Firm Narain Das Balak Ram vs Bhagwan Das Kedar Nath And Ors. on 2 August, 1950

Equivalent citations: AIR1951ALL860, AIR 1951 ALLAHABAD 860

JUDGMENT

P.L. Bhargava, J.

1. This is an application in revision, under Section. 115, Civil P. C. & it is directed against an order of the second Civil Judge of Kanpur passing a decree in terms of an award. The application has been filed by the Firm Narain Das Balak Ram, who will hereafter be referred to as the applicants, against the Firm Bhagwan Das Kedar Nath, who will hereafter be described as the opposite party. The facts, which have given rise to the application are these: On 1-6-1946, Messrs. Har Govind Agarwal and Rameshwar Das Darolia filed a petition, under Section 14, Arbitration Act, 1940, in the Court of Munsif, City Kanpur. In that petition, they stated that there were certain disputes between the parties, relating to certain transactions entered into by the Firm Bhagwan Das Kedar Nath -- a firm registered with the National Chamber of Commerce, Ltd., Kanpur, according to the rules and bye-laws of the Chamber -- for and on behalf of the applicants; and that the disputes were referred, in accordance with the rules and bye-laws of the Chamber, to the Arbitration Board of the Chamber, in pursuance of an agreement between the parties. They further stated that the opposite party had nominated one of them, namely, Har Govind Agarwal, as their arbitrator but the applicants failed to nominate any arbitrator; that, according to the rules and bye-laws of the Chamber, one of them, viz , Rameshwar Das Darolia, was thereupon appointed an arbitrator on behalf of the applicants, by the managing agent of the Chamber; and that after their appointment as arbitrators they made an award, which was being filed in Court. The arbitrators prayed that judgment may be pronounced and a decree passed in terms of the award in favour of the opposite party against the applicants. The petition filed by the arbitrators was supported by the opposite party, but it was opposed on behalf of the applicants, whose contention was that there was no agreement for reference to arbitration; that the award was vitiated owing to misconduct; and that the transaction between the parties was in the nature of a wagering contract.

2. The learned Munsif found that there was no valid agreement between the parties to refer the dispute to arbitration and rejected the petition filed by the arbitrators. On appeal, the learned Civil Judge came to the Conclusion that there was such an agreement between the parties and, after disposing of the other matters in controversy, made a decree in terms of the award. In this revision, learned counsel for the applicants has reiterated the objection, raised on behalf of the applicants that there was no valid agreement between the parties to refer the dispute to arbitration; and contended that the decision of the learned Civil Judge is erroneous and liable to be set aside.

3. Section 2, Arbitration Act, defines "arbitration agreement" as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. The question, therefore, arises whether there was any written agreement to submit the dispute, which bad arisen between the parties, to arbitration.

4. The rules and bye-laws of the National Chamber of Commerce, Ltd , Kanpur, contain a provision for the reference of disputes, between the firms registered with the Chamber, to arbitration (vide Rule 114). The firm Bhagwandas Kedar Nath (opposite party) was registered with the Chamber but the firm Narain Das Balak Ram (applicants) was not so registered. The opposite party alleged that the applicants had agreed to abide by the rules and bye - laws of the Chamber, including the rule relating to reference of disputes to arbitration. The learned Civil Judge has found that there was an oral agreement between the parties to abide by the rules and bye-laws of the Chamber; and, relying upon the case reported in Mohanlal v. Bissesarlal, A. I. R. (34) 1947 Bom. 268, the learned Judge has held that that amounted to a valid agreement of reference to arbitration.

5. Learned counsel for the applicants has, however, contended that there should have been a written agreement to refer the dispute to arbitration and that the rules and bye-laws of the Chamber, read with the oral agreement between the parties, do not amount to such an agreement and that the case reported in A. I. R. (34) 1947 Bom. 268, is clearly distinguishable from the present case. In our opinion, this contention must prevail. What was the effect of the oral agreement between the parties to abide by the rules and bye-laws of the Chamber ? Under the said agreement, the parties bound themselves to abide by the rules and bye-laws of the Chamber, including the rule relating to submission of disputes to arbitration. There was undoubtedly an oral agreement to abide by the arbitration clause; but there was no written agreement to refer their disputes to arbitration, as defined in Section 2, Arbitration Act.

6. In the case reported in A. I. R. (34) 1947 Bom. 268, the parties were members of the Bombay Bullion Exchange Ltd., and when they had applied for enrolment as members of the Association they had signed the applications by which they had agreed to bind themselves to act and follow the current rules and regulations and those made in the future also, including rules about arbitration. In those circumstances, the learned Judge, who decided that case, observed :

> "..... it is clear that when the plaintiff as well as the defendants though at different dates applied to be enrolled as members of the Bombay Bullion Exchange, Ltd., agreeing by the very terms of the applications which they signed to be bound by the current rules and regulations which included rules about arbitration, there was an agreement between the plaintiff and all other members and the defendants and all other members and thus between the plaintiff and the defendants, the members of the Bombay Bullion Exchange. Ltd., in any event by the date of the later application, that as between both of them, members of the Bombay Bullion Exchange, Ltd., all present or future differences would be submitted to arbitration. I, therefore, hold that there was an agreement to submit present or future differences to arbitration arrived at between both the parties to this suit."

It would thus appear that the facts of that case were different; both the parties were members of the association and they had signed an application containing an agreement to abide by the rules and regulations of the association, including the arbitration clause and that there was not merely an oral agreement between a member and non. member of an association as in the present case. Moreover, in that case there were documents from which it was possible to infer the existence of a written agreement for submission of disputes to arbitration; but in the case before us, there are only the rules and bye-laws of the Chamber and the oral agreement to abide by the rules. These taken together do not amount to any written agreement to refer the disputes to arbitration. Consequently, that case does not support the view taken by the learned Civil Judge.

7. Learned counsel for the opposite party has invited our attention to the following cases: Sukhmal Bansidar v. Babu Lal Kedia & Co., 42 ALL. 525, Shankar Lal Lachhmi Narain v. Jainy Brothers, 53 ALL. 384, Keshoram Cotton Mills v. Kanhyalal, 44 C. W. N. 607, Radha Kanta v. Baerlien Brothers Ltd., 56 Cal. 118 and Jubilee Chamber of Commerce v. Amrit Shah, A. I. R. (27) 1940 Lah. 180.

8. In the first case reported in Sukhmal Bansidhar v. Babu Lal Kedia & Co., 42 ALL. 525, Walsh J. observed :

> "We agree with the view taken by Woodroffe J. in Ram Narain v. Liladhur (33 Cal. 1237) and with the majority of the English cases on this point, particularly Caerlson Tinplate Co. v. Hughes, ((1891) 60 L. J. Q. B. 640) that that provision (Section 4 (b), Arbitration Act, 1899) involves submission signed by both parties or their agents. But we agree that the agreement to submit, provided it is an agreement, may be collected from a series of documents, even though connected by parole evidence, and signature of any document forming part of the agreement is sufficient to bind the party signing to the submission contained in the agreement."

9. There a dispute had arisen between a firm at Kanpur and another firm at Delhi, with which the former had entered into a contract for the purchase of cloth. It appears that the contract had been entered into by one party signing an indent, which had printed upon it certain terms, including the arbitration clause, and its acceptance by the other party. The form of the indent had been prescribed by the Delhi Piece Goods Association of which the Delhi firm was a member. When the dispute arose the Delhi firm gave notice to the Kanpur firm of their intention to appoint a certain person as the arbitrator in terms of the arbitration clause. That arbitrator gave notice to the Kanpur firm to appoint their arbitrator, who was to meet him on a date fixed, and in the even of their failure to do so, he alone was to give an award in accordance with the arbitration clause. The Kanpur firm did not appoint any arbitrator and the arbitrator appointed by the Delhi firm made the award. In revision the Kanpur firm raised the question, among others, that there had never been any submission and it was held :

> "In the face of the documents in this case, namely the invoices or indents, and the acceptances, the submission is clear and binding upon both the parties." In the present case, the documents relating to the contract are not before us; and the opposite party relies upon the rules and bye-laws of the Chamber, supported by the

oral agreement and they do not constitute any written agreement of submission.

10. In the next case, Shankar Lal v. Jainy Brothers, 53 ALL. 384, the view expressed in Sukhmal Bansidhar's case (48 ALL 625) cited above, namely that the submission should be signed by both the parties or their agents was said to be erroneous and a similar opinion was expressed in Radha Kanta v. Baerlien Brothers Ltd., (56 Cal. 118), to which reference will be made hereafter. We are, however, inclined to agree with the other view expressed in Sukhmal Bansidhar's case (42 ALL. 625) viz., that the terms of a written agreement to submit differences to arbitration may be collected from a series of documents signed by the parties.

11. In Shankarlal Lachhi Narain's case (63 ALL. 384) the facts were similar to those in Sukhmal Bansidhar's case (42 ALL. 525). There also the contract was entered into by one party signing an indent on the form, prescribed by the Delhi Piece Goods Association as in the other cases the other party accepting the same. The acceptance was contained in a letter, which did not contain any reference to the arbitration clause in the indent. It was argued before this Court that the letter did not amount in law to an acceptance in writing of the submission to arbitration set out in the indent contract. It was held that "the terms of a written agreement may be collected from a series of documents and a 'written agreement' does not mean that each party has to sign a document containing the terms. The plain acceptance of a document containing all the terms is sufficient." The letter accepting the indent was, therefore, held to be sufficient acceptance of the terms embodied in the indent contract. It was further held:

> "All that is required is that both parties accept a written document as containing the agreed terms : it might be in the form of a signed document by both parties containing all the terms, or a signed document by one party containing the terms aid a plain acceptance, either signed or orally accepted by the other parry, or, in the third case, an unsigned document containing the terms of the submission to arbitration, agreed to orally by both parties."

Learned counsel for the opposite party laid stress on the words "either signed or orally accepted" & pointed out that the rules & bye laws of the Chamber in the present case were orally accepted by the parties. The oral acceptance of the rules & bye-laws of the Chamber, which have nothing to do with the contract, is different from such an acceptance of a contract signed by a party.

12. It has been pointed out on behalf of the opposite party that the view taken in Shanker Lal Lakshmi Narain's case (53 ALL. 384) was followed in Keshoram Cotton Mills v. Kanhyalal (44 C. W. N. 607). The head-note of this case is misleading. It merely reproduces an observation of this Court, which was quoted in the judgment of the Calcutta High Court. In the body of the judgment it was pointed out that it was not enough that the parties orally agreed to be bound by the arbitration clause, as it appears in the common form, & that if they had recorded in writing that the common form of the arbitration clause was to be applied that would be a different matter. These observations fully cover the argument which has been advanced by learned counsel for the opposite party and do not help him at all.

13. In Radha Kanta v. Baerlien Brothers Ltd, 66 Cal. 118, it was held that a submission to arbitration under the Arbitration Act need not be signed by both parties & all that was required was a written agreement to submit and to act upon it. In that case the plff. Radha Kanta Das, who carried on business in Calcutta, had placed an order with the defendants, Baerlien Brothers Ltd., a limited Company incorporated in the United Kingdom, who carried on business at Manchester, through Mr. M. N. Dutta of Calcutta, for supply of some goods, and they had signed an indent, which contained an arbitration clause. The indent was sent to the defts., who acknowledged receipt of the same direct to the plff. The plff. then wrote a letter to the defts and the contract was thus finalised. It was held that the indent form signed by the plff. was part of the offer which was accepted by the defendants and again confirmed by the plff. The plff. had signed the indent containing the arbitration clause and the defts. had accepted the same in their letter acknowledging the receipt of the same. In the circumstances, it was further held that the mere fact that the defts. had not affixed their signature to the indent was of no consequence & that all the documents taken together constituted a written agreement as required by the Arbitration Act, 1899. In the case before us, the rules & bye-laws of the Chamber are not signed by the applicants the opposite party might have accepted it when they were registered as member of the Chamber The applicants oral acceptance of the same is of no consequence. The case has, therefore, no bearing on the present case.

14. The case reported in Jubilee Chamber of Commerce v. Amrit Shah, A. I. R. (27) 1940 Lah. 180, n) doubt, supports the contention put forward on behalf of the opposite party. There, it appears, a letter & the rules along with the terms of business were sent to the party concerned & they were impliedly accepted by him. In the rules which were sent along with the letter there was an arbitration clause. That could not amount to a written agreement to submit any existing or future dispute to arbitration, as defined in Section 2, Arbitration Act. We are, therefore, not prepared to agree with the view expressed by the learned single Judge, who decided that case.

15. None of these cases supports the view taken by the learned Civil Judge. In the present case, the arbitration clause did not form part of any written contract signed by the parties or signed by one of them and accepted by the other. The oral acceptance of the rules and bye-laws of the Chamber could not, in the circumstances of the ease, amount to a written agreement within the meaning of Section 2, Arbitration Act. It follows, therefore, that there was no valid reference to arbitration & no decree could be passed in terms of the award made in pursuance of that reference. In this view of the matter, the decision of the Court below is erroneous; and we held accordingly.

16. Learned counsel for the opposite party has further contended that even if the decision of the learned Civil Judge was erroneous it cannot be set aside in a revision, under Section 115, Civil P. C. He has relied upon the observations of their Lordships of the Privy Council in Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras, 1949 A. L. J 213. In that case, the decision of the Dist. Judge was based on the construction of a will & the High Court "considered that the conclusion of the learned Judge upon the construction of the will was so entirely out of accord with the meaning of the document that it required interference by the High Court, and that the wrong construction put upon the will by the learned Dist. Judge involved such material misuse of jurisdiction as to involve interference by the High Court"

> under Sub-section (c) of Section 115, Civil P. C. Their Lordships, after referring to the earlier decisions of the Board in Amir Hasaan v. Sheo Bakhsh, 11 I. A. 237 and Balakrishna v. Vasudeva, 44 I. A. 261 and certain decisions of the Calcutta High Court, disapproved the view taken in Bhagwan Ramanuj Dass v. Khetter Moni Dassi, 1 C W N 617, viz. :
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> "Sub-section (c) of Section 115, Civil P. C. was intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate Courts, so as to prevent gross injustice in non-appealable cases"

and observed :

> "Section 115 applies only to cases in which no appeal lies, and, where the Legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong shall be final. The section empowers the High Court to satisfy itself upon three matters (a) that the order of the Subordinate Court is within its jurisdiction, (b) that the case is one in which the Court ought to exercise jurisdiction and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however, profoundly, from the conclusions of the Subordinate Court upon questions of fact or law. No such matters arose in this case, and the order of the High Court upon the petition was without jurisdiction."

17. The error in that case was obviously not Such as affected the jurisdiction of the Court. The observations of their Lordships in this and the earlier cases of the Privy Council (Amir Hassan Khan's case 11 I. C. 237 and Bala Krishna Udayar's case, 44 I. a 261) must be taken to apply to a case in which a question of jurisdiction is not involved. In the latter case their Lordships pointed out that Section 115, Civil P. C. "applies to jurisdiction alone, the irregular exercise, or non-exercise of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

Therefore different considerations would arise in case where a decision on a question of law or fact gives rise to a question of jurisdiction and where it does not give rise to such question. The point has been further clarified in a later decision of their Lordships of the Privy Council reported in Joy Chand v. Kamalaksha, 1949 A. L. J. 278. In Joy Chand Lal Babu's case, 1949 A. L. J. 278,. an application was made by a debtor for relief under Sections 30 and 36, Bengal Money lenders Act, 1940, in respect of a loan; and the relief could not be granted if the loan was a commercial loan, as defined in Section 2(4) of the Act. The Subordinate Judge refused to grant the relief as he found that the loan was a commercial loan. In revision the High Court held that the loan was not commercial loan and remanded the case to the Subordinate Judge for retrial. The matter was taken to the Privy Council and Mr. Pringle for the appellant argued that the Subordinate Judge had jurisdiction to

decide that the loan was a commercial loan, and in so doing he did not act illegally or with material irregularity and that the High Court had no power to interfere in revision merely because it disagreed with his decision. Their Lordships of the Privy Council observed :

> "So far Mr. Pringle is on safe ground, but the learned Subordinate Judge, having held that this was a commercial loan, was bound to go on to consider what effect that decision had upon the respondents' application, and, since the Act in terms does not apply to commercial loans, the learned Judge was bound upon his finding, to dismiss the application without determining whether or no the respondents brought themselves within Sections 30 and 36 of the Act as they claimed to do. In so doing, on the assumption that his decision that the loan was a commercial loan was erroneous, he refused to exercise a jurisdiction vested in him by law, and it was open to the High Court to act in revision under Sub-section (b) of Section 115."

> Their Lordships further observed :

> "There have been a very large number of decisions of Indian High Courts on Section 115, to many of which their Lordships have referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under Sub-section (c), nevertheless, if the erroneous decision results in the Subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under Sub-section (a) or Sub-section (b), and Sub-section (c) can be ignored."

Then their Lordships cited a decision of this Court in Babu Ram v. Munna Lal, 49 ALL. 454 and another decision of the Bombay High Court in Hari Bhikaji v. Naro Vishyanath, 9 Bom. 432 as instances "in which a Subordinate Court by its own erroneous decision (erroneous that is in the view of the High Court), in the one case on a point of limitation and in the other on a question of res judicata invested itself with a jurisdiction which in law it did not possess, and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result."

With reference to the particular case before them, their Lordships expressed the view "that the High Court upon the view which it took that the loan was not a commercial loan, had power to interfere in revision under Sub-section (b) of Section 115."

18. In the present case, as we have seen, the award was given by the arbitrators without any valid reference. That being so, no decree could be passed on its basis. On an erroneous view of law, the learned Civil Judge came to the conclusion that the award could be made and passed a decree on its basis. He could not do so; and assumed jurisdiction which did not vest in him. Therefore, in revision, this Court can set aside the order which was passed without jurisdiction.

19. A similar question arose in a case reported in Mohd. Yaqub Khan v. Sirajul Haq, 1949 A. L J. 288, to which one of us was a party. There a suit was referred to arbitration on the statements made by the counsel for the parties, which were recorded, not in the form of an application but in a Court rubkar, and were signed by the parties in the presence of the Court. The arbitrator so appointed made an award. Both the parties raised objections to it. One of the objections raised by the plaintiff was that the reference to arbitration was invalid, as it was not in writing, as required by the Arbitration Act, All the objections of the parties were overruled by the Court and a decree in terms of the award was passed by the trial Court. The plaintiff appealed, and the appellate Court, being of the opinion that the agreement of reference was invalid, as there was no application in writing, and the statements of the counsel for the parties were not such an application, set aside the decree passed by the trial Court and made an order that the case be heard and disposed of according to law. When the matter came up to this Court in revision, it was held that (i) the reference was a valid reference; (ii) the order of the lower appellate Court amounted to a "case" decided; and (iii) the lower appellate Court by deciding that there was no valid reference to arbitration and that, therefore, the case-should not have been referred to the arbitrator but that it should have been tried by the trial Court and is ordering the trial Court to try the case itself, had acted illegally in the exercise of its jurisdiction, and its order was, therefore, revisable by the High Court.

20. We, therefore, see no force in the contention that the decree passed by the learned Civil Judge cannot be set aside in revision. Accordingly, we allow this application in revision set aside the decree passed by the learned Civil Judge and dismiss the petition filed by the arbitrators. The opposite party, firm Bhagwan Das Kedar Nath, shall pay the cost of the applicants and bear their own costs in all the Courts.