

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, AKIWUMI & TUNOI, JJ.A.)
CIVIL APPEAL NO. 111 OF 1997

BETWEEN

B. R. AGGARWAL suing in his
capacity as executor of Late Lekhraj Aggarwal APPELLANT

AND

MUNSHIRAM & COMPANY LIMITED RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (G. S. Pall, J)
dated 17th October, 1990

in

H.C.C.C. NO. 1804 OF 1985)

JUDGMENT OF TUNOI, J.A.

The appellant, the unsuccessful plaintiff in the suit, is the executor of the estate of his father the late Lekhraj Aggarwal, a wealthy and a successful entrepreneur, who died on 3rd February, 1982. He left behind him the respondent, a successful company and five well educated sons. Since his demise, these sons have been perpetual and indeed sometimes vexatious litigants in our courts. They have never hesitated to sue each other at the slightest instance and for no apparent cause at all. Consequently, their father's soul has never, since then, been allowed to rest in peace.

By a plaint dated 21st June, 1985 the appellant sued the respondent for the recovery of Shs.477,656/50 claiming that his late father as a director of the company was owed this sum by the company as at 31st December, 1979 and that the same amount was confirmed by the respondent as payable to him by its letter dated 17th December, 1979 and addressed to him. The respondent in its written statement of defence denied liability and averred that the claim was fully considered in the award filed by Mr. C. J. Patel of Messrs. Patel Shah & Joshi, Accountants, of Nairobi who had been appointed the sole arbitrator of all disputes between the deceased and his five sons. It was further contended that the appellant is bound by the award and the claim, the subject of this appeal is, ***res judicata*** .

The learned Judge the late Pall J (as he then was) in a well considered judgment agreed with the respondent and held that as the late Masime J (also as he then was) had entered judgment in terms of the award on 18th July, 1980 the appellant's claim, if any, was ***res judicata*** . He further held that the issue of the company's liability to the late Lekhraj Aggarwal as per the terms of reference of the arbitrator is deemed to have been raised and determined in the award.

Mr. Gautama for the appellant submits in the main that the learned judge's interpretation of the award was erroneous and that he ought to have concluded that the amount of Shs.400,000/= had been awarded in the interim award and should have been singled out.

The late Masime J (as he then was) held in H.C.C. Miscl. Cause No. 361 of 1979 that:

"The interim award referred to awarded to Lekhraj Aggarwal a sum of Shs.400,000/= to be paid to him by Munshi Ram & Company Limited on the strength of letter written by auditors of Munshi Ram & Company Limited on 12th January 1981 to Lekhraj Aggarwal seeking confirmation that the company owed him Shs.477,656.50 on 31st December, 1979. It was urged that I should order that sum to be paid by the Company to Lekhraj Aggarwal. In view of Clause 2 of the Award I reject this separate claim and I consider that ***the said claim was taken into consideration in the final award filed herein.*** "

It is plain, therefore, that the claim the subject matter of this appeal was substantially and directly in issue between the parties before Masime, J. And as the final award had been made the judgment of the court, the award operated to extinguish all claims which were the subject matter of the reference and any action on the original cause of action was barred. The terms of reference of the arbitration determined the issues which the arbitrator had to decide. Accordingly, as in the matter before us, if a particular issue were included in the terms of reference, the claimant would be estopped by the doctrine of *res judicata* from raising that issue in subsequent proceedings even though the arbitrator in the original arbitration had made no award in relation to that issue. See *Purser & Co. Hillingdon Ltd vs. Jackson [1976] 3 ALL ER p 641.*

Furthermore, looking at the terms of reference agreed upon by the parties, it was clear that all disputes including the claim of Shs.400,000/= was to be determined by the arbitrator and his award was final and conclusive as desired by the parties. I would, therefore, think that there is no basis in the argument advanced by Mr. Gautama that this particular claim was extraneous the reference.

In the result, I would dismiss this appeal with costs.

Dated and delivered at Nairobi this 10th day of November, 2000.

P. K. TUNOI

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JUDGE OF APPEAL