
(1950) 12 PAT CK 0015
In the Patna High Court
Case No : A.F.O.O. No. 368 of 1948

Dwarka Nath Sahai and Others

APPELLANT

Vs

Kedar Nath Sahai and Others

RESPONDENT

Date of Decision : 04-12-1950

Acts Referred:

Arbitration Act, 1940 — Section 21, 30
Evidence Act, 1872 — Section 101, 102, 103

Citation : AIR 1951 Patna 445

Hon'ble Judges : Narayan, J;C.P. Sinha, J

Bench : Division Bench

Advocate : Girja Nandan Prasad, Ram Nandan Prasad and G.S. Prasad, for the Appellant; Roy Paras Nath and Umesh Ch. Prasad, for the Respondent

Final Decision : Allowed

Judgement

Narayan, J.—This appeal is directed against an order of the Subordinate Judge, Bhagalpur, setting aside an award. The award had been given by one Mr. Anant Prasad who had been appointed an arbitrator by the parties of Partition Suit No. 5 of 1947, to decide the dispute which is the subject-matter of that suit. After the award had been submitted, the defendant No. 1 filed an objection & contended that the award was not fit to be accepted. This objection found favour with the learned Subordinate Judge who set aside the award & directed that the suit be heard on the merits.

2. The pltfs & the deft. No. 1 are the descendants of one Babu Baij Nath Sahai. Baij Nath Sahai left two sons, Bhagwat Sahai & Bhawani Sahai. The pltf. No. 1 is the son of Bhawani Sahai, & the other pltfs. are the sons or grandsons of the pltf. No. 1. The deft. No. 1 is the son of Bhagwat Sahai, the other defts. being transferees from deft. No. 1. These other defts. never appeared in the suit, & on a petri. that was filed on 24-9-1947 by the lawyers representing the pltfs & the deft No. 1, the case was referred to arbitration & Mr. Anant Prasad, a common relation of the parties, was appointed the arbitrator. The award was submitted on

5-6-1948.

3. The allegation of the pltfs. was that after the death of Bhawani Sahai, there arose a dispute between the mother of the pltf. No. 1 & the mother of the deft. No. 1, both the pltf. 1 & the deft. No. 1 being minors at the time, & because of the dispute the mother of the pltf. No. 1 left the ancestral house in Mahal la Shujaganj of the Bhagalpur town & began to reside in the garden house in Chunihartoli lane, & for the sake of convenience in cultivation, 60 bighas of land were divided, half & half, between the pltf. 1 & the deft. No. 1, & two houses in Chunihartoli lane were allotted to the mother of the pltf. No. 1 for her residence. This arrangement was alleged to have been made in the year 1906, & according to the pltfs." case, all the remaining properties remained in joint possession of the pltfs. & the deft, though under the management of the deft. No. 1. This suit was instituted because the deft. No. 1 did not agree to a private partition.

4. The deft. No. 1 was contesting the suit, & according to his allegation, there was a complete partition in 1906, as a result of which all the properties were divided between the pltf. No. 1 & the deft. No. 1. The deft's contention is that ever since the year 1906 he and the pltf. No. 1 have been in separate possession of the properties & have also alienated some of the properties allotted to their respective shares. The deft. No. 1 challenged the award on the following grounds : (1) that the arbitrator was guilty of misconduct; (2) that the award is invalid because of an error of law apparent on, the face of the award; & (3) that the award is bad in law because it affects the interests of certain persons who did not join in the reference.

5. The learned Subordinate Judge overruled the contention that the arbitrator was guilty of misconduct & also the contention that the award is bad because all the defendants had not joined in the reference. The learned Subordinate Judge has given good reasons to support his view that the arbitrator is not guilty of misconduct, that he had not got annoyed with deft. No. 1, & that he did not refuse to take oral evidence which the deft. No. 1 was prepared to adduce. These findings could not be seriously challenged before us, & we are in complete agreement with the learned Subordinate Judge on these points.

6. There is also no merit in the contention, that the award is bad because defts. other than the deft. No. 1 had not joined in the reference.

The other defts. did not appear in the suit in spite of service of summons & with regard to the properties in respect of which there are transferees the order of the share of the is that they should allotted tted to the share of the deft. No. J. The arbitrator has also directed that if there be transferees from the pltfs. the properties transferred to such transferees will be allotted to the share of the pltfs. In Raghu Nath v. Bam Rup. 2 Pat. 777 : A. I. R 1924 Pat. 83) it was pointed out that it was not necssary that all the parties to a suit should concur in an appln. for an order of reference in order to make the submission valid & that it was only necessary that all the parties who were interested in the subject-

matter of the reference should have joined in the submission. This is a suit for partitioning the properties belonging to a Hindu family, & the real parties interested are only the pltfs & the deft. No. 1 In view of the directions given by the arbitrator the interest of the deft3. other than the deft. No. 1 who are transferees from the deft. No. 1 will not at all be affected. These defts. did not put in appearance, & in fact, between them & the parties to the submission there is no matter in difference in the suit. The ease of Shaikh Muhammad Khalil Vs. Shaikh Abdul Rahim and Another, is also an authority to the same effect, & in view of the principles laid down in this case it is quite immaterial if the other defts. were no parties to the reference. Belying on this decision & also on the decision of Calcutta H. C. in *Jadu Nath v. Kailash Chandra*, 14 C. W. N. 75 1/2 (37 Cal. 63), it was held in *Md, Syed Khan v. Abdul Gafoor* 10 P. L. T. 53 : 115 I. C. 680) that the award is binding as between the parties to the reference even if some of the parties interested were not parties to the submission. The award, therefore, cannot be held to be invalid because the defts. other than the deft. No. 1 whose interest is, however, well protected by the order given by the arbitrator, were not parties to the submission. The Privy Council decision in AIR 1925 293 (Privy Council) has no appln. in this present case, as will be clear from the perusal of the following observation made by their Lordships:

" In their Lordships" judgment such an award is in no true sense one made in obedience to the order of 23-51922. While it would not be easy to segregate the findings with reference to the matters in question in the suit from those not so in question--the findings in which Annardeyi was interested from those in which she was not --it is, their Lordships think, impossible to uphold an award in relation to a suit the conclusions of which were plainly coloured, if not dictated, by the view taken by the arbitrators of other questions between the parties or some of them to which the suit had no reference."

Taking even a narrower view of the matter the award so far as it purported to constitute a new partnership, giving to a party who refused to come into it only rights which were far below those to which as a member oE a dissolved partnership he was entitled, was not in their Lordships" judgment an award in any way contemplated or authorised by the order of reference."

7. That was a suit in which there was a prayer for a dissolution of a family partnership and accounts. The members of the family referred to arbitration all matters in difference between them, & some of the difference so referred were not subject of the suit;, and a member of the family who was not a party to the suit was interested in certain of them. The Court made an order referring to arbitrators all matters in difference in the suit between the parties to the suit, & the arbitrators made an award as to all the matters in dispute without determining between those which were the subject of the suit & those which were not. In such circumstances it was held that the award was " otherwise invalid ", & I have quoted a passage from their Lordships" judgment in which the grounds on which the award was set aside have been indicated by their

Lordships. In *Gopal Das Vs. Baij Nath and Others*, it was held that a partner in a firm against which a suit was pending was not entitled, unless there was a deed of authority, to enter into an agreement to refer the matters in dispute to arbitration so as to bind the other partner or partners who had not agreed to or joined in the application to refer. Their Lordships took the view that in such a case it was open to a partner who had not agreed to a reference to challenge in revision the award & the decree based thereon upon the ground that the reference was illegal. Sulaiman J. had to make the following observation in this case :

"Where the applicant challenges the proceedings of the Court itself & attacks the reference made by the Court to the arbitrator, it is not merely a question of a wrong decision by the Court but may be one of irregularity or illegality committed by it in the exercise of its jurisdiction. The objection is not as to the validity of the award only, but as to the illegality of the reference to the arbitration. "

And Mukherjee J. observed as follows :

"In order to establish the proposition that one of the members of a partnership business could refer a dispute to arbitration on behalf of all the members of the partnership, something more than the rules enacted in Order 30, Civil P. C. should be pointed out.

This ruling has certainly got no application to this case. We are not in this case concerned with a partnership business or a firm, it being quite manifest in this case that the real parties interested in the litigation are the surviving descendants of Baij Nath Sahai.

8. It is the other objection which is more important & which was strenuously pressed before us. The contention is that there is an error of law apparent on the face of the award & that the award is consequently liable to be set aside. The learned Subordinate Judge was of the opinion that the arbitrator had laid down a wrong proposition of law, and that as that wrong proposition of law formed the basis of his award, the award was invalid. The wrong proposition of law which the arbitrator is said to have enunciated is that even when a partial partition is admitted, the onus is on the defendant to prove the allegation of private partition as made by him. The learned Subordinate Judge has also pointed out that the arbitrator has been inconsistent, inasmuch as though he has accepted the story of private partition of two of the houses in Chunihartoli lane, he has ordered a partition of all the houses. In my opinion, there is no such inconsistency in the award, & the arbitrator has not laid down any such wrong proposition of law which can be deemed to have affected his award. Nobody can dispute the proposition that when a partition is admitted or proved, the presumption is that all the property was divided, & if anybody alleges that family property in the exclusive possession of any of the members after the partition is still to be deemed as joint property liable to be partitioned, he has to prove that allegation. But there must be either a clear admission or a definite finding to the effect that there was a partial partition, & in absence of an admission on the point a

finding .with regard to it can be given only after a consideration of the evidence adduced. It is certainly a question of fact in this case as to whether in the year 1906 there was a partition of some of the properties or a temporary arrangement with regard to some of the lands for the sake of convenience in cultivation. It is now very well recognised that any arrangement for the sake of convenience in cultivation does not amount to a partition, & in this case the pltf. No. 1 had come forward with a clear allegation to the effect that in the year 1906 & after the death of Bhawani Sahai, 30 bighas out of 60 bighas of land in village Nanani Pair & Gaura were allotted to the mother of the pltf. No. 1 for his maintenance, and two houses in Chunihartoli were allotted to him for residence, & that similarly 30 bighas out of 60 bighas were allotted to the mother of deft. No. 1.

9. There is a distinct averment to the effect that this partition was only a partial partition "for the sake of convenience." It appears from the plaint that the feelings between the two widows, namely, the mother of the pltf. No. 1 & the mother of the deft. No. 1, had run so high that even a respectable relation of theirs like Eai Bahadur Shiva Shankar Sahai thought it desirable that the mother of the pltf. No. 1 should leave the residential house & should remove to the garden house at Chunihartoli. As advised by such a respectable relation, the lady with her infant son shifted to the garden house at Chunihartoli, & evidently under pressure from such a respectable person, there was an arrangement made for the cultivation of the 60 bighas of land. Each branch had to maintain itself, and it is simply natural that a temporary arrangement should have been made for the cultivation of the lands. The usufruct of such valuable lands could not have been allowed to be wasted, & without some temporary arrangement it was impossible to cultivate the lands when there was such estrangement of feelings between the two widows. There is great force in the contention of the applts that with the pltf. No. 1 & deft. No. 1 as minors it was impossible to make a permanent partition. It is stated in paragraph 14 of the written statement that the feeling between the mother of the pltf. No. 1 & the mother of the deft. No. 1

"grew from bad to worse in 1906 & as the respective mothers of pltf. No. 1 & deft. No. 1, both of them being then minors & unmarried, & as guardians of their respective sons requested Rai Bahadur Shiva Shankar Sahai to partition all joint family properties between pltf. No. 1 & deft. No. 1 & that the shifting of the pltf. No. 1 & his mother to the garden house in Chunihartoli lane was a result of an out & out partition, which was done & carried out by Rai Bahadur Shiva Shankar Sahai with the help of his brother Babu Anant Prasad"

10. It is noteworthy that even according to the deft's. version the feelings between the two widows were very much strained, & the pltf. No. 1 & the deft. No. 1 were minors in the year 1906 when the private partition is said to have been effected. While it is quite probable that for the purposes of cultivation & residence some arrangement should have been arrived at, it is difficult to believe that a person of the status of Bai Bahadur Shiva Shankar Sahai would have a permanent partition made during the minority of the pltf. No. 1 & the deft. No. 1.

At any rate, it was a question of fact as to whether the pltfs. version that there was a partial partition in the year 1906 "for the sake of convenience", or the deft's version that there was a complete partition in that year of all the joint family properties was correct, & I fail to understand how the arbitrator can be said to have committed an error of law, if he has held, after a consideration of the evidence & the materials on the record, that the deft. had failed to prove that there was an out & out partition in or about the year 1906, If the arbitrator says that in 1906 the pltf. only got 30 bighas of land out of 60 bighas in villages Nanani Pair & Gaura & some houses in Chunihartoli lane, & the rest of the properties remained joint under the management of the deft. No. I, that only shows that he has accepted the pltfs. version which is not that there was a complete partition but an arrangement for the sake of convenience. I need not repeat that the expression "for the sake of convenience" has been used in the plaint itself, and the arbitrator could not & has not attempted to make out a case for the pltfs. which they themselves had not made out. It is only a question of accepting the pltfs version or the deft's version, & certainly if the pltfs version is accepted, the question whether, because of an admission or proof of a partial partition, the onus will shift on the pltf. to show that there was a partition of all the joint properties does not arise.

11. In this view, I am of the opinion that this is not a case in which it can be urged that the arbitrator has committed an error of law. There is no inconsistency in the decision of the arbitrator if he has ordered the partition of all the houses after holding with the pltf. that he had got the houses in Chunihartoli for temporary residence by him and his mother. This was also an arrangement which had to be made for the residence of the pltf. on account of the strained relations between the two widows after the death of : Bhawani Sahai. As was pointed out by the Judicial Committee in *Ghulam Khan v. Muhammad Hassan* 29 Cal, 167 : : 29 I. A. 51 P. C.) the arbitrator had to give his award on the whole case, and he being the Judge of law as well as fact a mere error of law committed by him cannot vitiate his award. The Judicial Committee in *Champsey Bhara & Co. v. Jivraj Ballo Spinning & Weaving Co. Ltd.* 47 Bom. 578 : A. I. R 1923 P. C. 66) referred with approval to the following observation of Williams J. in the case of *Hodgkinson v. Fernie* (1857) 3 C. B. (N. S.) 189 : 140 E. R. 712).

"The law has for many years been settled, & remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact.... The only exceptions to that rule, are cases where the award is the result of corruption or fraud, & one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying & forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

12. In a very recent case AIR 1949 334 (Privy Council) , their Lordships of the

Judicial Committee observed as follows:

"However that may be, their Lordships are satisfied that the two points of law as to which it is said that the arbitrator's error vitiates the award were specifically referred to him to decide & if this is so, it would be contrary to well-established principles such as are laid down in *In re King and Duveen* (1913) 2 K. B. 32 : 82 L. J. K. B. 733) and *F. R. Absalom, Ltd. v. Great West (London) Garden Village Society* (1933) A. O. 592 : 102 L. J. K. B. 648) for a Court of law to interfere with the award even if the Ct. itself would have taken a different view of either of the points of law had they been before it."

In this case it was a partition suit which was referred to the arbitrator, & as already pointed out there were two versions put forward by the contending parties. What has happened is that the arbitrator has accepted one of the versions; & this cannot, in my opinion, be regarded as a case in which the arbitrator can even be said to have committed an error of law. No Court will review the arbitrator's conclusions or findings if he has acted within his authority & according to the principles of justice & behaved fairly to both parties. The plea of misconduct has been overruled in this case, & there is no "legal misconduct" in this case. The finding of the learned Subordinate Judge that the decision is vitiated because it is based on a wrong proposition of law enunciated by the arbitrator appears to me to be altogether unsustainable. In the result, I am of opinion that the award is fit to be acted upon & a decree should be pronounced in terms of it.

13. The appeal is allowed with costs, and it is directed that a decree would be passed and prepared in terms of the award; and thereafter the usual proceedings" for the division and allotments would be taken.

C. P. Sinha, J.

14. I agree.