

(1928) 08 CAL CK 0001
In the Calcutta High Court

Abdul Rahim Oosman and Co.

APPELLANT

Vs

Ojamshee Purshottamdas and Co.

RESPONDENT

Date of Decision : 24-08-1928

Acts Referred:

Arbitration Act, 1940 — Section 15
Civil Procedure Code, 1908 (CPC) — Section 11
Limitation Act, 1963 — Section 14

Citation : AIR 1930 Cal 5

Hon'ble Judges : Lort-Williams, J; Lord Williams, J

Bench : Division Bench

Judgement

Lort-Williams, J.—The facts in this case are as follows : By seven contracts, partly printed and partly in writing, and dated 10th November 1920 the plaintiffs sold to the defendants 1871/2 tons of white Java Sugar ex. S.S. "Rajput." Notice of arrival was sent to the defendants on the 16th December, and on 5th January 1921 the delivery order was tendered. Defendants failed to take delivery, and thereupon the goods were resold on the 6th at a loss of Rs. 22,899-3-3.

2. Defendants disputed their liability, and as the contracts contained arbitration clauses, plaintiffs appointed a Mr. Duggan to act as sole arbitrator, the defendants having refused to make any appointment. Defendants declined to recognize the arbitration, and on 25th January 1921 the arbitrator made seven ex parte awards in favour of the plaintiffs, and these were filed in Court on the 31st. Seven warrants of attachment were issued on 3rd February. These were entitled "In the matter of the Indian Arbitration Act (9 of 1898)" and "in the matter of a reference to arbitration, etc., Nos. 32 to 38 of 1921." The warrants were executed and goods seized and defendants paid to the Sheriff, under protest, the sum of Rs. 26,220-7-1 for debt and Sheriff's costs to obtain release of their goods, and, on the 15th April, the said sum was paid by him into Court to the credit of Nos. 32-38 of 1921 as aforesaid.

3. On 5th April, defendants had instituted Suit No. 1008 of 1921 against plaintiffs

and obtained an injunction restraining them from withdrawing the aforesaid sum from the Sheriff or from Court, and on 21st an order was made by Greaves, J., that that suit and the seven arbitration matters aforesaid should be amalgamated, and that, without prejudice to the right of contention of the defendants, on the plaintiffs giving security and undertaking to pay interest in the event of the suit being decreed in favour of the defendants, the aforesaid sum then standing to the credit of the said arbitration matters should be paid out to the plaintiffs.

4. By their plaint in that suit, defendants alleged that they had always been ready and willing to take delivery of the goods, that the resale was bogus and the loss had not been sustained, that the arbitration was invalid as the arbitrator was ineligible according to the terms of the arbitration clause, and that plaintiffs wilfully misled and deceived the arbitrator and wrongfully procured the aforesaid awards by fraudulently concealing; material facts, namely, that the delivery order was bogus and did not represent any goods, that the resale was bogus, as there were no goods to resell, and that consequently the plaintiffs suffered no loss.

5. The suit was heard by Costello, J., and the following issues were raised:

(1) Was there a valid submission?

(2) Was Mr. Duggan eligible to act as arbitrator?

(3) Was he validly appointed as sole arbitrator?

(4) Were the awards obtained by fraud on the basis of a resale which never took place?

6. The question raised in issue 2 turned on whether Mr. Duggan could be described properly as a European merchant within the meaning of the arbitration clauses, he being only an assistant and head of a department in a firm of European merchants.

7. On issue 4, evidence was given in full of the facts concerning the readiness of the seller, the unreadiness of the buyer, the resale and the loss sustained. However, in his judgment given on 25th February 1927, Costello, J., quite properly confined himself strictly to the issues raised by counsel, and especially the allegation of fraud which he described as the real ground of complaint. He did not specifically find either that the seller was ready or that the resale was genuine or that the price was the fair market price. But he found that the arbitrator had not been misled, that no fraud had been made out, that the arbitrator was eligible, that the arbitration therefore was valid, and passed a decree in favour of the present plaintiffs.

8. Upon appeal, the learned Judges, by their judgment delivered on 21st March 1928, set aside this decree on the ground that the arbitrator was ineligible and the arbitration therefore invalid. But with regard to the question which they said had occupied the greatest amount of the time and attention of the Court below

and the appeal Court and on which whole case had been thrashed out upon the evidence, they found specifically that the sellers had the goods and were ready and willing to sell, that the buyers were unable and unwilling to take delivery, that there was a breach of contract and a genuine resale, that the price was reasonable, that the loss was sustained by the sellers by reason of the breach, and that the awards had not been procured by fraud. Consequently, as the sellers had succeeded upon the chief matters which required the taking of evidence, they made no order as to costs, but ordered the sellers (the present plaintiffs) to repay to the defendants the aforesaid sum of Rs. 26,220-7-3 with interest in accordance with the order of Greaves, J.

9. Thereupon, on 22nd March 1928 the present suit 639 of 1928 was instituted. By their plaint plaintiffs claim the sum of Rs. 25,016-3-9, as damages for breach of the contract already referred to, and they allege that they realized the said sum by enforcing the aforesaid awards, and are entitled to retain it by reason of their right of appropriation as creditors of the defendants. They also say that their original cause of action remained suspended from the date of the awards or of the filing thereof or of the execution proceedings up to the date of the judgment of the Court of appeal, that alternatively a fresh cause of action for the same amount arose in consequence of that judgment, that their original claim remained satisfied up to that time, and that they have a right of set-off against the sum which they have been ordered to refund.

10. By their written statement, the defendants allege, inter alia, that the suit is barred by limitation, they deny any breach of contract and all other allegations in the plaint.

11. The issues raised are as follows:

- (1) Is the suit barred by limitation?
- (2) Were plaintiffs ready and willing to perform the contract?
- (3) Was any extension of time given for taking delivery, as alleged in para. 6 of the written statement?
- (4) Was there a genuine resale?
- (5) Did plaintiffs suffer the alleged or any loss?
- (6) Did plaintiffs' claim remain satisfied, as alleged?
- (7) Did plaintiffs' original claim remain suspended as alleged, and could they have instituted a suit meanwhile?
- (8) Have plaintiffs any cause of action by reason of the judgment of the Court of appeal?
- (9) Is the judgment conclusive on the question whether plaintiffs had enough sugar to perform the contract, and whether there was a genuine resale?

12. I will deal first with the question of res judicata. This issue is important in the light of events which have happened, though I decided to hear the evidence once again, and came to the conclusion hereinafter stated. Section 11, Civil P.C. states inter alia that no Court shall try any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and has been finally decided.

13. In my opinion, the issues of fact raised in this suit were not directly, though they were substantially, in issue in suit No. 1008 of 1921. The direct issue in that suit was whether the awards had been procured by fraud and were so dealt with by Costello, J. But in order to decide that issue, it was necessary, practically, and substantially, to go into the whole of the evidence regarding the contract and its breach by the buyers, and the loss sustained, and in fact all that evidence was given. And the Court of appeal based their decision that the awards were not fraudulently procured upon their specific findings of fact, that the buyers had been guilty of breach of contract and that the sellers had suffered the loss claimed. However, the issue cannot be said to have been finally decided within the meaning of the section, because the suit was decreed in favour of the buyers, who were not therefore in a position to appeal against the specific findings, and the sellers being defendants in the suit were not in a position to ask for a decree. Further, I doubt whether these findings were necessary for the determination of the appeal. However that may be, I have heard the evidence over again and have come to the same conclusion. I do not propose to discuss for a third time evidence which has been dealt with at length on two previous occasions. It is sufficient for me to say that I am satisfied upon the evidence that the plaintiffs had the goods and were ready and willing to deliver them, that the defendants were not ready and willing and failed to take delivery that no extension of time was given for taking delivery, that there was a genuine resale, that the sum realised was reasonable and at the market rate, and that plaintiffs suffered the loss alleged in consequence of defendant's said breach of contract.

14. But Section 11, Civil P.C. is not exhaustive of the circumstances in which an issue is res judicata. Upon general principles of law, no issue ought to be twice litigated, and it is clear that in this case to some extent the same evidence has been given, and the same issues decided as in suit No. 1008; and the question of res judicata arises in an unusual way, for it is urged on behalf of the plaintiffs, who say that they ought not to have to prove the same facts a second time, which have already been found in their favour in the former suit. Moreover, the question whether this issue has already been decided in suit 1008 becomes important on the question of limitation.

15. In my opinion, the plea of res judicata is misconceived, and is due to some confusion of thought arising from the contemplation of an unusual and somewhat complicated legal puzzle, the solution of which will be found more readily when discussing the question of limitation, which I will now consider.

16. In Section 9, Lim. Act of 1908, it is stated that Where once time has begun

to run, no subsequent disability to sue stops it." Time in the present case, so far as the original cause of action is concerned began to run when the breach occurred. But in Section 14(1) it is provided that

In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

17. In my opinion, the proceedings before the arbitrator were proceedings in a Court within the meaning of the section. Moreover his awards were filed in Court with the result that, in accordance with the provisions of Section 15, Arbitration Act, they became enforceable as decrees, and were executed as such, and the amounts due thereunder were realised by payment to the Sheriff. It is true that those amounts were paid under protest, and were paid out to the present plaintiffs only upon the undertaking given to Greaves, J. but that undertaking was given in suit 1008, with which the execution proceedings were amalgamated, and it is difficult to see how the plaintiffs could have instituted another suit for the same amount while that amalgamated suit was pending and until the awards and the execution were set aside. In that suit, the present defendants then plaintiffs by an amendment of their plaint, made four years after the institution of the suit, themselves raised all the issues of fact regarding the contract and its breach, which were subsequently decided in favour of the present plaintiffs. That proceeding, therefore, was, to that extent, founded upon the same cause of action as in the present suit. But the appeal Court owing to the form of the suit, had no jurisdiction to give effect to their decisions of fact in favour of the present plaintiff's, by decreeing the amount due to them as a result of the breach of contract.

18. The argument for the plaintiff is put in two ways. Either that, in computing the period of limitation, the time during which they, were prosecuting the proceedings in suit 1008, which was amalgamated with the execution proceedings, ought to be excluded, or that their right of action was extinguished when they executed the awards, revived when the Court of appeal ordered them to refund the money; or in other words, their cause of action accrued at the time when the awards having been set aside the defendants' obligation to pay damages revived, and that defendants, when the awards were set aside and they recovered the money paid in execution, took it back with the obligation to pay plaintiffs the damages found due to them by the appeal Court, and that such damages must be taken to have become due when the repayment was ordered to be made, or, to put it another way there was a failure of consideration. They further say that upon execution, their claim was satisfied, and they could not have sued for damages until the awards had been set aside.

19. I agree generally with these contentions, and in my opinion, they are

supported by the decision of the Judicial Committee in the case of *Surno Moyee v. Shooshee Mokhee Burmonia* [1868] 12 M.I.A. 244.

20. In that case a zemindar had caused the rights of certain patindars in a patni taluk to be sold for arrears of rent under Bengal Regulation 8 of 1819. The sale was cancelled on the ground that the zamindar had failed to give the necessary notices, and she was ordered to pay the patnidars mesne profits for the period during which they were out of possession. Thereupon, she brought a suit for the arrears which had accrued before and during that time and was met by a plea of limitation u/s 32, Act 10 1859. It was held by the Deputy Collector that the suit was not barred, inasmuch as the plaintiff could not both take the rents and sell the patni taluk, that so long as she was engaged in lawfully defending a suit to reverse the sale she could not possibly sue for the rents, and, therefore, her cause of action did not accrue until the sale was set aside. On appeal, the High Court of Calcutta reversed this decision. The learned Judges said that

the plaintiff urged that the arrears were put in abeyance by satisfaction out of the proceeds of the irregular sale, and revived or rather become a second time due this ground of contention is untenable, other wise the plaintiff would be enabled to take advantage of her own wrong...was her duty in law to have that notice duly served...she maintains that she was unable on account of the pending litigation to sue... We must observe that the words of Section 32 of that Act are absolute and do not admit of any exception whatever to their operation. Moreover, it is not correct to say that this suit could not have been brought pending the litigation respecting the irregular and invalid sale, and here again she cannot claim any benefit from acts of her own, which she ought from the beginning to have known were illegal or defective, or she could at any time have sued or abided the result, so saving her time.

21. On appeal to the Privy Council, their Lordships said that it was perfectly clear that the cause of action accrued at the time at which, the sale having been set aside, obligation to pay this money revived, that upon the fair construction of Section 32 of that Act the time had really not run; that because, when the zemindar pursued the remedy which was" clearly competent to her if it had been regularly pursued, she inadvertently omitted one of the formalities prescribed by the Act, she could not in bringing the suit be said to be seeking to take advantage of her own wrong, and that it was clear that until the sale had been finally set aside she was in the position of a person whose claim had been satisfied, and that her suit might have been successfully met by a plea to that effect.

22. It will be observed that there is a curiously close analogy between the facts and the arguments on both sides in that, and the present case. The main distinction is that in that case the patnidars had been dispossessed by the sale, whereas in this case, the money realized by the execution -was paid to the plaintiffs only upon giving the security and undertaking already mentioned.

23. That case was followed in *Lakhan Chunder Sen v. Madhusudan Sen* [1907] 35 Cal. 209. In that case, which was a suit for possession of a share in certain property A sued B and C. C supported A, and an issue concerning a share claimed by C was raised at B's request as between himself and C. A decree was passed in favour of A, and a declaration made in favour of G and possession ordered to be given in accordance therewith. On appeal the decree so far as C was concerned, was set aside on the ground that the suit being for possession and not partition, the Judge had no power to give relief as between two co-defendants. Thereupon G brought a suit, and was met by a plea of limitation. Bodilly, J. made a decree in favour of the defendant, holding that to avoid the bar it must be shown that the claim in the first suit had been satisfied, and that this could not be established where the decree had been set aside as invalid for want of jurisdiction. On appeal, the learned Judges expressed a doubt whether the case fell within the provisions of Section 14, Lim. Act, but held that so long as the decree was undischarged it was susceptible of execution, and it was not open to C to institute a fresh suit, and, therefore, the right of action was suspended and was not barred by limitation. On appeal to the Privy Council *Nrityamani Dassi v Lalchan Chandra Sen* AIR 1916 P.C. 96 this judgment was affirmed. Their Lordships concurred generally with the reasons given by the appellate Court for overruling the plea of limitation and held that limitation remained in suspense whilst G was bona fide litigating for rights in a Court of justice, and that the decree was made by a competent Court and was capable Of being enforced until set aside.

24. In my opinion, the present case falls within the *rationes decidendi* of those cases. It is not necessary for me to deal seriatim with the large number of oases which have been decided upon this question, because the whole subject has been exhaustively considered by Mukerji, J. in *Srimati Sarat Kamini Dasi Vs. Nagendra Nath Pal*, and by Sir Asutosh Mookerjee, J. in *Dwijendra Narain Roy Vs. Joges Chandra De and Others*, . The cases of *Kartar Singh v. Bhagat Singh* AIR 1921 lah. 71 and *Muthuveerappa Chetty v. Adaikappa Chetty* [1920] 43 Mad. 845 are directly in point upon the question whether a fresh cause of action arose. In my opinion, the suit is maintainable either on the ground that upon a liberal construction of Section 14, limitation was in suspense, or upon the ground [that a fresh cause of action arose as a result of the judgment of the Court of. appeal.

25. Therefore, there will be a decree in favour of the plaintiffs for Rs. 22,899-3-3 with costs, and with interest on the above sum at 3 per cent from 7th February 1921, to date of decree and at the rate of 6 per cent from date of decree until realization.

26. Plaintiffs will realize the said decretal amount and the costs of this suit-out of the sum of the Rs. 37,291-6-8 now laying in Court in Suit No. 1008 of 1921 and the balance will be withdrawn by the defendants.