

REVISIONAL CIVIL.

Before Mr. Justice Piggott.

AJUDHIA PRASAD (PETITIONER) v. BADAR-UL-HUSAIN (OPPOSITE PARTY). *

1917
April, 18.

Civil Procedure Code (1908), schedule II, paragraphs 15 and 16—Arbitration—Agreement to refer pending suit—Agreement not made by all the parties to the suit—Award—Objection to validity of agreement to refer—Revision.

Out of twenty-one defendants, sixteen joined with the plaintiff in an application to refer the matter in dispute in the suit to arbitration. Of the remaining five defendants, three had not entered an appearance, and the Court had already passed an order that the case would be proceeded with *ex parte* as to them, and as to the remaining two the plaintiff abandoned his claim against them. A reference was made and an award was delivered for payment of a sum of money by one of the defendants alone, and a decree followed in accordance with the award.

Held that there was a valid order of reference, or at any rate one which the defendant against whom the award was made should not be permitted to challenge *Pitam Mal v. Saïq Ali* (1), *Kadhu Singh v. Baljit Singh* (2), *Negi Puran v. Hira Singh* (3), *Ishar Das v. Keshab Das* (4), *Haswa v. Mahbub* (5) and *Sabta Prasad v. Dharam Kirti Saran* (6) referred to.

Held also that, in view of paragraphs 15 and 16 of the second schedule to the Code of Civil Procedure, 1908, the question whether there had been a valid reference to arbitration was a question reserved to the decision of the trial court and ought not to be made the subject of the revisional jurisdiction of the High Court. *Lutawan v. Lachya* (7) referred to.

THE facts of this case were as follows :—

A suit was filed by one Badar-ul-Husain against twenty-one defendants, the principal defendant being one Ajudhia Prasad, in which the plaintiff claimed a sum of money by way of damages. A number of defendants, including Ajudhia Prasad, joined with the plaintiff in petitioning the court to refer the entire matter in dispute to the decision of a certain arbitrator. On receiving this application the court examined the array of parties. It found that there were two contesting defendants who had not joined in the application; but in respect of these the plaintiff abandoned his claim, so that they ceased to be parties interested in the suit. There were three other

* Civil Revision No. 8 of 1917.

(1) (1902) I.L.R., 24 All., 229. (4) (1910) I.L.R., 32 All., 657.

(2) (1907) I.L.R., 29 All., 423. (5) (1911) 8 A.L.J., 645.

(3) (1909) 6 A.L.J., 333. (6) (1913) I.L.R., 35 All., 107.

(7) (1914) I.L.R., 36 All., 69.

1917

AJUDHIA
PRASAD
v.
BADAR-UL-
HUSAIN.

defendants, Nos. 5, 18 and 19, who also had not joined in the agreement to refer to arbitration. With reference to these three defendants the court made a note to the effect that they had never entered any appearance in the suit and that order had already been passed that the trial of the suit should proceed *ex parte* as against them. Thereupon the court passed an order of reference under paragraph 3 of the second schedule to the Code of Civil Procedure. The arbitrator dealt with the matter under the authority conferred upon him by this order of reference and delivered an award for a certain sum of money against Ajudhia Prasad alone, exempting all the remaining defendants. Objections were taken to this award and, amongst others, a point was taken that, inasmuch as all the parties interested in the suit had not agreed that the matter in difference between them should be referred to arbitration, the order of reference was bad and all proceedings thereunder null and void. The learned Judge of the court below proceeded to deal with this objection. He considered that the point was covered by a decision of this Court in *Pitam Mal v. Sadiq Ali* (1), and accordingly overruled the objection. He also overruled all the other objections taken to the award and pronounced judgement accordingly. A decree in favour of the plaintiff in accordance with the terms of the award necessarily followed.

Against this decree Ajudhia Prasad applied in revision to the High Court challenging the validity of the order of reference and of the award based thereon.

Babu *Krishna Rao Narain Laghate*, for the applicant.

Mr. *Abdul Raof*, for the opposite party.

PIGGOTT, J.—This is an application in revision by one Ajudhia Prasad, who was one of the twenty-one defendants impleaded in a certain suit in which the plaintiff claimed a sum of money by way of damages. A number of defendants, including Ajudhia Prasad, joined with the plaintiff in petitioning the court to refer the entire matter in dispute to the decision of a certain arbitrator. On receiving this application the court seems to have examined the array of parties. It found that there were two contesting defendants who had not joined in the application ;

(1) (1902) I. L. R., 24 All., 229.

1917

AJUDHIA
PRASADBADAR-UL-
HUSAIN.

but in respect of these the plaintiff abandoned his claim, so that they undoubtedly ceased to be parties interested in the suit. There were three other defendants, Nos. 5, 18 and 19, who also had not joined in the agreement to refer to arbitration. With reference to these three defendants the court made a note to the effect that they had never entered any appearance in the suit and that an order had already been passed that the trial of the suit should proceed *ex parte* as against them. Thereupon the court passed an order of reference under paragraph 3 of the second schedule to the Code of Civil Procedure. The arbitrator dealt with the matter under the authority conferred upon him by this order of reference and delivered an award for a certain sum of money against Ajudhia Prasad alone, exempting all the remaining defendants. Objections were taken to this award, and, amongst others, a point was taken that, inasmuch as all the parties interested in the suit had not agreed that the matter in difference between them should be referred to arbitration, the order of reference was bad and all proceedings thereunder null and void. The learned Judge of the court below proceeded to deal with this objection. He considered that the point was covered by a decision of this Court in *Pitam Mal v. Sadiq Ali* (1), and accordingly overruled the objection. He also overruled all the other objections taken to the award and pronounced judgement accordingly. A decree in favour of the plaintiff in accordance with the terms of the award necessarily followed. Ajudhia Prasad has brought the matter in revision before this Court. One of the pleas taken by him seeks to raise a point which was not taken at all in the court below, namely, that the award went beyond the terms of the reference. I should not in any case have allowed the applicant to raise this point when he had omitted to take it in the court below, but as a matter of fact there is no force in it. I am satisfied that the award did not go beyond the terms of the order of reference. The other point taken is that already referred to as having been considered and overruled by the court below. On the question whether there can be a valid reference to arbitration upon an agreement entered into between the plaintiff and the contesting defendants in any suit, when

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1917

ATUDHIA
PRASAD
v.
BADAR-UL-
HUSAIN.

certain other defendants, who had entered no appearance, and against whom the trial of the suit was proceeding *ex parte*, have not joined in the application to refer to arbitration, the course of decision in this Court appears by no means uniform. The case relied upon by the learned Munsif is certainly in favour of the view which he has taken. That case was distinguished against, but upon a somewhat different state of facts, in *Kadhu Singh v. Baljit Singh* (1). In another case, that of *Negi Puran v. Hira Singh* (2), the proceedings of the trial court had been marked by so many irregularities that it is not easy to say upon what point in particular the decree, which purported to have been passed in accordance with an arbitration award, was set aside. Finally, in *Ishar Das v. Keshab Deo* (3) the older decision in *Pitam Mal v. Sudiq Ali* (4) was re-affirmed and acted upon in circumstances quite undistinguishable in principle from those of the case now before me. I find, however, that the authority of this decision has undoubtedly been shaken by certain subsequent pronouncements of this Court. I refer particularly to the case of *Haswa v. Mahbub* (5) where the decision in *Ishar Das v. Keshab Deo* (3) was referred to and seems to have been in substance dissented from. Moreover, the learned Judges who decided this case referred in the course of their judgement to an unreported decision by another Bench of this Court as supporting the view taken by them. There has been another case on the point since then, namely, that of *Sabta Prasad v. Dharam Kirti Saran* (6). The learned Judges who decided that case affirmed the decree passed upon an arbitration award; but they have used language in the course of their judgement which seems to indicate agreement rather with the principles laid down in *Haswa v. Mahbub* (5) than with the older decisions of this Court. In such a state of the authorities I should ordinarily have been disposed to refer any point of law to a Bench of two Judges, if only I were satisfied that the point of law arose in a pure form and was capable of being definitely decided.

I think, however, that an order of reference would be of little use in the present case in the way of obtaining a definite

(1) (1907) I. L. R., 29 All., 423. (4) (1902) I. L. R., 24 All., 229.

(2) (1909) 6 A. L. J., 333. (5) (1911) S. A. I. J., 645.

(3) (1910) I. L. R., 32 All., 657. (6) (1913) 35 I. L. R., 107.

pronouncement from this Court on the precise point on which the reported decisions of the learned Judges appear to differ. The circumstances of the present suit were peculiar, and I apprehend that they are such as to bring the point for determination within the operation of the principles affirmed in *Sabta Prasad v. Dharam Kirti Saran* (1), as well as those which govern the decision in *Ishar Das v. Keshab Deo* (2). I have examined the pleadings in some detail. It seems to me that, although the plaintiff elected to drag twenty-one defendants into court and to take his chance of obtaining relief against any or all of them, he set forth in his plaint a cause of action maintainable in substance against the defendant Ajudhia Prasad alone. At the time of the reference to arbitration, it is clear that the plaintiff was prepared to treat any of the defendants who had not chosen to join of their own accord in the reference to arbitration as being merely *pro forma* defendants. I feel no real doubt that if the Munsif had, on the very date when the application for a reference to the decision of an arbitrator was made to him, indicated his opinion that the reference would be incomplete in law by reason of the absence of those defendants against whom the suit was proceeding *ex parte*, the plaintiff would have at once agreed to an order formally exempting these defendants from his claim. As a matter of fact it seems to me that the court below only did not record them as being exempted from the plaintiff's claim, because it took the view that, as defendants who had not entered an appearance, they had already ceased to be parties interested in the result of the suit and there was therefore no need of any formal order to put that point beyond doubt. I think, therefore, that there was in the present case a valid order of reference, or at any rate one which the defendant Ajudhia Prasad should not be permitted to challenge.

In this connection I have one more point to notice. It is a remarkable circumstance that all the cases of this Court, to which I have referred as authorities on the question of law involved, come before this Court either as second appeals or as first appeals from orders or as regular first appeals. The learned Judges who decided the case of *Sabta Prasad v. Dharam Kirti Saran* (1)

(1) (1913) I. L. R., 35 All., 107.

(2) (1910) I. L. R., 32 All., 657.

1917

 AJUDHIA
 PRASAD
 v.
 BADAR-UL-
 HUSAIN.

1917

AJUDHIA
PRASAD
v.
BADAR-UL-
HUSAIN.

were dealing with a regular first appeal from a decree, and it is obvious that they would have been prepared to reverse that decree in appeal if they had found that the order of reference to arbitration was void in law. Since that decision was pronounced, however, the question of the admissibility of an appeal in a case like the present had been referred to a Full Bench. In the case of *Lutawan v. Lachya* (1) it was held that no appeal would lie from a decree purporting to be passed on the basis of an award, except on the grounds stated in article 16 of the second schedule to the Code of Civil Procedure. The decision proceeds of course to some extent on the particular facts which were before the Court in that case; but I think it may fairly be quoted as authority for the broad proposition of law above stated. The learned Chief Justice in the course of his decision laid stress upon certain alterations in the law effected by the passing of the present Code of Civil Procedure (Act V of 1908). He summed up his opinion in the following words:—“ It seems to me that it was the clear intention of the Legislature . . . that objections to the award on the ground of invalidity from any cause whatever should be decided by that court (meaning the court which had made the order of reference to arbitration and passed a decree in accordance with the award) and *by no other court.*” I do not know how far the learned Judges who concurred in the decision can be regarded as having committed themselves to the same proposition of law; but personally I am prepared to say that I find myself in the completest accordance with the view above expressed in the language of the learned Chief Justice. It seems to me, however, that those words raise a further question, namely, the discretion of this Court to interfere in revision in a matter like that now before me. If the principle of law which I have quoted above is correct, then this question, namely, whether there had been in the present case a valid reference to arbitration, was one which the provisions of paragraph 15 of the second schedule to the Code of Civil Procedure expressly reserve to the decision of the trial court without any right of appeal. If this Court is to make it a practice to interfere in revision, merely on the ground that the decision arrived at by the trial court upon a point which

(1) (1914) I. L. R., 36 All., 69.

it had jurisdiction to determine, namely, the validity or otherwise of the order of reference, was a wrong decision, I can only say that it seems to me that this Court will fail to carry into effect the express intention of the Legislature. According to the practice prevailing before the decision of the Full Bench in the case of *Lutawan v. Lachya* (1), an appeal from the decree of the Munsif would have lain in this case to the court of the District Judge. To admit the present application would, it seems to me, amount to giving the defendant the privilege of an appeal on a point of law direct to this Court.

These are my reasons for preferring to dispose of this application myself rather than to seek a fresh pronouncement from a Bench of this Court on the controverted question of law which has been discussed before me. So far as my own opinion in the matter goes, I desire to place it on record that, while I think that the facts of each case should be carefully examined, I find myself in general agreement rather with the decision in *Ishar Das v. Keshab Deo* (2) than with that in *Haswa v. Mahbub* (3). More particularly I think that the point which was taken in the present case should always be carefully considered before a court comes to the conclusion that the reference to arbitration was invalid, namely whether in the circumstances of the particular case the reference to arbitration may not have involved a virtual, if not an express, abandonment by the plaintiff of his claim as against any defendant or defendants who had not joined in the order of reference. I do not think this consideration was present to the mind of the learned Judges who decided the case of *Haswa v. Mahbub* (3). Possibly it did not arise in any clear form on the facts of that case. The result is that I dismiss this application with costs.

Application dismissed

(1) (1914) I. L. R., 36 All., 69.

(2) (1910) I. L. R., 32 All., 657.

(3) (1911) 8 A. L. J., 645.

1917

AJUDEHA
PRASAD
v.
BADAR-UL-
HUSAIN,