

PETITIONER:
SOHAN LAL AND OTHERS

Vs.

RESPONDENT:
AMIN CHAND AND SONS AND OTHERS(With connected appeals & peti

DATE OF JUDGMENT 22/08/1973

BENCH:
MATHEW, KUTTYIL KURIEN
BENCH:
MATHEW, KUTTYIL KURIEN
BEG, M. HAMEEDULLAH

CITATION:
1973 AIR 2572 1974 SCR (1) 453
1973 SCC (2) 608

ACT:
Arbitration Act (10 of 1940) Ss. 13(b), 14(3) and 39(1)
(ii)--Opinion on a question of law referred by arbitration
to Court-If appealable.
Code of Civil Procedure (Act 5 of 1908), s. 107; 0.30, r. 4-
Appeal by firm-Death of partner-If appeal abates.
Code of Civil Procedure (Act 5 of 1908). 0.47, r. 7-Review
on merits Scope of appeal.

HEADNOTE:

Certain trade marks were registered in the name of two firms and one of the partners gave notice of dissolution of the two firms. Thereafter, he filed two suits for accounts. While the suits were pending he died and his legal representatives (appellants) were impleaded. The parties agreed to refer the matter to arbitration and before the arbitrators a question was raised whether the legal representatives were entitled to continue the suits. The arbitrators stated a special case to the Court for its opinion under the first part of a. 13(b), Arbitration Act, 1940. Meanwhile, one of the firms filed a suit against the appellants in the names of the firms under which they (appellants) were tracking for an injunction restraining them from using the trade-marks. An ex-parte injunction was granted restraining the appellants from manufacturing and selling certain implements under the trade marks. On objection by the appellants, the order was vacated. A review application by the respondents was Allowed,. The order of the Court granting review was a combined order granting review and disposing of the application for interim injunction on merits. Oil appeal, the High Court confirmed the order. Against the order of the High Court an appeal was filed to this Court and this Court passed an interim order that the appellants will be entitled to use the trade marks but that the parties should keep accounts of all goods manufactured and sold and submit them to the trial court during the pendency of the appeal. While the appeal was pending in this Court, one of the appellants died. The Court, to which reference was made under the first part of s. 13(b), Arbitration Act, gave its opinion that the appellants were not entitled to continue the suits, and an appeal was filed against the order under Art. 136.

The respondents filed a criminal complaint before the Magistrate stating that the appellants were using the trade marks without authority, and that they were passing off their goods as goods manufactured by the original firm. The appellants applied to this Court for taking proceedings for contempt of court against the respondents 'for having disobeyed the interim order of this Court'.

On the questions :

- (1) Whether the appeal against the order of injunction had abated because of the death of one of the appellants ?
- (2) Whether the appeal against the order of injunction on merits, was maintainable "
- (3) Whether the trial court 'was justified in passing the order of injunction ?
- (4) Whether an appeal against the opinion of the Court given under the first part of s. 13(b) of the Arbitration Act was maintainable, and
- (5) Whether the respondents, in filing the criminal complaint were guilty of contempt of this Court ?

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HELD : (1) Under 0.30, r. 4, C.P.C., two or more persons may sue or be sued in the name of a firm, and if any of the partners dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit. Under s. 107, C.P.C., the provisions of 0.30, r. 4, apply to appeals also. Since the appellants were sued in the names of their firms, the injunction was issued against them in the names of their firms, and they filed the appeal in the names of their firms, the death of one of the partners would not cause the appeal to abate. [456F-H]

(2) The order of the trial court was not only an order granting the review but also an order passed on merits. Therefore, the appellants were entitled, not only to challenge the order on the grounds mentioned in 0.47, r. 7, but also on any other ground open to them, namely that on merits, the order of injunction should not have been passed. [457 B-D]

(3) Prima facie the respondents are not entitled to the exclusive use of the trade marks which formed part of the assets of the partnership of the two firms. If that be so, the court was not justified in granting the injunction restraining the appellants from using the trade marks. [457 G-H]

(4) The consultative 'jurisdiction of the court does not result in a decision which is equivalent to a judgment, decree, determination or order which is appealable to this Court under Art. 136, and hence, the appeal is incompetent. [458E; 459F-G]

(a) There is no material difference in the language of the corresponding section of English Act and s. 13(b) of the Indian Arbitration Act. In spite of the opinion given by the Court the arbitrators are clothed with the final duty of determining the case and the opinion of the Court does not finally determine the case and is not binding on the arbitrators. [459E-F; 460B]

British Westing House Electric and Manufacturing Company Ltd. v. Under, round Electric Railways Company of London, Ltd., [1912] A.C. 673, in re an Arbitration between Knight and the Tabernacle Permanent Building Society, [1892] 2 Q.B.D. 613, Union of India v. M/s. South India Corporation A.I.R. 1960 Andhra Pradesh 346, Union of India v. M/s Ram

Sukh Das and Others, A.I.R. 1959 Punjab 61, Adamji Lukmanji and Louis Dreyfus & Co. In the matter of an Arbitration, A.I.R. 1925 Sind 83, and Clive Mills Ltd. v. Swalal Jain A.I.R. 1957 Calcutta 692, referred to.

(b) It might be that the arbitrators may choose to act upon the opinion, but that is not because the opinion is a determination or decision binding on the arbitrator. It need even be incorporated in the award under s. 14(3). Section 14(3) is concerned only with the latter part of s.13(b) because, that part provides for stating the award wholly or in part in the form of a special case of such question for the opinion of the court, and under s. 14(3) such opinion should, be added to and form part of the award. But an opinion given under the first part of section 13 (b) need not be added to and does not form part of the award. There could be no appeal from the decision of the arbitrators on the ground they did not act upon the opinion although it might be a ground for impeaching their award on the ground of misconduct. [459F; 469F-H; 461AC]

(c) Moreover, under s. 39(1)(ii) an appeal is provided only against an order on an award stated in the form of a special case, but there is no provision for an appeal against the opinion given by the court on a special case Started to the court under the first part of s. 13(b). The scheme of the Act shows that the legislature wanted to provide for an appeal only when there is to be a decision by the court binding on the parties and not when it tenders an opinion which is not binding on the arbitrators and which is not to be incorporated in the award, [460G-H-. 461B]

(5) There could be no dispute that the respondent was entitled to file the complaint and therefore, it cannot be held that the respondent had disobeyed the order of this Court and committed any contempt. [462D-E]

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JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 227 (N) of 1970.

Appeal by Special Leave from the Judgment and Order dated April 7, 1969 of the Punjab and Haryana High Court at Chandigarh in F.A.O. No. 41 of 1969 and civil-appeals Nos. 1296-1297 of 1971.

From the judgment and order dated 1st June 1971 of the Court of Senior Sub Judge, at Jullundur in Case No. 130 and 140 of 1968.

C. L. Lakhanpal, S. K. Mehta, K. R. Nagaraja, M. Qamaruddin and Vinod Dhavan, for the appellant in all the appeals.

R. P. Khosla, R. S. Sodhi and Hardev Singh, for respondent No. 1 in Civil Appeal No. 227 of 1970.

G. N. Dikshit, S. K. Bisaria and Parmod Swaroop, for respondent No. 1 in Civil Appeal Nos. 1296-97 of 1971.

The Judgment of the Court was delivered by MATHEW, J. Civil Appeal No. 227 of 1970.

There were two firms called 'Amin Chand and Sons' and 'Landra Engineering & foundry Works'. The partners of the firms were three brothers Bakshi Ram, Shiv Dayal and Kishan Chand, after the retirement of the 4th partner. Certain trade marks were registered in the names of the firms. On January 30, 1967, Bakshi Ram gave notices to the other partners dissolving the firms. The notices were served upon the other partners sometime before March, 1967. On October 3, 1967, Bakshi Ram filed two suits for rendition of

accounts against the other two partners in the subordinate Judge's court at Jullundur. The defendants in the suits filed applications under s. 34 of the Indian Arbitration Act for stay of the trial of the suits on the ground that the court had no jurisdiction to proceed with the trial in view of the clause for arbitration in the partnership agreements. On February 4, 1968, Bakshi Ram died and his legal representatives, 10 in number, were brought on record. On June 24, 1968, the parties agreed to have the matter referred to arbitration. The court stayed the trial of the suits and referred the matter to arbitrators. Before the arbitrators, a question was raised whether the legal representatives of Bakshi Ram were entitled to continue the suits. The arbitrators stated a special case for the opinion of the court under the first part of s. 13 (b) of the Act the question of law, whether the legal representatives are competent to, continue the suits. On December 20, 1968, a suit was filed by a firm called "Amin Chand and Sons" through Shiv Dayal, in the District Court at Rohtak against three of the legal representatives of Bakshi Ram trading under the names "Bakshi Ram and Sons", "Sohan Lal and Brothers" and "Kaybus Industries and others", for a permanent injunction restraining them from using certain trade marks. The plaintiff-

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respondents in the suit applied for restraining the defendant-appellants and their dealers from manufacturing or selling agricultural implements under the trade mark Nos. 125062 and 138979 which were originally registered in the name of Amin Chand and Sons of which Bakshi Ram, Shiv Dayal and Kishan Chand were partners. The court granted an ex parte injunction. That was vacated on the objection of the defendants in the suit. Thereafter applications were filed by the plaintiff-respondents for reviewing the order dismissing the application for temporary injunction, and for issue of a temporary injunction, to restrain the defendant-appellants from using the trade marks registered in the name of Amin Chand and Sons of which Bakshi Ram was a partner. These applications were allowed and temporary injunction as prayed for was granted. The defendant-appellants preferred an appeal against that order to the High Court. The High Court confirmed the order. This appeal, by special leave, is directed against that order.

During the pendency of the appeal here, one of the appellants, namely, Dharam Vir, died on May 14, 1970. The application to implead his legal representatives was filed only on July 14, 1970. The respondents, by way of preliminary objection, contended that the appeal has abated. So, the first question for consideration is whether the appeal has abated. The plaint shows that three persons were sued in the names of the firms under which they were carrying on business. The injunction order was issued against these persons in the names of the firms. The injunction order operated against these persons as carrying on business in the names of the firms.

Order 30 rule 4 of the Civil Procedure Code provides that notwithstanding anything contained in s. 45 of the Indian Contract Act, 1872, two or more persons may sue or be sued in the name of a firm under the foregoing provisions and if any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. We have already said that the injunction order was directed against the partners in the names of the firms and that it operated as against them. The partners filed

the appeal in the names of the firms against the order and when one of the partners died, the failure to implead his legal representatives would not cause the appeal to abate under sec. 107 of the C.P.C. the provisions of rule 4 of Order XXX will apply to appeals also.

Counsel for the respondents also raised another objection namely that since the appeal to the High Court was against the order granting a review, the only grounds which could have been taken in the appeal were those mentioned in Order 47, rule 7 of the Civil Pro-

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cedure Code and that the appellants are not, therefore, entitled to canvass the merits of the injunction, order here. There, is no substance in this objection either.

It is not very clear from the order of the trial court whether that court reviewed its previous order vacating the injunction and then passed the order of injunction after granting the review or whether it modified its previous order vacating the injunction in the exercise of its inherent Power- If the order under appeal before the High Court is considered to be one granting the review, then certainly the only grounds on which that order could have been impeached in the appeal are those stated in rule 7 of Order 47. But the order appealed against was not only an order granting the review but also an order passed on merits on the application for injunction. It cannot be disputed that an appeal lay from the order granting the injunction, and in such an appeal it was open to the appellant to urge any grounds to show that the injunction was wrongly granted. The order of the trial court was a combined order granting the review and disposing of the application for injunction on merits and, therefore, the appellants were not only entitled to challenge the order on the grounds mentioned in Order 47, rule 7, but also on any other ground open to them, namely, that, on merits, the order of injunction should not have been passed.

Then the question is whether there was any justification for passing the order of injunction and whether the appellate court was right in confirming it.

It may be recalled that Bakshi Ram gave notices for the dissolution of the two firms in January, 1967 to the other partners. The appellants contend that with the dissolution of the firm assets of the firm- including the trade marks registered in the name of the firms belonged to the partners as co-owners and that two of the partners, namely, the respondents, have no right to appropriate or use the assets of the firm to the exclusion of the legal representatives of the other partner, Bakshi Ram. The suit in which the injunction order was passed was filed for a declaration that "Amin Chand and Sons" constituted by the two surviving partners alone was entitled to use the assets of the firm of "Amin Chand and Sons" of which Bakshi Ram was a partner, and it was for restraining the appellants from using that firm's assets, namely, the two trade marks in question, that the order of injunction was sought. Prima facie, it would appear that the respondents are not entitled to the exclusive use of the two trade marks which formed part of the assets of the partnership of Aminchand and Sons of which the three brothers were partners. The appellants being the legal representatives of Bakshi Ram were also entitled to a share of the assets of that partnership. If that be so we do not think that the courts were justified in granting the injunction restraining the appellants from using the trade marks. In these, circumstances, we think that the proper course to adopt is to continue in force the order passed by

this Court when it granted the special leave, on the basis of the application filed by the appellants for stay of the order of injunction, after setting aside the order under appeal.

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We, therefore, order that the injunction granted by the District Judge, Rohtak, on March 20, 1969, is varied to the extent that the appellants will be entitled to use the trade mark "Amin Chand and Soins" and "Landra", but they will keep accounts of all goods manufactured and sold and submit six-monthly accounts to the trial court during the pendency of the suit and that the respondents will also keep similar accounts and furnish accounts to the trial court. The appeal is allowed to the extent indicated but is dismissed in other respects. We make no order as to costs.

Civil Appeals No. 1296 and 1297 of 1971

It might be recalled that Bakshi Ram had filed two suits for rendition of accounts on the basis that the firms stood dissolved by the notices issued by him in 1967 and that after his death, the parties to the suits had agreed to have the subject matter of the suits referred to arbitration. After the arbitrators had entered upon the reference, a question was raised whether the legal representatives of Bakshi Ram were competent to proceed with the two suits. The arbitrators stated a special case for the opinion of the court under the first part of s. 13(b) of the Arbitration Act.

The Court gave the opinion and it is against the opinion that these appeals by way of special leave have been preferred.

A preliminary objection was raised by the respondents to the maintainability of these appeals on the ground that an opinion given pursuant to the first part of s. 13(b) of the Arbitration Act is not a judgment, decree, determination or order as visualized in article 136 of the Constitution and, therefore, the appeals would not lie.

In order to dispose of the objection it is necessary to decide the nature of an opinion given by a court under the first part of s. 13(b) of the Arbitration Act.

In *British Westing House Electric and Manufacturing Company Ltd. v. Underground Electric Railways Company of London Ltd.* (1) the House of Lords held that the opinion of the High Court upon a special case stated by an arbitrator under the Arbitration Act, 1889, with regard to a question of law arising in the course of the reference cannot be the subject of an appeal, but, if that opinion is erroneous an award expressed to be founded on that opinion can be set aside as containing an error of law apparent on the face of the award. In the course of his speech Viscount Haldane L.C. said:

"No doubt an opinion given by the Court under the provisions of the Arbitration Act is not a judgment or order, and is, therefore, not susceptible of being the subject of an appeal. But in my opinion, that is the only reason why it cannot be appealed, and if the law embodied in it is afterwards set out on the face of a final award, I see no reason for thinking with Vaughan Williams, L.J. that the Act inten-

(1) [1912] A. C. 673.

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ded to make the statement of the law appearing on the face of the award binding on a higher tribunal before which the award might come for review."

In re an Arbitration between Knight and- the Tabernacee Permanent Building Society(1), Lord Esher said that when the statute stated (Arbitration Act, 1889) that "any referee, arbitrator or umpire may at any stage of the proceedings under a reference, and shall if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference", the words being not "for determination" or "decision" by the court, there is no determination or decision when the court gives the opinion. He also said that it would be most inexpedient that, where an opinion is given by the court- under this statute in the course of a reference for the guidance of, the arbitrators, there should be an appeal which might be carried up to the House of Lords. Bowen, L.J. said that it could not have been intended that, whenever a case is stated under this section for the opinion of the Court, such opinion when taken is to be treated as an absolute determination of the rights of the parties with the result that there may be an appeal from it which may be carried to the House of Lords. He further said that the section in question contemplated a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference and that he does not divest himself of his complete authority over the subject matter of the arbitration but still remains the final judge of law and fact although, a fair and honest arbitrator would, in the absence of special circumstances, be bound in honesty and morality, after taking the opinion of the Court, to act upon such opinion.

We think that in spite of the opinion given by the Court, the arbitrators are clothed with the final duty of determining the case and that the opinion of the Court does not finally determine the case, although it might bind the arbitrators in honesty and morals to act upon the law as the court stated it. We also think that there could be no appeal from their decision because they- did not act upon the opinion although it might be a ground for impeaching their award on the ground of misconduct. It appears to us that this consultative jurisdiction of the Court does not result in a decision which is equivalent to a judgment, decree, determination or order.

In Union of India v. M/s. South India Corporation(2) it was held that an opinion on a special case stated under the first part of s. 13 (b) of the Arbitration Act is consultative in character and is not a determination of the rights of the parties.

In Union of India v. M/s. Ram Sukh Das and Others(3), the Court said that no appeal will lie from an opinion given by the Court, on a special case stated under the first part of S. 13 (b) of the Arbitra-

(1) [1892] 2 Q. B. D. 613. (2) A. T. R. 1960 Andhra Pradesh 346.

(3) A. T. R. 1959 Punjab 61.

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tion Act. The same view was taken in Adamji Lukmanji and Louis Dreyfus & Co. In the matter of an Arbitration(1).

Counsel for the appellants relied on the ruling in Clive Mills Ltd. Swalal Jain(2) and submitted that there are material differences between the English Arbitration Act and the Indian Arbitration Act and therefore the decision of the House of Lords might not be a safe guide. We do not think that there is any material difference in the language of the corresponding section of the English Act with which the House of Lords was dealing.

Counsel for the appellants submitted that the opinion given

by court has to be incorporated in the award under S. 14 (3) and therefore, the opinion was binding on the arbitrators. Section 14 (3) provides:

"14 (3) Where the arbitrators or umpire state a special case under clause (b) of s. 13, the Court after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of the award."

The marginal note to s. 14 says: "Award to be signed and filed". Section 14 (1) says that when the award is made by the arbitrators, they shall sign it and give notice to the parties of the making and signing of the award; s. 14 (2) provides that the arbitrators shall, at the request of any party to the arbitration agreement, cause the award to be filed in court and that the court shall thereupon give notice to the parties of the filing of the award. Then comes sub-section (3) of s. 14. The entire scheme of the section would show that the section is concerned with the making of an award. Therefore, the reasonable way to read s. 14 (3) is that it is concerned only with the latter part of s. 13 (b), because the latter part of s. 13(b) provides for stating, the award wholly or in part in the form of a special case of such question for the opinion of the court. The opinion given under the latter part of s. 13 (b) should be added to and form part of the award under s. 14(3). We do not think that an opinion given under the first part of s. 13(b) should be added to and form part of the award. The reason why the opinion given under the latter part of s. 13 (b) should be added to, and becomes part of the award is because the arbitrators have stated the award wholly or in part in the form of a special case of such question for the opinion of the court. This view is further strengthened by the circumstance that under s. 39(1) (ii), an appeal is provided only against an order on an award stated in the form of a special case. The reason why an appeal is provided for in such a case is that the opinion of the court has to be added to and form part of the award and it therefore becomes a decision of the court, notwithstanding the fact that it is incorporated in the award. There is no provision for an appeal against an opinion given by the court on a special case stated to the court under the first part of s. 13 (b) or against the decision to state a special case for the opinion of the,

(1) A. T. R. 1925 Sind 83.

(2) A. 1. R. 1957 Calcutta 692.

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court for the reason that the opinion is not a decision. Nor is it to be incorporated in the award. If, as a matter of fact, the opinion given by the court on a special case stated under first part of s. 13 (b) is binding on the arbitrators and has to be incorporated in the award, there was no reason why, the legislature should not have provided for an appeal against the opinion or against the reference which led to the opinion. The scheme of the Act shows that the legislature wanted to provide for an appeal only when there is to be a decision by the court binding on the parties, not when it tenders an opinion which is not binding on the arbitrators and which is not to be incorporated in the award. It might be that the arbitrator may choose to act upon the opinion. But that is not for the reason that it is a binding determination or a decision. We have, therefore no hesitation in holding that the appeals are incompetent.

The appellants' counsel argued that the opinion expressed by

,the court is prima facie wrong for the reason that it did not take into account the real issue. The real issue, according to counsel, was whether the partnerships "Amin Chand and Sons" and "Landra Engineering & Foundry Works" stood dissolved by the notices issued by Bakshi Ram in 1967, whether the two suits instituted by Bakshi Ram for rendition of accounts were competent, and whether there was any bar in his legal representatives continuing the suits. Counsel argued that under s. 43 of the Indian Partnerships Act, it was open to Bakshi Ram to dissolve the partnerships by giving notice to, the other partners as the partnerships were partnerships at will and that clauses 14 and 15 of the partnership agreement have nothing to do with the competency of one of the partners to dissolve the firms or the legal representatives of Bakshi Ram to continue the suits. Apparently, it would seem that there was no bar to Bakshi Ram filing the suits for rendition of accounts if the partnerships stood dissolved by the notices issued by him and perhaps there, would then be no reason also why his legal representatives could not continue the suits. However, we, do not express any final opinion on the merits of the controversy. We need only say that that opinion of the court is not binding on the arbitrators and counsel for the respondents did not contend otherwise.

The appeals have to be dismissed and we do so but in the circumstances, order as to costs.

Civil Miscellaneous Petitions No. 2183 and 2184 of 1972

This application is for taking proceedings for contempt of court against "Amin Chand and Sons" represented by Shiv Dayal, the respondent in these petitions, for having disobeyed the interim order passed by this Court on the application for stay while admitting Special Leave Petition (Civil) No. 1851 of 1969 on January 29, 1970. That order provided as follows:-

"Special leave granted. The injunction granted by the District Judge, Rohtak on 20-3-69 is varied to the extent that the petitioner will be entitled to use the trade mark "Amin Chand and Sons and Landra", but they will keep

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accounts of all goods manufactured and sold and submit SIX-monthly accounts to the Trial Court. during the pendency of the appeal. The respondents will also keep similar accounts and furnish accounts to the Trial Court."

The main allegation in this application is that the respondent Shiv Dayal filed a criminal complaint before the Judicial Magistrate, I Class, Phillaur stating that the applicants were using the trade marks "Special Landra" and "Amin Chand" without authority and that they were using the name of "Amin Chand and Sons" under which the respondent Shiv Dayal and his partner were carrying on their trade.

On the objection of the applicants as to the maintainability of the complaint, the learned Magistrate passed an order holding. that the complaint was maintainable because one of the allegations in the complaint was that the applicants were using the name of "Amin Chand and Sons", the firm under which Shiv Dayal and his partner are carrying on the trade on the goods manufactured by the applicants and thus passed off their goods as goods manufactured by "Amin Chand and Sons". On a perusal of the complaint, it is clear that there are allegations to show that the applicants were using the name of the firm "Amin Chand and Sons" under which the respondent Shiv Dayal and his partner are carrying on the

business, on the goods manufactured by the applicants. In these circumstances, we do not see how the respondent has committed any contempt by disobeying the order of this Court. There can be no dispute that the respondent was entitled to file a complaint on the ground that the applicants were manufacturing goods under the trade marks as being manufactured by, the firm of "Amin Chand and Sons" and were passing off the goods as manufactured by the respondent firm. It would appear that the applicants have filed a petition under s. 561-A of the Code of Criminal Procedure before the High Court of Punjab and Haryana for quashing the order of the Magistrate holding that the complaint was maintainable. The High Court will pass the appropriate order on that petition.

We see no substance in this petition. We therefore dismiss it.

V. P. S.
1970 allowed.

C.A. 227 of

Other matters dismissed.

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