
(1943) 07 BOM CK 0007
In the Bombay High Court

Rahmat Ilahi

APPELLANT

Vs

Mohammad Hayat Khan

RESPONDENT

Date of Decision : 28-07-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (1945) 47 BOMLR 553

Hon'ble Judges : Thankerton, J;Porter, J;George Rankin, J;Clauson, J;Atkin, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Clauson, J.—This is an appeal from a judgment of the High Court of Lahore, sitting as a Court of Second Appeal, dated April 25, 1939, allowing an appeal from a judgment of August 4, 1936, of a District Judge, which affirmed the decision of a Subordinate Judge of August 2, 1935, dismissing a suit of Mst. Umrao Begum (whom it will be convenient to call the plaintiff) who died on June 25, 1938, pending the appeal to the High Court, against Sheikh Rahmat Ilahi (whom it will be convenient to call the defendant). Two questions arise for their Lordships' determination, first, whether it was competent to the High Court to entertain the appeal from the District Judge, and, second, whether, assuming the appeal to be competent, the High Court were right in reversing the decision of the District Judge and holding, as they did, that the plaintiff was entitled to the relief claimed by her in the suit.

2. In a previous suit the defendant had obtained on March 30, 1933, a decree for Rs. 30,000 and interest against the plaintiff for money alleged to be due on a money bond. On August 28, 1933, the present suit was begun by the plaintiff against the defendant with a view to setting aside the decree for Rs. 30,000. The case alleged by the plaintiff in her petition of plaint as finally amended and dated December 20, 1933, may be summarized as follows : It was said that one Chaudhri Mohammed Din with the help of one Mahbub Ilahi had fraudulently secured the plaintiff's signature on the bond above referred to while she lay ill,

thus fixing on her a liability to the defendant, although she had never seen him nor raised any loan from him ; that three months later the same two persons without the plaintiff's knowledge purchased a stamp paper in the name of the plaintiff, and a fictitious dispute having been set up, an agreement referring the same to arbitration was written on the paper and a bogus arbitrator was appointed; that a suit was instituted by the defendant for a decree enforcing the arbitrator's award ; that on March 30, 1933, a decree against her for Rs. 30,000 was passed, having been obtained by a fraudulent representation that she accepted the award and its terms; that the award and the decree were null and void.

3. In the Court of the Subordinate Judge the issue was formulated as follows :

Was the decree in dispute obtained by fraud and collusion or undue influence and is therefore void or illegal.

4. The plaintiff gave evidence that she had ample means left to her by her father. She did not know the defendant, and had never even seen his face. She had not taken any loan from him or executed any document respecting loan in his favour. She had never nominated the alleged arbitrator. She had engaged one Iqbal Singh as her counsel in the previous suit. When Iqbal Singh went away to Lahore Umar Din told her that he (Umar Din) had engaged Mr. Sindhi as her counsel. She did not see Mr. Sindhi. She did not get any paper sent to him asking him to admit on her behalf the claim of Rs. 30,000. Umar Din did Court work for her ; he had been employed for her by Mohammed Din. The latter did work for her in connection with her cases. She used to put her signature on the papers at the instance of Mohammad Din. She could not exactly say whether he used to secure her signature on written papers or on blank papers. She does not know Urdu. She can only put her signature in Urdu. Mohammad Din simply asked her to put her signature. She used to put her signature at his instance. He used to secure her signatures in connection with all the Court matters. She used to put her signatures at his instance.

5. Dr. Sri Ram gave evidence that the plaintiff suffered from renal colic in 1932.

6. Mr. Sindhi, pleader, gave evidence that in March, 1933, Umar Din and Mohammad Din verbally retained him as counsel for the plaintiff and produced a form of power-of-attorney with the plaintiff's signature on it but otherwise blank. He took his fee and filled in the form. Subsequently Umar Din and Mohammad Din brought him an "application " signed by the plaintiff, which was in substance a submission to a decree in the terms of the award. He attended in Court and presented this document and submitted on her behalf to the decree for Rs. 30,000 accordingly. The plaintiff never came before him during the pendency of the suit nor did he ever consult her regarding the case.

7. Abdul Hamid Akhtar, who had acted as the arbitrator and given the award, the subject-matter of the decree which the plaintiff sought to set aside, gave evidence that no witness had come before him in the arbitration and that there

was no occasion on which both parties were present before him in the arbitration. The defendant's representative produced before him a bond in which the plaintiff had admitted Rs. 30,000 to be due to the defendant from her. No other documentary evidence was produced before him. He stated that as the plaintiff admitted the amount of the bond it was unnecessary to make an enquiry as to what the consideration for the bond was ; and also that he did not enquire from the defendant's representative what necessity the plaintiff had to borrow such a large amount ; and he made no enquiry regarding the fact from her.

8. The defendant gave evidence and in chief disclaimed any fraud in obtaining the decree. He said that at the suggestion of one Mohammed Hassan he had advanced money to the plaintiff, the sum in the first instance being Rs. 6,000. He took promissory notes and returned these to her when he secured from her the Rs. 30,000 bond. He gave her approximately Rs. 30,000 in a period of a year or a year and a half. The loan to the plaintiff was advanced out of the amount of his personal account. He had not kept a note of the personal account. He had not been introduced to the plaintiff by Mohammed Din.

9. The Subordinate Judge held that though the circumstances which led up to the giving of the award were not free from suspicion the evidence was not quite conclusive on the point and that at any rate the kind of fraud which would justify the setting aside of the decree on the score of fraud had not been proved. He made no finding as to whether the plaintiff was or was not a debtor to the defendant when she executed the bond, notwithstanding that she had sworn that she had never had any loan from the defendant and had not executed any document respecting the loan in his favour, evidence which (as appears above) was directly contradicted by the defendant.

10. The plaintiff carried the case on appeal to the Court of the District Judge, who took the evidence of two additional witnesses Umar Din and Mohammad Din. Umar Din deposed that at the plaintiff's request he brought Mr. Sindhi to her and that she told Mr. Sindhi that she owed money to the defendant and that she did not want to fight the suit for enforcement of the award, that she signed a written statement and asked Mr. Sindhi to present that statement in Court so that a decree might be passed against her. Umar Din admitted that he was illiterate and that for him all papers were the same. Mohammed Din disclaimed all knowledge of the statement of the plaintiff submitting to a decree on the award.

11. The District Judge in his judgment after stating the plaintiff's allegations, including her allegation that she had never received anything from the defendant, said that what he had to find was whether the written statement in which the plaintiff confessed judgment was in fact her written statement. In view of the fact that the plaintiff had stated that she did not know that the statement was by way of confession of judgment he was (he said) led to the suspicion that the plaintiff signed the statement without knowing what it was, and so he made further enquiry (i.e. by calling Umar Din and Mohammed Din). He referred to the

discrepancy between Umar Din's account of the genesis of the statement and the account given by Mr. Sindhi. He regarded it as very significant that although the plaintiff had started challenging the award (i.e. by instructing Iqbal Singh to put in a statement of objections to the award) she had suddenly collapsed and took no steps to question the decree until the following August when the decree was put in execution by attachment of her property. He considered the inference irresistible that she had decided not to prosecute her objections to the award. He summed up his views by stating; that as her silence from March 30 to August, 1933, stood unexplained, he could not come to any finding other than the one arrived at by the Subordinate Judge, that she had failed to prove the fraud alleged by her. He accordingly held that the appeal failed.

12. From this decision of the District Judge the plaintiff brought an appeal to the High Court at Lahore. The matter came before Tek Chand J. and, holding that the appeal raised an important, question of law, whether the facts and circumstances as disclosed on the record and found by the Court below do on do not in law amount to fraud, he referred the matter to a division bench.

13. Pending the hearing of the appeal in the High Court the plaintiff died, and as a preliminary to the hearing of the appeal various questions were argued as to the proper parties to be brought before the Court as her representatives. Counsel for the defendant, on the present appeal before their Lordships, stated that they did not desire to raise any point on that matter and their Lordships accordingly do not find it necessary to deal with those questions, and they will accordingly assume that the proper parties representing the plaintiff were before the High Court and are now before their Lordships.

14. It does not appear from the materials before this Board whether any and what objections were made at the hearing of the appeal before the High Court to the competency of this second appeal and in the judgment of the High Court the question of competency is not discussed, and the grounds on which the appeal was treated as competent are not stated. Possibly the learned Judges treated the question of competency as sufficiently dealt with by Tek Chand J. and accordingly assumed sub silentio that the question before them was one of law as formulated by Tek Chand J. On the present appeal a vigorous and lengthy argument was addressed to their Lordships in order to persuade them that the controversy on the second appeal could turn only on the weight of evidence, and it is, of course, well-settled that if that was in fact the only basis for the second appeal, that appeal was not competent. See *Mussummat Durga Choudhrai v. Jawahir Singh Choudhri* (1890) L.R. 17 IndAp 122 and *Wall Mohammad v. Mohammad Bakhsh* (1929) L.R. 57 IndAp 86 . Their Lordships are, however, not prepared to accept the view of the present case so presented to them. It is true that the question whether the decree in the former suit ought to be set aside necessarily involved the consideration of the circumstances relating to the arbitration and of the various steps taken in the course of the suit, and may also have involved the consideration of the plaintiff's inaction for a period of some four months after the

decree had been passed, and a decision on those matters (if they were the only relevant matters) might well amount to the decision of a question of fact on which a second appeal would not be competent. It appears, however, to their Lordships that a correct determination in law of the issue as raised in the action necessarily involved the consideration of the question of fact, on which there was a grave conflict of evidence, whether there ever had been any debt due from the plaintiff. The determination of this question was in their Lordships' judgment, vital to the determination of the question whether the proceedings to enforce the alleged debt were fraudulent. If in fact the plaintiff's allegation that there had never been any debt were found to be correct, the proceedings for enforcing the bond by an arbitration followed by a suit for a decree might well assume a very serious complexion. The failure of the Courts below to investigate and come to a finding on this basic question of fact constituted, in their Lordships' view, a serious error in law against which the plaintiff was entitled to relief on a second appeal. The material words of Section 100 of the CPC are as follows :

...An appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely (a) the decision being contrary to law?.

15. and, in their Lordships' view, those words directly cover the present case. Their Lordships had occasion to point out in *Damusa v. Abdul Samad* (1919) L.R. 46 IndAp 140 that where the Courts below had misconceived the real question of fact they had to try, there was an error of law on which a second appeal lay ; and their Lordships can see no difference in principle between a failure to appreciate and determine the real question of fact to be tried and a failure to appreciate and determine a question of fact which vitally affects the issue stated in the case. In either case the failure is a failure in the duty imposed by law on the Court, and the question whether there has been such a failure must, in their Lordships' opinion, be a question of law. Their Lordships would add that if, as was the duty of the High Court, that Court had clearly specified the grounds on which they held the second appeal to be competent, not only would their Lordships' task have been facilitated, but the expense and delay occasioned by the appeal to His Majesty in Council might very possibly have been saved.

16. Their Lordships are accordingly of opinion that the appeal to the High Court was competent. u/s 103 of the CPC the High Court were free to determine the issues of fact on which the lower Courts had failed to make a finding; and accordingly it only remains for their Lordships to consider whether the appellant has shown any ground on which their Lordships ought to interfere with the High Court's findings of fact. These findings were reached after a careful consideration and detailed analysis of the evidence and are clearly and forcibly stated. They may conveniently be summarized as follows. The High Court held that the loan of Rs. 30,000 had not been made, that the dispute which was the basis of the arbitration was a mere pretence and that the plaintiff had been overreached by people in whom she reposed confidence and trust when she was made to sign a

document which purported to refer non-existing disputes to arbitration. They held that the plaintiff Was deliberately and fraudulently kept in the dark regarding the course of the proceedings before the arbitrator and that those proceedings were a fraudulent contrivance designed to secure a false decree against her, the fraud thus relating to proceedings which eventually culminated in a decree. They held that the admission by counsel engaged on her behalf by means of which he agreed to a decree for Rs. 30,000 against a client whom he had not personally consulted on the subject was a continuation of the same fraud. On these findings they held that the plaintiff was entitled to have the decree in the earlier suit set aside.

17. Counsel for the defendant in the present appeal have taken their Lordships carefully through the whole of the evidence and through the detailed findings in the judgment of the High Court and the reasons on which they are based ; and they have subjected their findings and reasons to minute criticism. Counsel, however, have, in their Lordships" judgment, completely failed to displace those findings or the reasons for them which are, in their Lordships" judgment, sufficiently and fully given in the judgment of the High Court and do not need repetition.

18. Their Lordships accordingly see no reason for disturbing the judgment of the High Court, and they will humbly advise His Majesty that the appeal should be dismissed with costs.