

their Lordships held that only the Municipal Committee was entitled to a notice or opportunity of being heard. This distinction is of no avail because under section 236, there is no provision made that any notice or opportunity of being heard will be given to the Municipal Committee whose proceedings or resolution has to be annulled or modified. It follows that no other person has the right to be heard while taking action under section 236 of the Act. There is, therefore, no merit in the submission of the petitioner that the impugned order passed by the Punjab Government is invalid because he was not given an opportunity of hearing before passing that order. In my opinion, he has no right to challenge that order. If at all, that right vests in the Municipal Committee, Ludhiana, which has made no complaint about it. In this view of the matter, I do not feel the necessity of determining whether the impugned order was in conformity with the provisions of section 236 of the Act or not.

(5) For the reasons given above, I hold that the present petition is not maintainable and is, therefore, dismissed but the parties are left to bear their own costs.

B. S. G.

APPELLATE CIVIL

Before Prem Chand Pandit and Gopal Singh, JJ.

SHIV LAL—Appellant.

versus

PT. ISHAR DAS,—Respondent.

Regular First Appeal No. 361 of 1973.

November 18, 1973

Code of Civil Procedure (Act No. V of 1908)—Order 9, rules 8 and 9—Suit for rendition of accounts dismissed in default under rule 8—Application for restoration under rule 9 pending—Parties entering into agreement referring all disputes to arbitration—Application for restoration withdrawn—Arbitration agreement superseded on account of misconduct of arbitrators—Fresh suit filed for rendition of accounts thereafter—Such suit—Whether barred under rule 9.

Shiv Lal v. Pt. Ishar Das (Pandit, J.)

Held, that under Order 9, rule 9 of the Code of Civil Procedure, if the first suit has been dismissed in default either wholly or partly under rule 8, the plaintiff is precluded from bringing a fresh suit on the same cause of action. He is, however, entitled to make an application for an order to set aside the dismissal in default. During the pendency of such application if the parties enter into an agreement referring their disputes to arbitration and the application is withdrawn but the arbitration agreement is later on superseded on account of misconduct of arbitrators, the second suit brought by the plaintiff for rendition of accounts is not barred under Order 9, rule 9 of the Code. If the arbitrators had not misconducted themselves, the reference would have proceeded and the question of filing another suit would not have arisen. All these circumstances do give to the plaintiff a new cause of action to file another suit and hence the second suit is not barred under the provisions of Order 9, rule 9 of the Code.

(Para 10)

Regular First Appeal from the decree of the Court of Shri Charan Dass Bajaj, Sub-Judge, 1st Class, Amritsar, dated 27th March, 1973, rejecting the plaint of the appellant.

N. K. Sodhi and R. N. Mittal, Advocates, for the appellant.

H. L. Sarin, Advocate with T. N. Bhalla, M. L. Sarin, A. L. Bahl and K. T. S. Tulsi, Advocates, for the respondent.

JUDGMENT

Pandit, J.—(1) The facts giving rise to this appeal are these. On 15th March, 1953, Ishar Dass and his brother Shiv Lal entered into a partnership to do textile business under four different names—(i) National Textile Manufacturers, Amritsar, (ii) Messrs Indian Traders, Amritsar; (iii) Messrs Ishar Dass Weavers, Amritsar; and (iv) Messrs Ishar Dass-Shiv Lal, Kanpur. The first three concerns had to be carried on by Ishar Dass at Amritsar and the fourth by Shiv Lal at Kanpur. On 29th June, 1954, in the original partnership agreement, one more term was added, according to which, no partner could carry on any other business, except the four mentioned above, single-handed. It appears that towards the close of 1958, disputes arose between the two brothers. On 9th March, 1959, an arbitration agreement was entered into between them, according to which two arbitrators were appointed. They had to go into the various disputes and also decide about the rendition of accounts. They entered on the reference, but, according to Shiv Lal, after sometime they started misconducting themselves, with the result that on 22nd August, 1959, he had to make an application under section 11 of the Arbitration Act in the Court of the Senior Subordinate Judge Amritsar for their removal. They were actually removed by the Court on 26th

February, 1960. In the meantime, however, on 5th October, 1959, Shiv Lal filed a suit against his brother for dissolution of partnership and rendition of accounts. His allegations were that the defendant was not rendering the accounts of the Amritsar concerns.

(2) Summons in this suit was served on the defendant, but on 24th May, 1960, the suit was dismissed in default under the provisions of Order 9, rule 8, Code of Civil Procedure, on account of the absence of the plaintiff. On 28th June, 1960 an application under Order 9, rule 9, Code of Civil Procedure, was made by Shiv Lal for the restoration of the suit. While this application was pending, according to the plaintiff, a compromise was effected between the two brothers on 16th February, 1961, according to which, both of them agreed to appoint two new arbitrators, who were to decide the entire dispute. According to Ishar Dass, however, no compromise was affected; but the fact remains that a new arbitration agreement was entered into, on the basis of which the two arbitrators entered on the reference. On 16th February, 1961, Shiv Lal's counsel made a statement in the proceedings which commenced on the application, which he had filed under Order 9, rule 9, Code of Civil Procedure, saying that since a compromise had been effected between him and his brother Ishar Dass, he would like to withdraw that application. The said application was, consequently, dismissed, because of the statement of his counsel.

(3) As I have already said, the two new arbitrators entered on the reference and commenced functioning. According to Shiv Lal, these two gentlemen also started misconducting themselves, with the result that an application had to be filed by him on 21st July, 1961, for their removal as well. They too were removed by the Court on 19th January, 1962, on the ground of misconduct and the arbitration agreement was also superseded.

(4) On 19th March, 1962, a fresh suit was brought by Shiv Lal, out of which the present appeal has arisen, against Ishar Dass for rendition of accounts and dissolution of partnership. According to him, the defendant was not agreeable to render the accounts of the Amritsar business. He also stated that Ishar Dass had started another business under the name of Kwality Woollen Mills at Amritsar on his own account and that was against the terms of the partnership agreement, especially when the defendant was not sharing the profits of that concern with him.

(5) The suit was contested by Ishar Dass, who pleaded that the partnership had already been dissolved on 9th March, 1959. He was

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not liable to render the accounts, since he was not an accounting party. He admitted having joined the new business, but that was on 26th December, 1959, after the dissolution of his partnership with Shiv Lal and, therefore, he was not liable to render any accounts or share the profits of the new concern, because he was not bound by the terms of the original partnership deed, which was executed between him and his brother.

(6) A number of issues were framed in the case, but we, in the present appeal, are concerned with only issue No. 3, which runs as under:—

“Was the previous suit dismissed under Order 9 rule 8, C.P.C., as alleged? If so, does it bar the present suit?”

(7) It was held by the trial Judge that the suit was within time, but it was barred under the provisions of Order 9, rule 9, Code of Civil Procedure. It was further found that the defendant was liable to render accounts to the plaintiff for the three business concerns at Amritsar, the account-books of which were in possession of the former. It was also held that the plaintiff was liable to render accounts to the defendant only for the partnership business at Kanpur. The partnership, according to the learned Judge, came to an end on 22nd April, 1959, and it was, consequently, dissolved on that date. The parties held equal shares in the partnership business. The suit was dismissed, in view of the finding of the trial Judge on issue No. 3. Against that decision, the present appeal has been filed by Shiv Lal.

(8) Counsel for the appellant has challenged the finding of the trial Judge only on issue No. 3.

(9) Under issue No. 3, the learned trial Judge had held that the subsequent suit of 19th March, 1962, was based on the same cause of action as the first one, which was filed on 5th October, 1959, and since the first suit had been dismissed under Order 9, rule 8, Code of Civil Procedure, in the absence of the plaintiff, therefore, the second suit was barred under the provisions of Order 9, rule 9.

(10) It is true that under Order 9, rule 9, if the first suit has been dismissed either wholly or partly under rule 8, the plaintiff would be precluded from bringing a fresh suit on the same cause of action. He is, however, entitled to make an application for an order to set aside the dismissal in default of the first suit. For that purpose, the plaintiff had made an application, but it was withdrawn by him, because,

according to him, a compromise had been effected between the parties. It is also true that according to the defendant, no compromise was entered into. But, as I have already said, the fact remains that the parties had entered into a fresh arbitration agreement, as a result of which the two new arbitrators had been appointed and they had actually entered on the reference. But be that as it may, the question still remains as to whether the subsequent suit is based on a new cause of action or the old one. It is undisputed that when the application under Order 9, rule 9, filed by Shiv Lal was pending, another arbitration agreement was entered into between the parties, according to which their disputes had been referred to the arbitration of two new named arbitrators. They, subsequently, entered on the reference and started functioning. It was because they misconducted themselves that they were later on removed on that account and the arbitration agreement was also superseded. It was due to these facts that the plaintiff had to bring a fresh suit for the dissolution of partnership and rendition of accounts. If the new arbitration had gone on and the arbitrators had proceeded with the reference, the question of filing another suit would not have arisen. All these facts and circumstances, according to me, gave the plaintiff a new cause of action to file another suit. That being so, the second suit should not have been held to be barred under the provisions of Order 9, rule 9, Code of Civil Procedure.

(11) The trial Judge had relied on a Single Bench ruling of Kapur J. in *Baru and others v. Maya Ram and others* (1). The facts of that case are, however, quite distinguishable and they do not apply to the instant case.

(12) In view of what I have said above, I would reverse the decision of the trial Judge on issue No. 3 and hold that the present suit was not barred under Order 9, rule 9, Code of Civil Procedure.

(13) The result is that this appeal is accepted, the decision of the trial Judge set aside and the case sent back to him for proceeding with it in accordance with law. Parties have been directed to appear before him on 13th December, 1971. In the circumstances of this case, however, I would leave the parties to bear their own costs in this Court as well.

GOPAL SINGH, J.—I agree.

N. K. S.

(1) A.I.R. 1952 Pb. 261.