
(1917) 02 AHC CK 0038
In the Allahabad High Court

Musammat Kulsum Fatma

APPELLANT

Vs

Saiyed Ali Akbar and Others

RESPONDENT

Date of Decision : 28-02-1917

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3

Citation : AIR 1917 All 71 : 39 Ind. Cas. 730

Hon'ble Judges : Walsh, J;Piggott, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Piggott, J.—This is an appeal from a decree of the Third Additional Subordinate Judge of Aligarh in an original suit. That decree purports to be passed on the basis of an award and there is no suggestion in any of the pleas in the memorandum of appeal that the decree is in excess of or not in accordance with the award. A preliminary objection is taken on behalf of the respondents that no appeal lies, or more strictly speaking, that the appeal cannot be heard on any of the pleas taken in the memorandum of appeal before us.

2. The facts essential to the determination of this point seem to be the following: The suit in the Court below was filed on the 11th of September 1913. There was a single plaintiff and there were four defendants. The Court fixed the 14th of November 1913 for settlement of issues. On that date the Court took note of the fact that three of the defendants, namely, defendants Nos. 1, 2 and 3 (there is a clerical error on this point in the proceedings of the Court below, but the facts are beyond question as above stated) were absent and unrepresented. It passed an order to the effect that the case would proceed ex parte against these defendants. The plaintiff and defendant No. 4 Mustafai Begam appeared before the Court by properly instructed Counsel and an application was then put in on behalf of the plaintiff by a Vakil duly engaged on her behalf, to the effect that negotiations were going on for the arrangement of a compromise and asking that the case be adjourned for that purpose. Counsel representing defendant No. 4

concurred in this application and an order of adjournment was passed. The case came up again on the 20th of December 1913. On that date an application was made which is the important document for consideration in the matter now before us. It is printed on page 7 of the paper-book. The application was presented on behalf of defendant No. 4 by her general attorney. It is to the effect that Mr. W.S. Marris, Collector of Aligarh, has been appointed as arbitrator to determine the questions raised in the suit by agreement between the plaintiff and the aforesaid contesting defendant. The Court is informed that the said arbitrator has consented to act and is "making inquiries", though he has not yet prepared any award. The prayer is that the case may be adjourned till the award is given. This application was endorsed by Mr. M.R. Kadri, Barrister-at-law, appearing on behalf of the plaintiff, and the adjournment asked for was granted accordingly. On subsequent dates six more applications were made, all on behalf of the plaintiff either by Mr. Kadri or by Mr. S. Abdullah, a Pleader engaged on her behalf. These applications were all for further adjournments of the hearing, on the ground that the arbitration proceedings were going on before Mr. Marris and that his award might be expected shortly. On each occasion the Court granted the application for adjournment, fixing a further date on which, the case was to come up for orders. On the 1st of May 1914 the Court decided to communicate direct with the arbitrator and caused a letter to be addressed to him, asking him to state how soon he hoped to be able to complete the arbitration proceedings, at the same time ordering the case to be put up again on the 2nd of June 1914. On that date the Court was informed that the arbitration enquiries had been completed and that an award might be expected very shortly. As a matter of fact an award was made by Mr. Marris and was duly registered on the 24th of June 1914. It is to be observed, though the fact is not essential, that the absent defendants Nos. 1, 2 and 3 had in the meantime petitioned Mr. Marris, expressing their agreement that his award should determine the litigation. On the 11th of July 1914 defendant No. 4 asked that a copy of this award might be filed and made a judgment of the Court. Upon this objection was taken by the plaintiff on a variety of grounds, and an order was passed, which is not on the printed book, but which seems to be of considerable importance. It is dated the 15th of August 1914, and its importance lies in the fact that it was passed by the Subordinate Judge who had hitherto been in charge of the case, whereas the decision under appeal was passed later on by his successor in office. In this order it is noted that the objection taken by the plaintiff is to the effect that the arbitration in question could not be treated as an arbitration upon a reference made by the Court, within the meaning of the first 16 paragraphs of the Second Schedule to the Civil Procedure Code, but ought to be dealt with as an award in a matter referred to arbitration without the intervention of a Court, within the meaning of paragraph 20 of the same Schedule. With regard to this plea, the learned Subordinate Judge seems to have taken up the position that it did not really matter whether the question before him was one of passing judgment and decree under paragraph 16, or under paragraph 21 of the Schedule. In either case he has to deal with an award actually before the Court to which the plaintiff

has taken a number of objections of the kind referred in paragraphs 14 and 16 of the Schedule. It was incumbent on the Court in any event to adjudicate upon these objections, and the Court proceeded to fix a date for enquiring into and adjudicating upon the same. Formal issues were drawn up and a date fixed for their determination. The matter eventually came up for decision before the successor of the learned Subordinate Judge who had passed that order and had framed the six issues. That officer seems to have been somewhat puzzled by the position of affairs and inclined to take a different view from that taken by his predecessor. Upon an issue which has been somewhat inaccurately framed, he went into the question whether the award which he was asked to make a decree of Court could be regarded as an award filed under either the earlier or the later portion of the Second Schedule to the Civil Procedure Code. The decision at which he seems to have arrived is that it is not material definitely to determine this question. He says that whether this be so or not, the agreement come to between the parties to refer the matter to arbitration, read together with the arbitrator's award, amounts at least to an adjustment of the suit by a lawful agreement, within the meaning of Order XXIII, Rule 3, of the Civil Procedure Code. In order to decide whether, as a matter of fact, the suit had been so adjusted it was necessary for the Court to determine the very same questions which would have to be determined in order to decide whether the award itself was binding, or was open to objection under paragraphs 14 and 15 of the Second Schedule to the Civil Procedure Code. The Court below accordingly went on to consider these points and having found on every point in favour of the defendant, that is to say, against the objections taken by the plaintiff to the validity of the award, it ordered that the plaintiff's claim be decreed in terms of the award dated the 24th of June 1914 made by Mr. W.S. Marris.

3. Now that the matter has been brought before us in appeal, it is necessary for us to determine whether, as a matter of fact, this was an award to which the provisions of the Second Schedule to the CPC applied, or not. It is impossible for us to put aside this question as indifferent, because we have to determine whether or not an appeal lies. If the question were one under Order XXIII, Rule 3, Civil Procedure Code, an appeal would lie against the order recording the terms of the award as an agreement or compromise disposing of the suit [vide Order XLIII, 1(m) of the Civil Procedure Code]. If, on the other hand, what we have before us is a judgment in the terms of an award passed either under paragraph 16 or under paragraph 21 of the Schedule, and it is to be noticed that the appeal before us is in terms an appeal against the decree and not an appeal against any order which resulted eventually in the said decree, then no appeal lies against the decree on any of the grounds taken in the memorandum of appeal now before us. The conclusion we have come to is that there was in this matter, having regard to the substance rather than to the form, a reference to arbitration by the Court under the earlier paragraphs of the Second Schedule to the Civil Procedure Code. The parties did not merely ask the Court to adjourn the suit, and to keep on adjourning it, on the ground that they were trying to arrive

at a compromise and had a fair prospect of doing so, but they expressly informed the Court that they had referred the case to a certain arbitrator, and they asked the Court over and over again to give time for the preparation and submission of that arbitrator's award. Over and over again, when these applications for adjournment were made, the Court could have rejected any one of them. It could have taken action under paragraph 8 of the Second Schedule to the Civil Procedure Code, taking note of the fact that no award had been received within the date fixed for the matter to come up before the Court for orders and have passed an order superseding the arbitration and deciding to proceed with the trial of the suit itself. Every time that the Court granted an adjournment under these circumstances it was in substance fixing a further date within which Mr. Marris was to make his award on the arbitration.

4. We ought perhaps to notice the cases which are principally relied upon on behalf of the appellant as supporting a contrary view. It was held in a case somewhat similar to the present, *Pragdas v. Girdhardas* 26 B. 76 ; 3 Bom. L.R. 431, that it was open to the Court to treat an award arrived at upon an arbitration commenced after the institution of the suit as an adjustment of the suit under the provisions of Order XXIII of the Civil Procedure Code. This is obviously not quite the point now before us. The case of *Vyankatesh Mahadev v. Ramchandra Krishna* 27 Ind. Cas. 46 ; 38 B. 687 ; 16 Bom. L.R. 653 seems in general principle rather against the plaintiff's contention than otherwise. At any rate it has no direct bearing on the case now before us, because the facts there were the precise opposite to those with which we have to deal. An application was made to the Court to adjourn the suit in order to give the parties time to refer the question to arbitration, but the Court refused to adjourn and insisted upon proceeding with the trial of the suit. It was held that the Court had jurisdiction to do so, and it certainly had. In *Venkatachellam Reddi v. Rungiah Reddi* 12 Ind. Cas. 372 ; 36 M. 353 ; 10 M.L.T. 248 ; 21 M.L.J. 990 ; (1911) 2 M.W.N. 249 the decision is only authority for the proposition that paragraph 17 of the Second Schedule to the CPC would not apply to the facts now before us. There is no suggestion that they do so apply. The question is whether paragraphs 1 to 16 apply, or in the alternative paragraphs 20 and 21.

5. On the other side we may refer to two or three cases. The case of *Lutawan Kvbar v. Lachiya* 21 Ind. Cas. 989 ; 36 A. 69 ; 12 A.L.J. 57 may be noticed, merely as the final decision of this Court on the question of the appealability of a decree passed upon an award. In *Ghulam Khan v. Muhammad Hassan* 29 C. 167 ; 29 I.A. 51 ; 12 M.I.J. 77 ; 1902 4 Bom. L.R. 161 ; 6 C.W.N. 226 ; 25 P.R. 1902 ; 8 Sar. P.C.J. 154 their Lordships of the Privy Council have laid down the general principles governing references to arbitration and decrees passed thereon. In *Nidamarthi Krishnamoorthy v. Garigiparti Ganapatilingam* 34 Ind. Cas. 741 ; 3 L.W. 375 the learned Judges of the Madras High Court had to deal with a case the facts of which were very similar to those now before us. If that case was rightly decided, and we think it was, it can scarcely be denied that in the present case the orders passed by the Court upon the various applications for

adjournment amounted in substance to a reference of the dispute as between the plaintiff and the contesting defendant to the decision of Mr. Marris as arbitrator.

6. We may note another case [Shama Sundram Iyer v. Abdul Latif 27 C. 61 ; 4 C.W.N. 92 ; 14 Ind.Dec. 41 in which it was held that in Section 506 of the old Code (Act XIV of 1882), which is now paragraph 1 of the Second Schedule to the present CPC (Act V of 1908), the direction that the parties desiring a matter to be referred to arbitration must make their application to the Court in writing, is merely mandatory, and that a reference to arbitration made upon an oral application is not necessarily void. Now the irregularity of admitting an oral application seems to be at least as serious as, if not more serious than, any irregularity in the procedure of the Court below in dealing with the question of the reference to Mr. Marris which has been brought to our notice upon this record.

7. One point more may perhaps with advantage be noted. It seems impossible to deny that, even if this was not what we think it was, viz., a reference to arbitration made under the order of the Court, it was at least a matter referred to arbitration without the intervention of the Court, within the meaning of paragraph 20 of the Second Schedule to the Civil Procedure Code. If the decision of Mr. Marris were treated as having been arrived at on a reference to arbitration made under the terms of the above paragraph, the only result, so far as the case now before us is concerned, would be that an appeal would have lain against the order of the Court below directing the award to be filed. In view of the course which the proceedings took in the Court below, it is perhaps a little difficult to say which of the various orders passed in that Court could be regarded as the final order directing this award to be filed within the meaning of that paragraph. But at any rate there is no appeal now before us against any such order, the appeal is simply against the decree. The contention that this appeal cannot be maintained on the grounds taken in the memorandum of appeal seems to be well founded, and we must dismiss it with costs, including in this Court fees on the higher scale.

Walsh, J.

8. I think the able arguments addressed to us by Mr. O'Connor are answered by the application of the simple principle of law that parties must be bound by their acts and conduct in proceedings in Court. Whatever may be said about other parties to this suit, it seems to me that the plaintiff represented by a leading Advocate, it appears, in the Court below from first to last went out of her way in every step she took to treat the proceeding as an ordinary reference to arbitration under the order of the Court, although no formal application for an order was considered necessary by the two legal gentlemen engaged and no formal order was drawn up. I am perfectly satisfied that the point now taken is an after thought. It never occurred to anybody in the case who represented the plaintiff from first to last that the proceeding before Mr. Marris was an arrangement to compromise the suit by the agreement of the parties within the

meaning of Order XXIII, Rule 3. Abundant proof is afforded of the view which I take about that by one of the numerous objections which the plaintiff filed to the award in paragraph 21. She said: "The statements caused to be written by the Counsel for the plaintiff in connection with the arbitration may be the result of the instruction of the perokars who took proceedings relating to the arbitration award in good faith but under personal fear." That is not a possible contention on behalf of a person who alleges that he is entering into arrangement by way of compromise. It is only applicable to a disputed suit before an arbitrator. I agree with every word which Mr. Justice Piggott has said.

9. By the Court.--The order of the Court is that this appeal is dismissed with costs, including in this Court fees on the higher scale.