1938

BABU BRIJ MOHAN LAL v. SARABJIT SINGH

provisions of order XLIII, rule 1(*w*), but his contention is that there is nothing in law to prevent him from attacking the judgment of the trial court on merits. We do not agree with this contention. We may point out that the application for review was allowed on the 4th of July, 1935, and the decree was prepared on the same date. The provision of order XLI, rule 1 of the Code of Civil Procedure is imperative and states that a memorandum of appeal shall be accompanied by a copy of the decree appealed against. It is a condition precedent to there being a valid memorandum of appeal that it should be accompanied by a copy of the decree appealed from. No such decree has been filed with the memorandum of appeal.

Thomas and Ziaul Hasan, JJ.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

BACHCHA LAL, (DEFENDANT-APPELLANT) *v.* MUNNU LAL (PLAINTIFF-RESPONDENT)*

1937
August, 23

Civil Procedure Code (Act V of 1908), Schedule II, paragraphs 3(2) and 15(1) and order XXIII, rule 3—Award—One party applying for setting aside of award and other party not objecting—Court, whether can set aside award—Grounds for setting aside of award—Reference to arbitration—Court's jurisdiction to try suit after it is referred to arbitration—Order XXIII, rule 3, applicability of, to agreement of parties to set aside an award.

The words of clause 15(1) of Schedule II of the Code of Civil Procedure are imperative and take away the jurisdiction of the court to set aside an award on any ground other than those specified in the said clause. Where, therefore, a court sets aside the award without coming to a finding whether or not any of the grounds specified in clause 15(1) existed but merely on the ground that one of the parties applied to have the award set

*First Civil Appeal No. 25 of 1935, against the decree of Babu Bhagwati Prasad, Civil Judge of Lucknow, dated the 30th of November, 1934.

1937

BACHCHA LAL v. MUNNA LAL

aside and the other did not object to it, the order of the court setting aside the award and taking cognizance of the suit offends against clause 15(1) and clause 3(2) of schedule II and is consequently illegal. *Doolichand Srimah* v. *Mohanlal Srimali* (1), and *Halimbhai Karimbhai* v. *Shankarsai* (2), referred to.

After a matter is referred to arbitration the court has no jurisdiction to try the suit without superseding the arbitration or without setting aside the award on any of the grounds on which it could legally be set aside.

Order XXIII, rule 3 contemplates an agreement or compromise entered into by the parties out of court which the parties ask the court to give effect to and does not apply to a case in which a party prays for an award being set aside and the other party does not object to that prayer. To hold otherwise would be tantamount to holding that parties can by consent confer upon a court jurisdiction which it does not possess inasmuch as a court has no jurisdiction to set aside an award on any ground not included in clause 15, schedule II of the Code of Civil Procedure. *Krishna Panda* v. *Balaram Panda* (3), and *Laldas Jibhai* v. *Bai Lala* (4), referred to.

Messrs. *Hyder Husain* and *B. N. Shargha,* for the appellant.

Messrs. *D. K. Seth* and *Suraj Sahai,* for the respondent.

THOMAS and ZIAUL HASAN, JJ.:—These are cross-appeals by the plaintiff and defendant No. 1, respectively against a judgment and decree of the learned Civil Judge of Lucknow dated the 30th of November, 1934.

One Makka had three sons, Badri, Tiloki and Jagannath. Jagannath's son is Munnu Lal plaintiff, while Tiloki's son is Bachcha Lal defendant No. 1. It is an admitted fact that Badri separated from the family about 1874. The suit of the plaintiff was for partition of three houses mentioned in the list attached to the plaint and situated in mohalla Ghasiari Mandi, Lucknow, on the allegation that though the parties were carrying on business separately for a few years, the houses constituted joint family property. The defendant No. 2 was impleaded as he was a transferee of house No. 1 of the list on behalf of defendant No. 1.

(1) (1923) I.L.R., 51 Cal., 432.
(2) (1885) I L.R., 10 Bom., 881.
(3) (1896) I.L.R., 19 Mad., 290.
(4) (1908) 1 I.C., 105.

1937

BACHCHA LAL v. MUNNA LAL

The defendants denied that the houses were joint family property and the defendant No. 2 also pleaded that he was a transferee in good faith of house No. 1.

The lower court decreed the suit in respect of houses Nos. 2 and 3 but dismissed it as regards house No. 1. Both the plaintiff and the defendant No. 1 therefore appeal. Defendant No. 1's appeal No. 25 of 1935, challenges the lower court's finding that houses Nos. 2 and 3 are joint family property and the plaintiffs appeal No. 38 of 1935 relates to the dismissal of his suit about house No. 1

Thomas and Ziaul Hasan, JJ.

One of the grounds in the defendant No. 1's appeal is that the court below was in error in setting aside the award delivered by an arbitrator appointed by the parties in the case. As this ground appeared to us to affect the jurisdiction of the court below to deal with the suit, we first heard arguments of the learned counsel for the parties on it and as a result thereof have come to the conclusion that the case must be remanded to the court below to be dealt with according to law.

It appears that on the 20th of August, 1934, all the parties to the suit applied to have the case referred to the arbitration of Babu Makund Behari Lal, an advocate. The case was so referred and Babu Makund Behari Lal delivered his award on the 28th of September, 1934, decreeing the plaintiff's suit in part and dismissing it in part. Thereupon the plaintiff filed an objection to the award on various grounds on the 9th of October, 1934. The same day the defendant No. 1 also filed an objection to the award alleging that the "arbitrator had shown great partiality to the plaintiff." On the 26th of October, 1934, the court below passed the following order on the objection of defendant No. 1:

> "The plaintiff does not oppose this application. The award is therefore set aside and a date will be fixed for evidence in the case."

1937

BACHCHA LAL v. MUNNA LAL

Thereafter the case was tried by the learned Judge and disposed of as noted above.

It is argued on behalf of defendant No. 1 that the court below had no jurisdiction either to set aside the award on any ground other than those specified in clause 15(1) of schedule II of the Code of Civil Procedure or to try the case after once referring it to arbitration.

Thomas and Ziaul Hasan, JJ.

We are of opinion that this objection has considerable force. Clause 3(2) of the second schedule of the Code of Civil Procedure provides—

> "Where a matter is referred to arbitration the court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the suit."

This clearly shows that after a matter is referred to arbitration the court has no jurisdiction left to deal with the matter except in accordance with the provisions of the schedule. The grounds on which an award can be set aside are set forth in clause 15(1) of the schedule and that clause distinctly lays down that "no award shall be set aside except on one of" these grounds. In the present case, however, the learned Judge has set aside the award without coming to a finding whether or not any of the grounds specified in this clause existed but merely on the ground that one of the parties applied to have the award set aside and the other did not object to it. The words of clause 15(1) quoted above are imperative and take away the jurisdiction of the court to set aside an award on any ground other than those specified in the said clause. Therefore, the order of the court below setting aside the award and taking cognizance of the suit offends both against clause 15(1) and clause 3(2) of the schedule and is consequently illegal.

In *Dooly Chand Srimali* v. *Mohanlal Srimali* (1) an agreement that was arrived at between the parties after a reference of the case to arbitration was not recognized on the ground among others that the reference to

(1) (1923) I.L.R., 51 Cal., 432.

arbitration not having been superseded, it was not competent to the court to record the terms of the compromise. A similar view was adopted in *Halimbhai Karimbhai* v. *Shankersai* (1) with regard to the provisions of the Code of Civil Procedure of 1882 corresponding to clause 3(2) of the second schedule to the present Code of Civil Procedure. It is thus clear that the court below had no jurisdiction to try the suit without superseding the arbitration or without setting aside the award on any of the grounds on which it could legally be set aside.

Thomas and Ziaul Hasan, JJ.

The learned counsel for the plaintiff argued that the procedure adopted by the court below was covered by order XXIII, rule 3 of the Code of Civil Procedure, but we are unable to accept this argument. Order XXIII, rule 3 in our judgment contemplates an agreement or compromise entered into by the parties out of court which the parties ask the court to give effect to and does not in our opinion apply to a case in which a party prays for an award being set aside and the other party does not object to that prayer. To hold otherwise would to our mind be tantamount to holding that parties can by consent confer upon a court jurisdiction which it does not possess, for we have already seen that the court had no jurisdiction to set aside the award on any ground not included in those prescribed by clause 15, schedule II of the Code of Civil Procedure.

The sanctity that the law attaches to an award of arbitrators is very well illustrated in the case of *Krishna Panda* v. *Balaram Panda* (2) in which a suit was brought for partition of joint Hindu family property after an award had been made by arbitrators to which both the parties objected and which was never carried into effect and yet in these circumstances it was held that the award was equivalent to a final judgment between the parties and barred the suit for partition.

(1) (1885) I.L.R., 10 Bom., 881. (2) (1896) I.L.R., 19 Mad., 290.

1937

BACHCHA LAL v. MUNNA LAL

The principle laid down in this case was followed by the Bombay High Court in *Laldas Jibhai* v. *Bai Lala* (1) and by the Court of the Judicial Commissioner of Sind in *Khanchand Javhersingh* v. *Kodumal Javhersingh* (2).

Thomas and Zia-ul Hasan, JJ.

In any case we are perfectly convinced that the order of the court below setting aside the award was passed without jurisdiction and we have therefore no alternative but to set aside the decree of the lower court and send the case back to that court to dispose of the objections to the award according to law. We therefore order accordingly. The defendant No. 1 will get his costs of this Court. In view of this order the plaintiff's appeal No. 38 of 1935 becomes infructuous and is dismissed.

Appeal allowed.

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge

1937
September, 8

SHAHID ALI AND ANOTHER (APPLICANTS) *v.* MESSRS SIKRE BROTHERS COAL MERCHANTS THROUGH DWARKA PRASAD (OPPOSITE-PARTY)*

United Provinces Agriculturists' Relief Act (XXVII of 1934), section 5—Provincial Small Cause Courts Act (IX of 1887), section 25—Small Cause Court refusing to grant instalments under section 5, Agriculturists' Relief Act—Revision under section 25, Provincial Small Cause Courts Act, whether lies against the order—Appeal against the order, whether lies to District Judge or High Court.

No revision under section 25 of the Provincial Small Cause Courts Act is maintainable against an order of the Court of Small Causes refusing to grant instalments in an application under section 5 of the United Provinces Agriculturists' Relief Act. *Krishna Datt* v. *Ram Saran* (3), and *Kunj Behari* v. *Baijnath* (4), referred to.

*Section 25 Application No. 112 of 1936, against the decree of Sayid Shaukat Husain, Judge, Small Cause Court, Lucknow, dated the 15th of August, 1936.

(2) (1908) 1 I.C., 105.
(2) (1911) 15 I.C., 819.
(3) (1933) 10 O.W.N., 1085.
(4) (1933) 10 O.W.N., 995.