FULL BENCH.

1913
December, 1.

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

LUTAWAN AND OTHERS (PLAINTIFFS) *v.* LACHYA AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *schedule II, articles* 15 *and* 16 *; order XXXII, rule* 7—*Arbitration—Agreement by guardian* ad litem *of minor party to refer—No objection taken to validity of award—Decree in accordance with award—Appeal.*

Where an objection to the validity of an award, which might have been raised under article 15 of the second schedule to the Code of Civil Procedure, is not raised within the time limited, or, being raised, is rejected, and the court proceeds to pronounce judgement and to frame a decree, no appeal will lie except on the grounds stated in article 16 of the same schedule. So *held* by RICHARDS, C. J. and BANERJI and RYVES, JJ.

Semble (*per* RICHARDS, C. J., and RYVES, J.) that order XXXII, rule 7, of the Code of Civil Procedure, 1908, does not control article 1 of the second schedule. It is not therefore necessary for the guardian of a minor party to obtain the express leave of the court before agreeing to a reference to arbitration being made by the court.

Ghulam Khan v. *Muhammad Hassan* (1) and *Hardeo Sahai* v. *Gauri Shankar* (2) referred to. *Lakshmana Chetti* v. *Chinnathambi* (3) distinguished.

THE facts of this case were as follows :—

During the pendency of the suit an application was made by all the parties, including minors, to refer the matter to a named arbitrator and order of reference was made. No application was made for leave to refer the matter on behalf of the minors. The arbitrator made an award and filed it. Objections were taken to the award but were overruled and a decree was made in accordance with the award. In appeal the objector set up a new plea as to the invalidity of the award on the ground that, as no leave of court had been obtained on behalf of the minors, there was no legal reference and no legal award. The court set aside the decree upon this ground. The plaintiffs appealed.

The Hon'ble Dr. *Sundar Lal*, for the appellants :—

The only ground on which the lower appellate court has set aside the award and the decree based thereupon was that the sanction of the court had not been obtained to the making of

* First Appeal No. 35 of 1913 from an order of L. Marshall, District Judge of Jaunpur, dated the 4th of December, 1912.

(1) (1901) I. L. R., 29 Calc., 167. (2) (1905) I. L. R., 28 All., 35.
(3) (1900) I. L. R., 24 Mad., 326.

1913

LUTAWAN v. LACHYA.

the submission to arbitration under rule 7, order XXXII of the Code. It had been definitely ruled by this Hon'ble Court under the corresponding section 506 of Act XIV of 1882, that no such sanction was required in such a case. Following the practice settled by that ruling, the parties did not apply for such sanction. No such sanction is necessary in law. If the parties unanimously move the court to make the reference, such unanimous action, though reduced to the form of a petition in writing signed by them all is not an "*agreement*" of the nature mentioned in rule 7, order XXXII. If it were so every motion by 'consent' including one for the adjournment of a case would be an agreement to which the sanction of the court would be necessary. It is the court which makes the reference, after satisfying itself that all the parties interested *agree* in such reference being made. Any facts antecedent to the reference affecting its validity should have been made the subject of an objection under paragraph 15 of schedule II of the Code. The words "*or being otherwise invalid*" added to sub-clause (3) of that paragraph, were intended to cover all possible objections of any kind to the award. The intention of the Code as now amended was that all objections to the award should be made to the court making the reference, whose decision on the validity of the award was to be final. The decree on the award was final under paragraph 16 of schedule II. Any objection not made to that court or if made to that court and rejected by it, could not be considered in appeal: *Ghulam Khan* v. *Muhammad Hassan* (1), *Hansraj* v. *Sundar Lal* (2), *Shib Kristo Daw & Co.* v. *Satish Chandra Dutt* (3) and *Kanakku Nagalinga Naik* v. *Nagalinga Naik* (4). It was not open to the lower appellate court to entertain an appeal, and to reconsider the decision of the court of first instance.

Munshi *Haribans Sahai*, followed on the same side.

Mr. *Hameed-ullah*, for the respondents.

The reference to arbitration was bad; there being minors on both sides the permission of the court was necessary, and it was not granted to either side. In cases where minors are concerned it is the duty of the court itself to see that all legal requirements

(1) (1901) I. L. R., 29 Calc., 167. (3) (1912) I. L. R., 39 Calc., 822.

(2) (1908) I. L. R., 35 Calc., 648. (4) (1909) I. L. R., 32 Mad., 510.

are fulfilled, even when the parties do not call the court's attention. The reference being bad in law, there was no proper arbitration. No valid and legal award was passed, which could form the basis of a decree and against which the law gives no appeal. Also the words of the present decree go beyond the words and spirit of the so-called award. No minor can be blamed for not filing objections to the reference on the award in the court of first instance. The defects in the wording of the decree could only be discovered later on and a higher court of law is not precluded from entertaining an appeal. Reference was made to sections 462, 506 and 521 of the Code of Civil Procedure, 1882, and to the Code of 1908, order XXXII, rule 7, and schedule II, articles 15 and 16, also to *Laksh mana Chetti* v. *Chinnathambi Chetti* (1).

RICHARDS, C. J.—This appeal arises out of a suit to recover possession of a house. The claim was only valued at the small sum of Rs. 43-4-0. Amongst the array of parties were minors on both sides who were represented in the suit by their respective guardians. During the course of the litigation an application was made in writing by all the parties that the matters in dispute should be referred to the arbitration of a named arbitrator. In pursuance of this application the court made an order of reference. The arbitrator took upon himself the burden of the arbitration and made an award. Objections were filed, on behalf of the defendants, to the award. The objections were six in number, relating to the conduct of the arbitrator and his alleged refusal to hear the evidence offered by the parties and other matters. No objection was taken that the leave of the court was not obtained prior to the order of reference, and it is quite clear that no such matter was ever brought under the notice of the court which had made the order of reference. The learned Munsif heard the various objections and having overruled them made a decree in accordance with the award. An appeal was preferred to the District Judge by the defendants, and there for the first time it was objected that the leave of the court had not been obtained prior to the reference, and it was contended on these grounds that there was no valid reference and, therefore, no valid award, and that an appeal lay. The learned District Judge accepted this contention

(1) (1900) I. L. R., 24 Mad., 326.

1913

LUTAWAN v. LACHYA.

and set aside the decree and the award and remanded the case. Hence the present appeal.

Arbitration proceedings are now governed by the second schedule to the Code of Civil Procedure. The first paragraph provides as follows :—

Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgement is pronounced, apply to the court for an order of reference.

Clause (2) is as follows :—

" Every such application shall be in writing and shall state the matter sought to be referred."

This provision corresponds to section 506 of the Code of Civil Procedure of 1882, the only difference being that in section 506 the words are as follows :—

" If all the parties to a suit desire that any matter in difference between them be referred to arbitration, they may."

The schedule then provides for the order of reference, the appointment of arbitrators and other matters. Paragraph 15 provides that no award shall be set aside except on one of the grounds specified :

(1) " Corruption or misconduct of the arbitrator or umpire."

(2) " Either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire."

(3) " The award having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the court, or being otherwise invalid."

The words " or being otherwise invalid " have been introduced into the present Code and were not in the Code of 1882. Paragraph 16 provides :—

" 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 judgement according to the award."

Clause (2) provides :—

" Upon the judgement 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."

It is contended on behalf of the appellants, first, that the matter in dispute which should be referred to arbitration is not an agreement within the meaning of order XXXII, rule 7, of the Code of

Civil Procedure requiring the leave of the court. It is further argued that, even if such an agreement was an agreement within the meaning of order XXXII, rule 7, the fact that leave was not obtained does not give a right of appeal. It was a matter which the court which had made the order of reference could have considered, if it had been properly brought before it as being a ground on which the award was "otherwise invalid."

In support of the appellant's first contention the case of *Hardeo Sahai* v. *Gauri Shankar* (1) was relied upon. In that case it was expressly decided that it was unnecessary to obtain the leave of the court before making an application to refer under Chapter XXXVII of the Code of Civil Procedure. The learned Judges say (at page 36) :—"In the first place we do not think that section 462 has any application to the proceedings provided for by Chapter XXXVII of the Code, that is to arbitration proceedings, which are special proceedings." This, no doubt, is an authority in favour of the appellant's contention. There is a slight change in the wording of paragraph 1 of the second schedule which I have already referred to. The words in section 506 are :

"If all the parties to a suit *desire* that any matter in difference between them be referred to arbitration"

while in paragraph 1 of the second schedule the words are

"Where in any suit all the parties interested *agree* . . ."

I do not think that much weight can be given to this verbal alteration in the provisions of the Code. It is not the parties who refer. It is the court which makes the order of reference, and at the present time, just as under the old Code, all that the parties do is to agree to make an application to the court asking it to make an order of reference.

The appellants also rely on the case of *Ghulam Khan* v. *Muhammad Hassan* (2). This was a decision of their Lordships of the Privy Council, in which their Lordships express a strong opinion in favour of the finality of awards. Exactly the same point had been taken as a ground for revision in the Punjab Chief Court as is raised in the present appeal, namely, that the leave of the court had not been obtained prior to the application for an order of reference. Sir William Rattigan, who appeared for the

(1) (1905) I. L. R., 28 All., 35. (2) (1901) I. L. R., 29 Calc., 167.

1913

LUTAWAN v. LACHYA.

appellants, expressly took the ground that the reference to arbitration was an agreement within the meaning of section 462 and that the leave of the court ought to have been obtained under that section. Their Lordships do not specifically deal with this ground of objection. They, however, make the following remark :— "Inasmuch as their Lordships hold that the application in revision was incompetent, it would be a work of supererogation to discuss the various objections raised by the appellants in the High Court. It is enough to say that in their Lordships' opinion there does not appear to have been any substance in any one of them." It is not easy to say that their Lordships of the Privy Council omitted to consider this ground of objection which was not only taken in the Chief Court but was actually argued by counsel before their Lordships.

On this part of the case the respondents rely on the case of *Lakshmana Chetti* v. *Chinnathambi Chetti* (1). There the parties, one of whom was a minor, agreed to refer certain matters in dispute in a suit to arbitration. The court held that as the leave of the court was not obtained the minor was not bound by the award and accordingly the sale should be set aside. It may be pointed out that in this case the court made no order of reference. The submission to arbitration was a private submission to arbitration, not made through the court. It may further be pointed out that this decison was given before the decision of their Lordships of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan*, already referred to. While I am inclined to agree with the decision of the Court in the case of *Hardeo Sahai* v. *Gauri Shankar*, referred to above, I do not think it is necessary in the present case to decide the point, because I think that the appellants are entitled to succeed on the second ground. I have already pointed out that the present Code expressly authorizes the court making the order of reference to entertain objections taken on the ground of the invalidity of the award. It seems to me that it was the clear intention of the Legislature by this amendment of the Code that objections to the award on the ground of invalidity from any cause whatever should be decided by that court and by no other court. It is no doubt the duty of

(1) (1900) I. L. R., 24 Mad., 326.

the court which makes the order of reference to carefully consider all such objections, and I think that the court ought not to hesitate to set aside an award if it finds that it is on any legal ground invalid.

I accordingly would allow the appeal and set aside the order of the court below and restore the decree of the court of first instance.

BANERJI, J.—The first question to be determined in this appeal is whether an appeal lay to the court below from the decree passed by the court of first instance. That decree was in accordance with an award of an arbitrator, and was not in excess of the award nor at variance with it. There may be a few verbal differences between the language of the award and the language of the decree, but in substance the judgement of the court and the decree which followed it are in complete accordance with the award. In the appeal to the lower appellate court no objection was taken on the ground that the decree was not in accordance with or was in excess of the award. Paragraph 16 of the second schedule to the Code of Civil Procedure provides that where a decree is in accordance with the award, and not in excess of or at variance with it, no appeal lies. No doubt, before the new Code of Civil Procedure was enacted, it had been held in a number of cases that for the finality of a decree made in accordance with an award, it was essential that there must have been an award valid in law. In this respect the present Code of Civil Procedure has made this alteration in the law that it has provided in paragraph 15 that an objection to the award may be taken on the ground that the award is "otherwise invalid." It is manifest from the provisions of the Code of Civil Procedure that the intention of the Legislature is to give finality to the decisions of arbitrators and to decrees passed in accordance therewith. Their Lordships of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan* (1), emphasized the desirability of such finality. In consequence of this decision of their Lordships the Legislature apparently added the words "or being otherwise invalid" in clause (*c*) of paragraph 15 of the second schedule. Under the old Code an objection could not be taken before the court which referred the case to arbitration on the ground

(1) (1901) I. L. R., 29 Calc., 167.

1913

LUTAWAN v. LACHYA.

that the award was invalid for any reasons other than the reasons mentioned in section 521 of that Code. But, as pointed out above, an additional reason has been added in the present Code for objecting to an award, namely, that it is " otherwise invalid." If upon such objection being taken the court judicially considers the objection and decides it in favour of the award, and passes judgement in accordance with the award the decree which follows such judgement is, under the present Code, final and no appeal lies from it. It is thus clear that the intention of the Legislature was that only one court, namely, the court which referred the case to arbitration, should try the question whether the award is invalid for any reason other than the reasons specifically mentioned in paragraph 15. It seems to me that the Legislature clearly intended to set at rest the conflict of opinion which existed before the enactment of the present Code and to take away the grievance which existed on the ground that the validity of an award could not be contested on any ground other than those specified in section 521 of the old Code. It is, therefore, needless to consider the various rulings on the point in cases decided before the enactment of the present Code. In the case before us the defendants took no objection before the court of first instance on the ground that the award was invalid because the agreement to apply to the court to refer the disputes between the parties to arbitration had not received the sanction of the court. Any such objection could have been taken before the expiry of the period of limitation allowed for preferring such objections and not having been taken at that stage it could not at any subsequent stage be put forward as a ground for setting aside the award. It was therefore, too late for the defendants to urge, as they did before the lower appellate court, that the award was invalid on the ground I have already mentioned, and it is equally too late to urge before this Court that it is invalid. I agree with the learned Chief Justice in holding that no appeal lay to the court below. Having regard to this view it is not necessary to express any opinion on the other question raised in the argument before us, namely, whether an agreement entered into by the guardian of a minor for making an application for an order of reference to arbitration comes within the purview of order XXXII, rule 7, of the Code. I

1913

LUTAWAN v. LACHYA.

would allow the appeal and set aside the order of the court below.

RYVES, J.—I agree with the learned Chief Justice in thinking that the decision in I. L. R., 28 All., 35, was right. I do not think the Legislature, by substituting the word "agree" in paragraph 1 of the second schedule of the new Code, for " desire " in section 506 of the old Code, intended that order XXXII, rule 7, should control proceedings under the second schedule, paragraph 1. But in any event I also agree with both my colleagues in thinking that no appeal lay to the lower appellate court on the ground that the award was invalid, no such ground having been taken before the court which made the reference within the period of limitation allowed. I also think that the appeal should be allowed.

BY THE COURT:—The order of the Court is that the appeal be allowed, the order of the court below be set aside and the decree of the court of first instance restored with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Piggott.

JAGARNATH SAHI (PETITIONER) *v.* KAMTA PRASAD UPADHYA (OPPOSITE PARTY).*

1913 *December*, 12.

Civil Procedure Code (1908), *section* 148; *order IX, rule* 13—*Decree* ex parte—*Conditional order setting aside decree—Condition not fulfilled—Court competent either to extend time for compliance with condition or to pass a fresh conditional order.*

On an application to set aside an *ex parte* decree the court passed an order in favour of the applicants, but conditional on their paying to the plaintiff by a certain date a sum of money as damages. This condition was not fulfilled, and the court—holding that it had no jurisdiction to receive the prescribed payment after the date fixed—disallowed the defendants' application to set aside the decree.

Held (1) that an appeal lay from this order, and (2) that the court below had jurisdiction to extend the time for payment of the damages or to pass a fresh conditional order setting aside the decree upon terms, the original order having become inoperative. *Suranjan Singh* v. *Ram Bahal Lal* (1) distinguished.

IN this case certain defendants, against whom a decree had been passed *ex parte* on the 12th of August, 1911, applied under

* First Appeal No. 127 of 1913 from an order of V. N. Mehta, Subordinate Judge of Jaunpur, dated the 12th of April, 1913.

(1) (1913) I.L.R., 35 All., 582.