

T. Wang Vs. Sona Wangdi

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Court : Kolkata

Decided On : Dec-15-1924

Reported in : AIR1925Cal812,(1925)ILR52Cal559,87Ind.Cas.633

Judge : Suhrawardy and ;Cuming, JJ.

Appellant : T. Wang

Respondent : Sona Wangdi

Judgement :

Suhrawardy and Cuming, JJ.

1. This appeal raises an interesting question of law, which, so far as we are aware, is not covered by authority. In execution of a money decree obtained by the appellant against the respondent, the respondent contended that the decree had been fully satisfied out of Court and that the appellant practising fraud on the respondent did not certify payment in Court. The appellant contended that the uncertified payment could not be enquired into under Order XXI, Rule 2, Code of Civil Procedure, but the learned Subordinate Judge in the execution Court decided to investigate the allegation of fraud. After he had examined several witnesses, the parties filed an application referring the dispute about payment to two arbitrators and an umpire. The case was thereupon referred to the arbitrators who by their award found a much lesser amount due to the appellant than he was claiming in execution. Various objections to the legality of the award were raised by the

appellant which were overruled by the Subordinate Judge. The concluding portion of the learned Subordinate Judge's judgment is in these words: 'The application of the decree-holder to set aside the award is therefore rejected, the suit is consequently decreed in terms of the award with proportionate costs'. The meaning of the last clause is not sufficiently clear but it appears that the learned Subordinate Judge was of opinion that a proceeding under Section 47, Code of Civil Procedure, followed as it is by a judgment is a suit which was decided in accordance with the award. Against this decision the appellant decree-holder appealed to the District Judge of Darjeeling who held that no appeal lay to him under Section 16, Schedule II, Civil Procedure Code.

2. The decree-holder has preferred this second appeal on the ground, among others, that the learned District Judge is wrong in holding, that no appeal lay to him. A preliminary objection is raised to the competency of this appeal on the ground that as no appeal lay to the Court of Appeal below no second appeal lies to this Court. The preliminary objection really begs the question in this case which is the determination of the nature of the proceedings in the execution Court.

3. It is contended by the appellant that the reference to arbitration was invalid in law inasmuch as there was no dispute between the parties within Section 1, Schedule II, Civil Procedure Code, because the Court could not take notice of uncertified payments alleged by the judgment-debtor. There is no force in this argument. Whether or not the Court can legally enquire into it, any question on which the parties join issue is a dispute within the meaning of that section.

4. The next point urged is one of substance and deserves careful consideration. It is argued that the second Schedule of the Code of Civil Procedure does not apply to execution proceedings and therefore the reference to arbitration was without jurisdiction and ultra vires of the executing Court: the award is accordingly illegal and unenforceable. In our judgment this contention is right and ought to prevail. Section 1 of the second Schedule empowers reference to arbitration of a dispute between parties to a suit. Section 16 provides that a decree should follow the award. The decree must be a decree as is passed in a suit and capable of execution and not merely a judgment as the learned Subordinate Judge seems to

think, for by that section the decree is made appealable as a decree where it is not in conformity with the award. It is admitted that all the provisions of the Code of Civil Procedure relating to suits are not applicable in execution proceedings. Order IX [Hari Charan v. Manmatha (1913) I. L. R. 41 Calc. 1, Bipinbehary Shaha v. Abdul Bank (1916) I. L. R. 44 Calc. 950], Order XVII [Tirthasami v. Annappayya (1894) I. L. R. 18 Mad. 131], Order XXII (Rule 12), Order XXIII (Rule 4) and of course such other Orders that deal with parties to suits or pleadings do not apply to execution of decree. Nothing has been shown to us to persuade us to hold that there is any speciality in the second Schedule which makes it applicable to questions arising in the execution of decrees. Section 141, Code of Civil Procedure, is more an authority for the view we take and does not lend countenance, to the contention of the respondent. As has been explained in Hari Charan v. Manmatha (1913) I. L. R. 41 Calc. 1, the law is the same as it was under Section 647 of the Code of 1882 which expressly excluded execution proceedings from those to which provisions relating to suits were extended. The view that the special procedures in suits do not apply to execution of decrees is based on the supposition that Order XXI relating to executions is self-contained and exhaustive as to the special subject with which it deals.

5. But the learned vakil for the respondent maintains that an order passed under Section 47, Code of Civil Procedure, is a decree under Section 2 and therefore a proceeding under Section 47 is a suit. This contention is untenable as a proceeding under Section 47 comes into being after the termination of the suit and in course of execution of the decree which concludes the suit. The second clause of Section 47 clearly indicates that the proceeding under that section is distinct from a suit.

6. It is next argued for the respondent that the Execution Court having jurisdiction over the proceeding under Section 47, the reference to arbitration was-not without jurisdiction. We have not been able to follow the reasoning for the appellant's objection is directed against the jurisdiction of the Execution Court in following a procedure not warranted by law.

7. It is further argued that the objection with regard to the illegality of the award must be taken to have been made under Section 15, Clause (c) of the Second Schedule as an award 'being otherwise invalid' and even if the reference was without jurisdiction the appellant's objection having been overruled and the award confirmed, no appeal lay to the lower Appellate Court from the order of the First Court. The answer to this contention is simple. Section 15 and Section 16 of the Second Schedule depend for their operation on a valid reference under Section 1 of the Schedule. The reference to arbitration by the Executing Court being without jurisdiction must be totally ignored and the question that is left for consideration is one relating to the satisfaction and discharge of the decree under Section 47, Civil Procedure Code. The appeal to the lower Appellate Court and a second appeal to this Court are therefore-competent.

8. It is faintly suggested that the appellant being a party to the submission to arbitration he should not in equity be allowed to question the validity of the proceedings initiated at his instance. It is also submitted that the Court having jurisdiction over the subject of the litigation, parties can by consent invest it with power to do something not strictly within its jurisdiction. It is an elementary principle of law that parties by consent cannot confer jurisdiction where it does not exist. In *Girijanath Roy Chowdhury v. Kanai Lal Mitra* (1917) 27 C. L. J. 339 and *Seth Dooly Chand v. Mamunji Musaji and Ors.* (1916) 25 C. L. J. 339, one of the parties to the submission was permitted to successfully question the validity of an award on the ground that all the parties to the suit had not joined in the reference. These decisions afford complete answer to the other contentions raised by the respondent.

9. We are not called upon in this case to consider the question of the validity of an award on a reference to arbitration without the intervention of Court by way of adjustment of the decree under Order XXI, Rule 2.

10. Though we look upon the conduct of the appellant with disapproval we are constrained in the view we take of the law to uphold his contention that the Execution Court had no jurisdiction to refer the dispute between the parties to arbitration under the Second Schedule of the Civil Procedure Code. In this view

we are of opinion that an appeal lay to the lower Appellate Court from the order of the First Court giving effect to the award, but it is not necessary to remit the case to the Court of Appeal below for a re-hearing of the appeal as we have by our judgment decided the sole question raised in that Court.

11. In the result the appeal is allowed and the order of the Execution Court upholding the award set aside. The case will be sent back to that Court with a direction to proceed with the execution according to law. We make no order as to costs of this appeal; the order relating to costs passed by the Courts below will stand.

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