

(1927) 04 CAL CK 0005
In the Calcutta High Court

Dwarka Nath Chakrabarti Chowdhury	APPELLANT
Vs	
Atul Chandra Chakrabarti Chowdhury and Others	RESPONDENT

Date of Decision : 14-04-1927

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 5

Citation : 106 Ind. Cas. 509

Hon'ble Judges : Roy, J; Mukerji, J

Bench : Division Bench

Judgement

Roy, J.—This appeal is directed against the decree passed by the Subordinate Judge Second Court, Mymensingh amending the decree passed by his predecessor in the suit brought by the plaintiff. We learn that the plaintiff commenced this action in the Munsifs Court but the valuation of the suit was found to be over Rs. 5,000 and it came eventually before the Subordinate Judge. It is said that the defendants Nos. 4 and 5 were owners of some parcels of land in villages Gangatiya and Saidpur lying within Kharija taluk No. 1760-28 of the Mymensingh. Collectorate and that they were in exclusive possession of some of the plots and were in possession of some shares in the other plots with the other defendants Nos. 1-3 he owned the remaining shares. The plaintiff alleged that the defendants Nos. 4 and 5 sold half of what they had in these plots to the plaintiff by a kobala dated the 26th June, 1915, but the said defendants subsequently colluded with defendants Nos. 1-3 and allowed the latter to take possession of these lands.

2. The plaintiff thereupon brought the present suit (from which this appeal arises) and he sought to establish his title to the lands he purchased and he asked for partition and for khas possession of his share in these lands. The defendants Nos. 1-3 disputed plaintiff's title and that of his vendors and, the vendors denied the sale. Issues were drawn up and after protracted proceedings a commission was taken out to examine the plaintiff who resides in Calcutta. Before the Commissioner the parties entered into a compromise and this was

embodied in a petition dated the 16th March, 1925.

3. The decision of the case turns on the terms of this petition of compromise. The plaintiff gave up his claim based on his alleged purchase. It was settled that the lands in these villages Gangatiya and Saidpur appertaining to Taluk 1760/28 were to be divided between the plaintiff and his co sharers on one side and the defendants Nos. 1, 2 and 3 on the other, proportionately to the admitted shares they had therein, on reference to the last Settlement Survey. The plaintiff and his co-sharers and the defendants Nos. 1, 2 and 3 appointed Babu Sarat Chandra Bhattacharjeea Pleader to be the arbitrator. The arbitrator was to equalise possession as far as possible and it was agreed that after the said arbitrator had made the proposed division, the plaintiff would withdraw from the suit and the defendants would withdraw the allegations they had made with respect to the plaintiff's purchase. Babu Sarat Chandra declined to arbitrate. Efforts were made to have a joint petition filed agreeing on a partition by some other person or persons but these efforts were unsuccessful. The learned Subordinate Judge thereafter on plaintiff's petition, purporting to act under Sections 5(3), Schedule II of the CPC called on the defendants Nos. 1-2 to appoint an arbitrator. The defendants objected and protested that there was no reference to arbitration as understood under Schedule II of the Civil Procedure Code, that the petition of compromise dated the 16th March, 1925, was not signed by all the parties and that the compromise did not relate to the subject matter of the suit and so on, but the learned Subordinate Judge refused to listen to any objection and being of opinion that the defendants were trying to back out of the compromise they had entered into "on flimsy technicalities" he appointed a Pleader Babu Satyaranjan Guha as an arbitrator in place of Babu Sarat Chandra Bhattacharjee and asked him to complete the division. This gentleman filed a so-called award though the defendants objected and protested all throughout that the proceedings were illegal and ultra vires. The award was returned by the learned Subordinate Judge for consideration on a particular point. The Pleader re-filed his award and thereafter the learned Subordinate Judge made a decree in conformity with, the said award, the defendants objecting and protesting throughout these proceedings. The defendants Nos. 1, 2 and 3 then filed an application for amendment of the decree to bring it in conformity with the judgment of the Subordinate Judge. It came for hearing before his successor and he had no hesitation in deleting the so-called award from the decree. The decree, as it stands, now, merely states that the claim of the plaintiff is treated as withdrawn without liberty to bring a fresh suit and the allegations made by the defendants in their written statements in the kobala of the plaintiff are deleted.

4. The plaintiff has appealed and the learned Vakil appearing for the plaintiff seeks to restore the previous decree which was achieved and which purported to embody the arbitrator's so-called award. The appeal to say the least is audacious.

5. Certain preliminary objections were taken by the learned Vakil for the

respondents. They are not serious; one was that no appeal lay from a decree which is based on a compromise. The contention of the plaintiff is that the whole compromise has been struck out. The dispute is over the nature of the compromise and the plaintiff has a right in appeal to show what the compromise was. The second ground is that the period of limitation should be counted from the date of the original decree and that counted from that time the appeal is barred. The plaintiff was not aggrieved, however, until the amended decree was passed and he is within time from that point of time, allowance being made for time taken in obtaining a copy. The third ground is that the stamp fee of u/s 211 is insufficient and ad valorem fees should have been paid. The answer of the plaintiff that so far as the present dispute is concerned it is in respect of partition end that at any rate the relief, claimed is not capable of being valued, seems sufficient.

6. Returning to the merits of the case it may be mentioned that the words "arbitration" and "reference to arbitration" are use the common parlance. The CPC uses the same expressions but lays down certain forms and steps for a reference to arbitration and for the award made by the arbitrator to be embodied in the decree of the Court and unless these forms and steps are followed it is idle to appeal to Section 5 of the Schedule II of the CPC by which the learned Subordinate Judge purported to have appointed Babu Satyaranjan Guha as arbitrator in place of Babu Sarat Chandra Bhattacharjee who refused to act Section 1 of Schedule II of the CPC says hat where all the parties to a suit agree that any matter in difference between them shall be referred to arbitration, They may before judgment is pronounced, apply to the Court for an order of reference Clearly there was no such application before the Court nor did the Court make an order of reference as contemplated by Section 3. Finally the Court has to pronounce judgment according to the award of the arbitrator. The petition of compromise does not contemplate that any award was to be made by the arbitrator and that it should be embodied in the judgment of he Court. The learned Subordinate Judge seems to have realised this for in his judgment he states a petition of compromise is more appropriate in describing it, rather than a petition of reference to arbitration. For there is no prayer in this petition that the suit would be disposed of in terms of the award filed by the salis (arbitrator) or that the award would be incorporated into a decree." In spite of this conclusion he, however, fell back on Rule 5 of the Second Schedule and that this rule has a wide application and could act on it and dispose of the matter by saying that he appointed another gentleman to effect the partition according to the original wishes of the parties. He says this gentleman "has filed his report Call it an award or anything else. The partition has been effected and as the parties are bound by their petition of 16th March, 1925, the suit will be disposed of on its terms."

7. On the face of it this was very arbitrary and the learned Subordinate Judge who succeeded could hardly maintain the so-called award of this kind. He held that his predecessor had treated the petition of 16th March, 1925, as a petition

of compromise and he thought that so much of the compromise that the plaintiff would withdraw from suit without liberty to bring a fresh suit and that the defendants would withdraw their imputations against the purchase, could be maintained and he thereupon deleted the award and amended the decree.

8. The learned Vakil appearing for the plaintiff has referred to Order XXIII, Rule 3 and he seeks to justify the action taken by the trial Judge thereunder. All the parties did not join and all that the petition said was that there will be a partition done by Pleader Sarat Babu and on his doing so the suit would be withdrawn and the imputations against the plaintiff deleted. Sarat Babu declined to make the partition with the result that the compromise was hung up. If it be argued as the trial Judge did, that there was a valid compromise between the parties, viz., that the lands would be divided according to their respective shares it is not clear how the trial Judge could insist on carrying it through in the manner he did. The plaintiff may have his remedy elsewhere but it could not be done in this suit. The plaintiff gave up his claim based on a purchase and the compromise was in respect of something else. The compromise did not relate to the subject-matter of the suit. New parties were again brought in, viz., the principal co sharers. The compromise so far as the suit before us is concerned must be in the circumstances of the case taken to have fallen through and the only order, in my opinion, which the Subordinate Judge could have passed on 3rd April, 1925, was that he should proceed with the trial of the suit.

8. The amended decree cannot be maintained for the simple reason that the compromise was not completed. The suit was to be withdrawn and the imputations made by the defendants also withdrawn on the happening of a certain event, viz., the division of the lands by Pleader Sarat Babu. That contingency did not happen and the petition of compromise cannot be acted upon--for obviously the two parts are connected and it would not be right to pass a decree on a portion of the compromise ignoring the firsts part. We do not know of course what the plaintiff wishes to do, viz., to continue the suit from the point the compromise could not be effected or seek his remedy on the settlement that the lands are to be divided according to the admitted shares of the parties. In the present suit we must leave out the compromise. In case the plaintiff wishes to continue the suit he should be given the chance. As the amended decree stands he cannot and a future suit by him may also be barred as it happened in the case of Gland Lal v. Manna Lal 23 A. 219 : A.W.N. (1901) 66..

9. The original decree has been superseded. It cannot be restored. The amended decree shall also be set aside. The appeal, therefore, is allowed in part. The parties are relegated to the position they stood on 3rd April, 11(25). The learned Judge will now allow the plaintiff to continue his suit from that day and thereafter dispose of it according to law. The contesting respondents will get their costs, the hearing-fee being assessed at 3 gold mohurs.

10. The plaintiff appellant had an application in revision as an alternative on which a Rule was issued. The Rule is discharged.

Mukerji, J.

11. I have had the advantage of reading the judgment which my learned brother is about to deliver. I agree in his conclusions and the order which he has proposed to pass, and I desire to add a few words.

12. The true character of the petition dated the 16th March, 1925, appears to have been very much misconceived by the Court below. Obviously it is not, and cannot be regarded as, an application to file in Court an agreement to refer to arbitration such as is contemplated by Clause 17 of Schedule II, or as an application to file in Court an award made in an arbitration held without the intervention of the Court, as provided for by Clause 20 of Schedule II. Could it be treated as an application to the Court for an order of reference within the meaning of Clause 1 of Schedule II? The Court below treated it as such an application, and made an order under Clause 3 stating that the arbitrator was to do the work mentioned in the petition within two weeks (vide Order No. 74 dated 31st March, 1925), an order appointing anew arbitrator under Clause 5, (vide Orders No. 74 dated 3rd April, 1925, No. 80 dated 18th April, 1925, and No. 81 dated 29th May, 1925, Orders extending the time for filing the award under Clause 8 vide Orders No. 83 dated 30th May, 1925, and No 81 dated 15th June, 1925) and also an order remitting the award under Clause 14 (vide Order No. 87 dated 29th June, 1925). There are several weighty reasons why the petition cannot be regarded as one made for an order for reference in a pending suit such as Clause 1 contemplates. In the first place the petition does not contain any prayer for such reference, and it does not appear anywhere that it was in the contemplation of the parties that there should be a judgment according to the award. Secondly, the foundation of the jurisdiction of the Court is an agreement between all parties interested. As pointed out by the Judicial Committee in *GhiulamKhan v. Muhammad Hassan* 29 I.A. 51 : 29 C. 167 : 6 C.W.N. 226 : 12 M.L.J. : 4 Bom. L.R. 161 : 8 Sar. P.C.J. 154 : 25 P.R. 1902 (P.C.) in dealing with Ch. XXXVII of the Code of 1882 in which the words were "where in any suit all the parties agree," that the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of: the Court, and that large powers are given to the Court with the view of making the award in such cases, complete, operative and final. The word "interested" was added by the Code of 1908 to give effect to the decision in *Pitam Mal v. Sadiq Ali* 24 A. 299 : A.W.N. (1902) 19 which laid down that the words "all the parties to a suit" "would not necessarily include parties who never put in any appearance in the Court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit." In the present case the defendants Nos. 4 and 5 were not parties to the agreement. They, no doubt, denied having any interest in the subject-matter of the suit, but the plaintiff claimed relief as against them, and, therefore, it cannot be said that they are not parties interested. Moreover the agreement affected the shares of the plaintiff and his co sharers but it is not known who these co-sharers are and what their shares are. Thirdly, the

expression any matter in difference must mean matter in difference arising in the suit. This is clear from the context, as well as the form prescribed for an Order of Reference, Form No. 2 of the Appendix. That this is so has been explained by the Judicial Committee in the case of *Ram Protap Chamaria v. Durga Prasad Chamaria*, AIR 1925 PC 293 . In the present case what the arbitrator had to do was wholly outside the scope of the pleadings in the suit. The Subordinate Judge, therefore, was clearly wrong in proceeding on the supposition that the petition of the 16th March, 1925, was one which gave him jurisdiction to proceed under paras. 1 to 16 of Schedule II.

13. The intention of the parties appears clearly from the wording of the petition itself. It stated: "The arbitrator shall within 14 days from this day or as soon as possible, make the division in the aforesaid manner. After the aforesaid arbitrator files his report in Court after effecting the division in the aforesaid manner, the plaintiff shall withdraw the aforesaid Suit No. 269 of 1922 of the Court of the Subordinate Judge of Mymensingh without permission to institute a fresh suit, and after the plaintiff withdraws the aforesaid suit, the defendants shall withdraw the allegations made in their written statement against the truth of the plaintiff's purchase." It was an adjustment by a lawful agreement or compromise which the petition purported to notify to the Court as contemplated by Order XXIII, Rule 3, and if the terms were carried out, as intended, by the arbitrator appointed by the parties, it could have been recorded and the suit allowed to be withdrawn and dismissed, and the objectionable passages in the written statement could have been deleted. If the adjustment had taken place, that is to say if the said arbitrator had not refused to act but had done what was expected, the compromise or agreement would then have been recited in the decree, though the decree would have been, confined in its operation to so much of the subject-matter of the suit as was dealt with by the agreement: *Hemanta Kumari Debi v. Midnapore Zemindari Co. Ltd.* 53 Ind. Cas. 534 : 47 C. 485 : 496 46 I.A. 240 : 31 C.L.J. 298 : 37 M.L.J. 525 : 17 A.L.J. 1117 : 24 C.W.N. 177 : (1920) M.W.N. 66 : 27 M.L.T. 42 : 11 L.W. 301 : 22 Bom. L.R. 488 (P.C.). The result of the proceedings before the arbitrator and his award could not have been enforced under Order XXIII, Rule 3 *Dekari Tea Co. Ltd. v. Assam Bengal By Co.* 61 Ind. Cas. 919 : 25 C.W.N. 127; *Amar Chand Chamaria Vs. Banwari Lall Rakshit and Others*, . The agreement, however, fell through as the arbitrator appointed did not act.