

REVISIONAL CIVIL

Before Mr. Justice Kendall

1934
September,
14

JHINNU SINGH AND OTHERS (JUDGMENT-DEBTORS) v. BRAHM-DAT SINGH AND ANOTHER (DECREE-HOLDERS)*

Civil Procedure Code, schedule II, paragraph 1—Reference to arbitration—"All parties interested"—Defendants or judgment-debtors who are jointly and severally liable.

Upon an application in execution of a decree against seven judgment-debtors who were all jointly and severally liable, the decree-holder and five of the judgment-debtors made a joint application that the question of ascertainment of the amount of mesne profits should be referred to arbitration. Subsequently, after the award was made, the decree-holder made an application exempting the two judgment-debtors who had not joined in the reference. The award was upheld by the court:

Held, in revision, that the reference to arbitration was in contravention of the provisions of paragraph 1 of schedule II of the Civil Procedure Code and invalid, inasmuch as all the judgment-debtors were jointly and severally liable and their interests could not be severed, and therefore at the time of the reference the two who did not join were also parties interested within the meaning of that paragraph. The award was, accordingly, invalid and *ultra vires* and should be set aside in revision.

Bankey Lal v. Chotey Miyan Abdul Shakur (1), discussed.

Mr. *Mukhtar Ahmad*, for the applicants.

Mr. *Shiva Prasad Sinha*, for the opposite parties.

KENDALL, J.:—This is an application for the revision of an order of the Subordinate Judge of Azamgarh maintaining the award of an arbitrator in execution proceedings. The facts are given fully in the judgment of the trial court. It is only necessary to say that the decree-holder was proceeding in execution against seven judgment-debtors, who were jointly and severally liable for a sum due to the decree-holder for mesne profits, and the question for decision was the amount of the sum for which they were liable. Of the seven judgment-debtors, five joined the decree-holder in an application

*Civil Revision No. 446 of 1933.

(1) (1931) I.L.R., 53 All., 369.

for a reference of this matter to arbitration, and the reference was accordingly ordered by the court. At that stage all the seven judgment-debtors were jointly and severally liable for the amount of the decree, though at a subsequent stage two of them, Jagdeo Singh and Faujdar Singh, were exempted by the decree-holder. When the award was filed, an objection was lodged on the ground, among others, that as all the parties had not joined in the reference, the reference was illegal. But the trial court relying on the decision in the case of *Bankey Lal v. Chotey Miyan Abd'ul Shakur* (1), has held that the reference was not invalid merely because two of the judgment-debtors, who were jointly and severally liable, did not join in it.

Under paragraph 1 of the second schedule to the Civil Procedure Code, "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 judgment is pronounced apply to the court for an order of reference". In the present proceeding it is admitted that all the seven judgment-debtors were jointly and severally liable, and therefore the decree-holder was in a position to execute the decree against any one or more of them. They were, therefore, one and all interested in the suit at the stage which it had reached when the reference to arbitration was made. If there were any doubt as to the law on the point, it has been decided by decisions of Benches of this Court reported from time to time, and I need only mention three: *Haswa v. Mahbub* (2); *Shib Lal v. Chatarbhuj* (3), where at page 452 it has been remarked: "Therefore it is manifest that the reference was not made by all the parties to the suit as mentioned in section 506 of Act XIV of 1882. As there was no reference to arbitration by Badri Das and by one of the defendants, the arbitrators appointed under the reference had no power

1934

 JHINNU
SINGH
v.
BRAHM DAT
SINGH

(1) (1931) I.L.R., 53 All., 660. (2) (1911) 8 A.L.J., 645.
(3) (1909) I.L.R., 31 All., 450.

1934

JHINNU
SINGH
v.
BRAHM DAT
SINGH

to decide the matter in controversy and their award was *ultra vires*." This passage is good authority for holding that the present application is one that may properly lie under section 115 of the Civil Procedure Code. A third case to which I may refer is that of *Tej Singh v. Ghasi Ram* (1).

Learned counsel for the opposite party has pointed to the decision which is relied on by the trial court, namely, the case of *Bankey Lal v. Chotey Miyan Abdul Shakur* (2), and specially to the passage on page 672 where the Bench remarks: "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." It is stated that the defendants in that case were jointly and severally liable, and for this reason the decision has been relied on. In the present case it is clear that as the judgment-debtors were jointly and severally liable their interests should not be severed, and at the time of the reference the two who did not join were interested in the subject-matter of the suit and the proceeding. I have further been referred on behalf of the opposite party to the decision of *Jagrup Ram v. Kashi Prasad Gupta* (3), but in that case the non-joining defendant was a *pro forma* party. In other words, he was not interested in the suit in the manner contemplated by the first paragraph of the second schedule. So the case is clearly distinguishable from the present one.

I am, therefore, clearly of opinion that the present application must succeed. I therefore allow it with costs and direct that the order of the trial court be set aside and that the proceedings relating to the ascertainment of mesne profits be continued according to law from the stage where the reference to arbitration was made.

(1) (1927) I.L.R., 49 All., 812. (2) (1931) I.L.R., 53 All., 669 (672).
(3) [1934] A.L.J., 694.