State Of Uttar Pradesh vs Abdul Aziz And Ors. on 6 May, 1955

Equivalent citations: AIR1955ALL673, AIR 1955 ALLAHABAD 673

JUDGMENT

Mootham, C.J.

1. This is in form an appeal from an order of the learned Civil Judge of Rae Bareli dated 15-4-1953.

2. On 29-5-1952. the first respondent filed a suit against the State Government, the Assistant Engineer, Public Works Department, and two other persons. His principal claim in this suit was for the recovery of a substantial sum of money from the State Government as damages for the alleged breach of a contract entered into by him with the State Government on 25-2-1948, where under he was to supply 50,000 C. ft. of Kanpur lime to the Government at a certain price. The other reliefs sought by the plaintiff were not related to the claim founded on the alleged breach of the contract dated 25-2-1948, and with these reliefs we are not now directly concerned.

3. On 6-10-1952, the first and second defendants filed what purported to be an application under Ss, 32 and 34 of the Arbitration Act. They contended that under Clause 23 of the contract entered into between the plaintiff and the first defendant all disputes arising out' of the contract were to be referred to the Deputy Chief Superintending Engineer for the time being 'Whose decision would be final, and that the Deputy Chief Superintending Engineer had in fact considered and rejected the plaintiff's claim. In these circumstances the defendants submitted that the suit was not maintainable under Section 32 of the Arbitration Act, and that under Section 34 of the same Act it was incumbent upon them to apply for the proceedings to be stayed.

There was clearly some confusion in the mind of the person who drafted this application and the learned Civil Judge very properly required these defendants to state whether their application was to be deemed to be one under Section 32 or under Section 34. They elected that it be treated as an application for stay of proceedings under Section 34. That application was considered and dismissed by the learned Judge by an order dated 31-3-1954, on the ground that if the arbitration clause applied to the dispute arising out of the contract of 25-2-1948, there had been an award by the arbitrator. No appeal was filed against this order which has become final.

4. The learned Civil Judge left undecided the question whether the arbitration clause applied to the dispute between the parties; his order of 31-3-1954, concluded as follows:

> "The plaintiff challenges the existence of the aforesaid arbitration clause in the bond. It is therefore necessary that this question should also be deeded before passing any further order. If the question is decided in favour of the plaintiff the suit will proceed

and if it is answered in the affirmative the suit will stand dismissed under Section 32 of the Arbitration Act. Put up for disposal of this question on the 11th April."

5. On the 11th April the learned Judge heard counsel on this question and by an order dated the 15th April he held that the arbitration clause did not apply to the dispute between the plaintiff and the first and second defendants and directed that the suit should proceed. It is against this order that the first and second defendants have filed the appeal which is now before us.

6. Upon the appeal coming up for hearing learned counsel for the appellant conceded that no appeal lay but he prayed that the memorandum of appeal be treated as an application under Section 115 of the Civil 'P. C. and Article 227 of the Constitution, and we have heard argument on that basis.

7. The argument for the applicant is that the decision of the learned Judge that the arbitration clause had no application to the subject matter of the dispute is wrong in law and that as a result of this erroneous decision the learned Judge will, unless the order be get aside, exercise a jurisdiction not vested in him by law. There is no doubt that, this Court can in such circumstances exercise its powers of revision under Clause (c) of Section 115 of the Code provided the decision is in a case which has been decided within the meaning of that sub-section : see -- 'Joy Chand Lal v. Kamalaksha Chaudhury', AIR 1949 PC 239 (A), 'which was approved by the Supreme Court in --'Keshardeo v. Radha Kissen', AIR 1953 SC 23 (B).

8. The question which however arises in this case is whether the order which we are asked to revise is one which was made in a "Case which has been decided". In my opinion it was not.

9. Under Order 8, Rule 2, of the Code a defendant must raise by his pleading all matters which show the suit not to be maintainable. A defendant may therefore aver the existence of an arbitration agreement and of an award thereon disposing of the claim the subject of the suit, and plead that by virtue of Section 32 of the Arbitration Act the suit is not maintainable. The Court will then, under Order 14, Rule 1 frame issues upon which it will in due course record its finding. But an issue which arises out of the pleadings must in my opinion now be held, as a result of the recent decision of a Full Bench of the Court in -- 'Ramrichpal Singh v. Dayanand' Sarup', AIR 1955. All 309 (C), not to amount to a case decided if the decision of the Court on that issue does not result in the termination of the suit and the passing of a decree.

10. In -- 'Ramrichpal Singh's case (C)', the Court held that an order refusing to stay the hearing of a suit made under Section 10 of the Civil P. C. was a case decided within the meaning of Section 115, on the ground that the order related to a matter which was separate from the trial of the suit. The question as to what constitutes a 'case decided' was exhaustively discussed, and all the learned Judges were of opinion that the decision of an issue which properly arose on the pleadings would not unless by that decision the suit was finally disposed of, constitute a 'case decided'. A plea based on Section 10 of the Code was held "hot to be a defence to a suit and not therefore an issue which properly arose on the pleadings. In his judgment at page 313 Malik, C. J., said:

> "This matter has been recently dealt with by me in 'Malkhan v. Mehar Chand', AIR 1955 All 307 (D), where I said that 'if a court decides to determine preliminary issues of law under Order 14, Rule 2, and as a result of that decision decides that it is not necessary to go into other questions, it has to pass a decree, but if as a result of the decision of those issues the other issues of fact have also to be determined, then the decision of the preliminary issues if only a part of the judgment and so long as the judgment has not been completed by the decision of the other issues of fact or of law that had been left undetermined, a decree cannot be passed.
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> The Court on determination of the preliminary issue if it comes to the conclusion that the case has to proceed and the other issues have to be decided, has not got to pass any formal order Incorporating the result of its decision. In the circumstances, it cannot be said that it has decided a case or even a part of a case".

Agarwala J. at page 314 said :

> "A decision on any one of the issues raised in the suit arising out of the defence in respect of matters mentioned in Order 8, unless it disposes of a severable part of the plaintiff's claim cannot in my judgment amount to a 'case.' Therefore normally a separate decision on one of the issues in this suit is not to be treated as a case decided. ..... in my opinion the decision on a question of jurisdiction of the Court to hear and determine a suit or that the suit is barred by limitation or 'res judicata' is not to be treated as a case decided, unless the suit itself is disposed of by the decision,"

11. There is in my opinion a very clear distinction between" an application under Section 10 of the Civil P. C. and one under Section 32 of the Arbitration Act. An application under Section 10 does not raise the question of the nonmaintainability of the suit; all that is claimed by the applicant is that he is entitled to have the hearing of the suit stayed until the decision of a previously instituted suit which is pending. On the other hand a plea founded on Section 32 of the Arbitration Act is plea that the suit is not maintainable at all.

12. Had reliance been placed upon the provisions of Section 32 in a written statement filed by the first and second defendants and had an issue been framed thereon, the decision of that issue against the defendants would not have amounted to a case decided. In the present case no written statements have yet been filed. The question of the applicability of the provisions of Section 32 was raised by the first and second defendants in their application dated 6-10-1952. I do not think this makes any difference. The question whether the suit is maintainable has been raised, and once raised it became an issue between the parties. As the decision of the learned Civil Judge on that issue has not resulted in the termination of the suit, his order, cannot in my judgment be revised by this Court under Section 115 of the Code.

13. It is however said on behalf of the applicants that this Court should set that order aside in exercise of its powers under Article 227 of the Constitution. Under that Article the Court has a power

of judicial superintendence, but as pointed out in -- 'Waryara Singh v. Amarnath', AIR 1954 SC 215 (E), that is a power to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors.

14. Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915; and prior to that a power of superintendence had been conferred on the High Courts by Section 15 of the High Courts Act of 1861. The nature of that power has been considered in a number of cases, particularly by Norman, J. in -- 'Gopal Singh v. The Court of Wards', 7 Suth WR 430 (F), and by Roe, J. in -- 'Parmeshwar Singh v. Kailaspati', AIR 1916 Pat 292 (FB) (G). The learned Judges in these cases pointed out that superintendence is a term which, has a legal' force and signification which are well known to the Legislature, and after a careful examination of the earlier authorities Roe J. in the second of these cases stated his conclusion in the following passage at page 298:

> "I am satisfied upon this investigation that the power of superintendence is not a legal fiction whereby a High Court Judge is vested with omnipotence. It is a term having a legal force and signification. It is the power by which English Courts interfere by Prohibition and 'Mandamus'. It is confined to cases in which the Court had acted without jurisdiction, or in excess of jurisdiction, or has refused to exercise a jurisdiction vested in it by law. The High Court will not interfere merely because there has been an irregularity in the proceedings. It will interfere if the irregularity has been go serious that one of the parties has suffered prejudice. By prejudice is meant disability to lay before the Court that party's version of the facts of the case and the law to be applied. It will not interfere with any decision arrived at after a fair trial however erroneous in law or fact that decision may appear to be."

15. Rankin C. J. in -- 'Manmatha Nath Biswas v. Emperor', AIR 1933 Cal 132 (H), similarly rejected the argument that the High Court has an unlimited power to correct the errors of a subordinate court. "The general superintendence" he said "which this Court has over all jurisdictions subject to appeal, is a duty to keep them within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal 'manner. It does not involve "responsibility for the correctness of their decisions, either in fact or law."

In a recent case of the Calcutta High Court, -- 'Dalmia Jain Airways Ltd. v. Sukumar Mukherjee', AIR 1951 Cal 193 (SB) (I). Harries, C. J. said:

> "The power of superintendence.... is not a power given to this Court to correct errors, otherwise it would be tantamount to a right to entertain appeals on law and fact. The right should be exercised only in cases where the Courts have clearly done something which they are not entitled to do. The power must be used to keep the Courts below within the bounds prescribed by law for such Courts."

With this opinion I respectfully agree. The Court's powers of superintendence are exercised primarily through Section 115 of the Civil P. C. and Article 226 of the Constitution, and it appears to me that Art 227 confers upon it supplementary power not differing substantially in content but

exercisable in case to which those provisions are not appropriate, as for example, to correct the arbitrary decision of a Rent Controller (as 'Waryam' Singh's case (E)) or to issue directions to an Election Tribunal (as in 'Hari Vishnu Kamath v. Ahmad Ishaque', (S) AIR 1955 SC 233 (J).

16. The duty of this Court is to ensure that subordinate Courts and tribunals keep within the bounds of their authority. It is not its duty in the exercise of its powers of superintendence to correct mere errors of fact or law unless the latter are apparent on the face of the record and there is no adequate alternative remedy. Nor in my opinion should it so exercise its power of superintendence as to effect an alteration in the judicial system the maintenance of which it should be its object to uphold.

17. Section 115 of the Code gives this Court powers to revise an order of a subordinate court on certain limited grounds provided that order is one from which no appeal lies to the High Court and which has been made in a "case which has been decided." This Court has held it to be the law that the decision of an issue which does not result in the termination of the suit is not a "case decided", the remedy of the dissatisfied party being by way of appeal at a later stage. In such circumstances this Court is not in my opinion justified in setting aside such an order in the exercise of its powers under Article 227 for by so doing it would, in effect, be extending the provisions of Section 115 to cases which do not come within the ambit of that section. The consequences of such a course would be not only to prolong the time taken in hearing such a suit but would introduce an element of uncertainty in the administration of justice which it is most desirable to avoid. As Lord Denham C. J. said in --'The Queen v. Bolton', (1841) 1 QB 66 at p. 76 (K):

> "It is of much more importance to hold the rule of law straight than, from a feeling "of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision, of future cases.'

18. For these reasons I would dismiss the present appeal with costs which I would assess at Rs. 200/-.

Randhir Singh, J.

19. I have had the benefit of reading the judgment of my Lord the Chief Justice. I do not think I can usefully add anything to what has been said in the judgment. I agree entirely with the conclusions arrived at and I would dismiss the appeal which has been treated as a revision, with costs.

20. BY THE COURT: This appeal is dismissed with costs which we assess at Rs. 200/-.