
(1956) 11 PAT CK 0001

Patna High Court

Case No: A.F.O.O. No. 312 of 1951

Mohammad Abdur
Razaque

APPELLANT

Vs

Abdul Majid and Others

RESPONDENT

Date of Decision: Nov. 15, 1956

Acts Referred:

- Arbitration Act, 1940 - Section 47
- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3, Order 6 Rule 2

Citation: AIR 1957 Patna 656 : (1957) 5 BLJR 14

Hon'ble Judges: Dayal, J; Choudhary, J

Bench: Division Bench

Advocate: B.C. De and Syed Hassan, for the Appellant; S.N. Dutt, A.H. Fakhruddin and S.S. Asghar Hussain, for the Respondent

Final Decision: Dismissed

Judgement

Choudhary, J.

This appeal is by defendant No. 2. The facts leading to the presentation of the appeal stated shortly, are these. There is a sugar mill in Siwan known as Indian Sugar Works, Siwan. A title suit, being title suit No. 33 of 1943, was filed by three plaintiffs, named Abdul Mazid, Mohammad Hadi and Lutf Ahmad, against Abdul Razak for dissolution of partnership and rendition of accounts with respect to the said mill. Lutf Ahmad, plaintiff No. 3 of that suit, was appointed receiver and he leased out the mill to one Nasir Ahmad at Rs. 2,10,100 rental per season,

A money suit, No. 28 of 1948, out of which the present appeal arises was thereafter filed by four plaintiffs, namely, the Indian Sugar Works, Lutf Ahmad, Abdul Mazid & Mohammad Hadi, against Nasir Ahmad, the lessee, and Abdul Razak alleged to be the manager of the Indian Sugar Works, for recovery of the lease rent and certain other amounts totalling Rs. 2,89,944-10-6. The two defendants filed two separate written

statements. The Plea of defendant No. 2, so far as is relevant for the purpose of the present appeal was that Abdul Mazid, plaintiff No. 3 of this suit and plaintiff No. 1 of the above title suit, had no interest in the mill.

The plea of defendant No. 1, the lessee, substantially was that the entire amount of rental under claim, had been paid off and there was no due left with him. The hearing of the money suit, by an order of the Court, was stayed till the disposal of the title suit. On the 21st of September, 1949, the said title suit was decided. It was held that Lutf Ahmad, plaintiff No. 3 of that suit, and Abdul Razak, the defendant of that suit, were the only partners in the mill. Thereafter, en compromise to which Abdul Mazid, plaintiff No. 1 of that suit and plaintiff No. 3 of the money suit, was not a party a final decree was prepared on the 21st of November, 1949.

Abdul Mazid, therefore, preferred an appeal to this Court which was numbered as First Appeal No. 5 of 1950. Before this, however, on the 18th of November, 1949, a compromise petition was filed in the money suit in which all the parties except Abdul Mazid, joined and it was prayed that a decree may be passed in terms of the compromise inasmuch as Abdul Mazid who had not joined in the compromise, had no interest according to the decision of the said title suit. Since, however, the above appeal against the decree in the title suit was pending in this Court no final order was passed on tin"s compromise petition.

On the 27th of August, 1950, all the parties Including Abdul Mazid agreed to nave their dispute settled by Dr. Syed Mahmud who was then a Minister of Revenue and Transport at Patna. Accordingly, their dispute was referred, without the intervention of the Court, to the arbitration of the said Dr. Syed Mahmud by all the parties concerned. One of the terms of the agreement of reference to arbitration was that the first appeal No. 5 of 1950, which was pending in this Court, was to be withdrawn by Abdul Mazid, the appellant of that case. Accordingly, on the 22nd of September, 1950, he withdrew the above appeal. Thereafter, the arbitration proceeding proceeded.

One of the questions in dispute which had to be decided by the arbitrator was question No. 4 given in the award, Exhibit 2. This question was as to who were entitled to withdraw the sum of Rs. 47,000 which was in deposit with the Government Treasury in connection with the above money suit, No. 28 of 1948, in the Court of the Second Subordinate Judge, Chapra. We are concerned in the present appeal with the award on this point only. It appears that before the arbitrator the parties agreed that Abdui Mazid was entitled to withdraw a sum of Rs. 33,309-9-7 and Abdul Razak and others were entitled to withdraw Rs. 13,690-6-5. The arbitrator, therefore, gave his award on this agreement on this point to the following effect:

"I award that out of the sum of Rs. 47,000 which is in deposit with the Government Treasury in connection with Money Suit No. 28 of 1948 in the Court of the 2nd Sub-Judge, Chapra, Indian Sugar Works. Siwan, plaintiff versus Shaikh Nasir Ahmad,

defendant. Rs. 33,309-9-7 will be paid to the said Shaikh Abdul Mazid and Rs. 13,690-6-5 will be paid to Abdul Razak, Haji Bashir Ahmad, Nazir Ahmad, Nasir Ahmad separately. They will be entitled to withdraw the amount accordingly."

This award was given on the 22nd of February, 1951. On the 2nd of March, 1951, Abdul Razak, defendant No. 2 of the money suit and the sole defendant in the title suit, filed an application for recording the compromise which had been filed of the 18th November, 1949, as stated above, as the above F. A. No. 5 of 1950 had already been withdrawn. On the 21st April, 1951, Abdul Mazid, plaintiff No. 3 of the money suit and plaintiff No. 1 of the title suit, filed a re-joinder that in view of the award of Dr. Syed Mahmud the above compromise could not be recorded. He, on the 27th of April, 1951, also filed another application for disposing of the money suit in terms of the award.

There was a preliminary hearing of the matter in the Court below on the same date and it was held that the suit could not be disposed of either in terms of the award as it was an award in a pending suit without the intervention of the Court or on the above compromise petition inasmuch as Abdul Mazid did not join in it. It was, however, urged before the Court that adjustment should be recorded in accordance with the agreement arrived at between the parties with respect to the above sum of Rs. 47,000 before the arbitrator. The parties were, therefore, asked by the Court to bring their respective witnesses to prove the adjustment and they thereafter adduced both oral and documentary evidence in support of their respective cases.

The learned Subordinate Judge held that the award was invalid as it was made in a pending suit without the intervention of the Court and, therefore, could not be recorded. But he held that the parties did agree to the distribution of the above sum of Rs. 47,000 before the arbitrator as given in the award and recorded the said agreement. Abdul Razak, defendant No. 2 of the money suit, has, therefore, preferred the present appeal to this Court.

2. The award in question was made on reference by agreement between the parties but without the intervention of the Court in a pending suit. Such an award cannot be recorded as an adjustment of the suit unless the parties have consented to the same after it was made. The proviso to Section 47 of the Indian Arbitration Act lays down that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

According to this proviso, therefore, in order that this award should have been recorded as a compromise or adjustment of the suit, the consent of all the parties interested should have been obtained. In the present case, instead of the parties consenting to it, one of them objected to it, and that being the position, the award could not be recorded either as a compromise or as an adjustment of the suit.

The law on this point is well established by now, and, if any authority is needed, reference may be made to the case of [Raghunandan Rai and Others Vs. Sukhlal Rai](#), where a Bench of this Court held that under the proviso to Section 47 of the Arbitration Act it was not open to the Court to record any arbitration award under Order 23, Rule 3 of the Code of Civil Procedure if objection to the recording of it was made by any party. In this connection the following observation of their Lordships may profitably be quoted:

""On the plaintiff's own allegations the leave of the Court before which the suit was pending was not taken to make any reference to purchase for the decision of the dispute which was the subject-matter of the suit. At the time when the Court was asked to dispose of the suit in terms of the award the defendants did not consent to the compromise or adjustment of the suit being recorded according to the award. Therefore, even if the parties consented to the dispute being settled by arbitration without obtaining the sanction of the Court it had no jurisdiction under the proviso to Section 47 of the Indian Arbitration Act, 1949 to dispose of the suit in terms of the award under Order 23, Rule 3, CPC unless all the parties to the suit consented to the same."

Mr. Dutt appearing for the respondent Abdul Mazid has frankly conceded that the above award could not be recorded as a compromise or an adjustment of the suit.

3. Mr. Dutt, however, has contended that even apart from the award the agreement entered into between the parties with respect to the above sum of Rs. 47,000 before the arbitrator could itself be recorded as an adjustment of the suit to that extent. The contention seems to be well founded. Order 23, Rule 3 of the CPC Provides that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit.

According to this provision, if it is proved that the parties agreed to certain terms with respect to any point in suit, though they may have done so before an arbitrator appointed without the intervention of the Court in a pending suit the agreement could be recorded as an adjustment apart from the award. No authority has been placed before us to hold that such an agreement could not be recorded as a compromise or an adjustment of the suit. Mr. De appearing for the appellant has, however, contended that the application that was filed by the respondent Abdul Mazid on the 27th of April, 1951, was for recording the award as an adjustment and not for recording any agreement entered into between the parties before the arbitrator.

It has therefore, been urged that the adjustment could not be recorded on ground different from one made in the application for recording it. In support of this contention reliance has been placed on the cases reported in AIR 1930 57 (Privy Council), AIR 1945 64 (Privy Council) [Bihar Subai Sunni Majlis Awkaf Vs. Sitaram and Another](#), and [Rajendra Prasad Singh Vs. Governor-General in Council and Another](#), . In AIR 1930 57

(Privy Council) , claim made on the basis of a gift was never made in the defence Presented and it WAS held that no amount of evidence could be looked into upon a plea which was never put forward.

In the case of AIR 1945 64 (Privy Council) , the points on which the parties were allowed to adduce evidence were not raised either in the pleadings or issues and it was held that such a procedure was irregular and should not have -"been allowed without amending the pleadings and raising the necessary issues. In [Jaigobind Misir and Others Vs. Nagesar Prasad and Others](#) , a Bench of this Court relying on the above two Privy Council cases held that when a particular claim was not made in the defence presented, no amount of evidence could be allowed to be adduced with regard to it.

In that case neither in the evidence nor in the written statement the defendants stated the point on which they put forward a claim before their Lordships. In [Rajendra Prasad Singh Vs. Governor-General in Council and Another](#) , a Bench of this Court to which I was a party relying on the above cases held that a defendant should not be permitted to adduce evidence "in proof of a case which was never pleaded in the written statement and which was contrary to the case made out therein, and even if such evidence is adduced, it should not be looked into while deciding the case.

In that case the defendant had pleaded in the written statement that the plain-tiff managed not to get the tins unloaded at Chapra Station and allowed the same to go up to Bhatpar Rani Station. At the trial, however, evidence was adduced on behalf of the defendants to establish a plea contrary to that taken in the written statement as stated above that the tins of butter were unloaded at Chapra and, thereafter, the plain-tiff, by bringing some of the railway staff in collusion, managed to reload them in the said parcel train and got them unloaded at Bhatpar Rani Station.

In those circumstances it was rightly held that the evidence adduced to establish a contrary plea should not be looked into. In the present case, though in the application made on the 27th of April, 1951, no prayer was made to record an adjustment on the basis of an agreement made before the arbitrator, yet on that very date the Court by order No. 109 held that that the only alternative for plaintiff No. 3 was to prove by adducing evidence in this case that there was an agreement between the parties as alleged in the award outside the Court and the suit should be decided accordingly, and the parties were asked to bring their witnesses in support of their respective cases On this point.

Thus on that date an issue was raised between the parties as to whether there was any agreement between them before the arbitrator which could, be adjusted. The parties thereafter deliberately adduced evidence both oral and documentary in support Of their respective cases. The present case is, therefore, distinguishable from the cases referred to above. In my opinion, this case is covered by the decision of their Lordships of the Judicial Committee in AIR 1930 205 (Privy Council) . In that case a suit was based on a certain agreement and its subsequent variance was not mentioned in the plaint but was

put in issue and contested and proved. It was held that the suit was fought by the parties deliberately upon issues substantially as framed by the trial Judge and ought upon that footing to be determined.

4. The above agreement alleged to have been entered into between the parties before the arbitrator had been sufficiently proved by the evidence adduced on behalf of the respondent Abdul Mazid. Dr. Syed Mahmud has stated on solemn affirmation that his award regarding point No. 4 (the point regarding the distribution of the above sum of Rs. 47,000) is based on agreement between the parties themselves. He further stated that Shaikh Khuda Bux and his two sons, Latif Ahmad and Md. Ahmad disclaimed interest in the said sum of Rs. 47,000 and that the other five adjusted the account in his presence and he has in his award recorded their agreement and adjusted to it.

In cross-examination he has stated that his award is based regarding point No 4 mainly on agreement between the parties. There is no reason why the evidence of Dr. Syed Mahmud who is a respectable and independent witness should not be believed. The other witness, namely, Mohamad Yusuf Quaraisi, who is the Chairman of Rusra Local Board and a member of the District Planning Committee and District Congress Committee, Balia, and was a member of All India Congress Committee, has stated as follows :

"Accounts were seen by the parties. Khuda Bux and his sons disclaimed any interest in Rs. 47,000 and agreed that Rs. 33,300 and odd would be given to Mazid alone and the balance of Rs 13,000 and odd would be taken by his four brothers together. This agreement they intimated to Hon"ble Dr. Syed Mahmud in my presence. All these agreements and talks had taken place in January, 1951, at the house of the sole arbitrator at Patna."

As against the evidence of these two witnesses, defendant No. 2 examined himself as witness No. 2 and Attaullah his ammokhtar, as witness No. 1 to deny the above agreement. Both these witnesses are interested and in face of the evidence of the above two independent and respectable witnesses examined on behalf of Abdul Mazid, it cannot but be held that the parties agreed to the distribution of the above sum of Rs. 47,000 and odd before the arbitrator.

5. For the reasons given above, it is manifest that the judgment and the order of the Court below regarding the above agreement as an adjustment of the suit to the above extent is perfectly correct. There is thus no merit in this appeal. It is accordingly dismissed with costs to the contesting respondent.

Dayal, J.

6. I agree.