Privy Council Appeal No. 16 *&* 22 *of* 1943

Sir Mohd Akbar Khan - - - - - - - *Appellant*

v.

S. Attar Singh (deceased) and others - - - *Respondents*
and connected appeals (consolidated)

FROM

THE COURT OF THE JUDICIAL COMMISSIONER NORTH-WEST FRONTIER PROVINCE, AT PESHAWAR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JULY 1945

Present at the Hearing :

LORD SIMONDS
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

These are three consolidated appeals from the Court of the Judicial Commissioner, North-West Frontier Province. Appeal No. 22 covers an appeal and cross-appeal from a decree of the said Court dated 10th July, 1939, which varied a decree passed by the Senior Subordinate Judge, Mardan, dated 28th November, 1938. Appeal No. 16 is from a decree of the Court of the said Judicial Commissioner, dated 3rd July, 1941, which varied an Order dated the 13th September, 1940, passed by the Senior Subordinate Judge, Mardan, in execution proceedings. Most of the controversy arises on Appeal No. 22 and it will be convenient to deal with that appeal first.

On the 1st January, 1919, the appellant, Sir Mohammad Akbar Khan (hereinafter called " the appellant "), and the original first respondent S. Attar Singh (hereinafter called " the first respondent "), entered into a Deed of Partnership for carrying on the business of moneylending. The appellant was to finance the business, and the first respondent was to manage it. Under Clause 8, Hira Singh, the father of the first respondent, was to be liable as a surety for loss occasioned by the default of the first respondent.

On the 25th July, 1929, the appellant instituted the suit out of which these appeals arise, for dissolution of the partnership and the taking of the necessary accounts. The defendants were the first respondent, his father Hira Singh, and the first respondent's sons. The plaint alleged that all the defendants constituted a Hindu joint family, and that the first respondent had entered into the partnership with the plaintiff on behalf of such joint family. Hira Singh died before the hearing of the suit and two of his sons, the respondents—Ishar Singh and Wazir Singh—were brought on the record as his legal representatives with the first respondent. It may be mentioned that the first respondent died in January, 1941, and respondents 2, 3 and 4 are his legal representatives.

The suit came on for hearing on the 6th October, 1930, before the Senior Subordinate Judge, Mardan, who, by his judgment, dismissed the suit

against all the defendants except the first respondent, and on the 15th October, 1930, a preliminary decree was passed declaring the partnership to have been dissolved as from the 13th July, 1929, and directing various partnership accountants.

The appellant appealed from the said decree to the Court of the Judicial Commissioner, North-West Frontier Province, and on the 1st August, 1931, the Court gave judgment upholding the dismissal of the suit as against the sons of the first respondent but holding that Ishar Singh and Wazir Singh, as legal representatives with the first respondent of Hira Singh, were properly sued and should be restored to the record as defendants. In passing such Order the Court noted that before the final decree it would be necessary for the Court to determine the extent, if any, to which Hira Singh's estate was liable under Clause 8 of the Partnership Deed, and whether the liability was such as could properly fall upon his legal representatives whoever they might be. The Court further directed that the costs in the lower Court should follow the result.

On the 3rd May, 1933, the Senior Subordinate Judge, on the application of the parties, directed that the decision of the whole case should be referred to The Honourable R. B. Lala Ram Saran Das as arbitrator. On the 14th January, 1938, the arbitrator made his report. After discussing very fully the contentions of the parties raised before him the arbitrator held that the contribution to the partnership capital of the appellant was Rs.290,882.11.3, which sum, together with interest at annas 7 per cent. per month (the rate agreed in the partnership deed) up to 31st July, 1929, came to Rs.4,35,415.0.3 and that out of that sum the appellant had already withdrawn Rs.93,843.12.0 on the 11th July, 1929, so that the balance due to him was Rs.3,41,672.3.0. After adding various sums which the arbitrator held that the appellant was entitled to, the arbitrator found the total sum due to the appellant as Rs.4,50,920.15.0 for which sum he purported to pass a decree in favour of the appellant against the first respondent. The arbitrator stated that he exonerated the legal representatives of the deceased surety Hira Singh, because of the fact that no liability in terms of the partnership deed had been incurred by the said surety. The arbitrator, as regards the costs of the suit, directed that the parties should bear their own costs because the issues involved were very complicated and both the parties had partly succeeded in respect of their allegations and pleadings.

Against that Award both the appellant and the first respondent filed objections. The first respondent challenged the whole Award and alleged misconduct on the part of the arbitrator. The appellant asked that the Award might be remitted to the arbitrator so that he might take the objections of the appellant into consideration and make the necessary amendments in his Award.

The powers of the Court to amend an Award are contained in Clause 12 of the second schedule to the Code of Civil Procedure. So far as relevant to this Appeal an Award can be amended when it appears that part of an Award is upon a matter not referred to arbitration and that part can be separated from the other part; and where the Award contains an obvious error which can be amended without affecting the decision. Clause 14 deals with the power of the Court to remit an Award; but, as the claim to remission was abandoned by the appellant, this need not be considered.

The objections were heard by the then Senior Subordinate Judge, Mardan, who, on the 28th November, 1938, accepted the Award and passed a final decree in favour of the appellant for Rs.4,50,920.15.0, and directed that he should get future interest on the principal sum of Rs.1,97,038.15.3 at the agreed rate of 7 annas per cent. per mensem against the first respondent from the date of the suit to realization, and directed that the parties should bear their own costs. In giving his reasons for dismissing the objections of the first respondent the learned Judge pointed out correctly that the decision of the arbitrator was final on questions both of law and of fact, and that he, the learned Judge, was not sitting in appeal upon the decision of the arbitrator. In dismissing the objections of the appellant the learned Judge said that he was of the opinion

that legally he was not competent to rectify the Award because he could not add anything to, or subtract anything from it. He noted that the claim for remission of the Award had been given up.

Under Clause 16 of the second schedule to the Code of Civil Procedure no appeal lay from the order of the learned Subordinate Judge, but under the North-West Frontier Province Courts Regulation 1931, Section 34, power is conferred upon the Court of the Judicial Commissioner to call for the record in any case in which no appeal lies and, if the Court by which the case was decided appears 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 with material irregularity, to make such order in the case as it thinks fit. Under this Regulation the appellant applied in revision to the Court of the said Judicial Commissioner and the application was heard by Soofi, J. who delivered judgment on the 10th July, 1939.

The learned Judge held that the appellant was entitled to have the Award rectified in respect of four matters. First he held that it was not competent for the arbitrator to exonerate altogether from liability the representatives of Hira Singh, since the fact of Hira Singh's liability had already been determined by the Court of the Judicial Commissioner by the Order directing that such representatives should be restored to the record, and be awarded a substantial sum against the estate of Hira Singh, though less than the appellant claimed. Their Lordships think that the learned Judicial Commissioner was clearly wrong upon this point. The Order of the Judicial Commissioner's Court of 1st August, 1931, merely held that the representatives of Hira Singh were properly before the Court as defendants in order that the liability, if any, of Hira Singh as surety might be determined; but the question whether any such liability existed was a matter to be determined in the suit before a final decree was passed, and this matter was included in the reference of the whole suit to arbitration. In their Lordships' opinion the arbitrator, in deciding that Hira Singh's representatives were under no liability, exercised a jurisdiction vested in him and his award on this point cannot be challenged.

The second point decided was that the direction of the Court of the Judicial Commissioner that costs in the lower Court should follow the result removed the question of costs from the jurisdiction of the arbitrator, and that the appellant was entitled to his costs in the lower Court. Their Lordships are of opinion that the learned Judge was wrong also on this point. The direction that the costs should follow the result necessarily involved that when the whole case was referred to arbitration the arbitrator should have power to deal with the costs, and the arbitrator was acting within the scope of his authority in directing that each party should pay his own costs.

The fourth point decided was that the arbitrator should have allowed to the appellant a sum of Rs.1,26,000 being the amount which the first respondent had allowed to a debtor to the partnership in settling the amount of such debtor's claim. The arbitrator held that this remission fell within the scope of the first respondent's authority as managing partner. This was clearly a matter which the arbitrator had power to decide and the learned Subordinate Judge was right in holding that he could not interfere with the Award on this point, whether he agreed with it or not, and his judgment is not open to revision.

The third point decided by Soofi, J. presents rather more difficulty. The arbitrator in the course of his Award held that the first respondent had made deductions in respect of first payments of interest on making various loans on behalf of the partnership, and that he ought to have given credit for these amounts. But, in determining at the end of his Award the total sum due to the appellant the arbitrator omitted any mention of these sums. Mr. Wallach for the appellant agrees that the sum involved is Rs.75,971, and not the sum of Rs.76,567 mentioned in the judgment of Mr. Justice Soofi. Their Lordships think that it was open to the appellant to argue that the omission from the final calculation of this sum, when the arbitrator had found that it ought to be allowed, was an obvious error which could

be amended without affecting the arbitrator's decision, under Clause 12 of Schedule 2, and their Lordships must assume that such a submission was made to the learned Subordinate Judge. If the learned Subordinate Judge considered the submission, and came to the conclusion that there was no obvious error which he could correct his decision would be final. On that hypothesis he exercised jurisdiction even if in so doing he reached a wrong conclusion, and revision would not lie. But if, on the other hand, he declined to consider the submission because he was of opinion that he had no power in any event to amend the Award of the arbitrator, then their Lordships think that he failed to exercise a jurisdiction vested in him. Which attitude the learned Judge did adopt is not altogether clear from his judgment. His statement that he was not competent to rectify the Award because he could not add anything to, or subtract anything from, it, rather suggests that he thought he had no jurisdiction to amend the Award in any manner, though the language is not altogether conclusive. But their Lordships observe from the judgment of Mr. Justice Soofi that Counsel had submitted that the arbitrator had by sheer oversight not given the appellant the credit of this amount, and that Counsel for the respondents did not challenge the correctness of this submission. Their Lordships think, therefore, that they must take it that the learned Subordinate Judge did, in this respect, fail to exercise a jurisdiction vested in him, and that there must be allowed to the appellant on account of interest a sum of Rs.37,985 being half the total sum of Rs.75,971. In the result the learned Judicial Commissioner passed a decree dated 10th July, 1939, by which the liability of the first respondent under the Award was increased to the sum of Rs.5,52,204.7 and the appellant was given his costs in that Court and the Lower Court.

The decision of the Board on these four points disposes of the cross appeal No. 22. The decision on Points 1 and 4 also disposes of Appeal 22 in which the appellant claimed an increase in the amounts awarded by the Judicial Commissioner under these heads.

Appeal No. 16 raises the question " What amount of principal remains due to the appellant on which interest runs? " On the 17th March, 1939, a sum of Rs. 291,951.11.0 was received by the appellant. His contention was that that sum should be treated as a payment in the first instance of the interest due, and that only the balance after satisfying the interest should be treated as a payment of capital. In Execution Proceedings the learned Subordinate Judge held that the sum received should be attributed, in the first instance, to capital.

On an appeal presented under Section 47 of the Code of Civil Procedure against the order of the Subordinate Judge the Court of the Judicial Commissioner, North-West Frontier Province, disagreed with this view. The judgment dealt with the matter in the following terms:—

POINT 5.

" Although it is undoubtedly correct that a debtor may appropriate a payment to a particular debt, we know of no authority for the proposition that he can appropriate a payment to principal before the interest is paid. This view is supported by 1922 Pat. 369 and 1922 P.C. 233 relied upon by learned counsel for the D.H. He concedes that after payment of interest, payments should be appropriated to the interest-bearing portion of the decree before being appropriated to the non-interest bearing portion. The calculation of the interest due up to 17th March, 1939, made by the executing Judge has not been disputed. The payment made on that date therefore discharged all the interest due up to that date and all the interest-bearing principal (Rs.1,97,038.15.3) except Rs.4,739.12. This latter sum alone will therefore carry interest from that date and any subsequent payments will be credited in the first place to the payment of interest on that sum, in the second place to the payment of that sum and in the third place to the satisfaction of the remainder of the decree."

The law so stated appears to their Lordships to be right, and it has not been challenged by either party.

But the appellant contends that in applying the law the learned Judicial Commissioner fell into error, and that the interest bearing principal should have been the sum of Rs.1,49,272.1.8 and not Rs.4,739.12.0 as found by the Judicial Commissioner. The figures as worked out in the appellant's case show that on the 31st July, 1929, there were due to the appellant a sum of Rs.197,038.15.3 as principal and Rs.144,532.5.0 as interest. Between the 31st July, 1929, and the 17th March, 1939, a further sum of interest amounting to Rs.99,652.8.5 accrued due, so that on that date the total amount due for interest was Rs.244,184.13.5. On the said 17th March, 1939, the appellant received a sum of Rs.291,951.11.0. According to the principle laid down by the Court of the Judicial Commissioner this amount should have been debited against the interest due so far as the same would extend and this would leave a balance of Rs.47,766.13.7 to be deducted from principal leaving the amount of principal due as Rs.149,272.1.8, not the sum of Rs.4,739.12.0. In finding this latter sum the Court of the Judicial Commissioner seems to have added the interest received between 31st July, 1929, and 17th March, 1939, to the principal sum due on the 31st July, 1929, omitting the very substantial sum of interest due on that date and to have deducted the sum of Rs.291,951.11 from that total; this seems to have been an obvious error. The figures showing the amount of capital due as Rs.149,272.1.8 were before the Court of the Judicial Commissioner when leave was granted to appeal to His Majesty in Council, and were the basis on which such leave was given. The figures have not been challenged by the respondent, though Mr. Parikh says that he is not in a position to admit them. In order to bring the figures up to date it will be necessary to add to the interest due to the appellant the sum of Rs.37,985 allowed in Appeal No. 22, thereby increasing the amount of principal bearing interest by a like amount. The appellant therefore succeeds in Appeal No. 16.

With regard to the costs of the appeal to His Majesty in Council the appellant has succeeded in the whole of Appeal No. 16 but he has failed on three out of four claims made in Appeal No. 22 and in the cross-appeal and the heavier part of the record is concerned with that appeal. In the circumstances their Lordships think that the fairest order is to direct each party to pay his own costs.

Their Lordships will therefore humbly advise His Majesty that in Appeal No. 22 the order of the Court of the Judicial Commissioner of the North West Frontier Province dated 10th July, 1939, be set aside and that the order of the Senior Subordinate Judge of Mardan, dated the 28th November, 1938, be restored but with the variation that the amount due to the appellant be increased from Rs.450,920.15.0 to Rs.488,905.15.0 and that the appellant should pay three-quarters of the costs of the respondents in the application to the Court of the Judicial Commissioner; and that in Appeal No. 16 the order of the Judicial Commissioner's Court dated 3rd July, 1941, be varied by declaring that the interest bearing principal remaining due to the appellant on 17th March, 1939, was Rs.1,87,257.1.8 instead of Rs.4,739.12.0.

There will be no order as to the costs of these appeals.

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In the Privy Council

SIR MOHD AKBAR KHAN

v.

S. ATTAR SINGH (deceased) AND OTHERS
AND CONNECTED APPEALS
(CONSOLIDATED)

DELIVERED BY SIR JOHN BEAUMONT

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