

Sohan Lal and Others

Vs

Amin Chand and Sons and Others

Civil Appeals Nos. 227(N) of 1970

(K.K.Mathew, M.H. Beg JJ)

22.08.1973

JUDGMENT

MATHEW, J. -

1. There were two firms called "Amin Chand and Sons" and "Landra Engineering and Foundry Works". The partners of the firms were three brothers Bakshi Ram, Shiv Dayal and Kishan Chand, after the retirement of the 4th partner. Certain trade marks were registered in the names of the firms. On January 30, 1967, Bakshi Ram gave notice to the other partners dissolving the firms. The notices were served upon the other partners sometime before March, 1967. On October 3, 1967, Bakshi Ram filed two suits for rendition of accounts against the other two partners in the subordinated Judge's court at Jullundur. The defendants in the suits filed applications under Section 34 of the Indian Arbitration Act for stay of the trial of the suits on the ground that the Court had no jurisdiction to proceed with the trial in view of the clause for arbitration in the partnership agreements. On February 4, 1968, Bakshi Ram died and his legal representatives, 10 in number, were brought on record. On June 24, 1968, the parties agreed to have the matter referred to arbitration. The Court stayed the trial of the suits and referred the matter to arbitrators. Before the arbitrators, a question was raised whether the legal representatives of Bakshi Ram were entitled to continue the suits. The arbitrators stated a special case for the opinion of the Court under the first part of Section 13(b) of the Act the question of law, whether the legal representatives are competent to continue the suits. On December 20, 1968, a suit was filed by a firm called "Amin Chand & Sons" through Shiv Dayal, in the District Court at Rohtak against three of the legal representatives of Bakshi Ram trading under the names "Bakshi Ram & Sons", "Sohan Lal and Brothers" and "Kaybus Industries and others", for a permanent injunction restraining them from using certain trade marks. The plaintiff-respondents in the suit applied for restraining the defendant-appellants and their dealers from manufacturing or selling agricultural implements under trade mark Nos. 125062 and 138979 which were originally registered in the name of Amin Chand & Sons of which Bakshi Ram, Shiv Dayal and Kishan Chand were partners. The Court granted an ex parte injunction. That was vacated on the objection of the defendants in the suit. Thereafter application were filed by the plaintiff-respondents for reviewing the order dismissing the applications were filed by the plaintiff-respondents for reviewing the order dismissing the application for temporary injunction, and for issue of a temporary injunction to restrain the defendant-appellants from using the trade marks registered in the name of Amin Chand & Sons of which Bakshi Ram was a partner. These applications were allowed and temporary injunction as prayed for was granted. The defendant-appellants preferred and appeal against that order to the High Court. The High Court confirmed the order. This appeal, by special leave, is directed against that order.

2. During the pendency of the appeal here, one of the appellants, namely, Dharam Vir, died on May

14, 1970. The application to implead his legal representatives was filed only on July 14, 1970. The respondents, by way of preliminary objection, contended that the appeal has abated.

3. So, the first question for consideration is whether the appeal has abated. The plaint shows that three persons were sued in the names of the firms under which they were carrying on business. The injunction order was issued against these persons in the names of the firms. The injunction order operated against these persons as carrying on business in the name of the firms.

4. Order 30, Rule 4 of the Civil Procedure Code provides that notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872, two or more persons may sue or be sued in the name of a firm under the foregoing provisions and if any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. We have already said that the injunction order was directed against the partners in the names of the firms and that it operated as against them. The partners filed the appeal in the names of the firms against the order and when one of the partners died, the failure to implead his legal representatives would not cause the appeal to abate under Section 107 of the C.P.C. the provisions of Rule 4 of Order XXX will apply to appeals also.

5. Counsel for the respondents also raised another objection namely that since the appeal to the High Court was against the order granting a review, the only grounds which could have been taken in the appeal were those mentioned in Order 47, Rule 7 or the Civil Procedure Code and that the appellants are not, therefore, entitled to canvass the merits of the injunction order here. There is no substance in this objection either.

6. It is not very clear from the order of the trial Court whether that court reviewed its previous order vacating the injunction and then passed the order of injunction after granting the review or whether it modified its previous order vacating the injunction in the exercise of its inherent power. If the order under appeal before the High Court is considered to be one granting the review, then certainly the only grounds on which that order could have been impeached in the appeal are those stated in Rule 7 of Order 47. But the order appealed against was not only an order granting the review but also an order passed on merits on the application for injunction. It cannot be disputed that an appeal lay from the order granting the injunction, and in such an appeal it was open to the appellants to urge any grounds to show that the injunction was wrongly granted. The order of the trial Court was a combined order granting the review and disposing of the application for injunction on merits and, therefore, the appellants were not only entitled to challenge the order on the grounds mentioned in Order 47, Rule 7, but also on any other ground open to them, namely, that, on merits, the order of injunction should not have been passed.

7. Then the question is whether there was any justification for passing the order of injunction and whether the appellate court was right in confirming it.

8. It may be recalled that Bakshi Ram gave notices for the dissolution of the two firms in January, 1967, to the other partners. The appellants contend that with the dissolution of the firm the assets of the firms including the trade marks registered in the name of the firm belonged to the partners as co-owners and that two of the partners, namely, the respondents, have no right to appropriate or use the assets of the firm to the exclusion of the legal representatives of the other partner, Bakshi Ram. The suit in which the injunction order was passed was filed for a declaration that "Amin Chand & Sons" constituted by the two surviving partners alone was entitled to use the assets of the firm of "Amin Chand & Sons" of which Bakshi Ram was a partner, and it was for restraining the appellants from

using that firm's assets, namely, the two trade marks in question, that the order of injunction was sought. Prima facie, it would appear that the respondents are not entitled to the exclusive use of the two trade marks which formed part of the assets of the partnership of Amin Chand & Sons of which the three brothers were partners. The appellants being the legal representatives of Bakshi Ram were also entitled to a share of the assets of that partnership. If that be so, we do not think that the Courts were justified in granting the injunction restraining the appellants from using the trade marks. In these circumstances, we think that the proper course to adopt is to continue in force the order passed by this Court when it granted the special leave on the basis of the application filed by the appellant for stay of the order of injunction, after setting aside the order under appeal.

9. We, therefore, order that the injunction granted by the District Judge, Rohtak, on March 20, 1969, is varied to the extent that the appellants will be entitled to use the trade mark "Amin Chand & Sons" and "Landra", but they will keep accounts of all goods manufactured and sold and submit six-monthly accounts to the trial Court during the pendency of the suit and that the respondents will also keep similar accounts and furnish accounts to the trial Court.

10. The appeal is allowed to the extent indicated but is dismissed in other respects. We make no order as to costs.

Civil appeals No. 1296 and 1297 of 1971.

11. It might be recalled that Bakshi Ram had filed two suits for rendition of accounts on the basis that the firms stood dissolved by the notices issued by him in 1967 and that after his death, the parties to the suits had agreed to have the subject-matter of the suits referred to arbitration. After the arbitrators had entered upon the reference, a question was raised whether the legal representatives of Bakshi Ram were competent to proceed with the two suits. The arbitrators stated a special case for the opinion of the Court under the first part of Section 13(b) of the Arbitration Act.

12. The Court gave the opinion and it is against the opinion that these appeals by way of special leave have been preferred.

13. A preliminary objection was raised by the respondents to the maintainability of these appeals on the ground that an opinion given pursuant to the first part of Section 13(b) of the Arbitration Act is not a judgment, decree, determination or order as visualized in Article 136 of the Constitution and, therefore, the appeals would not lie.

14. In order to dispose of the objection it is necessary to decide the nature of an opinion given by a court under the first part of Section 13(b) of the Arbitration Act.

15. In *British Westing House Electric and Manufacturing Company Ltd. v. Underground Electric Railways Company of London Ltd.* (1912 AC 673.), the House of Lords held that the opinion of the High Court upon a special case stated by an arbitrator under the Arbitration Act, 1889, with regard to a question of law arising in the course of the reference cannot be the subject of an appeal, but, if that opinion is erroneous, an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award. In the course of his speech Viscount Haldane L.C. said :

"No doubt an opinion given by the Court under the provisions of the Arbitration Act is not a judgment or order, and is, therefore, not susceptible of being the subject of an appeal. But in my opinion, that is the only reason why it cannot be appealed, and if

the law embodied in it is afterwards set out on the face of a final award, I see no reason for thinking with Vaughan Williams, L.J. that the Act intended to make the statement of the law appearing on the face of the award binding on a higher tribunal before which the award might come for review."

16. In *In re an Arbitration between Knight and the Tabernacle Permanent Building Society* ((1892) 2 QBD 613.), Lord Esher said that when the statute stated (Arbitration Act, 1889) that "any referee, arbitrator or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case of the opinion of the Court any question of law arising in the course of the reference", the words being not "for determination" or "decision" by the Court, there is no determination or decision when the Court gives the opinion. He also said that it would be most inexpedient that, where an opinion is given by the Court under this statute in the course of a reference for the guidance of the arbitrators, there should be an appeal which might be carried up to the House of the Lords. Bowen, L.J. said that it could not have been intended that, whenever a case is stated under this section for the opinion of the Court, such opinion when taken is to be treated as an absolute determination of the rights of the parties with the result that there may be an appeal from it which may be carried to the House of Lords. He further said that the section in question contemplated a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference and that he does not divest himself of his complete authority over the subject-matter of the arbitration but still remains the final judge of law and fact although, a fair and honest arbitrator would, in the absence of special circumstances, be bound in honesty and morality, after taking the opinion of the Court, to act upon such opinion.

17. We think that in spite of the opinion given by the Court, the arbitrators are clothed with the final duty of determining the case and that the opinion of the Court does not finally determine the case, although, it might bind the arbitrators in honesty and morals to act upon the law as the Court stated it. We also think that there could be no appeal from their decision because they did not act upon the opinion although it might be a ground for impeaching their award on the ground of misconduct. It appears to us that this consultative jurisdiction of the Court does not result in a decision which is equivalent to a judgment, decree, determination or order.

18. In *Union of India v. M/s. South India Corporation* (AIR 1960 AP 346.), it was held that an opinion on a special case stated under the first part of Section 13(b) of the Arbitration Act is consultative in character and is not a determination of the rights of the parties.

19. In *Union of India v. M/s. Ram Sukh Das and Others* (AIR 1959 Punj 61.), the Court said that no appeal will lie from an opinion given by the Court on a special case stated under the first part of Section 13(b) of the Arbitration Act. The same view was taken in *Adamji Lukmanji and Louis Dreyfus & Co., In the matter of an Arbitration* (AIR 1925 Sind 83.).

20. Counsel for the appellants relied on the ruling in *Clive Mills Ltd. v. Swalal Jain* (AIR 1957 Cal 692.), and submitted that there are material differences between the English Arbitration Act and the Indian Arbitration Act and therefore the decision of the House of Lords might not be a safe guide. We do not think that there is any material difference in the language of the corresponding section of the English Act with which the House of Lords was dealing.

21. Counsel for the appellants submitted that the opinion given by court has to be incorporated in the award under Section 14(3) and therefore, the opinion was binding on the arbitrators. Section 14(3) provides :

"14(3) Where the arbitrators or umpire state a special case under clause (b) of Section 13, the Court after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of the award."

The marginal note to Section 14 says : "Award to be signed and filed". Section 14(1) says that when the award is made by the arbitrators, they shall sign it and give notice to the parties of the making an signing of the award; Section 14(2) provides that the arbitrators shall, at the request of any party to the arbitration agreement, cause the award to be filed in court and that the Court shall thereupon give notice to the parties of the filing of the award. The comes sub-section (3) of Section 14. The entire scheme of the section would show that the section is concerned with the making of an award. Therefore, the reasonable way to read Section 14(3) is that it is concerned only with the latter part of Section 13(b), because the latter part of Section 13(b) provides for stating the award wholly or in part in the form of a special case of such question for the opinion of the Court. The opinion give under the latter part of Section 13(b) should be added to and form part of the award under Section 14(3). We do not think that an opinion given under the first part of Section 13(b) should be added to and form part of the award. The reason why the opinion given under the latter part of Section 13(b) should be added to and becomes part of the award is because the arbitrators have stated the award wholly or in part in the form of a special case of such question for the opinion of the Court. This view is further strengthened by the circumstance that under Section 39(1)(ii), an appeal is provided only against an order on a award stated in the form of a special case. The reason why an appeal is provided for in such a case is that the opinion of the Court has to be added to and form part of the award and it therefore becomes a decision of the Court, notwithstanding the fact that it is incorporated in the award. There is no provision for an appeal against an opinion given by the Court on a special case stated by court under the first part of Section 13(b) or against the decision to stated a special case for the opinion of the Court for the reason that the opinion is not a decision. Nor is it to be incorporated in the award. If, as a matter of fact, the opinion given by the Court on a special case stated under first part of Section 13(b) is binding on the arbitrators and has to be incorporated in the award, there was no reason why the legislature should not have provided for an appeal against the opinion or against the reference which led to the opinion. The scheme of the Act shows that the legislature wanted to provide for an appeal only when there is to be a decision by the Court binding on the parties, not when it tenders an opinion which is not binding on the arbitrators and which is not to be incorporated in the award. It might be that the arbitrator may choose to act upon the opinion. But that is not for the reason that it is a binding determination or a decision. We have, therefore, no hesitation in holding that the appeals are incompetent.

22. The appellants' counsel argued that the opinion expressed by the Court is prima facie wrong for the reason that it did not take into account the real issue. The real issue, according to counsel, was whether the partnerships "Amin Chand & Sons" and "Landra Engineering and Foundary Works" stood dissolved by the notices issued by Bakshi Ram in 1967, whether the two suits instituted by Bakshi Ram for rendition of accounts were competent, and whether there was any bar in his legal representatives continuing the suits. Counsel argued that under Section 43 of the Indian Partnership Act, it was open to Bakshi Ram to dissolve the partnerships by giving notice to the other partners as the partnerships were partnerships at will and that Clauses 14 and 15 of the partnership agreement have nothing to do with the competency of one of the partners to dissolve the firms or the legal representatives of Bakshi Ram to continue the suits. Apparently, it would seem that there was no bar to Bakshi Ram filing the suits for rendition of accounts if the partnerships stood dissolved by the notices issued by him and perhaps there would be no reason also why his legal representatives could not continue the suits. However, we do not express any final opinion on the merits of the

controversy. We need only say that that opinion of the Court is not binding on the arbitrators and counsel for the respondents did not content otherwise.

23. The appeals have to be dismissed and we do so but in the circumstances without any order as to costs.

Civil Miscellaneous Petition No. 2184 of 1972.

24. This application is for taking proceedings for contempt of court against "Amin Chand & Sons" represented by Shiv Dayal, the respondent in these petitions, for having disobeyed the interim order passed by this Court on the application for stay while admitting Special Leave Petition (Civil) No. 1851 of 1969 on January 29, 1970. That order provided as follows :

"Special leave granted. The injunction granted by the District Judge, Rohtak on March 20, 1969 is varied to the extent that the Petitioner will be entitled to use the trade mark "Amin Chand & Sons and Landra", but they will keep accounts of all goods manufactured and sold and submit six-monthly accounts to the trial Court, during the pendency of the appeal. The respondents will also keep similar accounts and furnish accounts to the trial Court."

25. The main allegation in this application is that the respondent Shiv Dayal filed a criminal complaint before the Judicial Magistrate, I Class, Phillaur stating that the applicants were using the trade marks "Special Landra" and "Amin Chand" without authority and that they were using the name of "Amin Chand & Sons" under which the respondent Shiv Dayal and his partner were carrying on their trade.

26. On the objection of the applicants as to the maintainability of the complaint, the learned Magistrate passed an order holding that the complaint was maintainable because one of the allegations in the complaint was that the applicants were using the name of "Amin Chand & Sons", the firm under which Shiv Dayal and his partner are carrying on the trade on the goods manufactured by the applicants and thus passed off their goods as goods manufactured by "Amin Chand & Sons". On a perusal of the complaint, it is clear that there are allegations to show that the applicants were using the name of the firm "Amin Chand & Sons" under which the respondent Shiv Dayal and his partner are carrying on the business, on the goods manufactured by the applicants. In these circumstances, we do not see how the respondent has committed any contempt by disobeying the order of this Court. There can be no dispute that the respondent was entitled to file a complaint on the ground that the applicants were manufacturing goods under the trade marks as being manufactured by the firm of "Amin Chand & Sons" and were passing off the goods as manufactured by the respondent firms. It would appear that the applicants have filed a petition under Section 561-A of the Code of Criminal Procedure before the High Court of Punjab and Haryana for quashing the order of the Magistrate holding that the complaint was maintainable. The High Court will pass the appropriate order on that petition.

27. We see no substance in this petition. We therefore dismiss it.

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