ALLAHABAD HIGH COURT

Gopal Das

Vs.

Baij Nath

(Sulaiman, J.)

10.11.1925

JUDGMENT

Sulaiman, J.

1. This is a civil revision from an order disallowing certain objections to an award and directing that a decree be prepared in terms of the award.

2. A preliminary objection is taken on behalf of the respondents that no matter whether the decision of the Court below was right or wrong as to the objections raised before it, the order is not open to revision by this Court. Where objections are raised as to the proceedings before an arbitrator, and they are the subject of a decision by the trial Court, it cannot be suggested that there has been any irregularity committed by the Court in the exercise of its jurisdiction. Such objections, therefore cannot be properly raised again in revision. But where the applicant challenges the proceedings of the Court itself and attacks the reference made by the Court to the arbitrator it is not merely a question of a wrong decision by the Court, but may be one of irregularity or illegality committed by it in the exercise of its jurisdiction. The learned Counsel has relied on the case of *Ajudhia Prasad v. Badar-ul-Hasan*[1], where a learned Judge of this Court did observe that objections as to the validity of a reference ought to be raised under para. 15 of Sch. 2 of the Code. But in the case of *Kanhya Lal v. Jagannath Prasad Hanuman Prasad*[2], decided by a Banch of which the same learned Judge was a member, it was remarked that objection as to the validity of a reference to arbitration was not an objection within the meaning of para. 15 and had no finality attached to it. With this last observation we agree. The objection is not as to the validity of the award only, but as to the illegality of the reference to the arbitration. This reference having been made by an order of the Court it is open to revision after the case has terminated. It would not have been possible for the applicant to come up in revision from an interlocutory order. We accordingly overrule this preliminary objection.

3. The facts of this case are that a suit was instituted by the plaintiffs against a firm named Gobind Prasad Makund Ram which has two partners, Gopal Das and Sheo Prasad, father and son. In the plaint the plaintiffs expressly asked that notices should be served on the two partners named individually. The notices were ordered to be issued to them separately. Only Sheo Prasad filed a written statement and engaged a vakil, and in the

[1] AIR 1917 All 183 : 41 Ind. Cas. 357

[2] AIR 1921 All 16 : 60 Ind. Cas. 857

vakalatnama he purported to engage the vakil as a partner of the firm. Gopal Das did not put in any appearance in the Court of the Subordinate Judge. Before the evidence commenced one of the plaintiffs and the vakil for all the plaintiffs as well as Sheo Prasad signed an application referring the dispute between the parties to a named arbitrator. In this application Gopal Das did not join.

4. The matter was referred to the arbitrator and an award was made against the defendant firm. Objections were filed both by Sheo Prasad and Gopal Das to the validity of the award, but they have been overruled by the learned Subordinate Judge. Gopal Das, the father has now come up in revision and challenged the validity of the reference on which the award is based.

5. There can be no doubt that under Sch. 2, para. 1, it is imperative that all parties interested should agree that any matter in difference between them be referred to arbitration. Of course it is not now necessary that pro forma defendants must also join; nor is it necessary that persons who are not interested in the matter in difference between those joining in the reference should be impleaded. But all the same, necessary it is that all persons who are interested in the matter which is in difference between the parties and which is going to be referred to arbitration, should join. Although it is not absolutely necessary that they should all sign the application made to the Court, it is necessary that they should agree to the reference. The learned advocate for the respondents has relied on the provisions of Order 30, Rule 1, sub-Cl. 2, under which, when a suit is brought against a firm, then in the case of any pleading or other document required by or under this Code to be signed verified or certified by the plaintiff or the defendant it is sufficient if such pleading or other document is signed, verified or certified by one of the partners. It may however be noted at once that under no provision of the Code is an agreement or application to the Court required to be signed, verified or certified by a party. All that Sch. 2, para. 1, sub-Cl. 2 requires is that application to the Court should be in writing. It does not require that it should be signed by the party. From the case of *Umed Singh v. Seth Sobhag Mal Dhadha*[3] it is clear that the agreement need not be in writing, it may be oral. Thus Order 30, Rule 1, sub-Cl. 2 does not empower one partner to refer the case to arbitration so as to bind the other partners who have not agreed to or joined in the application for reference. It may be pointed out that once a decree has been passed against a firm it can be executed under Order 21, Rule 50, not only against the property of the partnership, but also against any person who has appeared as a partner or who has been individually served as a partner with a summons and has failed to appear. Thus the consequences of a decree passed against a firm are to make the partners who have been served individually liable.

6. I therefore think that it could never have been in the contemplation of the Legislature to make an agreement for reference to arbitration by only one of the partners binding on all the partners merely because the suit is against the firm as such.

7. Reliance has been placed on the case of *Ishar Das v. Keshab Das*[4] where it was held that a minor defendant whose guardian ad litem did not put in an appearance in the case nor contested the suit was not a person interested in the matters which were referred to arbitration and that therefore his not joining in the reference did

[3] AIR 1915 PC 79 [4](1910) 32 All 657

not invalidate it. It may be that the learned Judges on the facts came to the conclusion that the matter referred to arbitration did not affect the interest of the minor at all. We are not prepared to

hold that if a defendant is interested in the subject-matter of the reference, and does not join in the reference, he is bound by the award merely because he did not choose to put in an appearance and contest the suit. In the present case as already remarked Gopal Das was directly interested in the subject-matter of the reference.

8. I am accordingly of opinion that there is nothing in the Civil Procedure Code which entitles Sheo Prasad, as one of the partners, to refer the entire dispute to arbitration without the agreement of the other partner, Gopal Das.

9. The learned advocate for the respondent has lastly relied on the finding of the Subordinate Judge that although Gopal Das had not agreed to the reference to arbitration at the time when it was so referred, and bad not signed the application, nevertheless he acquiesced in the proceedings and did actually on one occasion appear before the arbitrator. The question before us is really one of the illegality of the reference. If there was no agreement of all the parties at the time of reference then a subsequent agreement cannot make the reference itself valid though under certain circumstances it may amount to estoppel. In the present case however we cannot hold that Gopal Das is precluded by his subsequent conduct from challenging the validity of the reference. He might have tried to make the best of the situation but when the case did not succeed before the arbitrator he falls back on his right to challenge its validity.

10. We are not satisfied that the learned Judge has come to any distinct finding that as a matter of fact Sheo Prasad had authority to make the reference on behalf of the other partner Gopal Das. He has merely referred to four previous occasions on which such a thing was done; but it might very wall be that on those occasions Sheo Prasad had special authority or it might be that no objection was raised on the point and considered. Furthermore, those cases were cases which came up before a kapra committee (a previously appointed board of arbitrators), whereas, in the present case, it was a new arbitrator-a pleader-who was going to constitute the private tribunal. I would accordingly allow this revision, and setting aside the order of reference (with which the award and the decree fall to the ground), direct that the case be restored to its original file and disposed of according to law.

Mukerji, J.

11. I agree. I wish to add just a few words to emphasize my view that when a reference is made to arbitration in a suit in which a firm is a party all the members of the firm who are sought to be bound must join in making the reference. The object of enacting Order 30, Civil Procedure Code of 1908, was not to give any one of the members of the partnership any higher authority than he possessed under the law before the enactment. For brevity of reference it was sometimes expedient to describe certain partners merely by the name of the firm. A firm is not a corporation and has got no entity apart from the entities which constituted the firm. In order to establish the proposition that one of the members of a partnership business could refer a dispute to arbitration on behalf of all the members of the partnership, something more than the rules enacted in Order 30, Civil Procedure Code, should be pointed out. It will be noticed that in Rule 2 of Order 30, a defendant may at any time call upon the plaintiffs, who are suing under the name of their firm, to disclose the identity of the partners who constitute the firm. If they fail to disclose their names the proceedings must be stopped. This shows that the Legislature meant that, where necessary, all the individuals who constitute the plaintiff or the defendant firm must come before the Court

under their original names and descriptions. This is an additional reason for holding that a partner is not entitled, except under a deed of authority, to refer a matter to arbitration so as to bind all his partners.

12. The revision is allowed, the award and the decree are set aside and the case be restored to the original file and be disposed of according to law. As Gopal Das is partly to be blamed we direct that the costs should abide the event.
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