REVISIONAL CIVIL.

1920
November, 16.

Before Mr. Justice Piggott and Mr. Justice Walsh.

KANHAIYA LAL (DEFENDANT) v. JAGANNATH PRASAD, HANUMAN PRASAD (PLAINTIFF)*

Civil Procedure Code (1908), *sections* 105, 115; *schedule II, article* 15—*Arbitration in a suit—Award—Objection as to validity of order of reference—Absence of fresh written statement by defendant who alleged minority but was found to be of full age—Award set aside—Revision.*

The defendant to a suit on a contract pleaded infancy and filed a written statement through a person who professed to act as his guardian. Issues were framed, amongst them one as to the age of the defendant. This was tried first, and it was found that the defendant was not an infant. The defendant did not put in a fresh written statement as the result of this finding but accepted the statement originally filed on his behalf. At this stage the parties agreed to refer the suit to arbitration, and the issues which had been framed were by order of the Court referred to an arbitrator, who in due course submitted his award. This was in favour of the defendant. The plaintiff filed objections, and took exception, *inter alia*, to the absence of a written statement filed by the defendant after he had been found to be of full age. The Court accepted this plea and on this ground alone set aside the order of reference and the award.

Held, on application in revision by the defendant, that the application would lie. The court below had in this case no jurisdiction to reverse the order of reference, which in substance it had done, and, in setting aside the award on the sole ground of some supposed defect in the order of reference, which was irrelevant, it had acted with material irregularity. *Ghulam Khan* v. *Muhammad Hassan* (1) and *Lutawan* v. *Lachya* (2) referred to.

PIGGOTT, J., while agreeing that the order complained of was unsustainable, expressed a doubt as to whether the proper course for the defendant was not to wait for the final decree of the trial court and to challenge the order setting aside the award in his memorandum of appeal, in the event of the suit ending in a decree against him.

THE facts of this case are fully stated in the judgment of WALSH, J.

The Hon'ble Dr. *Sapru*, Dr. *Kailas Nath Katju*, and Babu *Durga Charan Banerji*, for the applicant.

Mr. *B. E. O'Conor* and Munshi *Badri Narain* for the opposite party.

WALSH, J.:—In this case a suit was brought in the Court of the Subordinate Judge of Cawnpore by a firm named Jagannath Prasad, etc. against one Kanhaiya Lal, who was alleged to

* Civil Revision No. 154 of 1919.

(1) (1901) I.L.R., 29 Calc., 167. (2) (1913) I.L.R., 36 All., 69.

1920

KANHAIYA LAL v. JAGANNATH PRASAD.

Walsh, J.

be 22 years of age, for damages for non-delivery of goods. The defendant alleged infancy, and a written statement was filed on his behalf by one Lachmi Narain, in which the contract was denied, and the defences of infancy and of wagering were set up. Issues were settled by the Judge on the 9th of January, 1919. The question of the defendant's minority was separately tried and was decided against him in March. When the day for the trial in May arrived the parties decided to refer their dispute to arbitration, and the issues which had been struck were, by order of Court, referred to an arbitrator, who made an award on the 23rd of June in favour of the defendant, holding that, although the defendant was of age, there had been no contract, and dismissing the suit.

On the 25th of June, the plaintiff filed objections in the Court of the Subordinate Judge praying that the award be set aside. These objections alleged, first, fraud and collusion between the defendant and the arbitrator, and necessarily, therefore, misconduct by the arbitrator, secondly, failure by the defendant to file a written statement of his own after the decision against him as to his age, and, thirdly, further trumpery complaints of the nature of misconduct against the arbitrator, not necessary to particularize here.

On the 16th of September, in spite of the fact that the defendant had adopted the written statement of Lachmi Narain, and that the issues originally settled had been expressly referred to the arbitrator by the Court, the Subordinate Judge held that the absence of a further written statement by the defendant invalidated the reference and the arbitration, and that therefore the award was invalid, and he set it aside. The defendant now applies to this Court in revision to quash the order, and an objection is raised to the jurisdiction of this Court to interfere. This objection gives rise to a technical question of some difficulty.

The decision of the Subordinate Judge is clearly indefensible. The ground upon which he has interfered is no ground at all for questioning either the arbitration proceedings or the award. Both parties were bound by the order of reference as to all matters covered by it, including the pleadings as they then stood

and the issues as settled. After the order of reference it was too late for either party to object to the form of the proceedings anterior to the reference, or to the form of the issues. The defendant could not have done so himself, and the plaintiff had less ground, if possible, than the defendant for objecting to the absence of a fresh written statement, as the prejudice, if any, would affect the defendant alone. The ground upon which the learned Judge has acted is, in fact, an objection to the decision of the arbitrator, in the guise of an objection to the proceedings of the trial court, and the decision of the Subordinate Judge amounts to a reversal of the order of reference passed by the same Court, without any change in the circumstances, except the execution of the order by the holding of the arbitration and the making of the award. In other words, it is equivalent to an order refusing to stay the suit where there has been not only an agreement, but an order to refer to arbitration. It is not so in terms, otherwise it would be appealable under section 104.

In the course of the argument we were referred to the case of *Ghulam Khan* v. *Muhammad Hassan* (1), the leading authority in the Privy Council on arbitration law as laid down in the Code of Civil Procedure, and to that of *Lutawan* v. *Lachya* (2), a Full Bench decision of this High Court. In both cases a decree had been passed in accordance with, and not in excess of, an award, so that the point to be decided differed from the question now raised. It is necessary, therefore, to examine the principles established by those cases, which are, of course, binding upon us.

Their Lordships point out that the Code deals with arbitrations under three heads. Only the first of these need concern us, namely, where the parties to a litigation refer to arbitration any matter in the suit, so that all proceedings are under the supervision of the trial Court. Subject to that an arbitrator has a free hand. If he proceeds regularly, and decides the matters referred to him and no others, he may make any error of law or fact with reference to the matters actually in dispute, without power of redress to any party, and if the award is duly made and an application to set it aside is dismissed by the

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1920

KANHAIYA LAL v. JAGANNATH PRASAD.

Walsh, J.

trial Court, that Court has no option but to pronounce a decree in accordance with it. Against such decree there is no appeal. Turning to schedule II of the Code, paragraph 15 provides the grounds upon which an award may be set aside. Since the case of *Ghulam* (*supra*) was decided the words "or being otherwise invalid" have been added without in any way affecting the decision or the reasons given by their Lordships of the Privy Council. But reasoning mainly from that expression the members of the Court in *Lutawan* v. *Lachya* (1) were unanimous in saying that the original court, and no other, should decide any objections to the award on the gound of invalidity from any cause whatever. That is to say, the "otherwise invalid" must not be construed as *ejusdem generis* with what has gone before it. Accepting to the full that construction, it is necessary to point out that some limitation must be placed upon the words so construed. They cannot mean that a decision merely adopting an idle or wanton objection, however absurd and irrelevant, would be a decision of "invalidity from any cause whatever." We think the meaning to be put upon the language of the Full Bench is that the decision must be a real decision of some ground, no matter what, which if it existed would invalidate an award. In fact paragraph 15 prescribes and delimits the jurisdiction of the original Court. "No award", it says "shall be set aside except etc." The ground taken and adopted in the decision of this case is no ground affecting the validity of the award at all. It is merely a decision that the Court ought not to have referred. Is that a matter affecting the validity of the award once the dispute has been referred? On this point their Lordships say (29 Calc., 183):—"In cases falling under head I" (as this case now does) "the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. *So that no question can arise as to the regularity of the proceedings up to that point.*" The decision before us in fact questions their regularity, and is based upon it It appears, therefore, to us that the Judge has travelled outside his jurisdiction as expounded by the Privy Council, without deciding any

(1) (1918) I. L. R., 36 All., 69.

ground in any way affecting the validity of the award. In the ordinary way revision would therefore lie. The Privy Council, however, have pointed out in *Ghulam's* case that in cases where an attempt is made to review, or avoid a decision on the merits by an arbitrator, revision is more objectionable than an appeal, because the finality of the award would be open to question. But in *Ghulam's* case they took pains to explain that the application in revision was avowedly an application to set aside the award, and also (p. 186) that the Judge in the original Court had not exercised a jurisdiction not vested in him by law, or failed to exercise his jurisdiction, or acted in the exercise of his jurisdiction with material irregularity. In our opinion the Judge in this case had no jurisdiction to reverse the order of reference, which he has in substance done, and in setting aside the award on the sole ground of some supposed defect in the order of reference, which was irrelevant, he has acted with material irregularity.

We have taken pains to make the position clear, as, although the result of our order will be to restore to the award that finality which the Legislature intended, it must not be supposed that we desire to depart, or have in any way departed, from the principle of inviolability which attaches to decisions, either upholding or rejecting objections under paragraph 15, when they are in fact decisions upon real objections of invalidity to the arbitration proceedings and award.

The order of the Court is that the order of the Subordinate Judge of the 20th of September, 1919, be set aside, and the application to have a decree passed in accordance with the award be restored to the file of the Court to be dealt with according to law. The plaintiff must pay the costs in this Court and of the proceedings in the Court below.

PIGGOTT, J. :—I agree that the order complained of is quite unsustainable and I am clearly of opinion that the defendant must be allowed some legal remedy against it, so that the only proper ending to the suit necessarily is a decree dismissing the same in accordance with the award of the arbitrator. The difficulty which has been discussed in the judgment of my learned brother strikes me as in substance a question only of

1920

KANHAIYA LAL v. JAGANNATH PRASAD.

Piggott, J.

procedure. I have myself long inclined to the view that, under the present Code of Civil Procedure, the intention of the Legislature was to impose a somewhat stringent limit on the revisional jurisdiction of this Court by the use of the words "any case which has been decided" in section 115, but at the same time to open a wide door of relief to litigants who have been prejudiced by errors of procedure on the part of the trial courts by means of the provisions of section 105. I certainly think that those honourable judges who are disposed to accept the more rigid view of the effect of section 115, to which I have referred, ought to be prepared to give a very liberal interpretation to the words "affecting the decision of the case" in section 105. Possibly, if I were certain that my own individual view in this matter would prevail, not only at this stage but throughout thi articular litigation, I might be disposed to hold that the proper course for the defendant was to wait for the final decree of the trial court and to challenge the order setting aside the award in his memorandum of appeal, in the event of the suit ending in a decree against him. I am aware, however, that there is considerable conflict of judicial opinion over the interpretation of the words, "affecting the decision of the case" in section 105 of the Code of Civil Procedure, and I certainly think it would be unjust to the defendant if he were to fail in the present application by reason of any doubts I might entertain as to the applicability of this Court's revisional jurisdiction and later on be deprived of his remedy by way of appeal on account of any judicial opinion regarding the operation of section 105 of the same Code. For these reasons, subject only to this reservation that I do not stand committed to the proposition that an order like the one here complained of could not be challenged in a petition of appeal under section 105, I concur in the order which has been passed.

Order set aside.