1937. The mare filing of an application for review will not re-open the suit; and it is not suggested that the application had been granted under O. 47, r. 8 Civil Procedure Code,. Moreover the circumstances clearly indicate that on the date of the agreement it was the intention of the parties that t:hs review application should be dropped. There is therefore no force in this contention and the parties were at liberty, notwithstanding the pendency of a review application, to refer privately to arbitration the matters which were in dispute between them after the decision of the suits

23. In the result we allow this appeal and set aside the decree of the Court below and we remand the suit to that Court for decision of the issues arising between the patties. Costs will abide the result.