Shanti Lal vs Madan Lal And Ors. on 7 May, 1954

Equivalent citations: AIR1954ALL789

JUDGMENT

Roy, J.

1. This appeal has been preferred by Seth Shanti Lal, the plaintiff, whose suit No. 42 of 1940 instituted against four persons, namely, Madan Lal, Phondi Lal, Nathi Mal, and Lallu Mal had been dismissed by the learned Civil Judge of Agra on 28-1-1944. The suit was instituted on 22-10-1940.

Shanti Lal alleged that the defendants formed a joint Hindu family and dealt in ready grain and also entered into forward contracts for the sale and purchase of grain and other commodities; that the defendants opened three different "khatas' with the plaintiff, the one in the name of "Madan Lal Lallu Mal", the other in the name of "Lallu Mal Dalai", and the third in the name of "Brij Kishore" and they did business in the commission agency of the plaintiff who acted as their 'pakka arhatia'; that the defendants entered into transactions in 'arhar, bajra', cotton seed, etc. in the commission agency of the plaintiff; that on account of these transactions ranging between 18-12-1939 and 14-3-1940, there was a debit balance of Rs. 5661/9/9 due to the plaintiff by the defendants under the khata of Madan Lal Lallu Mal; that in the 'khata' of Lallu Mal Dalai a sum of Rs. 125/14/6 was due to the plaintiff from the defendants, and in the 'khata' of Brij Kishore there was a credit balance of Rs. 140/4/- due to the defendants from the plaintiff, and that upon an adjustment of these amounts a sum of Rs. 5647/4/3 as principal and Rs. 352/11/9 as interest, total Rs. 6,000/-, was due from the defendants to the plaintiff which they had not paid in spite of repeated demands. The claim was, therefore, for a sum of Rs. 6,000/-.

2. Phondi Lal and Nathi Mall, defendants 2 and 3, pleaded that they had nothing to do with these transactions and they never did any business with the plaintiff. They contended that they were separate from Madan Lal and Lallu Mal, defendants 1 and 4, and they never gave them any authority to do any business on their behalf.

3. Defendants Madan Lal and Lallu Mal contended that the plaintiff was not their 'pakka arhatia', but he was only their commission agent; that these defendants had dealings with the plaintiff under 'khatas' styled as "Madan Lal Lallu Mal", "Lallu Mal Dalai", and "Brij Kishore", that the 'khata' styled as "Brij Kishore" related- to transactions of ready goods and the other two 'khatas' related to forward contracts which were wagering in nature and could not, therefore, be enforced; that since the plaintiff had not rendered accounts as commission agent and since he exceeded the authority given to him as a commission agent, he was not entitled to any relief.

4. Madan Lal and Lallu Mal instituted a suit No. 557 of 1941 in the Court of the Munsif of Agra on 16-9-1941, against Seth Shanti Lal for rendition of accounts in respect, of all the three khatas

aforesaid and for the recovery of such sum as may be ultimately found due after accounting. The suit was tentatively valued at the sum of Rs. 1,500/-.

5. At the instance of the parties the suit instituted in the Court of the Munsif was transferred to the Court of the Civil Judge of Agra and both the suits were consolidated and heard together. On 17-5-1943, both parties gave a statement before the Civil Judge of Agra saying that the evidence which may be recorded in suit No. 42 of 1940 may be read in evidence in the other case as well; that in suit No. 557 of 1941 the parties do not propose to produce any separate oral evidence; and that the documentary evidence filed in the one case or in the other be read in evidence in both the suits.

The learned Civil Judge recorded the oral evidence produced by the parties. Thereafter on 30-7-1943, the counsel for the parties made the following statement, which was recorded on paper No. 464B of suit No. 42 of 1940:

> "Babu Ram Krishna Garg may be appointed as commissioner for preparing accounts in both the cases. All the issues may be decided after the commissioner's report has been filed. This would not mean that the defendant would give up the plea of wagering. The commissioner aforesaid on the basis of the evidence produced by the parties in the suit would decide that in which item (?) the alterations have been made. The parties empower the Court to grant permission to the commissioner aforesaid to take additional evidence if the latter thinks it necessary. The Court may, after hearing the parties, pass order which it may deem suitable and the order will not be appealable or subject to a revision. For the present the parties shall deposit Rs. 100/-as commissioner's fee half and half."

6. The commissioner, after hearing the parties, submitted a report on 29-11-1943. Objections were taken to it, both by the plaintiff and by defendants 1 and 4. The learned Civil Judge, after hearing the parties, held that the transactions entered in the 'khatas' styled as "Madan Lal Lallu Mal" and "Lallu Mal Dalai" were wagering contracts relating to forward transactions in which no delivery was ever contemplated to be given or taken, that such contracts were, therefore, not enforceable; that defendants 2 and 3 were separate from the other two defendants and they never did any business with the plaintiff and never authorised defendants 1 and 4 to do business on their behalf; that suit No. 42 of 1940 was liable to be dismissed, and suit No. 557 of 1941 could be decreed with respect to the ready goods under khata of "Brij Kishore" for a sum of Rs. 270/13/3.

The learned Civil Judge upon those findings dismissed suit No. 42 of 1940 with costs and decreed suit No. 557 of 1941 for a sum of Ks. 270/13/3 and directed the parties to receive and to pay costs in proportion to success and failure.

7. The present appeal, as we have already said, has been preferred from the decision in suit No. 42 of 1940.

8. An appeal was preferred also in the other suit before the District Judge by Seth Shanti Lal, but since the memorandum of appeal was deficiently stamped and the deficiency was not made good,

the memorandum of appeal was rejected.

9. A preliminary objection has been taken by learned counsel for the respondent that when the parties entered into the agreement embodied on paper No. 464B quoted above, they intended that the proceedings should take place before the trial Court and not before an appellate Court and that consequently the decree passed by the Subordinate Judge was in essence a consent decree passed on an agreement arrived at between the parties, which amounted to a compromise and that no appeal lay against that decree.

On the other hand, it has been contended on behalf of the appellant that the agreement contained in the statement recorded on paper No. 464B related only to the appointment of the commissioner and the procedure to be followed by the commissioner and did not apply to the ultimate judgment in the case, and the words:

> "the Court may after hearing the parties pass order which it may deem suitable and the order will not be appealable or subject to a revision,"

in the agreement were intended to apply only to the immediately preceding sentence of the same agreement namely:

> "the parties empower the Court to grant permission to the commissioner aforesaid to take additional evidence if the latter thinks it necessary."

This argument is further based upon the circumstances that the word used in the agreement is "order" and not "final judgment". In our view this contention of the appellant is correct and must be accepted. There is, of course, a long series of decisions of this Court and of other Courts in support of the argument put forward on behalf of the respondent that where parties to a suit come to an agreement that the ultimate decision of the Court would be final and it would not be open to appeal, the decree passed in such circumstances would, in essence, amount to a consent decree based on an agreement arrived at between the parties and would not be appealable.

The earliest case that need be mentioned is that of -- 'Shahzadi Begam v. Muhammad Ibrahim', AIR 1921 All 310 (A). The next case is that of ---- 'Himanchal Singh v. Jatwar Singh', AIR 1924 AH 570 (B). Then there are the decisions in --'Ram Sunder Misra v. Jai Keran Singh', AIR 1925 All 271 (C); -- 'Sita Ram v. Peare', AIR 1925 All 558 (D); -- 'Ballabh Das v. Sri Kishen', AIR 1926 All 90 (E); -- 'Jaggu Mal v. Brij Lal', AIR 1930 All 127 (F); and -- 'Banwari Lal v. Ram Gopal', AIR 1940 All 190 (G). The principle underlying all these decisions is the same, although the facts were different. As the learned Chief Justice remarked in AIR 1925 All 271 (C):

> "It is surely open to a litigant, be he plaintiff or defendant, at any stage of the proceedings to make an offer to the other side to bring litigation to a close."

In AIR 1926 All 90 (E) Sulaiman J. (as he then was) has thus explained the underlying principle:

> "Where in pursuance of an agreement between the parties the Court proceeded outside its ordinary jurisdiction, the proper inference would be that there was to be no appeal from the decision as would be the case if the trial were in the ordinary way."

The learned Judge further made it clear that it is not only where the Court has proceeded outside its ordinary jurisdiction that an appeal is barred, and that there can be other circumstances because of which the parties to a case may have no right of appeal.

10. Reading the agreement contained on paper No. 464B we are of the opinion that this agreement was not in respect of the ultimate decision of the suit when it provided that:

> "The parties empower the Court to grant permission to the commissioner aforesaid to take additional evidence if the latter thinks it necessary. The Court may after hearing the parties pass order which it may deem suitable and the order will not be appealable or subject to a revision."

and that these words related only to the grant of permission to the commissioner to take additional evidence, if necessary. In our judgment, it cannot be urged that the agreement contained on paper No. 464B precludes the parties from preferring an appeal from the ultimate decision of the case.

11. The next question which has been urged before us on behalf of the respondents is that since the appeal preferred against the decision and decree in suit No. 557 of 1941 has been allowed to be dismissed by the non-payment of the requisite fee, the decision in that suit has become final and consequently that decision operates as 'res judicata' so far as the present appeal is concerned.

In the Full Bench decision of this Court in --'Ghanshiam Singh v. Bhola Singh', AIR 1923 All 490 (2) (II), it has been held that where it appears to the Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties and arising out of two appeals to a subordinate appellate Court, and only one of such decrees is brought before the High Court in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought, which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred cither by the rule of 'res judicata' or at all by reason of his failure to appeal from the decree which does not prejudice him; and that it would be wrong indeed for an appellant to appeal against a decree which did not prejudice him and to which he did not object or to appeal against two duplicate decrees where an appeal against one of them would be sufficient and he is certainly under no obligation to do so.

It was further observed that the ultimate rights of the parties must be adjusted and regulated according to the final decision of the last Court of appeal. In that case it was held that the case of -- 'Damodar Das v. Sheo Ram Das', 29 All 730 (I) was rightly decided and that the Court rightly treated the two decrees as being in substance one, though drawn up in duplicate; that the earlier Full Bench decision in -- 'Zahari v. Debi', 33 All 51 (J) did not lay down a rule of universal applicability and had been misapplied in some of the subsequent cases, and that the decisions in --'Abdul Basit v. Asfaq

Husain', 1908 All WN 211 (K), -- 'Dakhni Din v. Ali Asghar', 33 All 151 (L), -- 'Ram Charan v. Lachman Frasad', 9 Ind Cas 667 (All) (M), -- 'Anant Das v. Udai Bhan', 35 All 187 (N) and -- 'Balhari Pande v. Shiva Sampat', 18 All LJ 40 (O) must be treated as no longer good law.

12. A Full Bench of the Lahore High Court in -- 'Mt. Lachhmi v. Mt. Bhulli', AIR 1927 Lah 289 (P) held that where two widows were jointly in possession of certain land and each sued the other for a declaration that she was the exclusive owner of that land and that the other had no right in it of any kind, and both suits were disposed of by a single judgment which decided that one of them was the owner but that the other was entitled to hold possession of half the land in lieu of maintenance, and a separate decree was drawn up in each suit declaring the rights of the plaintiff according to that decision, and one of them appealed against one of those decrees only, namely, the decree given in the suit in which she was the plaintiff, the fact that no appeal had been preferred by her against the decree in the other suit could not prevent her appeal from proceeding.

13. In -- 'Pappammal v. Mcenammal', AIR 1943 Mad 139 (Q) three suits were tried together and disposed of by a common judgment. The only issue which had been determined by the Court of first instance was the heirship of the plaintiff with the deceased, and the three suits were dismissed and separate decrees were passed in each of them. An appeal was, however, preferred against one decree only. A Full Bench of the Madras High Court held that the object of the appeal being in substance to get rid of the very adjudication which is put forward as constituting 'res judicata' that adjudication in the other two suits, which had become final not being appealed against, should not be held to bar the appeal, and it was immaterial whether the suits were cross suits or not.

14. In -- 'Shankar Sahai v. Bhagwat Sahai', AIR 1946 Oudh 33 (R) a Full Bench of the Oudh Chief Court held that where two suits between the same parties involving common issues are disposed of by one judgment but two decrees, and an appeal is preferred against the decree in one but it is either not preferred in the other or is rejected as incompetent, the matter decided by the latter decree does not become 'res judicata' and it can be reopened in appeal against the former, and that this rule is subject to exceptions depending on the circumstances of each case.

15. In the recent case of -- 'Narhari v. Shanker'. AIR 1953 SC 419 (S), which went up from Hyderabad from the decree of the trial Court in favour of the plaintiff, two separate appeals were taken by two sets of the defendants. The appellate Court allowed both the appeals and dismissed the plaintiff's suit by one judgment and ordered a copy of the judgment to be placed on the file of the other connected appeal. Two decrees were prepared. The plaintiffs preferred two appeals. One of the appeals was time-barred and on the principle of 'res judicata' the High Court dismissed both the appeals.

It was held by the Supreme Court that it was not necessary to file two separate appeals in this case; that the question of 'res judicata' arose only when there were two suits; and even when there are two suits a decision given simultaneously cannot be a decision in the former suit. It was further observed that when there was only one suit, the question of 'res judicata' does not arise at all because both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit.

We do not think that it would be necessary for us to express our opinion as to whether the present appeal is hit by the principle of 'res judicata' because after hearing the parties on merits we have come to the conclusion that the decision of the Court below on the two vital questions, viz., (1) that the defendants 2 and 3 were not liable and (2) that the forward contracts were wagering contracts and were not enforceable in law, was correct,

16. We would first decide the question about the liability of Phondi Lal and Nathi Mall defendants 2 and 3. The plaintiff-appellant came upon the allegation that these defendants along with defendants 1 and 4, namely, Madan Lal and Lallu Mal formed a joint Hindu family and they entered' into the transactions by opening three 'khatas' with the plaintiff in the names of Madan Lal Lallu Mal, Lallu Mal Dalai, and Brij Kishore.

The defendants pleaded that defendants 2 and 3 were separate from the other two defendants and they never entered into these contracts and they never authorised defendants 1 and 4 to transact any business on their behalf. Of the three 'khatas' mentioned above, the 'khata' styled as Brij Kishore was in respect of ready goods, and the other two khatas were in respect of forward transactions. The forward contracts were 385 in number and they were signed either by defendant 1 or by defendant 4, or by both. None of them was signed by defendants 2 and 3. The evidence produced by the parties showed that defendants 2 and 3 never entered into any transaction with the plaintiff. They have been separate from defendants 1 and 4 and, have since long been in service. The Court below was, therefore, right in coining to the conclusion that defendants 2 and 3 were not liable.

17. In respect of the transactions of ready goods under the 'khata' "Brij Kishore", it was not contended that those transactions were wagering and were not enforceable in law. The plea of wagering had been raised with respect to the 385 forward contracts which had been entered into with the plaintiff by defendants 1 and 4 under 385 contract forms and it was contended that those contracts were wagering. The terms of contract are printed on the reverse of each contract form. One of them is to be found at pages 331 to 333 of the paper-book. One of the conditions of the contract says that defendants 1 and 4 would at all times be entitled to profit and liable for loss in respect of sale or purchase transactions which the defendants have entered into through their commission agency in accordance with the rules noted on the contract.

Rule 1 of the Rules says that in all forward transactions, delivery of goods is given and taken, that is to say, they are transactions in which delivery is made and the said delivery shall be made in accordance with the Rules of the Agra Gram Panchayat.

Rule 2 says that if it is a purchase transaction, defendants 1 and 4 shall have to send money to the plaintiff at Agra at least three days before the time fixed for delivery, so that the plaintiff may take delivery of the goods under the account of these: defendants.

Rule 3 provides that if it is a sale transaction and defendants 1 and 4 want to give delivery of the goods in order to square up the transaction they should send the goods to the plaintiff at Agra at least three days before.

Rule 6 provides that in respect of each transaction defendants 1 and 4 shall have to deposit with the plaintiff 25 per cent, of the price as margin money on being demanded by the plaintiff at any time before the date fixed for delivery and the said margin money shall remain in deposit with the plaintiff up to the expiry of the time fixed for delivery.

Rule 10 provides that the plaintiff shall be liable to pay the profit and shall be entitled to realise the amount of loss, and that the plaintiff shall not be bound to tell defendants 1 and 4 to which particular person he has paid the money.

18. 'Prima facie', the contracts do provide for delivery, but there is satisfactory evidence on the record to prove that in regard to these forward contracts no delivery was ever contemplated and no delivery was ever demanded or given and what was contemplated really was that only the difference would he paid on or after the due date.

The contracts cover about 25,200 maunds of grain and upon the most modest computation the price thereof will come to about five lakhs of rupees. There was nothing to show that 25 percent, of the price as contemplated by paragraph 6 of the Rules was ever deposited in any case. In one case a notice was sent to take delivery, but that was all.

What according to the plaintiff's own showing had happened was that on the due dates the transactions had been adjusted. 8660 maunds of 'arhar' had to be delivered towards the transactions of Kartik Sudi 15, Samvat 1996. The transactions of that date were adjusted and the account-books disclosed that liability of the promisee was struck. 13,400 maunds of grain were to be delivered on Kartik Badi 15 Samvat 1996, and those transactions were also adjusted.

The learned Civil Judge got lists prepared showing the adjustments and those lists disclosed that the plaintiff had been setting off 'saudas' one against the other. It was in the evidence of Lallu Mal defendant that no delivery was ever contemplated. Lallu Mal acts as a 'dalal' and he never stocks any grain.

Moti Lal, a witness for the plaintiff, deposed that on Magsar Sudi 15 there was no delivery of goods and profit and losses were paid to customers. Sat Narain, a witness for the plaintiff, stated that no delivery was made in respect of 'saudas' of Samvat 1996. Hazari Lal, witness for the plaintiff, stated that the names of defendants 1 and 4 are not to be found in the books of account of the sellers and that these defendants never gave any money for taking delivery or purchasing goods. The plaintiff's own evidence, therefore, discloses that delivery was never intended and that the real intention of the parties was to settle the accounts merely upon differences.

It has been contended on behalf of the plaintiff that at least in one instance delivery was given. But this instance was in respect of the 'khata' of Brij Kishore, which, as we have already stated, was in respect of ready goods and not in respect of forward transactions. Any delivery, therefore, made in respect of the 'khata' of ready goods would not help the plaintiff in contending that delivery could be demanded and could be given in the case of forward transactions as well.

19. There was controversy between the parties regarding the question as to whether the plaintiff was a 'pakka arhatia' or was only a commission agent or 'kachha arhatia'. The plaintiff contended that he was a 'pakka arhatia'. The answering defendants, on the other hand, contended that they were only commission agents and were liable to render accounts. The basis of the distinction between a 'kachha' and a 'pakka arhatia' is that a 'kachha arhatia' acts as an agent on behalf of his constituent and never acts as a principal to him. The person with whom he enters into a transaction on behalf of his constituent is cither brought into contact with the constituent Of at least the constituent is informed of the fact that the transaction has been entered into on his behalf with such and such other person. Although the 'kachha arhatia' may not communicate the name of his constituent to the third party, he informs the constituent of the name of the party. In the case of a 'pakka arhatia', the agent makes himself liable on the contract not only to the third party, but also to the constituent and he docs not inform his constituent as to the person with whom he has entered into the contract on his behalf. In the present case the contract shows that the position of the plaintiff was that of a 'pakka arhatia'.

In the case of a 'pakka arhat' transaction the real question is to ascertain what as between the parties was the real intention when they entered into the contract in question: Whether it was ever within their contemplation that goods should be delivered, or whether their real intention was only to pay a difference on or after the due date. The mere circumstance that in the printed contract form an opportunity is left open to the parties to complete their contract by actual delivery will not be allowed to deprive the Court of the power to consider whether that was their real intention, A contract may none the less be a contract by way of gaming or wagering because it purports to give the buyer or seller an option of demanding delivery or acceptance, as the case may be, of the subject matter of the contract. In short, the parties will not be allowed to "camouflage" their transaction by getting it up as a "delivery" transaction when, in fact, it was never their intention that it should be.

We may in this connection refer to a decision of a Bench of this Court in -- 'Firm Ram Krishna Das Jawahar Lal v. Firm Mutsaddi Lal Murli Dhar', AIR 1942 All 170 (T).

20. Having regard to the facts and circumstances of the present case, we have not the least doubt in our minds that the forward transactions were wagering in nature and no delivery was ever contemplated and the contracts cannot, therefore, be enforced in view of the provisions of Section 30, Contract Act.

We may refer to another single Judge decision of this Court in -- "Sheo Narain v. Bhallar', AIR 1950 All 352 (U), where it was said that what has to be proved in order to establish that a transaction of sale or purchase was a wagering one is the fact that it was agreed between the parties that no delivery was ever to be demanded or given; that the mere fact that delivery was, in fact, not given does not prove that it was not given because there was a term in the original contract to that effect; that in every case the terms of the contract have to be proved; and that if the terms of the contract have been proved, and they show on their face that delivery was to be given or taken, and it was alleged by the defendant that it was agreed that the term about delivery was not to take effect but the differences alone were to be paid, then the fact of non-delivery, coupled with certain other facts may induce the Court to believe the defendant instead of the plaintiff; and that these facts are the

financial condition of the parties and their capacity to deliver the goods in fulfilment of the contract.

21. Their Lordships of the Privy Council in --'Sukhdevdoss Ramprasad v. Govindoss Chathur-bhujadoss and Co.', AIR 1928 PC 30 (V) laid down that the mere fact that contracts are highly speculative is insufficient in itself to render them void as wagering contracts; that to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded but that differences only should become payable.

22. Having regard to the facts and circumstances of the present case and the evidence that was produced by the parties it is abundantly clear that the parties "camouflaged" their transactions by get ting them up as "delivery" transactions when, in fact, it was never their intention that delivery was to be demanded or to be given. The forward contracts in respect of the two 'khatas' sued upon having been wagering contracts, they could not be enforced in view of the provisions of Section 30, Con tract Act. Our conclusion, therefore, is that the decision of the learned Subordinate Judge was correct, and he was right in dismissing the plaintiff's suit No. 42 of 1940 from which the present appeal has been taken to this Court. In the result the appeal fails and is dismissed with costs.