

(1951) 08 AHC CK 0003
In the Allahabad High Court
Case No : Second Appeal No. 1429 of 1948

Firm Asharfi Lal Ramdeo and Others	Vs	APPELLANT
Firm Ganeshi Ram Jagarnath and Another		RESPONDENT

Date of Decision : 21-08-1951

Acts Referred:

Arbitration Act, 1940 — Section 30
Civil Procedure Code, 1908 (CPC) — Section 10, 11

Citation : AIR 1952 All 546 : (1951) 21 AWR 607

Hon'ble Judges : P.L. Bhargava, J

Bench : Single Bench

Advocate : M.A. Kazmi, for the Appellant; N.C. Vaish, for the Respondent

Judgement

P.L. Bhargava, J.—This is a plaintiffs' appeal. The parties to this appeal are two firms, firm Aaharfi Lal Ramdeo, the plaintiffs appellants, and firm Ganeshi Ram Jagarnath, the defendants-respondents, which carry on business in Pande Bazar in the district of Basti. The two firms had dealings with each other. The plaintiff-firm instituted a suit, No. 12 of 1943, against the defendant-firm in the Court of the Munsif of Basti to recover a sum of Rs. 500 and odd said to be due as balance of account on the basis of bahi Khatas. Another Suit No. 889 of 1942 was instituted by the defendant firm against the plaintiff-firm in the Court of the Civil Judge of Basti exercising the powers of Judge, Small Cause Court, for recovery of Rs. 205-9-9 said to be due on balance of account on the basis of bahi Khatas. Both the suits were separately referred to the arbitration of Hiralal and the arbitrator filed a separate award in the two suits. The award Sled in one suit was the exact copy of the award filed in the other, and the same award purported to decide the matter in dispute in the two suits. Objections were filed to the award in both the suits and the trial Courts dismissed the objections and made decrees in terms of the award in the two suits.

2. Against the decision of the Judge, Small Cause Court, a revision was filed in this Court; but it was dismissed. In the result, the award was upheld. Against the

decision of the Munsif of Basti an appeal was filed in the Court of the District Judge of that place. The appeal came up for hearing before the Civil Judge of Basti. The learned Civil Judge allowed the appeal in so far that the objections to the award were upheld and, in the result, the award was set aside. Against the decree of the learned Civil Judge allowing the appeal setting aside the award a revision was filed in this Court. The revision was allowed on the ground that the fact that the revision against the decision of the Judge, Small Cause Court, had been rejected and the award was upheld by this Court was not brought to the notice of the Civil Judge. The appeal was, therefore, ordered to be re-heard by the Civil Judge hearing in mind the above-mentioned fact.

3. The learned Civil Judge re-heard the appeal, but he again upheld the objections to the award and set aside the same. He further seems to have held that Suit no. 12 of 1943 of the Court of the Munsif of Basti was barred by the rule of res judicata in view of the decision in Suit No. 889 of (sic) of the Court of the Judge, Small Causes. Towards the close of his judgment the learned Judge, however, observed that Section 10 Civil P. C. was applicable to suit No. 12 of 1943 and that suit should have been dismissed accordingly by the trial Court and that in that view of the matter no question arose for consideration of the applicability of Section 11 of the Code. In the result, he modified the decree of the trial Court, in so far that the suit was dismissed u/s 10 of the Code and not in terms of the award.

4. Learned counsel for the appellants has challenged the view of the learned Civil Judge that the decision in the Small Cause Court's suit operates as res judicata as far as the suit in the Munsif's Court is concerned. He has argued that the Court of Small Causes was not competent to decide the suit filed in the Court of the Munsif and as such any decision by that Court could not operate as res judicata in the other suit and that the subject-matter of the two suits was also different, inasmuch the periods to which the claim in the two suits related were different and there was nothing on the record to show that any item was common. Learned counsel did not challenge the finding of the learned Judge that the award was vitiated on the ground of legal misconduct. In view of the observation of the learned Civil Judge that the award was governed by Section 10 Civil P. C. and there was no question of the applicability of Section 11 Civil P. C., it appears that the learned Judge had not held that suit No. 12 of 1943 was barred by the rule of res judicata in view of the decision in suit No. 889 of 1942 of the Court of the Judge, Small Causes. Even if we were to assume for the sake of argument that the learned Judge had come to that conclusion the view of the learned Judge cannot be upheld because Section 11 Civil P. C. lays down that:

"No Court shall try any suit or 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, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard

and finally decided by such Court."

It is not possible to hold that the matter directly and substantially in issue in the two suits was the same. In the plaint of the suit filed in the Court of Small Causes the plaintiffs had alleged that there was an accounting on 6-6-1942, and as a result of that accounting a sum of Rs. 725-12-3 was found due from the plaintiff to the defendant; that thereafter there were fresh dealings between the parties between 27-6-1942 and 7-7-1942, and goods worth Rs. 258-3-0 were supplied by the defendant to the plaintiff and in view of this supply a sum of Rs. 283-5-6 became due to the plaintiff from the defendant. Between 5-7-1942 and 16-7-1942, the plaintiff paid a sum of Rs. 494-15-9 and that after deducting the last payment the net amount due to the plaintiffs from the defendants was Rs. 205-10-0 for which the suit was instituted. The plaint of the suit filed in the Court of the Munsif, however, shows that it related to dealings between the parties between the period 21-4-1941, and 30-6-1942, during which period, according to the plaint allegations, goods worth Rs. 3,650-9-0 were supplied by the plaintiff to the defendants while the latter had paid in cash and goods Rs. 2185-0 6, leaving a balance of Rs. 465 8 6. Adding a sum of Rs. 35 by way of interest to the amount due to the plaintiffs a claim for Rs. 500-8-6 was put forward by the plaintiffs. The only period common to the claims in the two suits was between 7-6-1942, to 30-6-1942, and the rest of the claim was not the subject-matter of the suit in the Court of Small Causes.

5. Apart from the fact that the subject-matter of the two suits was different it cannot be disputed that the Court of Small Causes was not competent to try the suit filed in the Court of the Munsif of Basti. Consequently, as was pointed out by the learned Civil Judge, no question of the applicability of Section 11 arises.

6. The view of the learned Civil Judge that the present suit filed in the Court of the Munsif was governed by Section 10 Civil P. C. and as such liable to be dismissed on that account cannot be sustained. Section 10 Civil P. C. only provides for the stay of the suit and it lays down that:

"No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under Whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in the States having jurisdiction to grant the relief claimed, or in any Court beyond the limits of the States established or continued by the Central Government and having like jurisdiction, or before the Supreme Court."

In this case an application for the stay of the suit was made and granted. The order dismissing the suit on the ground of the applicability of Section 10 Civil P. C., must, therefore, be set aside.

7. Learned counsel for the respondents has attempted to support the decision of the lower appellate Court by challenging its decision by which the objections to the award were upheld and it was set aside. His contention is that the objections

raised against the award had no force and that the award which was the same in the two suits and which had been upheld in revision by this Court ought to have been upheld in this case also. The main objection to the award was based upon secret inquiries made by the arbitrator. The arbitrator was examined in Court and he frankly admitted that he had made open as well as secret inquiries and his award was based on those inquiries. Learned counsel for the respondents has contended that under the terms of reference the arbitrator was not bound to make any inquiries and there was nothing in the terms of reference which prohibited the arbitrator from making any secret inquiries. The terms of reference were to the effect that the parties appointed Lala Hiralal Marwari, resident of Basti, as an arbitrator and they would accept whatever award the said arbitrator gave according to his conscience.

8. The parties had, no doubt, agreed to abide by whatever decision was honestly given by the arbitrator, but they did not authorise him to form his own conclusions in any manner he liked. Consequently, he had to follow the ordinary principles of natural justice, viz., giving the parties a hearing and to make inquiries in their presence. An arbitrator has no authority to make inquiries behind the back of the parties and to base his decision thereon. An arbitrator who makes secret inquiries privately and does not allow the parties to explain the materials thus obtained is guilty of legal misconduct. In *Bhaiya Raj Kishore Lal Vs. Jageshwar Dayal*, it was pointed out that it is well settled that unless expressly authorised to do so, an arbitrator cannot be allowed to make private inquiries and allow himself to be influenced by evidence which either party has no opportunity to check or meet. This decision was based upon an earlier decision of this Court in *Daya Kishen v. Dharam Das* 4 ALJ 159. In view of this legal misconduct on the part of the arbitrator the award was liable to be set aside and the order of the learned Civil Judge setting aside the award on the ground of legal misconduct is correct.

9. Learned counsel for the respondents has laid stress on the fact that the arbitrator had given the same award in the two suits and by that award the entire claim relating to the dealings between the parties had been settled and that award having been upheld by this Court, the present suit was rightly dismissed. The award, for the reasons stated above, has to be set aside and the matter will have to be gone into by the trial Court. When the matter is being considered by the trial Court all the facts and circumstances can be brought to the notice of that Court and considered.

10. The appeal is, therefore, allowed, the decrees passed by the Courts below are set aside, the reference to arbitration and the award made in pursuance thereof are cancelled and set aside and the suit is remanded to the trial Court through the lower appellate Court with a direction to readmit the same to its original number for disposal on merits according to law. Costs here and hitherto will abide the ultimate result of the suit.