Khushhal Singh Vs. Nihal Singh and

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Court : Allahabad

Decided On : Feb-15-1916

Reported in : (1916)ILR38All297

Judge : Piggott and; Walsh, JJ.

Appellant : Khushhal Singh

Respondent : Nihal Singh And; Girdhari Singh and anr.

Judgement :

Piggott, J.

1. This appeal arises out of proceedings in the court of the Subordinate Judge of Mainpuri which commenced with an application under paragraph 21 of the second schedule of the Code of Civil Procedure, asking the court to file an award in a matter which had been submitted to arbitration without the intervention of the court. Objection was taken by the opposite party to the filing of the said award and then there was a further agreement to refer to arbitration the question whether the award ought to be filed or not. The arbitrator thus appointed came to a decision that the award ought to be filed. One of the parties, namely, the appellants now before us, objected to this award and presented a petition in court putting forward certain grounds why this award, or the decision of the arbitrator appointed in the case itself, should be set aside. After some delay the 24th of July, 1915, was fixed for disposal of these objections. On that date the objectors failed to appear and

their objection was dismissed ex parte. Thereupon Judgment was pronounced in accordance with the award, and a decree followed, that is to say, in this particular case a decree followed filing the award in the arbitration conducted without the intervention of the court. On the same day, that is to say, on the 24th of July, 1915, the present appellants presented to the court below an application under Order IX, Rule 13, of the Code of Civil Procedure, asking the court to set aside its ex parte order and the decree passed in accordance therewith, to re-admit their petition of objection and to decide the same on the merits. The court below examined the petitioners, Nihal Singh and Kirpil Singh, on their' application and, relying upon certain contradictions in their evidence, came to the, conclusion that they were not speaking the truth. The learned Subordinate Judge accordingly held that these persons had failed to show that they had been prevented by any sufficient cause from appearing before him on 24th of July, 1915, when their case was called on for hearing. He therefore dismissed their application. Against this order of dismissal the present appeal has been filed. A preliminary objection is taken that no appeal lies.

3. Under Order XLIII, Rule 1, Cause (d), of the Code of Civil Procedure an appeal lies against an order rejecting an application for an order to set aside a decree passed ex parte in a case open to appeal. What we have to determine is whether the case now before us was one open to appeal. It is contended by the other side that the decree pronounced under paragraph 21 of the second schedule to the Code of Civil Procedure, was not a decree against which an appeal lay, unless it were alleged that it was in excess of or not in accordance with the award. It is, therefore, contended that in the absence of any such allegation no appeal lay in the present case and the order refusing to set aside the ex parte decree is itself unappealable. To this I think the answer is two fold. The words in Order XLIII, Rule 1, Clause (d), are perfectly general; they are 'in a case open to appeal.' Now the case between the parties in the court below was whether or not an award made without the intervention of the court should be filed as a decree of the court. In that case an appeal lay under Section 104, Sub-section (1)(f), from any order which a court might pass, filing or refusing to file the award. It was therefore a case open to appeal. Moreover, an appeal might lie from the decree itself on certain grounds, and to this extent the decree itself was open to appeal. The fact that no appeal has

been brought from the decree is irrelevant, because the question before us is merely whether the decree was open to appeal. Nor is it relevant to ask us to consider whether the decree is or is not in fact in accordance with the award, because that only amounts to arguing that any appeal brought against the decree would he bound to fail. The question for determination is not whether an appeal could have been successfully prosecuted against the decree, but whether it was 'open to appeal.' It seems obvious that it was.

4. We now have to consider the appeal on the merits, that is to say, we have to reconsider the question determined in the court below, namely, whether the appellants had or had not shown that they were prevented by any sufficient cause from appearing when the suit was called on for hearing. According to their own sworn statement before the court they started from home at such an hour as to give them a reasonable expectation of being present in court before the case was called on. They reached the court as a matter of fact some two or three hours-late, and the reason for this was that they were delayed on the journey by heavy rainfall. The learned Subordinate Judge has relied upon certain discrepancies between the statement of Nihal Singh and that of Kirpal Singh. These discrepancies all seem to be upon incidental matters, not vital to the question for disposal. They may have been due to failure of memory on the part of the deponents, who were examined some weeks after the events to which they were deposing, or may have been due to one or the other trying to prove too much, as for instance, one of them stated that he left the village on horseback when as a matter of fact he was content to perform the first few miles of the journey on foot. What the learned Subordinate Judge has entirely overlooked is the amount of corroboration which these depositions receive from the record itself. We find that these appellants had summoned witnesses to attend on the 24th of July, 1915, that they had paid process fees and that summons had been issued and had been duly served on the 22nd July on the witnesses concerned. Under the circumstances it seems to me imputing to the appellants conduct on the verge of insanity if, after having made all possible arrangements for prosecuting their case, they deliberately absented themselves. There seems no real reason to doubt that they in fact left their village, thirty miles or more distant from the place of sitting of the court, on the evening of the 23rd of July, and that they did so with reasonable

prospect and intention of presenting themselves before the court at the proper time. The fair conclusion to arrive at is that they were in fact prevented by the cause alleged by them, namely, by the setting in of heavy rain which overtook them in the course of their journey. On these facts I would accept the present appeal and hold that the appellants have shown sufficient cause for their non-appearance, would set aside the order of the court below and in lieu thereof pass an order setting aside the ex parte decree in question and directing the court below to re-admit on to its pending file the petition of objection filed by the present appellants against the award of the arbitrator and to hear and dispose of the same according to law.

Walsh, J.

5. I concur in the order proposed by my learned brother and in the reasons given by him, I would further point out that this is only one example of several cases we have recently had before us, where a party has been shut out from a hearing, and where, whether he was rightly or wrongly shut out, the grounds given in the Judgment have not been adequate. Not unnaturally a party in that position is dissatisfied and comes to this Court. It is then sought to support the Judgment of the court below shutting out the party, on the ground of want of bond fides, or conspiracy to keep away by the party shut out. No doubt there are such cases; parties may cunningly devise to gain time, dishonestly keep away, and make dishonest applications for are hearing. But on a question of that kind, viz., whether there was a bond fide accident or a fraudulent attempt to gain time, it is not less difficult to arrive at a conclusion without a careful examination of the facts, than it is in hearing any other case where there is an issue of dishonest conduct. It is desirable in such a case that the court should examine all the facts with the same care and attention that it devotes to ordinary suits, and give the grounds for its decision with some adequacy. Secondly, I would point out that this case shows that, unless that course is taken, the action of the court defeats its own ends. If this case had been really a fraudulent attempt to gain time it might, even if the court were not absolutely satisfied of that fact, have been re-heard as early as October. There would have been a loss of two months. Now owing to the short cut which the court tried to take, the appellants have gained eight months since it cannot be

re-heard till March.

6. The appeal is allowed, the order of tie court below is set aside and in lieu thereof an order is passed setting aside the ex parte decree of the court below and directing the court below to re-admit on to its pending file the petition of objections filed by the appellants against the award of the arbitrator and to hear and dispose of the same according to law, No order as to costs.