PRIVY COUNCIL.

P.C.*
1915

Oct. 19;
Nov. 2.

UMED SINGH
v.
SETH SOBHAG MAL DHADHA.

[ON APPEAL FROM THE COURT OF THE CHIEF COMMISSIONER OF AJMER-MERWARA.]

Arbitration—Application of parties to Court for reference of suit to arbitration—Omission of guardian of minor party to sign application—Civil Procedure Code, 1908, ss. 114, 115, 121 and O. XLVII (1); Sch. II, ss. 1, 15 and 16 (1) (2)—Ground for setting aside award—Reversal by Officiating Chief Commissioner on review of order of Chief Commissioner refusing revision—Finality of decree on award.

Held, that Sch. II s. 1 of the Civil Procedure Code, 1908, which provides that where the parties to a suit have agreed that the matters in difference shall be referred to arbitration they may apply in writing to the Court for an order of reference, does not require that the writing should necessarily be signed; and where the guardian *ad litem* of a minor party was in Court and assented to the application, the omission of the guardian to sign it was immaterial.

Held, also, (allowing the appeal) that in this case there was no defect on the face of the award, nor any misconduct of the arbitrators or umpire, nor any concealment of facts by any of the parties which would bring the case within those provisions in Sch. II which might enable the Court to set it aside; and that the officiating Chief Commissioner was, therefore, not justified in interfering in review with an order made by the Chief Commissioner refusing revision.

APPEAL 103 of 1914 from a judgment (23rd May 1912) of the officiating Chief Commissioner of Ajmer-Merwara, which set aside certain arbitration proceedings, and the award therein made by the arbitrators, and remanded the respondent's suit to the Court of

Present: VISCOUNT HALDANE, LORD PARMOOR, LORD WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

first instance (the Extra Assistant Commissioner, and Subordinate Judge, Ajmer).

The defendants were the appellants to His Majesty in Council.

The facts are sufficiently stated in the judgment of their Lordships of the Judicial Committee, and are also shortly set out in the judgment appealed from of the officiating Chief Commissioner (MR. W. STRATTON) which was as follows:—

"The facts of this case are briefly that the plaintiffs, Seth Sobhag Mal and his son Kanwar Kalyan Mal of Ajmer, sued to recover a sum of about Rs. 88,320 on certain accounts from Thakur Umed Singh of Sawar and his son Kunwar Banspradip (minor) represented by his guardian Bhur Singh. At a certain stage in the proceedings the parties agreed to settle the dispute by arbitration and a written application for an arbitration order was made to the Court. This application was signed by all the parties except the minor Kunwar Banspradip Singh, nor was it signed by the minor's guardian.

"The Court referred the matter to the arbitration of Messrs. Mitha Lal and Jamna Shankar with the Raja Dhiraj of Shahpura as umpire. The arbitrators agreed that Rs. 5,945 should be disallowed, but could not agree about the balance of the claim, and the matter was then referred to the umpire who further reduced the claim by Rs. 65,064 and gave an award for Rs. 17,510. After hearing the plaintiffs' objections the Court, on 16th May 1911, passed a decree according to the award.

"The plaintiffs then came up to this Court in revision, the main contention being that as the application for arbitration was not signed by all the interested parties the lower Court had acted without jurisdiction. It was held by this Court (Sir Elliot Colvin) in its

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order dated the 25th November 1911 that as the *agreement* to arbitrate had been signed by all the parties the omission to sign the *application* to the Court by the minor or his guardian was unimportant. It was further held that only the minor or his guardian could raise such objections—not the plaintiffs.

"Other points were dealt with, and it was finally held that there was no illegality or irregularity in the proceedings to justify revisional interference, and the petition was rejected. It is this order of which review is now sought.

"The case has been presented to me by Mr. V. G. Bapat assisted by Mr. Gangaram on behalf of the plaintiffs. The other side have not, I regret to say, been represented and this is no doubt unfortunate in an important case of this kind. Due notice, however, was received by the defendants, and there was ample time for them to act; there seemed to be no valid reason for not proceeding, and arguments were accordingly heard for the plaintiffs *ex parte*.

"Although there are several grounds urged in the petition for review, only one ground was taken up in the argument, namely, that the learned Chief Commissioner was in error in regarding the omission to sign the application for arbitration by one of the parties as unimportant, and covered by the existence of the agreement between the parties.

"The case rests on the specific law laid down in Schedule II, paragraph 1 of the new Civil Procedure Code (corresponding with section 506 of the old Code). It is argued that according to this rule non-joinder of all the parties renders the application, and all proceedings based thereon, illegal and *ultra vires*.

"Mr. Mulla in his commentary writes that, 'if all parties interested have joined in the application, an order of reference will be made under paragraph 3

and, in order to give jurisdiction to the Court to make an order of reference . . . . it is necessary that all the parties interested must apply to the Court.' These opinions are based on Privy Council and Calcutta High Court rulings in *Ghulam Khan* v. *Muhammad Hassan* (1), and *Joy Prokash Lall* v. *Sheo Golam Singh* (2).

"Mr. Banerji in his work 'Arbitration in India' (Ed. 1908), page 73, quotes a Privy Council ruling to the effect that, even when the parties consent to waive conditions of law, this does not give jurisdiction; and Sir Peter Maxwell at page 579 of his 'Interpretation of Statutes' says that where an act required by statute is precedent to jurisdiction, compliance cannot be dispensed with. Mr. Justice Richards in *Ramjiawan Ram* v. *Kali Charan Singh* (3) has laid down that Courts ought to be most careful that the provisions of section 506, Civil Procedure Code, 1882, are strictly complied with.

"The learned counsel further argued that the agreement itself could not be taken as equivalent to the application for reference. The Chief Commissioner might have been influenced by the affidavit that appeared on the record to the effect that the minor had been present in Court when the application was made. But this affidavit was very defective and inadmissible. It does not bear the minor's name or that of his guardian as one of those who presented it. It has no order of the Court to bring it on the record, and it has been referred to in the lower Court's judgment actually after the Court had itself passed an order (dated 6th May 1911) to the effect that extraneous evidence about the arbitration being entered on with the consent of all parties, was inadmissible.

(1) (1901) I. L. R. 29 Calc. 167; L. R. 29 I. A. 51.

(2) (1884) I. L. R. 11 Calc. 37.

(3) (1907) I. L. R. 29 All. 429, 430.

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"The Judge did not in the proceedings note the fact that the minor was present when the application was presented, and failing that the affidavit is valueless in evidence: *vide* Field's Law of Evidence, page 406.

"Counsel further urged that even if the umpire's action had been with proper jurisdiction, it was in itself illegal, as he opened the case *de novo*, whereas all he had to do was to consider the points on which the arbitrator had failed to agree. Nor did he take evidence, though he called for it. He failed to realise that his position was judicial. His award had greatly prejudiced plaintiffs, and was improperly given, even if he had jurisdiction.

"I have heard Mr. Bapat's able presentation of the case with much interest, and I have read the rulings above quoted and several others. It is, as before remarked, unfortunate that the other side have not been represented, but this seems to be their own fault. Mr. Bapat's arguments appear to me to be incontrovertible, and I feel sure that my predecessor in office would not have hesitated to accept them as exceedingly strong ones. It is no doubt true that the error in the proceedings is a technical one, but the Court frequently insists on technical accuracy, and it is none the less illegal because it is technical. An error in a point of law is a good ground for review of judgment; and I am of opinion that a good case has been made out for review of this Court's order of the 25th November 1911, which was passed summarily without hearing arguments.

"I accept the application with costs, and in doing so accept the previous application for revision of the lower Court's order. The whole of the arbitration proceedings ordered in the lower Court must be regarded as without jurisdiction, and must be set aside.

"The case stands where it did before reference to arbitration was ordered by the lower Court, and must be proceeded with according to law from that point."

On this appeal, which was heard *ex parte*,

B. Dube, for the appellants, contended that the decree of 16th May 1911 made on the award by the Trial Judge was final and no appeal lay from it: reference was made to the Civil Procedure, 1908, Schedule II, sections 15 and 16 (*1*) and (*2*). The Chief Commissioner, though under section 16 he had, it was submitted, no power to entertain an appeal from or to revise the order, rightly held that the objection taken by the respondents that the application to the Court to refer the case to arbitration had not been signed by the guardian *ad litem* was not a valid objection, because all the parties having consented to it, the application was therefore not required to be signed. He found that there was no illegality or irregularity in the proceedings such as would justify revision of the order under section 115 of the Code, and he rightly rejected the application. The officiating Chief Commissioner, it was contended, acted entirely without jurisdiction in setting aside the Commissioner's order on review on the ground that the omission to sign the application for arbitration was fatal to the validity of the proceedings: such action was not only not justified under section 114 of the Code, but was a violation of the provisions of O. XLVII (*1*) of Sch. I. Reference was also made to the case of *Ghulam Khan* v. *Muhammad Hassan* (1), decided under the Civil Procedure Code, 1882. The decision appealed from, it was submitted, should be reversed.

(1) (1901) I. L. R. 29 Calc. 167; L. R. 29 I. A. 51.

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The judgment of their Lordships was delivered by VISCOUNT HALDANE. In this appeal the question is whether the Officiating Chief Commissioner of Ajmer-Merwara has properly set aside the award in certain arbitration proceedings. The respondent had brought a suit to recover from the appellants Rs. 88,320 alleged to be due under a mortgage. The appellant first on the record is the father of the second appellant, who was at the time of the proceedings a minor. The Trial Judge appointed one Bhur Singh guardian *ad litem* of this minor appellant. Before the trial came on, all the parties entered into an agreement to refer the questions in dispute to two arbitrators and, in the event of these differing, to an umpire. The agreement was signed by the appellants and respondents each with his own hand, excepting in the case of the minor appellant, on whose behalf it was signed by the guardian *ad litem*. The parties appeared before the Trial Judge and produced the agreement and applied for an order of reference. The guardian *ad litem* was present in Court and was a party to the application. The Trial Judge thereupon made an order of reference. The arbitrators differed, and the parties then concurred in an application to refer the dispute to the umpire, and an order was made accordingly. The umpire made an award allowing the respondents' claim to the extent of Rs. 17,510 only. This award was filed in Court. The respondents, being dissatisfied with it, applied to the Trial Judge under the provisions of s. 15 of the Second Schedule of the Code of Civil Procedure, 1908, to set the award aside. The Trial Judge refused the application. He held that all the parties to the suit, including the guardian *ad litem*, had been consenting parties to the application, and further that there was no ground for the objections made on the merits to the award. The order was

made under s. 16 of the Second Schedule to the Code already referred to. This section provides that—

"(1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree, except in so far as the decree is in excess of, or not in accordance with, the award."

The respondents then presented an application to the Chief Commissioner under section 115 of the Code of Civil Procedure. This section provides that :—

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court, and in which no appeal lies thereto, and if such subordinate Court appears (*a*) to have exercised a jurisdiction not vested in it by law, or (*b*) to have failed to exercise a jurisdiction so vested, or (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order as it thinks fit."

The Chief Commissioner dismissed the application. He held that the point taken that the application to the Court for reference to arbitration was not signed by the guardian *ad litem*, was not a good one, having regard to the fact that the agreement itself was signed by all parties concerned. Moreover, he thought that it was for the minor or his guardian, and not for the applicants, to raise such an objection. He also held that even if an agreement or compromise entered into on behalf of a minor without the leave of the Court was voidable against all parties other than the minor, that did not make it necessarily void against the minor. As to the merits he was of opinion that there was nothing in the case made for the applicants, the present respondents, based on misconduct or irregularity on the part of the arbitrators and umpire.

The respondents then applied to the Court of the Chief Commissioner for a review of this order,

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relying on s. 114 of the Code which, subject to such conditions and limitations as may be prescribed, allows a person aggrieved to apply for a review of any decree or order from which no appeal is allowed by the Code, and relying also on Order XLVII (*1*) of the First Schedule to this Code which provides that he may apply for such review on :—

"The discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason."

These rules are, under s. 121 of the Code, to have effect as if enacted in it, until altered as the Code provides.

This application for review was heard, not by Sir Elliot Colvin, the Chief Commissioner, but by Mr. Stratton who was officiating in his absence. The appellants were not represented on this hearing. The main point urged was that in dismissing the application for review, the Chief Commissioner was in error in regarding the omission to sign the application for arbitration by the minor or his guardian as unimportant, and as covered by the agreement which all the parties had signed. The Officiating Chief Commissioner acceded to the application, and set aside the whole of the arbitration proceedings, on the ground, apparently, that this error in the proceedings, though technical only, was fatal. The only other arguments before him appear to have been that even if the umpire had proper jurisdiction his action was illegal, because he opened the case *de novo*, whereas all he had to do was to consider the points on which the arbitrators had failed to agree, and because he had not taken evidence, although he called for it.

Their Lordships have had to hear the appeal *ex parte*, as the respondents, the plaintiffs in the suit,

did not appear on the appeal, but they have examined closely the documents and the various judgments in the Courts below. They are of opinion that the decisions of the Trial Judge and of the Chief Commissioner were right, and ought not to have been interfered with by the Acting Chief Commissioner.

In the first place the Second Schedule to the Code of Civil Procedure, which provides by s. 1 that where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an Order of Reference, does not require that the writing should of necessity be signed. As the guardian in this case was in Court and assented to the application it is plain that no injustice has arisen. They think, therefore, that there is no substance in the technical objection relied on. Nor can they find any defect on the face of the award, or any misconduct of the arbitrators or umpire, or concealment of facts by any of the parties which would bring the case within those provisions in the Second Schedule which might enable the Court to set it aside. They have accordingly arrived at the conclusion that the Acting Chief Commissioner was not justified in interfering with the order refusing revision made by the Chief Commissioner.

They are, therefore, of opinion that the appeal must be allowed with costs here and in the Courts below, and they will humbly advise His Majesty to that effect.

Appeal allowed.

Solicitors for the appellants: *Barrow, Rogers & Nevill.*

J. V. W.