Privy Council Appeal No. 34 *of* 1945

Bombay Appeal No. 32 *of* 1942

Brijlal Ramjidas and another - - - - - *Appellants*

v.

Govindram Gordhandas Seksaria and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND JULY, 1947

Present at the Hearing:

LORD THANKERTON
LORD DU PARCQ
LORD NORMAND
LORD OAKSEY
LORD MORTON OF HENRYTON

[*Delivered by* LORD DU PARCQ]

On the 17th July, 1935, the two appellants, four of the five respondents, and one other person who is now represented by his heir, the fifth respondent, entered into a deed of partnership. The partnership business was " that of acting as the managing agents and selling agents of the Indore Malwa United Mills Ltd." and was to be carried on " at Indore or at such other place or places as the partners shall or may from time to time agree upon." An arbitration clause in the deed provided for the reference of disputes to arbitration " in accordance with and subject to the provisions of the Indian Arbitration Act, 1899, or any statutory modification thereof for the time being in force." So far as appears from the Record, the business of the partnership was always carried on at Indore.

By the end of 1940 there were disputes between the partners which appear to have become the subject of public controversy, and on the 17th December, 1940, the seven partners referred their differences to the arbitration of the Prime Minister of Holkar State, Indore. There is nothing in the Record to indicate that the arbitrator was asked, or agreed, to act in accordance with any law but that of Indore. On the contrary, the appellants pleaded in the course of the suit which has given rise to this appeal that the arbitration was " governed by the Indore Arbitration Act," and until the hearing at their Lordships' Bar all the parties appear to have acquiesced in this view.

On the 8th February, 1941, the arbitrator made an award, after conducting an inquiry which was admittedly of an informal character. It was apparent that if effect were given to this award, a dissolution of the partnership would result. After reciting that all the parties " agreed that it was impossible to carry on the present partnership any longer ", the arbitrator stated his decision that the appellants should sell their " shares " in the partnership " at par " to the first respondent, and that they should sell to him, also at par, certain debentures held by them.

The appellants, without delay, began in the High Court of Bombay the suit which has ended in this appeal. Their Plaint, dated the 14th February, 1941, asked for declarations that the award was invalid and that the appellants continued to be partners in the firm, and for consequential relief.

Shortly after this, proceedings began at Indore. In pursuance of the Indore Arbitration Act, 1930, the arbitrator filed his award in the District Judge's Court. Rules appear to have been made under Section 20 of that Act, but they were not before the High Court of Bombay or their Lordships' Board, and their Lordships can only assume that in what followed the correct procedure was adopted. The present appellants filed objections to the filing of the award, which included the objections that the arbitrator had " misconducted himself within the meaning of the Arbitration Act " (*scilicet* the Indore Arbitration Act) and had " given his decision on matters not referred to him for decision and without jurisdiction." The other partners filed " cross-objections ", and the hearing of the issues raised was begun in the District Court. Very soon, however, the proceedings were transferred to the High Court of Indore on the application of three of the present respondents and, after a full hearing, a judge of that Court found that although the submission, which was in writing, did not in terms confer on the arbitrator authority to make the award which he did make, effect had nevertheless been given to the true intention of the parties, which, through a mutual mistake, had not been correctly embodied in the written submission. It was held that in these circumstances the arbitrator had not exceeded his authority or his jurisdiction. The judge further held that the arbitrator was not guilty of misconduct. The award was upheld as a valid award.

There was an appeal to the High Court of Indore, in its appellate jurisdiction, which was heard by two judges, one of whom was the Chief Justice. The Chief Justice was of opinion that there was no right of appeal under the Indore Civil Procedure Code, and was for dismissing the appeal on that ground. The other member of the Court disagreed, and thought that an appeal lay and should be heard. An enactment described as Indore Notification No. 34 provides that " when there is a difference of opinion between the two judges of the High Court constituting the Bench the decision of the lower Court will prevail." At a subsequent sitting the High Court held that this provision must be applied, and the decision appealed from thus prevailed.

When the present suit came before the High Court of Bombay the defendants (now the respondents) relied on the judgment and order of the High Court of Indore as a bar to the suit. Preliminary issues were framed and were tried by Mr. Justice Chagla, who decided in favour of the present respondents. On appeal, the High Court of Bombay (Sir John Beaumont, C.J., and Mr. Justice Weston) dismissed the appeal. The present appeal was brought against the decision of the High Court. Their Lordships find themselves substantially in agreement with the judgment of the learned Chief Justice, in which Mr. Justice Weston concurred, and will state their opinion as briefly as possible, dealing more particularly with those points which were relied upon in the argument of Counsel for the appellants before them.

The law relating to foreign judgments and their effect is stated in Sections 2 and 13 of the Code of Civil Procedure, 1908. Section 2 contains the following definitions, which however are all subject to the qualification " unless there is anything repugnant in the subject or context ":—

> " Foreign Court " means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Central Government or the Crown Representative.
>
> " Foreign judgment " means the judgment of a foreign Court.
>
> " Judgment " means the statement given by the Judge of the grounds of the decree or order.

Section 13 is as follows:—

> A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except
>
> (*a*) where it has not been pronounced by a Court of competent jurisdiction;

(*b*) where it has not been given on the merits of the case;

(*c*) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable;

(*d*) where the proceedings in which the judgment was obtained are opposed to natural justice;

(*e*) where it has been obtained by fraud;

(*f*) where it sustains a claim founded on a breach of any law in force in British India.

Some difficulty has been occasioned in the interpretation of Section 13 by the definition of " judgment" contained in Section 2. Notwithstanding this definition, their Lordships agree with the learned Chief Justice that the expression " foreign judgment " in Section 13 must be understood to mean " an adjudication by a foreign Court upon the matter before it." The Chief Justice pointed out that " it would be quite impracticable to hold that ' a foreign judgment ' means a statement by a foreign Judge of the reasons for his order," since " if that were the meaning of ' judgment ' the other section (viz. Section 13) would not apply to an order where no reasons were given."

Of the exceptions set out in Section 13 (*e*) and (*f*) may be disregarded, since no attempt was made at any stage to show that the judgment of the Indore Court fell within them. Exception (*c*) may be disregarded also, for, although (as will be seen) it was suggested at their Lordships' Bar that the Courts of Indore should have applied the law of British India to the arbitration, there was certainly no refusal to recognise that law, which indeed neither party to the proceedings in Indore suggested should be applied. Exception (*d*) is also now irrelevant, as it was conceded by the appellants' counsel that he could not contend that the proceedings in the High Court of Indore were " contrary to natural justice."

It will be convenient to deal at this stage with the arguments founded on the two remaining exceptions, and to take them in their order.

(*a*) It was contended that the transfer of the proceedings initiated before the District Judge to the High Court of Indore was an erroneous exercise of the High Court's powers, and that the High Court was not " a Court of competent jurisdiction." This argument was disposed of satisfactorily by both Mr. Justice Chagla and the Appellate Court, who rightly pointed out that the question whether a foreign Court is the " proper Court " to deal with a particular matter according to the law of the foreign country is a question for the Courts of that country. There is no doubt that some Court in Indore was " a Court of competent jurisdiction." It was for the High Court of Indore to interpret its own law and rules of procedure, and its decision that the High Court was the " proper " Court must be regarded as conclusive. It may be added that the appellants appear to have consented to the transfer of the proceedings from the District Judge's Court to the High Court.

(*b*) It was somewhat faintly argued that the decision of the High Court of Indore " was not given on the merits of the case " because the High Court in its appellate jurisdiction did not concern itself with the merits. The short answer to this contention is that the judgment of the Judge who heard the case was given on the merits, and that the High Court in its appellate jurisdiction held that his judgment must prevail. Before the Courts in India the appellants sought to derive assistance from the decision of this Board in *Sheosagar Singh* v. *Sitaram Singh* (1897) L.R.24, I.A.50. That case and the present are strikingly dissimilar. In the case cited the question arose whether a decree by which a suit had been dismissed amounted to *res judicata*. The decision on which it was sought to rely had been the subject of an appeal, and the Appellate Court dismissed the appeal, not on the merits, but on the ground that the suit could not be maintained for lack of parties. In the words of Lord Macnaghten, who delivered the judgment of the Board: " The judgment of the lower Court was superseded by the judgment of the Court of Appeal. And the only

thing finally decided by the Court of Appeal was that . . . . no decision ought to have been given on the merits."

Their Lordships are therefore clearly of opinion that none of the exceptions has any application to the present case, and they refrain advisedly from entering upon a discussion of the question, which is not for them, whether or not the judgment of the High Court of Indore was correct according to the law of the State.

Two other points were raised. It was argued, and argued for the first time at their Lordships' Bar, that there was one " matter " which had not been " directly adjudicated upon." The " matter " referred to was the question whether or not the arbitration was subject to the law of British India. It is certainly true that the High Court of Indore did not adjudicate upon this question in the sense of treating it as being in issue and coming to a decision upon it. That Court could not well have done so, because, as has been said, it was common ground between the parties before it, and the present appellants in terms asserted, that the law to be applied was that of Indore. In these circumstances, it is not surprising that it did not occur to the appellants in the Courts of India to make the point that this " matter " had not been the subject of adjudication. What is more, no place was found for any such ground of appeal among the forty-six grounds set out in the Petition for leave to appeal to His Majesty in Council. It would be not only a departure from the practice of this Board but a manifest injustice to allow the appellants to take advantage of a point which was never submitted to the Courts below, and is inconsistent with the case which the appellants have hitherto made. Their Lordships think it right to say, however, that the submission could not have prevailed, and appears to them to be founded on a misunderstanding of the section. The " matter " which was " directly adjudicated upon " by the High Court of Indore was the validity of the award. The Order of the Court, which was left standing after the appeal, was to the effect that the award had been properly filed and that the objections to it must be dismissed, and in their Lordships' opinion that Order was a " judgment," within Section 13 of the Code of Civil Procedure, which is conclusive between the parties as to the validity of the award. There is nothing in Section 13 to support a contention that every step in the reasoning which led the foreign Court to its conclusion must have been " directly adjudicated upon." Even if it were to be assumed that the arbitration was subject to the law of British India, and that the High Court of Indore was in error in treating it as governed by the law of Indore, the judgment would still be conclusive unless it could be shown that the foreign Court had " refused to recognise the law of British India," and, as has been said, there was no such refusal here. The fact that the error (if error there were) was induced by the appellants themselves does not improve their position. It is desirable to add, in order to prevent a possible misunderstanding, that their Lordships must not be taken to decide that the High Court of Indore did not " directly adjudicate upon " the question whether the law of Indore was applicable. " Directly " does not mean " expressly ", and it may well be argued (though it is unnecessary now to decide), that a matter which was not in issue only because all parties were agreed upon it, and was accordingly treated by the foreign Court as an admittedly correct foundation for its decision, can properly be said to have been " directly adjudicated upon."

Their Lordships heard some argument to the effect that even if the foreign judgment were conclusive, it did not extend so far as to prevent the Courts of British India from making the declaratory decree prayed. The appellants' counsel eventually conceded, however, that if the award was valid, so that the appellants came under a duty to abide by it, it would be futile to ask the Court to declare that the partnership was still subsisting, and their Lordships think that the wisdom of this concession cannot be doubted. It is perhaps well to add that the interpretation of the arbitrator's award, in so far as it presents any difficulty, is not a matter with which the Courts of British India were in any way concerned in these proceedings.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the respondents' cost of the appeal.

(58223) Wt.8013—20 180 7/47 D.L. G.338

In the Privy Council

BRIJLAL RAMJIDAS AND ANOTHER

v.

GOVINDRAM GORDHANDAS SEKSARIA AND OTHERS

DELIVERED BY LORD DU PARCQ

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1947