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THAKORE SAHEB OF LIMDI v. KHACHAR MANSUR RUKHAD

Lord Thankerton

Accordingly, their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the orders of the High Court should be set aside and the decrees of the Subordinate Judge should be restored, the cross-appeal being dismissed. The appellant the Thakore Saheb to have the costs of the appeal and cross-appeal and his costs in the High Court.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Nehra & Co.*

C. S. S.

ORIGINAL CIVIL.

Before Mr. Justice B. J. Wadia.

1935
July 22

ABDUL GANI SUMAR (PETITIONER) *v.* THE RECEPTION COMMITTEE OF THE 48TH INDIAN NATIONAL CONGRESS.*

Practice and procedure—Civil Procedure Code (Act V of 1908), Order I, rule 8—Indian Arbitration Act (IX of 1899), section 14—Award—Petition to set aside award—Misconduct of arbitrator—Numerous parties as defendants—Applicability of provisions of Order I, rule 8 of Civil Procedure Code to petition under Arbitration Act—High Court Rules (O. S.) 1930, rule 373†—Suit to set aside award—Whether maintainable—Suit, meaning of.

A suit is an original proceeding between a plaintiff and a defendant. The term "plaintiff" includes every person asking any relief against any other person by any form of proceeding, whether the same be taken by cause, action, suit, petition, motion, summons or otherwise. The term "defendant" includes every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.

In re Wallis' Trusts,[1] applied.

The provisions of Order I, rule 8, of the Civil Procedure Code, 1908, are applicable to a petition, filed under section 14 of the Indian Arbitration Act, 1899, to set asied an award on the ground of the misconduct of the arbitrator.

Quare: Does a suit lie to set aside an award on the grounds covered by section 14 of the Indian Arbitration Act, 1899?

* Award No. 21 of 1935.

† In 1936 Edition the corresponding rule is 378.

[1] (1888) L. R. 23 Ir. 7 at p. 9.

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PETITIONS under section 14 of the Indian Arbitration Act, 1899.

The petitioner was a timber merchant carrying on business in Bombay. The respondents were the Reception Committee of the 48th Indian National Congress which was held in Bombay in October 1934.

Under orders from the respondents, the petitioner supplied timber and other materials for the construction of various temporary structures and buildings for the purpose of the Congress Sessions. Part payments were made towards the price of the materials supplied and services rendered. Disputes arose as to the payment of the balance of the amount which became due to the petitioner. Those disputes were referred to the sole arbitration of S. D. Prabhavalkar, an Engineer. The arbitrator made his award on February 2, 1935. The award was filed in Court in accordance with the provisions of the Indian Arbitration Act, 1899.

Not being satisfied with the award, the petitioner filed a petition to set aside the said award on the ground, *inter alia*, of the misconduct of the arbitrator, inasmuch as "he set about his work in a most haphazard and irregular manner and had made his award without hearing the evidence of the petitioner."

On the petition coming on for hearing in chambers, a preliminary objection was taken on behalf of the respondents that the petition was not proper as it made the Reception Committee of the Indian National Congress respondents to it, and they were not a registered Association. It was contended that the members constituting it could alone be sued. On this the petitioner applied for leave to amend the title of the petition so as to allow him to proceed against the said Reception Committee through its Chairman and General Secretary as representing themselves and the other members of the Committee. This leave was applied for under the provisions of Order I, rule 8, of the

Civil Procedure Code, 1908. This application was resisted on behalf of the respondents on the ground that the petition to set aside an award was not a "suit" and that the provisions of Order I, rule 8, of the Civil Procedure Code applied only to suits. They therefore asked for the dismissal of the petition.

N. P. Engineer, for the petitioner.

M. C. Setalvad, for the respondents.

B. J. WADIA J. This is an application by the petitioner in the matter of award No. 21 of 1935 to amend the title of his petition filed on May 3, 1935, and for leave under Order I, rule 8, of the Civil Procedure Code. The petition was filed to set aside the award dated February 2, 1935, under the Indian Arbitration Act of 1899 on a submission dated December 17, 1934, to which the petitioner and the Reception Committee of the 48th Indian National Congress were parties. The petition was originally filed against (1) The Reception Committee, and (2) against Abidally Jafferbhai described as the General Secretary of the Reception Committee. On the hearing of the petition in chambers counsel for the respondents raised an objection to the title of the petition on the ground that the Reception Committee was not a registered society and could not be sued as such, and the petition was adjourned for three weeks in order to enable the petitioner to make such amendments as he might be advised to make. The petitioner now applies that the title of the petition should be amended, and that the Reception Committee should be proceeded against through its chairman and general secretary as representing themselves and all other members of the committee, as the members are numerous and have the same interest, and to make consequential amendments in the petition and the proceedings. He also prays for leave under Order I, rule 8, to file the petition and proceed with the same against the chairman and the general secretary as representing themselves and

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all other members of the committee, and for an order directing the Prothonotary and Senior Master of the Court to give notice of the filing of the petition by advertisement in the local newspapers. There is also a similar application in the matter of award No. 22 of 1935.

It was argued on behalf of the respondents that the leave could not be granted, as Order I, rule 8, was applicable to suits, and here there was only a petition. The rule provides that where there are numerous persons having the same interest in one " suit ", one or more of such persons may with the permission of the Court sue or defend on behalf of all who are in the same interest. The corresponding words of Order XVI, rule 9, of the Rules of the Supreme Court, are " one cause or matter ", and it is provided that where there are numerous persons having the same interest in such cause or matter, one or more of them may sue or be sued on behalf of the others. The words " cause " or " matter " are, if at all, a little wider than the word " suit " in Order I, rule 8. Under section 225 of the Supreme Court of Judicature (Consolidation) Act of 1925 " cause " includes an action, suit or other original proceeding between a plaintiff and a defendant, and " matter " includes every proceeding in the Court not in a cause. It was, however, stated that although the rule of the Supreme Court of England applied to a cause or matter, in practice it was only applied to suits which are known as representative suits, and that there was no precedent of a representative petition or application. Counsel accordingly contended that the only remedy for the petitioner was to file a suit before he could take advantage of the provisions of Order I, rule 8, of the Code.

On the other hand, counsel for the petitioner argued that it was not competent for him to file a suit when he was applying under section 14 of the Indian Arbitration Act to set aside an award on the ground that the arbitrator had misconducted himself or where an arbitration or award had

been improperly procured. In such cases the Court has jurisdiction to set aside the award, but it was contended that the procedure was by way of petition under rule 373 of the High Court Rules which provides that all applications under the Indian Arbitration Act other than under section 19 shall be made by petition. The rule is one of the rules made under section 20 of the Act which provides that the High Court may make rules consistent with the Act, amongst other things, as to the filing of awards and all proceedings consequent thereon or incidental thereto. It was also argued that rule 373 was imperative, and that there was no other procedure open to the petitioner. It is conceded that there is no provision in the Act which bars the filing of a suit to set aside an award. All that section 14 provides is that on the grounds mentioned in it or either of them the Court may set aside the award, and rule 373 lays down a summary remedy in order that the petition and the answer thereto may be speedily disposed of. The only question is whether that remedy takes away the remedy by suit. The point arose in *Radha Kissen Khettry* v. *Lukhmi Chand Jhawar*.[1]

In that case plaintiff filed a suit for a declaration that a contract for the sale of piecegoods alleged to have been entered into between him and the defendants was invalid, as the parties were not *ad idem* on a fundamental point, and that the award made in favour of the defendants for breach of the contract was void and inoperative. The plaintiff also charged the defendants with fraud, as it was alleged that the defendants claimed damages for refusal to accept goods which they never offered and were not in a position to deliver. It was held that there was nothing in the Act which barred the suit. It was said that this was unquestionably a suit of a civil nature, and the Court had not been able to discover how its cognizance was expressly or impliedly

[1] (1920) 24 Cal. W. N. 454.

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barred under the terms of section 9 of the Civil Procedure Code. At p. 459 Mookerjee, J., observes as follows :—

"Section 14 empowers the Court to set aside an award where an arbitrator or umpire has misconducted himself or an arbitration award has been improperly procured. Assume for a moment that this authority of the Court may be invoked by way of an application; still the question may arise, whether such remedy is exclusive, or, whether the party affected may not, at his choice, have recourse to a suit as the more preferable course. We need not decide that question, because in the case before us, the grievance alleged is deeper and broader than what is contemplated by section 14."

The question, therefore, whether an application by way of petition was the exclusive and not merely an alternate remedy, where the grounds of attack were completely covered by section 14 of the Indian Arbitration Act, was left open. In that case the buyer disputed the very existence of the contract, and contended that the claim of the sellers to recover damages was tainted with fraud. This according to the learned Judges was plainly a matter for investigation in a suit, though Rankin J. in the Court below had held that under the Indian Arbitration Act all applications to set aside an award which had been filed should be made by petition, whatever may be the ground. It was, however, held by the late Mirza J. in *Tarachand Raghavji* v. *Dawlatram Mohandas*,[1] following *Sassoon & Co.* v. *Ramduti Ramkissen Das*,[2] that an objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought to be taken by motion to set aside the award, but that where it was alleged that the arbitrator had acted wholly without jurisdiction, the award could be questioned in a suit brought for that purpose. In my opinion, however, a suit to set aside an award even on the grounds covered by section 14 is a civil suit in terms of section 9 of the Code, and it cannot be said that its cognizance is either expressly or impliedly barred. A suit is expressly barred by an enactment for the time being in force. It is impliedly barred when it is barred by general principles of the law. It cannot be said that the

[1] (1932) Arbitration No. 49 of 1932, decided by Mirza J., on November 25, 1932 (Unrep.)
[2] (1922) 50 Cal. 1, P. C.

suit would be barred by reason merely of a rule made under section 20. Such a rule must be consistent with the Act. The rule provides that the remedy to set aside an award shall be by petition, but there is nothing in the Act to indicate that the remedy by a suit is in any way inconsistent with it. It has been held that a suit for a declaration that an award is not binding on the plaintiff is maintainable under section 42 of the Specific Relief Act. It has also been held under article 91 of the Indian Limitation Act that an award is an instrument within the meaning of the article, and a suit can be brought to set aside the award within the period prescribed by it. Moreover, the provisions of the Indian Arbitration Act are based on the English Arbitration Act of 1889. The terms of section 11 of the English Act are similar to the terms of section 14. There is, however, no provision which prevents an award being set aside in England by an action. I can see no reason why in India an award cannot be set aside, on the grounds mentioned in section 14, by means of a regular suit, but the point is not altogether free from doubt. I may also in this connection refer to section 39 of the Specific Relief Act. If according to its terms the petitioner entertains a reasonable apprehension that the award if left outstanding may cause him serious injury, and he contends that the award, which is a written instrument, is either void or voidable and should be set aside, he may bring a suit to have it so adjudged. In such a case it is open to the Court not to allow the petitioner to proceed by suit, as a remedy specially designed for the speedy determination of a dispute relating to the conduct of arbitrators is open to him. But there is nothing in the Indian Arbitration Act which prohibits the filing of a suit, nor is there any other authority which precludes the Court from entertaining a suit to set aside an award on the ground of misconduct or irregularity. It was held in *Jai Narain-Babu Lal* v. *Narain Das-Jaini Mal*[1] that there is no cogent

[1] (1922) 3 Lah. 296.

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reason why the question of misconduct of arbitrators should be excluded from the scope of a regular action to set aside the award. It has also been held that where an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy is by filing a regular suit and not by an application under section 14 of the Indian Arbitration Act: see *Matulal Dalmia* v. *Ramkissen Das Madan Gopal*.[1]

Before driving the petitioner, however, to file a suit in order that he may take the benefit of Order I, rule 8, of the Code, I have still to consider whether he cannot avail himself of that rule even on a petition. The word "suit" has not been defined in the Civil Procedure Code, nor in the General Clauses Act. In Wharton's Law Lexicon it is stated that the word "suit" is used in divers senses, and the first is "An action in the Supreme Court, or a proceeding by petition in the Divorce branch of that Court; a prosecution; a petition to a Court, etc. See Judicature Act, 1873, section 100 (now section 225 of the Judicature Act of 1925). Under section 225 of the Act of 1925, "suit" includes "action", and "action" means a civil proceeding commenced by a writ or in such other manner as may be prescribed by Rules of Court. The word "cause" includes under the Judicature Act any action, suit or other original proceeding between a plaintiff and a defendant, as I have stated before. A suit is, therefore, an original proceeding, between a plaintiff and a defendant. Plaintiff is defined as including "every person asking any relief against any other person by any form of proceeding, whether the same be taken by cause, action, suit, petition, motion, summons or otherwise"; and defendant includes "every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings". Accordingly it was held in *In re Wallis' Trusts*[2] that these definitions were wide enough

[1] (1920) 47 Cal. 806.

[2] (1888) L. R. 23 Ir. 7 at p. 9.

to cover a petition served on anyone, and that a petition would come within the meaning of the word "suit". But it must be said that it is only by virtue of the interpretation clause in the Judicature Act that the term "suit" includes a petition.

It was pointed out in *Pita Ram* v. *Jujhar Singh*,[1] (p. 632) that

"there is no definition of the word 'suit', probably because it is not possible to frame one which will satisfactorily survive every test. But on the other hand it is not difficult to decide in the vast majority of cases whether a proceeding is in fact a suit or whether it is merely a summary or subsidiary application."

On the other hand, Peacock C. J. observed in a full bench decision in *Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Debia*[2] as follows (p. 406) :—

"The word 'suit' does not necessarily mean an action, nor do the words 'cause of action' and 'defendant' necessarily mean cause upon which an action has been brought, or a person against whom an action has been brought, in the ordinary restricted sense of the words. Any proceeding in a Court of Justice to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim, if recoverable, is a cause of action."

It is laid down in section 2 of the Indian Limitation Act that a suit does not include an appeal or an application, but this distinction seems to be confined in its effect to the immediate purposes of that Act. Suits, appeals and applications are, therefore, treated in three distinct divisions in the 1st Schedule of the Act. There is also the case of *Nursing Doyal* v. *Hurryhur Saha*,[3] in which the Appeal Court in construing the words in section 2 of the Indian Limitation Act of 1877, namely, "nothing herein shall be deemed to revive any right to sue" held that the words "right to sue" should be used in their widest signification, and would include any application invoking the aid of the Court for the purpose of satisfying a demand. It may be here mentioned that even in the Act of 1877 the term "suit" is defined as not including an appeal or an application. According

[1] (1917) 39 All. 626 at p. 632. [2] (1868) 9 W. R. 402.
[3] (1880) 5 Cal. 897.

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to the Privy Council, however, "suit" ordinarily means, and, apart from any particular context, may be taken to mean, a civil proceeding instituted by the presentation of a plaint: see *Hansraj Gupta* v. *Official Liquidators, Dehra Dun-Mussoorie Electric Tramway Co.*[1] It is also provided by section 26 of the Civil Procedure Code, read with Order IV, rule 1, that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. The words "in such other manner as may be prescribed" are new, but no other manner of instituting suits has hitherto been prescribed. It is arguable whether the word "suit" also includes a proceeding which according to the specific provisions of the law contained in any Act or Statute should be regarded as a suit under the Code. Sir Dinshah Mulla in his Commentary on the Code, 10th edn., at page 7, says that every suit is commenced by a plaint, and when there is no civil suit there is no decree. But, he adds, some proceedings commenced by an application are statutory suits, so that the decision is a decree, e.g., a contentious probate proceeding, or an application to file an agreement to refer to arbitration. In such and other cases proceedings are commenced by petitions, and not by plaints, by reason of the enactments relating to the special subjects. They are treated as suits. According to the decision in *Venkata Chandrappa Nayaniwaru* v. *Venkatarama Reddi*[2] there is authority for the view that the term "suit" has not a narrow significance, but is a very comprehensive one, and that it applies to all contentious proceedings in a civil Court in which the rights of parties are in question and in which the Court is asked to determine them. According to *Watkins* v. *Fox*[3] it is applicable to such proceedings as under that description are directly dealt with by the Code, and such as by the operation of the particular Acts which regulate them are treated as suits. Strictly speaking, therefore, it

[1] (1932) L. R. 60 I. A. 13 at p. 19. [2] (1898) 22 Mad. 256.
[3] (1895) 22 Cal. 943 at p. 948.

may be said that a proceeding which does not commence with a plaint, and which is not to be treated as a suit under any other Act of the Legislature, is not a suit, and a decision given therein is not a decree.

Counsel referred to Schedule II to the Code, paragraph 20 (2), which provides that an application by a person interested in an award, made in a matter referred to arbitration without the intervention of a Court, for filing the same shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. It was held by the Appeal Court in *Rajmal Girdharlal* v. *Maruti Shivram*[1] that the proceedings under paragraphs 20 and 21 of the 2nd Schedule were not proceedings in a suit, though for the purposes of convenience they may be numbered and registered as a suit. That was a decision for the purpose of section 11 of the Civil Procedure Code, and it was held that an order refusing to file an award was not *res judicata* in a later regular suit on the ground that the earlier proceedings were not a suit. In a later decision of the Appeal Court in *Govind* v. *Venkatesh*[2] it was, however, held that the application when numbered and registered as a suit becomes a suit for the purposes of Order XXXVIII of the Code, and that the Court had jurisdiction to direct an attachment before judgment. There is a still later decision of the Appeal Court in *Purshottamdas* v. *Kekhushru*,[3] in which the Appeal Court held that when an application for filing an award is made, it becomes a suit. It was also held that as Order I, rule 8, applies to suits, a notice can issue under Order I, rule 8, and that it was a mere surplusage to issue two separate notices, one under Order I, rule 8, and the other under paragraph 20 (3) of Schedule II; but the question whether the provision of Order I, rule 8, can or cannot be made use of in an application for filing an award, and also for setting an award aside,

[1] (1920) 45 Bom. 329 at p. 334. [2] (1926) 29 Bom. L. R. 342.
[3] (1933) 35 Bom. L.R. 1101.

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was not clearly decided in that suit. There is thus a conflict of opinion as to whether proceedings under paragraphs 20 and 21 of the 2nd Schedule to the Code can be said to be proceedings in a suit. The present petition, however, is not under the Code but under section 14 of the Indian Arbitration Act. It is true that there is no provision in the Act corresponding to paragraph 20 of the 2nd Schedule, for under the Act it is the arbitrator who at the request of a party to the submission files the award in Court, and there is no provision for any application by a person interested in the award for filing it in Court. It cannot, therefore, be said that a petition is a suit, strictly so called, but the question still remains whether it is a proceeding in the nature of a suit or analogous to a suit so as to attract to it the benefit of the provisions of Order I, rule 8. Under section 141 of the Civil Procedure Code, the procedure provided in it in regard to suits is to be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. The proceedings referred to are original matters in the nature of suits. The section does not, however, refer to execution proceedings. It must be remembered that Order I, rule 8, is a rule of procedure, and is an exception to the general rule that all persons interested in a suit are to be made parties thereto. As is pointed out by Sir Dinshah Mulla, convenience requires that in suits where there is a community of interest amongst a large number of persons a few should be allowed to represent the rest, so that trouble and expense may be saved.

Why should not, for the sake of the same convenience and the saving of trouble and expense, a few persons be allowed to sue or be sued in the matter of a petition where there is a community of interest amongst a much larger number? The Court has inherent powers under section 151 of the Code to make such orders as may be necessary for

the ends of justice. There will always be cases and circumstances, which are not covered by the express provisions of the Code, where justice has to be done, and it cannot be said that the Courts have no power to do justice or redress a wrong, merely because no express provision of the Code or a reported decision of a Court is to be found on all fours to meet the requirements of a case. The Code is not exhaustive. As was pointed out by Mahmood J. in *Narsingh Das* v. *Mangal Dubey*,[1] "Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle, prohibitions cannot be presumed" (p. 172). In India, where every Court is a Court of law as well as of equity, the Court has inherent powers to act according to justice, equity and good conscience, with this limitation that though these powers are wide and indefinable, the Court cannot use them to override the express provisions of the law. I have already stated that it is doubtful whether a suit lies to set aside an award on the grounds covered by section 14 of the Indian Arbitration Act. If then the provisions of Order I, rule 8, are applicable strictly to suits commenced by filing plaints, it will follow that a petitioner who wishes to proceed against numerous persons in the same interest in order to set aside an award on the ground of the arbitrator's misconduct cannot file a suit in which he can get the benefit of the provisions of Order I, rule 8, and being restricted to a petition as the only form of procedure, cannot be allowed to use those provisions, because he is told that a petition is not a suit. After all, Order I, rule 8, is only a rule of procedure made for the purposes of convenience and saving of trouble and expense, and I see no reason why a petitioner should be prevented

[1] (1882) 5 All. 163.

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from making use of it for the sake of the same convenience and for saving trouble and expense, if the respondents are numerous and in the same interest, and the petition is one which can be heard and tried as a suit. It is for the Court whilst granting the permission under Order I, rule 8, to consider whether the particular petition or application can be tried as an ordinary suit. A petition for setting aside an award under section 14 of the Indian Arbitration Act is such a petition. It was conceded that the number of members of the Reception Committee to be sued was very large. Such petitions are often adjourned into Court; and evidence is allowed to be tendered, both oral as well as documentary, just as in the trial of a suit, before the Court pronounces its judgment. Moreover, there is no specific prohibition in the rule against its being used in connection with petitions or applications which are analogous to or are in the nature of suits, and tried as such; and under section 151 which saves the inherent powers of the Court to do complete and substantial justice, I am inclined, even if I am thereby creating a precedent, to allow the amendment and to give the leave asked for, in both petitions. The petitioners will make the amendments in their petitions respectively at their own cost, and notice of the petition in each case will also be given by public advertisement at the petitioner's expense.

Costs of these applications in chambers will be costs in the respective petitions. Counsel certified.

Attorneys for petitioners: Messrs. *Patell & Ezekiel.*

Attorneys for respondents: Messrs. *Raghavayya, Naginda s & Co.*

Order accordingly.

B. K. D.