Before Mr. Justice Mukerji and Mr. Justice Bennet.

1931
February,
24.

BANKEY LAL AND ANOTHER (DEFENDANTS) *v.* CHOTEY MIYAN ABDUL SHAKUR (PLAINTIFF).*

Arbitration—Reference by plaintiffs and some of the defendants—Validity—Award—Failure to give full ten days for objections—Validity of decree—Appeal—Civil Procedure Code, section 99; schedule II, paragraphs 1, 16—Jurisdiction.

In a case where the interests of the defendants may be severed, there does not appear to be any bar to some of the contesting defendants joining with the plaintiffs in referring the matter in difference between them to arbitration. So, where in a case the liability of the two defendants was joint and several, and the plaintiffs and one of the defendants referred the dispute to arbitration with the result that an award was made against him, and ultimately (in the appellate court) the plaintiffs exempted the other defendant altogether, it was *held* that the reference was valid.

It is doubtful whether an appeal lies from a decree passed in accordance with an award, on the ground that the decree was passed before the expiry of ten days' time for taking objections. Supposing that an appeal lay, section 99 of the Civil Procedure Code would apply and the decree would not be reversed in appeal where the appellant raised no objection on this ground at the time the court took up the case to pass the decree, and it did not appear that the appellant could have taken any further objections than were taken by him, if the full ten days' time had been given.

Semble, the decree passed in such circumstances is not a decree passed without jurisdiction and fit to be set aside in revision.

Messrs. *U. S. Bajpai* and *J. P. Bhargava,* for the appellants.

Mr. *N. P. Asthana,* for the respondent.

MUKERJI and BENNET, JJ. :—This is an appeal by the defendants in a suit for money, being the price of certain goods supplied, instituted by the respondents against the appellants. The appellants were two in

*Second Appeal No. 811 of 1928, from a decree of P. K. Ray, District Judge of Agra, dated the 11th of April, 1928, modifying a decree of D. P. Mehrotra, Additional Munsif of Agra, dated the 21st of January, 1928.

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number, Bankey Lal and Munna Lal. On 20th December, 1927, the plaintiffs and one of the defendants Bankey Lal agreed to refer the matter in difference between the parties to the arbitration of one Achal Singh. Achal Singh filed a written award on 16th January, 1928. Before the award arrived, the 21st January, 1928, had been fixed for hearing of the case. When the award arrived, the learned Munsif directed that the parties should be informed of the fact that their award had arrived and he further directed the parties to file objections, if any. No objections were filed and the case was taken up on 21st January, 1928, and a judgment was pronounced in terms of the award.

The defendants went up in appeal to the learned District Judge and substantially two points were taken against the judgment. One was that ten days' time should have been allowed to the defendants to file objections to the award and the second was that Munna Lal not having joined in the arbitration, the whole arbitration proceeding was bad and no decree could be made on the award. In the appellate court the plaintiffs exempted Munna Lal from all liability. Thereupon the learned District Judge came to the conclusion that the award was a good one so far as the plaintiffs and Bankey Lal were concerned. The learned Judge accordingly dismissed the appeal, except in this that he exempted Munna Lal from all liability but ordered that he should pay his own costs.

The defendants have come up in second appeal and Munna Lal's grievance is that, having been exempted from the claim, he should have got his own costs. The learned counsel for the respondent has not been able to satisfy us that Munna Lal should not get his costs. We accordingly allow Munna Lal's appeal and direct that he shall recover his costs throughout the litigation.

So far as Bankey Lal's appeal is concerned, the preliminary objection is taken that no appeal lies. In view

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of this objection, we have been asked by the learned counsel for the appellant that, if we decide that no appeal lies, we should take up the matter in revision and do justice in the case.

It has been urged that the appeal is competent, inasmuch as the learned Judge failed to comply with the provisions of paragraph 16 of schedule II of the Civil Procedure Code inasmuch as he did not wait for ten days for a party in arbitration to file his objections. Reliance is placed on certain observations of one of us in the case of *Tursi Ram* v. *Basdeo* (1), to be found at page 708. There is no doubt that a good deal is said there which would support the argument of the learned counsel for the appellant that an appeal would be competent. But this is not a definite declaration of the law, because the Court found that there was another matter, namely a decision by the Judge himself, which made an appeal maintainable. In this particular case we do not propose to pronounce any definite opinion as to whether in the circumstances of this case, namely because the court has failed to give full ten days' time, an appeal is competent or not. Supposing that an appeal is competent, we are not prepared to reverse the judgment of the court below because full ten days' time has not been given. Section 99 of the Civil Procedure Code lays down that no irregularity in any proceeding in a suit, not affecting the merits of the case, should be permitted to reverse or substantially vary a judgment. The learned counsel has not been able to point out on the record any objection which his client could validly have taken to the award if full ten days' time had been given to him. We have already noted that he had five days' time and when the case was taken up he did not tell the learned Munsif that he should have five days' more time under the law and that as a matter of fact he wanted five days' more time to formulate his objections.

(1) (1926) 24 A.L.J., 705 (708).

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The second point is as to whether the arbitration itself was invalid because Munna Lal did not join in the reference. The defendants, according to the plaint, were jointly and severally liable to the plaintiffs. If one of the two defendants who were jointly and severally liable and the plaintiffs agree that there should be a reference to arbitration, the mere fact that the second defendant did not join will not debar the parties agreeing to an arbitration from making a reference to arbitration. Paragraph 1 of schedule II of the Civil Procedure Code reads as follows: "Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration. . . ." This does not mean that all the parties who are contesting a suit must necessarily join in arbitration. There may be cases in which it would not be possible to decide a case by compartments, i.e. where an arbitrator may be appointed to decide a part of the case and the court should decide the rest of it; such a case would be a suit for partition, for example. But where the interest of the defendants may be severed, as in this case, there does not appear to be any bar to some of the contesting defendants joining with the plaintiffs in referring the matter in difference between them to arbitration. There is a decision to that effect in the case of *Raghunath Sukul* v. *Ramrup Raut* (1). In this view we do not think that the arbitration is in any way vitiated.

There is no other point to be decided in this case and we dismiss the appeal of Bankey Lal with costs.

(1) (1923) I.L.R., 2 Pat., 777.