

(1920) 07 AHC CK 0001
In the Allahabad High Court

Harakh Ram Jani and Another

APPELLANT

Vs

Lakshmi Ram Jani and Others

RESPONDENT

Date of Decision : 06-07-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 89

Citation : AIR 1921 All 384 : 60 Ind. Cas. 626

Hon'ble Judges : Grimwood Mears, C.J; Ryves, J

Bench : Division Bench

Judgement

1. The parties to this litigation are members of the same family. In 1911 a dispute arose and it was decided to submit all matters in controversy to arbitration out of Court. On the 21st of April 1913 the arbitrator made his award. The history of what occurred in the interval between these two years is fully stated in the judgment of this Court in Hari Kunwar v. Lakhmi Ram Jani 35 Ind. Cas. 833 : 38 A. 380 : 14 A.L.J. 481, and we shall have to refer to that decision later on. Within six months of the award being made, two of the plaintiffs applied to the Subordinate Judge, under Paragraph 20 of the second Schedule of the Code of Civil Procedure, to have the award filed. The Court took appropriate action under that paragraph and issued notice to the other side. They appeared and objected but their objections were overruled and the Court passed an order under Paragraph 21 of the Schedule for filing the award and ordered a decree to be prepared in accordance with its terms. From that order the defendants appealed and raised in their appeal substantially the same objections which they had taken in the Court below and which are taken again here. We will refer to them later. This Court, on appeal in the case already mentioned, held that the lower Court should not have ordered the award to be filed. It appears that after the award was made the parties obtained possession of the property involved according to the terms of the award. After the decision of this Court the plaintiffs filed the suit out of which this appeal arises for a declaration that the award of the 21st of April 1913 was a good and valid award and one which bound all the parties, and asked to be maintained in their possession. They did this, because

the defendants had taken steps to recover possession of property of which the plaintiffs had taken possession under the award. The defendants-appellants here raised two main contentions. One was that, under the law as amended by Act V of 1908, the suit was not maintainable because the decision of this Court in *Hari Kunwar v. Lakhmi Ram Jani* 35 Ind. Cas. 833 : 38 A. 380 : 14 A.L.J. 481, operated as *res judicata*; and, secondly, that on the merits, there was misconduct on the part of the arbitrator such as would vitiate the award, and that there were other defeats also in the submission to arbitration. The Trial Court, after hearing evidence, has decreed the suit and the defendants come here in appeal. The same two grounds again are pressed but the only misconduct on the part of the arbitrator that has now been pressed is, that he omitted to determine at least one of the questions submitted to him for decision.

2. As regards the plea of *res judicata* the argument is as follows. Section 89 of the new CPC introduces a new legal position, and by that section it is enacted that the Procedure to be adopted in all arbitration proceedings is that laid down in the paragraphs contained in the second Schedule of the Act, unless otherwise provided for by special legislation. It is urged that the result of this amendment was to overrule all the older cases, such as *Kunji Lal v. Durga Prashad* 6 Ind. Cas. 127 : 32 A. 484 : 7 A.L.J. 425, in which it had been held that an order u/s 525 of the old Code, refusing to file an award did not operate as *res judicata* in a subsequent suit to enforce the award. It is said that now the only course open to a party who has obtained an award in his favour, and who wishes to avail himself of it, is to make an application within six months of its date under the terms of paragraph 20 of the second Schedule of the Code, if he does not do so, then, the argument is, that the award becomes mere waste paper and is ineffectual for any purpose either by way of attack or of defence. Similarly, or rather, *a fortiori*, it is argued that if a Court acting under paragraph 21 refuses to make an award a rule of Court that decision is final, and the finality of that decision is emphasised by the fact that a new paragraph has been introduced in Clause (f) of Sub-section (1) of Section 104 of the new Code. It seems to us that this contention is not well-founded. The framers of the new Act took all the sections in the old Act which referred to arbitration out of the body of the Code and re enacted them in very much the same language as before in the Second Schedule. Some changes in language were made, but only, apparently, with the object of getting rid of the conflict which existed in the various Courts in India in the interpretation of the old sections. Having done this, it seems to us, it was necessary for the framers of the new Act to enact some such section as Section 89 in the body of the Act, to show that the Procedure to be adopted in arbitration proceedings was to be found in the second Schedule and that the rules in that Schedule would govern all such proceedings unless otherwise provided for by some special Act. We do not think that this 89th section made any new substantial innovation of law. It left matters practically as they were before.

3. When we turn to Paragraphs 14 and 15 of the Schedule, it is not very easy to follow the language used. Thus, in paragraph 15, it is said "an award remitted

under Paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it." From this it would seem that an award which contained a flaw in it, inasmuch as the award had left undetermined any of the matters referred to arbitration, referred to in Paragraph 14, was not in itself void, but that it only became void if, after it had been remitted to the arbitrator or umpire, he had refused or failed to amend it. Be that as it may, these sections are found in that part of the Schedule which refers to the Procedure to be adopted in arbitration made in pending suits. The rules which govern arbitrations, made out of Court are to be found in Paragraphs 20 and 21. In Paragraph 20 the words are that "any person interested in the award may apply to any Court having jurisdiction," It does not say that the "person interested" shall or must apply. It does not say that if he does not apply under that paragraph, then the award ceases to have any effect. If this had been the intention of the Legislature, as argued, we think it would have been very easy for it to have used suitable words. Now, where such an application has been filed under Paragraph 20, the Court after issuing notice as laid down in that section can pass only one of two orders. If it is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground, such as is mentioned or referred to in paragraph 14 or paragraph 15, is proved, the Court shall order the award to be filed, "If, on the other hand, it finds that, for reasons mentioned in paragraphs 14 and 15, there is a flaw in the award, it cannot remit it, according to (the rulings of this Court, and unlike the English Act of 1889, but must confine itself to dismissing the application. An appeal can be made from such an order specifically u/s 104(1)(f) of the present Code. It is argued that this implies that the Code meant to give finality to a decision under Paragraph 21, and that the arguments which appeared to have found favour with the Judges of this Court, in Kuni Lal v. Durga Prasad 6 Ind. Cas. 127 : 32 A. 484 : 7 A.L.J. 425, and which they seemed inclined to adopt, but were prevented from adopting by reason of the curative clause of this Court, applied with great force. In our opinion, however, the object of enacting Clause (f) was to remove the conflict of opinion which prevailed in the various High Courts in India as to whether an appeal lay under the old Section 525. Incidentally, also, it cleared upon other matter that was open formerly to debate, namely, whether an order u/s 525 was not really a decree and appealable as such. It is made quite clear that an order under the corresponding section, that is Paragraph 21, is not a decree but is an order from which an appeal has been allowed. In opinion, the amendments made in the new Act have in no way affected the law as it stood and, therefore, on this part of the case we think the appeal fails. We may note that, just as the lower Court could only pass one of two possible orders as stated above, so this Court in appeal could only decide whether the lower Court was right in passing the order which it made. It had no wider jurisdiction. The only point which it could, and which, in fact, it did, decide was that the proper order for that Court to have made, was to reject the application, and to that extent, and to that extent only, is the decision authoritative and binding.

4. It did not find, and could not have found, decisively that the award was in law a bad and inoperative award. In fact, the learned Judge are careful to Say so, vide page 389 Page of 38 A.--[Ed.] of the report, and, there fore, any observations which they have expressed as to the validity of the award, are only to be read as their reasons for refusing to file the award, having regard to Paragraph 14 of the Schedule, and are not binding on us as a decision that the award was in law a bad award. Now, on the merits it has been argued that the award is vitiated by the misconduct of the arbitrator; and we agree that, if the defendant should prove that there was misconduct which in law would vitiate the award, then they were entitled to establish it. Now, in the present case the misconduct which is said to vitiate the award is the allegation that the arbitrator failed to determine one of the questions submitted to him. That question related to the future residence of Musammatt Hari Kunwar. The Trial Court, has taken evidence on the matter and has come to a finding with which we agree; and the facts appear to be these. At the time when the submission to arbitration was made, this question, as to the future residence of the lady, had not been decided and it was submitted to the arbitrator as one of the matters which he had to determine. The arbitrator has sworn that before he came to make his final award on the 21st of April 1919, that is, two years after the submission to arbitrator, he had an interview with the lady and she expressed her desire to continue to reside in the house in which she was then living and had been living before. Thereupon, the arbitrator went to Rabi Ram Jani, the owner of the house, and told him of the lady's wishes. He said that he was perfectly willing to allow her to live in his house as far as she liked, and the other parties to the arbitration offered no objection. It was a matter which did not concern them. As the only two parties who were concerned in the matter, namely, the lady and Rabi Ram Jani, were agreed on this point the arbitrator came to the conclusion that that matter was no longer in controversy, and, therefore, he said nothing about it in his award. On this state of facts we have to see whether his omission to record a finding to the effect that the parties interested had agreed amongst themselves as to the residence of this lady in the future, did really amount to an omission by him to decide a matter in controversy which required his decision. We are inclined to think that it did not. Reliance has been placed on the general rule in England, as set out in Halsbury's Laws of England, Volume I, page 469, in Paragraph 85, which is based on the case of *Randall v. Randall* (1805) 7 East 81 : 8 R.R. 604 : 103 E.R. 32, and other cases which are collected there, to the effect that the failure of an arbitrator to decide one out of several matters referred to him vitiates the award. In that case it appears that there were three matters in sharp conflict between the parties and the arbitrator was asked to decide each one of them. He failed entirely to decide one and, therefore, one point in controversy remained entirely undecided in spite of the arbitration. It was held that, under the circumstances, the whole arbitration award was bad. In the view which we take in this case of the action of the arbitrator, we think this case can be distinguished on the ground that no question really remained undetermined at the time the award was made. It appears, however, that the

Rule so broadly stated has been to some extent modified by Indian decisions. We were referred by the appellants to the case of Ganes Narayan Singh v. Malida Koer 10 Ind. Cas. 450 : 13 C.L.J. 399, In that case, similarly, the Court below had ordered an award to be filed under Paragraph 21 of the Schedule although one at least of the matters in controversy had not been decided, In dealing with this point, the learned Judges, after stating the law as laid down in Randall v. Randall (1805) 7 East 81 : 8 R.R. 604 : 103 E.R. 32, and other English cases, and going on to say that the same rule had been adopted in the American Courts, state that in their opinion the arbitrator had failed to adjudicate on all the matters in question "for this award, upon a reasonable construction of the whole of the instrument, must be taken to have left undecided one of the cardinal points in controversy, namely, whether the testator belonged With the present appellants to a joint Hindu family." It seems in to us that in that; particular case the omission to decide a point which went to the root of the matter, as that did, was in it self quite enough to vitiate the award. But another case of the same court has been relied upon. It is to be found in Ramji Ram v. Salig Ram 11 Ind. Cas. 481 : 14 C.I.J. 188. But if it is examined carefully it seems to us to be a complete answer to both parts of the appellants" argument. In that case an award was made by the umpire on the 18th of April 1909 in an arbitration out of Court, that is to say, it was an award which was made after the present Coda (Act No. V of 1908) came into force. It was patent on the face of that award that the arbitrator had entirely failed to decide one of the most important matters which had been referred to him, namely, how much money was due by on a party to the other. Within six months from the date of the award Salig Ram commenced that suit. It was a suit, according to the plaint, for the establishment of his rights and for partition of the estate. The foundation of the claim was unquestionably the arbitration award but the plaintiff prayed in the alternative that if, in the opinion of the Court, the award of the umpire was not for any reason a valid award the suit might be treated a one for partition, for accounts and for incidental reliefs. The claim was resisted on every conceivable ground, among others that the arbitrator had been guilty of misconduct. No less than 20 issues were fixed by the Trial Judge. It would seem to be obvious that that was not at application made under Paragraph 20 o the Schedule, nevertheless the District Judge, in spite of the comprehensive character of those issues, treated the suit as one under Paragraph 20 of the Second Schedule and, having heard objections overruled them and ordered the award to be filed and a decree to be prepared in accordance with it, This naturally satisfied neither party. The decree on the award as is stood failed to give the plaintiff the relief he sought, namely, the money which he claimed was due to him, and the defendant objected to the award on the ground of Various allegations of misconduct on the part of the arbitrator, quite apart from the fact that he had omitted to decide one of the questions submitted to him, The Calcutta High Court allowed both the appeals and, when dealing with the question as to how far the failure of the arbitrator to decide one of the matters referred to him vitiated the award, again referred to the English rulings which we have already discussed. The learned Judges in the

end go on to say that "an award will not be set aside if the question undecided was not notified to the arbitrator as a matter in difference, or the parties showed by their conduct that they did not mean him to decide it." Now, in this case, as we have said above, the parties had agreed and, therefore, it may be said, that they did not intend the arbitrator to decide a matter which was" already settled by the time when he was to make his award. However, in remitting the case back for trial to the Court below it is instructive to note the direction which they gave to that Court. "The case will be remanded to the District Judge in order that he may first take up the question of misconduct of the arbitrators and the umpire raised in the 15th paragraph of the written statement. The parties will be allowed to adduce evidence upon this matter. If it is decided in favour of the defendants, the whole of the award must be treated as invalid and inoperative in law. The questions in controversy between the parties will then be decided upon evidence as if no award had ever been made. If, however, the objection taken by the defendants on the ground of misconduct fails, the suit will be tried out on the merits on the footing that the questions raised in the first four issues before the arbitrators have been definitely settled by them. These questions, and these questions alone, will be taken to have been finally decided by the arbitrators, all other questions which arise on the pleadings in this suit and are covered by the issues must be determined on evidence and a final decree made." It appears from this decision that it is not necessary for a party to an award to make an application under paragraph 20 and also that if an award fails to determine a particular matter it does not necessarily make the whole award bad, but that in a suit between the parties so much of the award as is good will be taken as such and so much as is not covered by the award will be left for decision.

5. It would be lamentable if we were forced now, seven years after it has been carried into effect, to upset the award on the ground simply that the arbitrator failed to record as part of his award the agreement under which this lady who was living in the house has continued to live in it ever since and which is not really a matter in issue.

6. On all these grounds we think that the appeal fails, and it is accordingly dismissed with costs including fees on the higher scale.