(1941) 09 AHC CK 0009

Allahabad High Court

Case No: Civil Revision No. 246 of 1941

Ram Gopal Insane, through Fateh Chand		APPELLANT
	Vs	
Shanti Lal		RESPONDENT

Date of Decision: Sept. 9, 1941

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

Bench: Division Bench

Advocate: Messrs. G.S. Pathak, S.C. Das and Jagnandan Lal, for the Appellant; Mr. Panna Lal for Opposite-party, for the Respondent

Final Decision: Allowed

Judgement

Collister and Bajpai, JJ.

The facts which have given rise to this appeal may be stated. One Seth Ram Gopal instituted suit No. 149 of 1921 against Rai Bahadur Seth Mewa Ram for dissolution of partnership and partition of partnership assets on the allegation that he was a partner with the Defendant in the ginning factories situate at Saha-ranpur and Chandausi. There were certain other suits more or less connected with suit No. 149 of 1921, but it is not necessary to give the details of those suits. The suit under consideration, namely suit No. 149 of 1921, was decreed by the trial Court on the 10th of August 1922, and a receiver was appointed to sell the factories and goods by the 30th of September, 1922. On the 23rd of August, 1922, the parties came to an arrangement which was to the effect that the Plaintiff should be put in possession of the Chandausi factory and Mewa Ram Defendant should continue in possession of the Saharanpur factory. An appeal (First Appeal No. 366 of 1922) was filed by Mewa Ram against the decision of the trial Court, but the private arrangement at which the parties arrived on the 23rd of August, 1922, continued during the pendency of the appeal. Mewa Ram died while the appeal was pending in this Court and his adopted son Shanti Lal was brought on the record as his legal representative.

2. On the 31st of May, 1926, the High Court decreed the appeal of Mewa Ram and dismissed the suit.

3. On the 11th of November, 1926, Shanti Lal made an application in the Court of the Additional Subordinate Judge of Moradabad u/s 144 of the Civil Procedure Code, for restitution. On the 15th of January, 1927, Seth Ram Gopal filed objection to Shanti Lal''a application. On the 17th of October, 1927, the objections of Seth Ram Gopal and the application of Shanti Lal were disposed of. The result of the adjudication was against Shanti Lal and he, therefore, preferred an appeal to the High Court. On the 21st of December, 1931, the High Court rtmanded the case, holding that the Applicant was entitled to restitution by possession of the old factory in addition to the other reliefs already decreed. He was also held to be entitled to profits, if any accruing from the factory during the period of management by the Plaintiff. The Court further held that the lower Court had not given a decision as to the amount of the profits. The case was, therefore remanded under Order 41, rule 23 Civil Procedure Code, . for disposal of the questions arising between the parties on the merits.

4. Some time after the decision of the High Court Ram Gopal became a lunatic, and on the 20th of May, 1932, the wife of Ram Gopal applied to be appointed the guardian of her husband during the pendency of the proceedings. She, however, was not appointed the guardian of her husband, but Ram Go-pal''s maternal uncle Rai Saheb Behari Lal was appointed the guardian and he filed his objections to the claim of Shanti Lai on the 3rd of August 1932.

5. After this the matter went to arbitration. We shall have occasion to discuss the circumstances under which the matter was referred to arbitration and in that connection we shall discuss the various applications of the parties, but at the present moment it is enough to say that the matter was referred to arbitration. On the 26th of April, 1933, the arbitrator Seth Champa Lal gave an award which was adverse to Seth Ram Gopal. Objections were filed by Seth Ram Gopal. On the 19th of January 1935, the Court below held that the objections had no force and passed a decree in terms of the award.

6. It is against this decree that the present appeal has been filed by Seth Ram Gopal. A preliminary objection has been taken on behalf of the Respondent that no appeal lies against the decree passed by the Court below in accord ance with the award. Our attention has been drawn to paragraphs 15 and 16 of the Second Schedule to the Civil Procedure Code, where it is provided that an award shall be set aside on certain grounds, but if the award is neither remitted or if no application has been made to set aside the award or the Court has refused such an application, then the Court shall proceed to pronounce judgment according to the award and

upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance

with, the award,

7. There is a plea by the Appellant that the Second Schedule is entirely inapplicable to the facts of the present case. We shall notice this plea later. At the present moment we are assuming that the Schedule is applicable and if it is so applicable the preliminary objection has great force. In Lutawan v. Lachiya (1913) 36 All. 69 (F. B.) : AIR 1914 All. 446, it was held by a Full Bench of this Court as follows:

Where an object on to the validity of an award, which might have been raised under Article 15 of the Second Schedule to the Civil Procedure Code, is not raised within the time limited, or, being raised, is rejected, and the Court proceeds to pronounce judgment and to frame a decree, no appeal will lie except on the grounds stated in Article 16 of the same Schedule.

8. It is conceded that the decree passed by the Court below is neither in excess of, or not in accordance with, the award, and therefore an appeal would be incompetent. Although the authority of this Full Bench in other matters was greatly shaken by the subsequent Full Bench case of Mariam Bibi v. Amna Bibi 1936 A.W. 1223 (F. B.), it was held again that the decision of the Court overruling an objection to the award and passing a decree in accordance with the award cannot be challenged by an appeal. It was, however, held in that case that the aggrieved party could bring the matter up in revision if the Court had assumed jurisdiction where it had none or had acted illegally or with material irregularity in the exercise of its jurisdiction.

9. As we said before, Learned Counsel for the Appellant has argued that the Second Schedule of the Civil Procedure Code, was inapplicable to the present proceedings and therefore the bar to an appeal as contained in paragraph 16 of the Second Schedule does not arise, but for the purposes of the present case we shall, without deciding the matter, assume that the preliminary objection is sound and that an appeal does not lie. This assumption is entirely at the instance of the Respondent. We can, however, convert the proceedings before us into an application in revision, and, as we are satisfied in the present case that interference of this Court is called for, we have converted this appeal into an application in revision. There is no question of limitation nor any question of court-fees, nor can it be said that the Respondent is being taken by surprise or is in any way being prejudiced by our action

10. The first question which is then raised by Mr. Pathak on behalf of the Applicant is that the proceedings in the Court below were u/s 144 of the Civil Procedure Code, and they could not be referred to arbitration. The arbitration in the present case was through the intervention of the Court and is said to be an arbitration in a suit. Paragraph 1, Second Schedule, of the Civil Procedure Code, provides:

Where in any suit all the parties interested agree etc. etc.

and the contention is that proceedings u/s 144 Civil Procedure Code, . do not amount to a suit. The word " suit" has not been defined in the Civil Procedure Code, , but Section 144, clause (1) provides that the proceedings will be started on the application of a party entitled to any benefit by way of restitution, and clause (2) says that no suit shall be instituted for the purpose of obtaining any restitution. It is clear from the phraseology of Section 144 itself that there is a distinction between a suit and an application for restitution. Section 89 Civil Procedure Code, . provides :

.....all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

11. Here again there is reference to a suit. Section 26 says that " every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed," and Section 144 says that the proceedings shall be initiated on the application of a party and no suit shall be instituted, or in other words no plaint shall be presented, for the purpose of obtaining restitution.

12. It was held in T. Wang Vs. Sona Wangdi, , that the Second Schedule of the Civil Procedure Code, is not applicable to execution proceedings because execution proceedings cannot be considered to be suits, but really arise after the decision of a suit, a. d this view was fallowed by a learned single Judge of this Court in Bachan Lal Vs. Amar Singh and Others, , where Bennet J. held that

an execution proceeding if not a suit and therefore Schedule 2 does not entitle the parties to an execution proceedings to file an application for a reference to arbitration. The arbitration proceedings are invalid and the Court is not entitled to enforce these arbitration proceedings

13. It is well settled so far as this Court is concerned that restitution proceedings are not in the nature of applications for execution, but at the same time it has not been laid down by this Court or by any other Court, and Learned Counsel for the parties have not been able to cite any authority to the effect that an application for restitution is the same thing as the presentation of a plaint in a suit. In Parmeshar Singh v. Sitla-din Dube (1934) 57 All. 26: 3 A.W. 740 (F. B.), it has been held that an application for restitution is not an application in execution, but there cannot be the slightest doubt that proceedings by way of restitution are taken as the result of a suit and not by the institution of a suit nor can they be said to be the continuation of a suit.

14. Mr. Panna Lal on behalf of the opposite-party has drawn our attention to certain casus where a comprehensive definition has been given to the word " suit ". In Pita Ram Vs. Jujhar Singh and Shanker Singh, , their Lordships were considering certain proceedings in insolvency matters and they were prepared to assign a very wide meaning to the word " suit ", and in Calcutta in the case of Provas Chandra Sinha v. Ashutosh Mukherji A, I. 1930 Cal. 258, the word "suit" as used in clause 12 of the

Letters Patent of the Calcutta High Court was interpreted as meaning any proceeding initiated on an originating summons. We have, however, got to interpret the word "suit" as used in the Second Schedule, and we find no warrant for extending its meaning beyond the one to be evolved out of Section 144 and Section 26 of the Civil Procedure Code, In Hansraj Gupta v. The Official Liquidators of the Dehra DunMussoorie Electric Tramway Company Ltd. (1933) 1 A.W. 205 (P.C.), their Lordships of the Privy Council said:--

The word ''suit'' ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of plaint.

15. It was then said on behalf of the opposite party that by reason of Section 141 of the Civil Procedure Cod the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of Civil jurisdiction, but it does not follow therefrom that the Second Schedule of the CPC becomes applicable to proceedings u/s 144 by reason of the provisions of Section 141 of the Civil Procedure Code. In this connection we cannot do better than quote what was said by Mukerji J. in the case of Sarat Krishna Bose Vs. Bisweswar Mitra and Others, .

An elaborate research into the history of Section 141 and an exhaustive analysis of the case law bearing on it will be found in the recent judgment of Page J in the case of Basarutulla Mia v. Reajuddin Mia (I. U. R 53 Cal. 679. Now amidst the hopelessly conflicting mass of judicial decisions which have clustered round Section 141 and Section 647 which stood in its place before, the Solid bed-rock on which it is safe to take one''s stand is the decision of the Judicial Committee in the case of Thakur Prasad v. Fakir-ullah (1 L 17 All 106). Their Lordships '' decision makes it perfectly plain that the section does not apply to applications for execution, but only to original matters in the nature of Suits such as proceedings in probates, guardianships and ''so forth'' The expression ''so forth'' must, in my opinion, be read as meaning proceedings ejusdem generis with the instances that precede it, and include such proceedings as in divorce, in insolvency, for succession certificate and the like and the expression '' original matters '' in my opinion confirms that view as meaning matters which originate in themselves and not those which spring up from a suit or from some other proceedings or arise in connection therewith.

16. Section 141 of the Civil Procedure Code, , therefore, does not help the opposite party.

17. This being our view, Schedule 2 of the Civil Procedure Code, does not apply to restitution proceedings and the Court below had no juridiction to refer the matter to arbitration.

18. Even if we were to assume that the Court below had jurisdiction and that Section 144 proceedings are capable of being referred to arbitration, we think that in this particular matter the trial Court acted illegally and with material irregularity in the

exercise of its jurisdiction.

19. We said before that the dispute between the parties was referred to arbitration and that we shall at a later stage discuss the various applications and the circumstances under which the dispute was referred to arbitration. It is clear that Ram Gopal had become insane in 1932 and a guardian had been appointed. Order 32, rule 15 C. P C. says that

the provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind.....

20. Order 32, rule 7 provides :

No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in a 1 proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he, acts as next friend or guardian.

21. Paragraph 1 of Schedule 2 says :

Where in any suit all the parties interested agree etc. etc.

22. The agreement to reference is, therefore, an agreement within the meaning of Order 32, rule 7 Civil Procedure Code, . This has been laid down by the Full Bench case or Mariam Bibi 2 to which we have already referred.

23. The position, therefore, is that there must have been the leave of the Court expressly recorded in the proceedings before the matter could have been referred to arbitration. Although in the case of persons who are under no such disability as minority or lunacy the leave of the Court for a compromise or for an agreement to refer is not necessary because they are excepted to protect their interests, such a requirement in the case of minors and lunatics is based on the fact that minors and lunatics are after all wards of the Court and it must be clear that the leave of the Court was obtained and that it was expressly recorded in the proceedings As pointed out by Lord Mac-naghten in Manohar Lal v. Jadunath Singh, (1906) 28 All. 585 : 3 ALJ 710

there ought to he evidence that the attention of the Court was directly called to the fact'' that a minor was a party to the compromise, and it ought to be shown, by an order on petition, or in some way to open to doubt, that the leave of the Court was obtained.

24. It is also dear that the Court should before granting leave exercise a judicial discretion as to the propriety of the compromise or the reference to arbitration in the interest of the minor. The Court must have materials before it and nothing should be concealed from the Court in a matter like this and the materials must satisfy the mind of the Court that the action proposed is for the benefit of the minor or the luratic.

25. It is not possible to lay down any hard and fast rule as to what should be done in a matter like this. In some cases it has been held that there should be an affidavit of the guardian that the compromise or the reference was for the benefit of the minor; in other cases it has been held that there should be an opinion of the counsel or a statement by the counsel at the bar that the compromise is a proper one and should be sanctioned in the interest of the minor, but there can be no doubt that all facts necessary for the exercise of a judicial discretion by the Court should be placed before the Court and nothing should be concealed, for where the matter is being referred to arbitration and one of the parties is a lunatic there should be abundant good faith. In Kalavati v. Chedi Lal (1895) 17 All. 531, it was held that

the Court should record the fact that such application was made to it: that the terms of the proposed agreement or compromise were considered by the Court and that, having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise.

26. In the present case we find that on the 6th of February, 1933, an application was filed in Court purporting to be one on behalf of Seth Ram Gopal through Babu Murli Manohar Agarwal, Advocate, and in that it was said that Rai Bahadur Seth Champa La] was the natural father of Lala Shanti Lal, Applicant to the suit, and Rtm Gopal was willing that the matter in dispute might be referred to him as arbittator. Naiain Singh, special attorney, and Sohan Lal, pairokar on behalf of Ram Gopal approached the Seth Saheb aforesaid at Beawar alias Naya Isagar and made a request to him and the Seth Saheb had agreed On the last date of hearing it was submitted on behalf of the Applicant that if the Seth Saheb agree, the matter might be teferred to him for arbitration. It was prayed that the matter might be referred to Seth Saheb aforesaid for arbitration. There is no allegation in this application which seems to be the first application in the matter regarding any benefit arising to Seth Ram Gopal by a reference to arbitration. The application was presumably shown to counsel for Shanti Lal and a week''s time was prayed for for giving a reply. On the 13th of February, 1933, the Court rejected the application for reference to arbitration because Shanti Lal after taking a week''s time had filed no application consenting to refer the case to arbitration and the conclusion, according to the Judge, was clear that he did not want to refer the case. On the 18th of February, 1933, there was an application by Shanti Lal expressing his agreement to the appointment of Seth Champa Lal as an arbitrator, and it is on the 23rd of February, 1933, that an application was presented on behalf of Seth Ram Gopal by his counsel and by his Mukhtar Khas Narain Singh stating that permission may be granted for the appointment of Seth Champa Lal as arbitrator and stating that the decision of the matter at issue by arbitration was beneficial to Seth Ram Gopal. Then and there the Court accepted the prayer by putting down the word "allowed'"' on the application.

27. We notice that on a former occasion the proceedings for reference to arbitration proved infructuous because of the hesitation of Shanti Lal himself, but they were

revived at the instance of Shanti Lal, and when on the 23rd of February, 1933, an application was made on behalf of the mukhtar khas of the guardian of the lunatic, the Court should have been alive to the gravity of the situation and should have asked for some more information on the subject. It has been established beyond any doubt that Seth Champa Lal is a creditor of Shanti Lal to the extent of a lakh or so. There are documents at pages 55, 61 and 69 of our record which show that Mewa Ram, the predecessor of Shanti Lal, had mortgaged the ginning factory at Chandausi to Seth Champa Lal and the arbitrator was, therefore, interested in the subject matter of dispute between Shanti Lal and Ram Gopal. Whether this fact was known to the pairokars of Ram Gopal or not is a question of minor importance. It was undoubtedly known to Shanti Lal and the fact ought to have been brought to the notice of the Court when Shanti Lal revived the application on the 18th of February, 1933, for sending the case to arbitration. Seth Champa Lal is the natural father of Shanti Lal, the opposite-party before us, and speaking for ourselves we are prepared to say that if an application for reference to arbitration had been made to us in a matter like this, where the arbitrator was the natural father of one of the parties to the reference and was himself interested in the subject matter of dspute, we would not have in the case of a lunatic granted leave.

28. We are not attaching any very great importance to the fact that leave was granted by writing the single word "allowed" on the application, but we feel that the Court below did not exercise a judicial discretion in the matter and gave leave as a matter of routine.

29. For the reason given above we are satisfied that the Court below acted illegally and with material irregularity in the exercise of its jurisdiction in referring the matter to arbitration.

30. Certain other points were taken by Learned Counsel for the Applicant to show that the award was vitiated by reason of the fact that the arbitrator decided certain extraneous matters or that the minor''s guardian was guilty of gross negligence, but we do not think that these are matters on which we can pay any attention in our revisional jurisdiction. On the whole we have come to the conclusion that this application in revision should be allowed. We accordingly allow the same, set aside the decree of the Court below dated the 19th of January, 1935, revoke the order of reference to arbitration and send back the case to the trial Court with directions to dispose of the application u/s 144 of the Civil Procedure Code, made by Shanti Lal after giving notice to the guardian of Seth Rum Gopal to file such objections as he may be advised to take in the matter. Parties will bear their own costs both in the Court below and in this Court.