

## **PRIVY COUNCIL**

Abdullah Ashgar Ali Khan

Vs.

Ganesh Dass

Privy Council Appeal No. 36 of 1916

(Lords Dunedin, CJ, Shaw Sumner, Sir John Edge And Mr. Ameer Ali. JJ )

30.7.1917

### **JUDGMENT**

**Mr. Ameer Ali J.**

1. The only point for determination involved in this appeal turns upon the meaning to be attached to the words " finally decided " in section 10 of the British Baluchistan Regulation IX of 1896. That section provides as follows :-

"A court shall not try any suit in which the matter in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties in the same rights, or between parties under whom they or any of them claim."

2. A short statement of the facts will explain how the question has arisen.

3. The parties to the litigation carried on certain business in British Baluchistan in partnership with two other men; in July 1910 they agreed to dissolve the partnership; according to the plaintiff, Ganesh Dass accounts were duly adjusted, when a sum of over 9,900 rupees was found due from the defendant, Ashgar Ali Khan; on the 12th July a formal deed of dissolution was executed by four partners, and on the day following the defendant executed the bond on which the present suit is brought. The defendant's case is that he signed the deed of dissolution which embodied the settlement and executed the bond, agreeing to pay the amount alleged to be due from him, on the fraudulent representation of the plaintiff that the adjustment of accounts was correctly made and on the assurance that should the defendant upon the examination of the accounts at his leisure discover any mistakes, they would be rectified.

4. The defendant alleges that it was on the faith of these representations he executed the two documents. He further alleges that some days after the execution of the deed of dissolution and the bond in suit he had an opportunity to examine the statement of account, which he found to be wholly incorrect and misleading, that thereupon he called upon the plaintiff and other partners to make a proper adjustment, undertaking to pay any amount that might on such further examination he found due from him. The plaintiff Ganesh Dass refused to accede to the proposal, and thereupon the defendant brought a suit on the 22nd July 1911 in the Court of the Assistant Commissioner of Quetta for a cancellation of the bond of the 13th July 1910, on the ground that he was induced to execute it by the fraudulent representations of the present plaintiff. The written statement of Ganesh Dass is not on the record of this appeal, but it appears from the judgment of the Judicial Commissioner in that case that among other pleas Ganesh Dass urged that, the bond being based on the dissolution deed and being merely executed to record the manner in which the payment of the amount due to him was to be made, a suit for the cancellation of the bond alone would not lie.

5. The defendant's suit for cancellation of the bond came for trial before the Assistant Commissioner of Quetta, and he held that the defendant, Ashgar Ali Khan, had failed to establish his allegation of fraud. He accordingly dismissed the action, and his judgment was affirmed on appeal by the District Judge on the 30th May 1913.

6. The defendant thereupon preferred a second appeal under the provisions of Regulation IX of 1896 to the Court of the Judicial Commissioner of British Baluchistan, which is the final Appellate Court in that province. The Judicial Commissioner, Mr. Archer, considered that the objection of Ganesh Dass to the frame of the suit was well founded, and accordingly without entering into the merits of the case, dismissed the defendant's appeal against the orders of the lower Court dismissing his action.

7. The Judicial Commissioner gave his decision in the following words, the exact import of which is not disputed. He says first :-

"Now it appears to me obvious that the respondent's objection to the frame of the suit was well founded, and that the plaint should either have been returned for amendment or rejected."

8. and then, after commenting on several mistakes in procedure in the Courts below, he proceeds as follows :-

"I purposely refrain from going in detail into the merits of the case, because

they cannot be discussed without bringing in the question of the validity of the dissolution agreement, a matter which is not formally before the Courts. It is sufficient to say that after careful consideration of the record and the pleadings I am not prepared to interfere with the orders of the lower courts dismissing the appellant's suit, since for the reasons given above, I hold that the bond of which cancellation is sought is merely consequential on the deed of dissolution of partnership and that a suit for avoiding the bond cannot succeed as long as the dissolution deed remains in force."

9. On the 14th October 1912, the plaintiff, Ganesh Dass instituted the present suit on the bond executed by the appellant on the 13th July 1910. The defendant denied liability on the ground that it had been obtained from him by the fraud of the plaintiff.

10. It is to be observed that whilst this suit was pending in the court of the Judicial Commissioner, the defendant brought an action to have the deed of dissolution cancelled, on the ground of fraud, but it was held that it was barred under the Statute of Limitation.

11. In Ganesh Dass's suit on the bond the Indian Courts have held that the issue raised by the defendant was *res judicata*, and that they were precluded by the provisions of section 10 of Regulation IX of 1896 from entering upon an enquiry whether the bond had been obtained from him on fraudulent representation. In this view they decreed the plaintiff's claim without entering into the merits of the defense. The defendant has appealed to His Majesty in Council, and it was contended on his behalf that the Indian Courts have wrongly applied the rule of *res judicata* to the defense in the present case, as his allegation regarding the execution of the bond on the fraudulent representations of the plaintiff has never been decided in the Judicial Commissioner's Court.

12. It appears to their Lordships that the contention is well founded. "The matter in issue" in the present suit is no doubt the same as in the defendant's own action. It is clear, however, that although the two first Courts had found against his allegation, the final Court of Appeal refused to determine the issue. Section 10 of the Regulation creates an *estoppel* by judgment only when the "matter in issue" has been "finally decided". These words have received judicial interpretation in the case of *Sheosagar Singh v. Sitaram Singh*<sup>1</sup>

13. In that case the Board had to deal with the identical question of *res judicata* arising under section 11 of the Indian Civil Procedure Code, which, so far as the question under discussion is concerned, is in *pari materia* with section 10 of the

Baluchistan Regulation. Lord Macnaghten, delivering the judgment of their Lordships explained the rule as follows:-

"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been heard and finally decided. If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal. and the only thing finally decided by the Court of Appeal was that in a suit constituted as the suit of 1885 was, no decision ought to have been pronounced on the merits."

14. Their Lordships will therefore humbly advise His Majesty that the judgments of the Courts in India in this case should be set aside and that it should be remitted to the Judicial Commissioner of British Baluchistan to direct a re-trial by the Court of first instance. The respondent will pay the costs of this appeal and of the application made on his behalf on the 19th July 1917; the costs incurred by the parties in India will abide the result.

Appeal allowed.

Cases Referred.

1. [1897] 24 Cal. 616 : 24 I.A.50 : 1 C.W.N.297 : 7 Sar.124 (P.C.)