

Durga and ors. Vs. Pohlu

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Court : Himachal Pradesh

Decided On : Jan-05-1952

Reported in : AIR1952HP48

Judge : Chowdhry, J.C.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 115; [Arbitration Act, 1940](#) - Sections 17 and 21; [Bilaspur \(Courts\) Order, 1949](#) - Section 35

Appeal No. : Civil Revn. No. 17 of 1950

Appellant : Durga and ors.

Respondent : Pohlu

Advocate for Def. : G.R. Prashar, Adv.

Advocate for Pet/Ap. : Balmukand Vig, Adv.

Disposition : Revision allowed

Judgement :

ORDER

Chowdhry, J.C.

1. This is a defendants' application in revision against the judgment and decree of the learned pistrict Judge of Bilaspur, dated 30-8-1950, passing a decree in terms

of the award in the course of review proceedings.

2. The three defendants Durga, Sihnu and Gulaba are brothers, the last named being a minor and represented in the litigation by his brother Durga as guardian ad litem. The defendants have a sister Mt. Shankari by name. On the allegation that Durga, as manager of the joint Hindu family consisting of himself and his brothers, agreed to give away Mt. Shankari in marriage to him but later broke the contract, the plaintiff-respondent Pohlu filed a suit against all the three defendants for recovery of Rs. 1,484/8/- as damages for breach of contract of marriage. The trial Court decreed the suit against Durga alone for Rs. 1,300/-, but on Durga going up in appeal the District Judge dismissed the suit in toto on 19-5-1949. Thereupon the plaintiff applied to the District Judge on 10-6-1949 for review of his aforesaid decree dated 19-5-1949. It may be noted here that in the appeal of Durga his two brothers, against whom the trial Court had dismissed the suit, were not impleaded even as pro forma respondents, and that in the review petition filed by the plaintiff on 10-6-1949, although the two brothers other than Durga were impleaded as opposite parties, no relief was sought against them, the only prayer being that the review petition be allowed, the appellate judgment and decree dated 19-5-1949 be set aside and the decree of the trial Court (which was only against Durga) restored. In the course of proceedings of review the plaintiff Pohlu and the defendant Durga applied to the District Judge on 2-12-1949 for reference of their dispute to the arbitration of one Surjan Singh. To this application for reference to arbitration the other two brothers Sihnu and Gulaba were not parties, and in fact it was specifically mentioned in the application that they would have nothing to do with the award which may be filed as a result of the reference. On 12-7-1950 the arbitrator submitted an award granting a decree in favour of Pohlu for Rs. 1,320/- against all the three defendants. The District Judge gave the parties (which means Pohlu and Durga, and not the other two defendants, who were absent) time till 17-8-1950 to file objections against the award, but no objection was filed by any party, and on 30-8-1950 the District Judge pronounced the judgment in terms of the award against all the three defendants against which the present application in revision has been filed.

3. The grounds taken by the three defendants in the present revision are that under Section 21 of the Arbitration Act no reference to arbitration could be made by an appellate Court, that the reference to arbitration was not by all the parties interested, and that no leave of the Court as required by Order 32, Rule 7, C. P. Code, for reference to arbitration on behalf of the minor was obtained.

4. A preliminary objection was taken on behalf of the plaintiff-respondent that no objection having been filed before the District Judge by the defendants-petitioners against the award, the present revision does not lie. In support of this argument he cited the following rulings: 'BHAGWANULU v. SEETHARAMASWAMI', AIR 1923 Mad 502; 'JAFAR v. ABDUL GAFOOR', AIR 1943 Oudh 304 and 'HARI SHANKER v. MT. AMRAOTI', AIR 1944 Lah 280. So far as the last named ruling is concerned, the proposition propounded by the learned counsel was not laid down there. All that was laid down in that ruling was that the lower appellate Court was not justified in allowing an objection to be raised before it which had not been taken before the trial Court. The other two rulings do no doubt support the said proposition, but, with due deference, I am unable to accept the view. It may be that an appeal against a judgment and decree pronounced according to the award may be barred except on the ground that the same were in excess of, or not otherwise in accordance with, the award in view of the provisions of Section 17 of the [Arbitration Act, 1940](#), but that does not take away the revisional powers of the High Court under Section 115, Civil Procedure Code, or of this Court under the corresponding provisions of paragraph 35 of the Bilaspur (Courts) Order, 1949, to interfere where the subordinate Court in pronouncing the judgment in terms of the award is found to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. So far as this Court is concerned, the word illegally does not appear in paragraph 35 of the Bilaspur (Courts) Order, 1949, and therefore the action of the subordinate Court in exercise of its jurisdiction can be set aside by this Court only if it is based on material irregularity. There is no doubt that so far as the award itself is concerned, it can only be set aside on grounds mentioned in Section 30 of the Arbitration Act and on any other grounds which might render the award 'otherwise invalid', and that by the Court before which objections for setting aside the award on any of those grounds are

taken. There could also be no doubt that, so far as the judgment of that Court pronounced in terms of the award is concerned, it cannot be questioned on any of the said grounds in revision since any error committed by that Court on those grounds in pronouncing its judgment in terms of the award could only amount to an error of law, which would be no ground for interference in revision. At the same time, if the judgment of the subordinate Court can be challenged on any of the aforesaid grounds under Section 115, C. P. Code, or the corresponding provision in the Bilaspur (Courts) Order, 1949, it can certainly be set aside in revision. In short, the error sought to be rectified in revision should be traceable to the error of the subordinate Court on any of the grounds on which revision lies, and it should not be attributable merely to an error on the part of the arbitrator in giving the award. 'MT. MARIUM v. MT. AMINA', AIR 1937 All 65, a Full Bench decision. Again, it was laid down by their Lordships of the Privy Council in 'CHHABA LAL v. KALLU LAL', AIR 1946 P C 72, as follows:

'If there is no valid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding.'

It was further held by their Lordships that an appeal lay to the High Court from a judgment pronounced in terms of an award. This pronouncement of their Lordships therefore demolishes the view attaching finality to a judgment pronounced on foot of an award. As to what would be an appropriate proceeding for challenging such a judgment, that would depend upon the grounds on which the judgment is challenged. I therefore repel the preliminary objection taken on behalf of the plaintiff-respondent and hold that the present revision does lie provided, of course, the judgment of the learned District Judge can be questioned on any of the grounds on which revision lies.

5. The second and third of the aforesaid three grounds on which the judgment and decree of the learned District Judge are assailed do not, in my opinion, avail the petitioners. The second ground is that the agreement of reference to arbitration was not by all the parties interested, as required by Section 21 of the Arbitration Act, since the two defendants Sihnu and Gulaba had, not joined it. The simple answer to this contention is that these two defendants were not parties interested

any longer since the trial Court had already dismissed the suit against them and, as adverted to above, they were not parties in the review petition filed subsequently by the plaintiff no relief was claimed against them. As regards the third ground, no question of leave of the Court under Order 32, Rule 7, C. P. Code, arose since the minor was not a party to the reference. The first ground however has force, namely, that an appellate Court has no power under the [Arbitration Act, 1940](#), to make a reference to arbitration. True, the reference in this case was made in the course of review proceedings, but that made no difference since the review petition was filed before the District Judge as an appellate Court. This view finds support from the following two rulings: 'SHUKRULLAH v. MT. RAHMAT BIBI', AIR 1947 All 304, and 'ABANI BHUSAN v. HEM CHANDRA', AIR 1947 Cal 93. The learned District Judge as a Court of appeal therefore exercised a jurisdiction not vested in him by law or acted with material irregularity in the exercise of his jurisdiction, and therefore the judgment and decree following on that reference pronounced by him must be set aside.

6. So far as the case of the defendants-petitioners Sihnu and Gulaba is concerned, there is one other ground on which the judgment and decree passed by the District Judge on foot of the award ought to be set aside. After the award had been received it should have struck him even without anybody filing any objection before him that the arbitrator had passed a decree against the two defendants Sihnu and Gulaba also although they were not parties to the reference. It was also patent on the face of the record that no objection on that ground could have possibly been filed on behalf of the said two defendants since the review proceedings were being had ex parte against them and no notice of the award had been given to them. It was, in the circumstance, incumbent upon the learned District Judge to have suo motu set aside the award as against those two defendants even though no objection had been filed before him. That being so, in pronouncing a judgment in terms of the award against the said two defendants the learned District Judge cannot be said to have committed an error of law, but to have acted with material irregularity in the exercise of his jurisdiction. This Court will therefore set aside the judgment and decree of the District Judge for this additional reason in exercise of its revisional jurisdiction so far as it purports to be against the defendants-petitioners Sihnu and Gulaba.

7. The revision is allowed with costs. The judgment and decree of the learned District Judge dated 30-8-1950 passed on foot of the award are set aside, and the case is sent back to him for disposal of the plaintiff-respondent's review petition according to the law.

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