

(1962) 11 P&H CK 0037

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 167-D/57

Mool Chand Wasakhi Ram and Another

APPELLANT

Vs

Tola Ram Suba Ram and Another

RESPONDENT

Date of Decision : 12-11-1962

Acts Referred:

Arbitration Act, 1940 — Section 32
Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1963 P&H 387

Hon'ble Judges : D.K. Mahajan, J

Bench : Single Bench

Advocate : Gurbachan Singh and Udhai Bhan, for the Appellant; S.N. Marwah, for the Respondent

Final Decision : Allowed

Judgement

D.K. Mahajan, J.—This second appeal is directed against the concurrent decision of the Courts below dismissing the plaintiff's suit for recovery of Rs. 1800/-.

2. In order to appreciate the entire controversy It is necessary to set out the facts in considerable detail. Mool Chand and his son Atam Parkash and Tola Ram and his son Dilbagh Rat were partners in a cycle shop situated at 12-Esplanade Road, Delhi. For the sake of convenience the names of the sons will be omitted henceforth. Plaintiff Mool Chand brought a suit for dissolution of partnership and for rendition of accounts against Tola Ram. In this suit, Mr. Naunit Rai, Advocate was appointed as an arbitrator. He gave his award on the 17th December, 1951. The relevant part of the award is as below:

"1. The partnership between the parties in respect of the gold and other dealings in Pakistan before partition and continued in India after partition and the alleged partnership in the cycle shop known as "Royal Cycle Co.," is hereby dissolved.

2. Plaintiffs shall have nothing to do with the cycle shop and all the goods, goodwill, furniture etc. in the shop would be the property of the defendants, the

defendants would be liable to pay the arrears of rent of the shop if any and also the rent in future. The defendants would be liable for all the liabilities and debts if any of the said shop and would indemnify the plaintiffs against any claims of the landlord of the shop or any creditor of the shop.

3. That the shop is in the name of Mool Chand plaintiff and he would give all reasonable and necessary assistance to the defendants in getting the shop transferred in the name of the defendants from the Red Fort authorities and Sabz and Co.

4. That the defendants would pay a total sum of Rs. 3674/37- (Rupees three thousand six hundred and seventy four and annas three only) to the plaintiffs a sum of Rs. 500/- (Rupees five hundred only) had been deposited by the defendants on account of security for the shop in the name of Mool Chand plaintiff this can only be withdrawn by Mool Chand, who will withdraw the same and account it towards the total amount awarded to the plaintiffs. A sum of Rs. 3410/-(Rupees three thousand four hundred and ten only) had already been deposited by and on behalf of the defendants in the Court. The plaintiffs would be paid a sum of Rs. 3174/3/- (Rupees three thousand one hundred and seventy four and annas three only) out of this amount and the balance would be returned to the defendants.

5. That the plaintiffs would be entitled to withdraw from the Court said sum of Rs. 3174/3/- (Rupees three thousand one hundred and seventy four and annas three only) after Mool Chand plaintiff has made a statement oral or in writing before the Red Fort Authorities giving his consent to the transfer of the shop in the names of the defendants." There were objections to the award and before the award was made a rule of the Court, the landlords of the premises, which term will connote the Red Fort Authorities and the Sabz and Company, claimed the arrears of rent from Mool Chand by a suit. This suit was settled by Mool Chand. It may be mentioned that the suit was filed by Sabz and company. On the 18th of February, 1953, a sum of Rs. 1340/- was paid by Mool Chand vide Exhibit P. 4 to Sabz and Company. On the 29th July, 1953, a decree in terms of the award was passed by the Court in which the suit for dissolution of partnership and for rendition of accounts was pending. This decree modified the award to a certain extent and, therefore, it is necessary to set out the operative part of the decree, Exhibit P-12, which is in these terms:

"This suit coming on this day for final disposal before me in the presence of Mool Chand and Atam Parkash plaintiffs, and Tola Ram and Dilbagh Rai defendants. In accordance with the statements of the parties, it is ordered and decreed that the defendants do pay to the plaintiffs a sum of Rs. 4000/- only in accordance with the terms of award Exhibit A-1, which is made a rule of the Court with the exception that in para 4 of the award the sum of Rs. 3674/3/- be substituted for Rs. 4000/- only. The award with the above amendment shall form a part of the decree and all sum of Rs. 3410/- deposited in Court by the defendants shall be payable to the plaintiffs in terms of the award and further that a sum of Rs. 90/-

shall be paid by the defendants after the latter had made the required statement before the Red Fort Authorities. The rest of the terms of the award will stand unchanged. The parties are left to bear their own costs."

It will be dear from the decree that the modifications to the award were made at the instances of the parties and their statements were recorded. Those statements have not been filed in this suit and, therefore, it is not possible to say as to what was the reason which prevailed with the parties to agree to the modification of the award. According to the terms of the award and the decree, Mool Chand could reimburse himself for any rent which may be recovered from him by Sabz and Company and in view of the rent decree suffered by him in the suit filed by Sabz and company he gave notice to Tola Ram for recovery of the same on the 9th September, 1953; and Tola Ram replied to this notice on the 30th September 1953.

However, on the 19th December, 1953, the decree-holder and the judgment-debtor made the following statements. The statement of the decree-holder in Exhibit D-2, and its translation is in these terms:

"Certified copy of the application by Mool Chand decree holder to Red Fort Authorities has been handed over to the counsel for the judgment-debtor. A sum of Rs. 90/-has been received. A cheque for the sum of Rs. 3410/-which is lying in deposit in Court be given to the decree-holder. In accordance with the decree no amount now remains due from the judgment-debtor." The statement of the judgment-debtor is Exhibit D-3 and its translation is in these terms:

"The certified copy of the application which MOOL Chand decree-holder has given to the Red Fort Authorities may be given to me. I have paid a sum of Rs. 90/-, to Mool Chand decree-holder. Now no amount remains due from the judgment-debtor."

The Court's order is Exhibit D-I and is in these terms:

"According to the statement of the counsel for the parties, a cheque for the sum of Rs. 3410/- be given to the decree-holder after obtaining receipt from him. Now no amount under the dectee remains due from the judgment-debtor. Orders announced."

It is in this manner that the decree that was passed in pursuance of the award of Mr. Naunit Rai was satisfied. The plaintiff has brought the present suit for recovery of Rs. 1800/-. Rs. 1340/- are claimed on account of the decree suffered by the plaintiff in a suit filed by Sabz and Company of which a mention has already seen made, it is alleged that a sum of Rs. 334/11/- was paid subsequently for rent due from 1-8-1952 to 30-4-1953. Thus the total rent paid according to the plaintiff comes to Rs. 1674/11/-. Rs. 61/- are claimed on account of the fees for engaging a counsel for defending the suit brought by Sabz and company. Rs. 64/5/- are claimed by way of interest; and thus a total claim of Rs. 1800/- has been made in the suit.

3. A number of pleas were raised by the defendants to the suit. The defendants denied their liability to pay this amount and further pleaded that the order of the Court, Exhibit D-I, finally absolved the defendant from any liability under the decree. It is pleaded that as the liability was incurred before the decree was passed, it must be taken to have been settled by the order of the Court, Exhibit D-1. A number of issues were framed, but only the first three were determined and it is, therefore, only necessary to set out these three issues:

1. Has the claim about the claim in suit been satisfied by the Courts order dated 19-12-1953?
2. Are the plaintiffs estopped from filing the present suit because of the order passed by Shri S. S. Kalha, Sub-Judge, Delhi, on 19-10-1953?
3. On proof of issues Nos. 1 and 2 is the present suit maintainable and is not barred by Section 47 of the CPC ?

The third issue was found in favour of the plaintiffs, but on the first two issues the trial Court came to the conclusion that by reason of the order. Exhibit D-1, the Decree was completely satisfied and all claims under the said decree, were given up by the decree-holder unconditionally, and the suit was dismissed. An appeal to the District Judge, which was heard by the Additional District Judge, also met with no success, The learned Additional District Judge merely paraphrased the Judgment of the trial Court and seems to have not applied his mind at all to the facts of the case. The plaintiffs who are dissatisfied with the decision of the Courts below have come up in second appeal to this Court.

4. The short question that requires determination in this second appeal is as to the interpretation of the award, the decree passed thereon and the subsequent settlement on its basis. It is obvious that with regard to the rent that the plaintiffs may be called upon to pay to Sabz and Company the award and the decree were merely declaratory. If the defendants who had taken over the liability for the rent failed to pay the same and that rent was recovered from the plaintiffs, the right of the plaintiffs to be reimbursed by the defendants would arise in terms of the decree. There is no liability *qua* the rent which the decree created *in praesenti*. It was merely a contingent liability.

5. It is well settled that a declaratory decree is not capable of execution and a separate suit has to be filed on the basis of that declaration. The award merely declared the rights of the parties on the happening of certain events. It did not determine the liability of the parties and indeed that could not be done because the contingency may never have arisen. Therefore, there was no relief which was available to the decree-holder by way of execution. Reference in this connection may be made to *Sant Lal v. Ramaya Ram* AIR 1938 Lah 177, where Tek Chand J. held as under:

"In partition, proceedings, the award declared the rights of the parties in the property and did not state that possession was to be given to the parties:

Held, that the award was merely declaratory and hence possession of the properties could not be given to the parties in the execution proceedings."

Reference may also be made to the decision of Sind Judicial Commissioner's Court in *Godumal Sanmukhmai v. Mt. Bhambho* AIR 1943 Sind 11, where Davis C. J. at page 13 made the following observations:

"Now it is clear from the terms of the decree itself that It seeks to fix over a period of years the rights and duties of the parties and particularly penalties to be incurred, on the happening of future uncertain events, we have not here the ease of an installment decree where future relief is ordered, but where the right to the property or money is ascertained in the decree, and the future direction only refers to the time at which payment shall be made or the mode in which the right shall be executed; *Mt. Lachmibai v. Kaniomal Assudomal* 1 SLR 184. We have here a case similar, rather to the case reported in *Krishnabai v. Hari Govind* ILR 31 Bom 15 (FB), in which the relations of landlord and tenant are established, and provision is made for forfeiture and dispossession, and penalties on the happening of some uncertain future event. Reading this compromise through as a whole it is clear to me that it is concerned not so much with the present right of the plaintiff to money or property, but as to his future rights on uncertain happenings in the future such as draught, floods, failure to cultivate and so on. It is not possible to separate one term of the decree from the other. It must be taken as a whole, and, taken as a whole, it is clear to me that while the agreement therein contained may be an appropriate matter for a suit, it is not an appropriate matter for execution. For these reasons, therefore, I think that the appeal should be dismissed. . . ."

6. The contention of the learned counsel for the respondent, however, was that the suit to recover the amount in question is virtually a suit to enforce the award and, therefore, such a suit is barred u/s 32 of the Indian Arbitration Act. I am unable to agree with this contention. The award merged into the decree and it was the decree which had to be executed and the decree as already shown, in the very nature of things, being declaratory, could not be executed. It cannot be held in the circumstances that the award dealt with the matter covered by the suit. Moreover, it could not deal with that matter inasmuch as the liability was contingent and may never have arisen. In this view of the matter, the contention based on Section 32 of the Indian Arbitration Act must be repelled.

7. The other contention advanced by the learned counsel for the respondents is that at the time when the decree was finally settled by compromise no liability under the decree remained and the liability qua which the present suit relates having arisen before the decree was satisfied it must be taken that that liability became part of the decree and, therefore, when the parties made the statement that the decree was fully satisfied they also gave up their claim to the liability that had arisen in view of the declaratory part of the decree.

There is no doubt that the parties could have, while making statements Exhibits

D-2 and D-3, foregone the cause of action which had arisen in pursuance of the declaration in the decree, but that was not done. They were merely adjusting the decree and were not dealing with other ancillary matters which were not the subject-matter of the decree, but qua which a suit would have to be brought on the basis of the decree. It is significant that when the decree was drawn up, the liability for reimbursement had arisen and the decree though it modified the award did not take the liability for reimbursement into account or even otherwise deal with it. It is not disputed that if the parties wanted, they could have taken these subsequent events into account and provided for them in the decree. But this was not done. It cannot, therefore, be said that the rent which is alleged to have been paid by the plaintiff to Sabz and Company in pursuance of the terms of the award had been accounted for in the decree that followed it.

8. It is then argued that in any case when the statements, Exhibits D-2 and D-3, were made the plaintiffs gave up their right to be reimbursed for they stated that the decree has been satisfied and nothing remained due under it. This argument assumes that the amount qua which reimbursement is sought was due under the decree. I have already held that it could not be recovered in execution of the decree as in the very nature of things the decree could not embrace it excepting of course if the parties had by agreement incorporated it in the decree. This the parties did not do.

9. That being so, in my view the Courts below have completely gone wrong in interpreting the statements, Exhibits D-2 and D-3, as indicative of the plaintiffs' having given up their rights under the declaratory part of the decree. If the facts had been viewed as a whole and not divorced from one another, no other conclusion would have been possible than the one to which I have come. In the circumstances, this appeal is allowed, the judgments and decrees of the Courts below are set aside. The case will now go back to the trial Court for determination of the remaining Issues on the merits. The costs will be costs in the cause.

10. The parties are directed to appear in the trial Court on the 3rd December, 1962.