

(1925) 04 CAL CK 0027
In the Calcutta High Court

Hem Chandra Kundu and Others

APPELLANT

Vs

Jnanendra Chandra Kundu and Others

RESPONDENT

Date of Decision : 30-04-1925

Acts Referred:

Citation : AIR 1926 Cal 116 : 90 Ind. Cas. 624

Hon'ble Judges : Pearson, J; Babington Newbould, J

Bench : Division Bench

Judgement

1. These two appeals are both preferred against the same order of the Subordinate Judge of Burdwan, dated the 20th February 1922, by which he directs that a certain award be filed. The parties to this case are members of a joint family being the descendants of one Hira Lal Kundu, The appellants in Appeal No. 133 of 1922 represent all the members of one branch of the family, being Hem Chandra Kundu the son of Hira Lal's son Trilochan, Srimati Madhabi Sundari Dasi, the mother of Hem Chandra and Srimati Bhupati Sundari Dasi his wife. The other parties to this litigation are Kumud Kamini Dasi, widow of Hira Lal's son Gour Mohan Kundu, and the descendants of Gour Mohan. The appellant in appeal No. 210 is Atulashi Dasi widow of Rampada Kundu son of Gour Mohan. In 1915 Bibhuti Bhusan Kundu grandson of Gour Mohan instituted a suit for partition of the family property. That suit was decreed on compromise on the 21st December 1916. The solehnama which was filed on behalf of all the parties was made part of the decree, and in that decree Radha Kishore Ta was appointed arbitrator. He pronounced the award on the 20th December 1919 and Jnanendra Chandra Kundu the youngest son of Gour Mohan applied to the Court for an order directing that the award be filed. This application has been contested by all the members of the family except Jnanendra's mother.

2. Before us objection has been taken to the award on several grounds which we will deal with in order. The first ground taken is that the reference was one in a pending suit and that, therefore, the award cannot be filed in accordance with the procedure laid down in the Second Schedule of the C.P.C. from para. 20

onwards which relate to arbitration without the intervention of a Court This point depends on the effect of the decree which was passed in the original title suit of 1915. In form that decree appears to be a final decree which terminated the litigation and not a preliminary decree which required further direction by the Court before effect could be given to it. The decree after setting out the claim goes on to state that this suit coming up on the 22nd December 1916 for final disposal it is ordered and decreed that this suit be decreed in the terms of the solehnama and the solehnama provides that certain preliminary matters relating to certain deeds of release have been settled in a certain way between the parties and that the remaining properties which were the subject of the suit shall be treated as joint properties and shall be divided by the arbitrator according to the shares of the parties taking into consideration the conveniences and inconveniences It further provides that the arbitrator shall examine the accounts of various business and other matters and settle those accounts between the parties. There is further a provision regarding other matters which are not of importance with reference to this appeal. The important clause with reference to the present argument is Clause 9 of the solehnama which, is in the following terms: "If Radha Kishore Ta fails or becomes unable to make the divisions and partition of all these properties that are settled as ijmalī and to adjust and settle the account relating to such of the karbars as to which accounts have to be taken, in such a case, any of the parties shall have power to enforce such divisions and partition and the taking of such accounts by executing this decree and upon such adjustment and settlement of accounts each party shall get a decree for the amounts that may be found due to him or her thereby". That is the only clause in the decree which provides for any further action by the Court. But action can only be taken under this clause in the event of the arbitrator failing to perform his duty. If there has been compliance by the arbitrator with the conditions of the solehnama as regards dividing the properties and settling accounts nothing remains to be done by the Court. In the present case it is not necessary to decide what action can be taken under this clause in the event of such failure on the part of the arbitrator. If he has failed to make a binding award which can be filed, this suit would be dismissed. If the award is held to be a proper award this Clause 9 will not come into operation. In our opinion Clause 9 is in favour of the respondents" case that the parties intended that no further steps should be taken in Court and that the arbitration should be an arbitration without the intervention of the Court and that this is the effect of the decree in which the solehnama, is embodied.

3. The next point urged is that if there was a valid submission to arbitration it was revoked for good cause. On this point we are in agreement that the findings of the lower Court that the revocation either by Hem Chandra Kundu or by Hrishikesh, the brother and, am mukteer of Atulashi Dasi, has not been proved. It is not necessary to deal with this point at great length because it is dependent on the question as to whether there has been misconduct by the arbitrator The connection is two-fold. Whether there was actual revocation or not is a question

of fact on which there is contradictory evidence and we shall have to deal with the credibility of the evidence in dealing with the question of misconduct. Further even if there were revocation it would not be effective unless it was for just cause, and unless we hold that there has been misconduct on the part of the arbitrator we could not give effect to the contention of the appellant that there was revocation of the arbitrator's authority.

4. As regards the question of misconduct the strongest case is made on behalf of the appellants in Appeal No. 133 of Hem Chandra Kundu. The case on this point as put forward on his behalf is as follows: The dispute was referred to the arbitrator towards the end of December 1916. The arbitrator sat in January 1917 and March 1917, but practically nothing was done. Then for 2. years and 8 months nothing more was heard of the arbitration. In December 1919 the arbitrator was advised and he believed that he must decide the case within three years from the date of the order of reference. On the 2nd December he fixed the 10th of December as the date of hearing the parties. On receiving notice of this date Hem Chandra Kundu wired that he could not come on the ground that his son was ill, and on this information the arbitrator postponed the sitting till the 20th December. On that date Hem Chandra appeared with certain khatas which he wished the arbitrator to examine. In the meantime in the absence of Hem Chandra the arbitrator had been holding his enquiry and had really finished it on the 19th. The drafting of the report continued on the 19th and the morning of the 20th December. The draft report was then fair copied and pronounced, and Hem Chandra's application that his khatas should be examined was refused. If these facts had been established there can be no doubt that the arbitrator would have been guilty of legal misconduct. On examination of the evidence we find that this case has not been established. In the first place Hem Chandra's application for adjournment did not reach the arbitrator until the 11th December. He had given due notice that he would proceed with the arbitration on the 10th and the sohnama expressly provides that if the parties do not appear after due notice the arbitrator can proceed ex parte, Consequently on the 10th when Hem Chandra did not appear the arbitrator was justified in proceeding with the arbitration in his absence as he did. Then further it is not shown that Hem Chandra was led to believe that the arbitration proceedings were postponed till the 20th December: Admittedly the arbitrator wrote a letter to Hem Chandra as regards his appearance on the 20th. That letter has not been put before us. It is not clear whether or not it was put in evidence before the lower Court, If it was it has not been printed in the paper-book; consequently there is nothing to rebut the arbitrator's story as to what actually happened in this connexion. This will be found set out in the commencement of the award. There it is stated that after issue of notice on the 2nd December Hem Chandra on obtaining notice appeared before the arbitrator at Burdwan and asked for time and it was settled that the arbitration proceeding would commence from the 10th December. The arbitrator understanding that he was trying to waste time for nothing sent him a telegram on the 10th December. But notwithstanding he failed to appear. On the 11th

December the arbitrator received a registered letter from him asking for adjournment. But he had already commenced taking accounts. Then having perceived that on settlement of accounts Hem Chandra would become liable for a large amount he again sent a telegram on the 12th December and also a letter through a messenger not only to Hem Chandra out also to his mother and wife who have joined with him in this appeal, for the purpose of enabling them to appear and produce if they so liked evidence on their behalf on the 20th December at 8 A.M., in the morning. It would thus appear that Hem Chandra had no reason to think that the enquiry would be postponed to the 20th December. He was aware that the arbitrator would proceed in his absence. All that the arbitrator undertook was that he would not finally pronounce his award without giving Hem Chandra and the other members of his branch of the family an opportunity of being heard on the 20th December. As regards what happened on the 20th December there is direct contradiction in the evidence. According to the arbitrator Hem Chandra appeared and he heard all that he had to say. That statement he makes in para. 1 of his award a contemporaneous record written on that very day. According to Hem Chandra the arbitrator refused to look at the accounts he had produced or hear him at all. In our opinion the probabilities are in favour of the arbitrator's version. He was an independent person selected for the office of arbitrator by consent of all parties. When he had specially fixed the 20th December for hearing what Hem Chandra had to say it seems unlikely that he would not have listened to him. Further where there is direct conflict of evidence we must give weight to the impression that the witnesses made on the Judge in whose presence they gave evidence. Here the learned Subordinate Judge was evidently most favourably impressed by the manner in which Radha Kishore gave his evidence and took the contrary view as to the value of the evidence of Hem Chandra, Harishikesh and the other witnesses who supported them on this point. As regards Harishikesh we certainly agree that his evidence is most unsatisfactory. He has not given any reason for his absence during the arbitration proceedings. He has admitted that the arbitration proceedings were going on for three or four months before the 20th December and he cannot be heard to say that he was in ignorance of the proceeding that was going on. But he has given no explanation of his absence from the 10th to the 19th December. That there was a quarrel between him and the arbitrator on the 20th is admitted. But it would appear from the evidence that it had nothing to do with the arbitrator's conduct in connexion with the arbitration proceedings but arose out of a dispute in consequence of Harishikesh having entered Radha Kishore's house under circumstances which Radha Kishore thought improper. We have no hesitation in accepting the evidence on the plaintiff's side that this quarrel took place after deliver of the award and not before.

5. Another point that has been urged as regards the case of Hem Chandra relating to the refusal to examine the khatas is that Hem Chandra in cross examination staled that he filed all the khatas he had before Sails. If he had done this he could not have had any khata to produce before him on the 20th

December. No question was put to him in re-examination to enable him to explain this damaging admission. We hold, therefore, that the contention that the arbitrator refused to admit evidence produced before him or to hear the parties when they appeared has not been sustained and that the proceedings were properly held *ex parte* after due notice to all parties concerned in accordance with the terms of the solehnama.

6. Another point in which there is alleged to have been misconduct is that the solehnama provided that the arbitrator should work in consultation with two other gentlemen, a Pleader Babu Bidhu Bhusan Sikdar and a mukhtear Babu Jagabandhu Hajra. It is contended that he did not consult the mukhtear Babu Jagabandhu Hajra. The evidence as to what actually happened is contradictory. The arbitrator says that he consulted Babu Jagabandhu Hajra, who left the entire matter to him and his uncle. Babu Jagabandhu Hajra's story is that he advised the arbitrator not to proceed *ex parte* and the arbitrator did not take his advice and after that he never gave him any opinion as to the proceedings. Here, also we think the arbitrator's version should be accepted. But whatever version may be accepted the fact remains that for some reason or other Babu Jagabandhu Hajra refused to advise the arbitrator. After advice was refused the arbitrator was not bound to consult Babu Jagabandhu Hajra further.

7. The next objection taken to the conduct of the arbitrator is as regards the method in which the partition of the Immovable properties was made. As regards the division between two branches of the family into 8 annas share it appears that there had previously been an amicable partition between them. This amicable partition was accepted by the arbitrator. It does not appear that any objection was made before him by any one concerned, and by so doing the arbitrator acted quite properly. Objection is taken to the arbitrator's method of dividing the property belonging to the branch of the family descended from Gour Mohan. This property had to be divided into four parts. It appears from the evidence that the plaintiff Jnanendra made a division of this property into four shares and it was decided by lot; which share should come to the representative of each of the four sons of Gour Mohan, It is contended that this way not in compliance with the terms of the solehnama which provided that the division should be made after considering the relative conveniences and inconveniences of the plaintiff and the defendants Nos. 2, 3 and 4. There is nothing in the evidence to suggest that the partition by lot was not properly conducted. In our opinion it is hard to imagine a fairer way of dividing the property, since Jnanendra in making the allotments would be bound to make them as equal as possible inasmuch as he was as likely as any of the other four members of the family to get the worst lot if there was any appreciable difference between them. There is nothing to show that there was any material before the arbitrator on which he could hold that there was any difference in the lots as regards the question of convenience and inconvenience. It is said that he was wrong in not himself preparing the four list of shares of property, but it was sufficient that it was done under his orders and the division was approved by him. We hold

therefore, that the arbitrator did not violate the terms of the reference in dividing the shares of this branch of the family in this manner. We may add that there was no specific ground of objection taken on this point nor was the arbitrator cross-examined as to his reasons for making the division of this part of the property in this manner.

8. We now come to the question of the accounts. So far as the accounts of the khata businesses are concerned we have already given our reasons for holding that the arbitrator had full material before him to come to a decision on these accounts. Objection is also taken in respect of the other matters of accounts which were referred to the arbitrator. He was required to take accounts relating to the Mohanpur dwelling house up to the year 1317. The only accounts which were produced before him ended on the death of Trilochan in Sarvan 1314 and on those accounts he held that Hem Chandra was liable for the sum of Rs. 1,341-4-10 gundas. In respect of other matters to which reference is made in the solehnama no accounts were produced before him and he has stated that it is impossible to determine whether any of the parties had any liability in relation thereof. Some other objections also have been taken as regards the items, but these related to matters which were most undoubtedly within the arbitrator's powers to decide.

9. The point that is strongly urged is that as the arbitrator has not adjudicated on all the points which were referred to him his award must be set aside, since that is one of the grounds referred to in para. 14 of the Second Schedule of the C.P.C. and under para. 21 of that Schedule if such ground is proved in a case of arbitration without the intervention of the Court, the Court cannot order the award to be filed. There has been an interesting argument as to the case law on the question whether the concluding portion of Clause (a) of para. 14 is applicable in the case of arbitration without the intervention of the Court. But on the view we take it is unnecessary to decide this point. In our opinion the learned Subordinate Judge and also the arbitrator himself have not realized the real effect of the arbitrator's findings with reference to these accounts. The arbitrator's finding really comes to this. In respect of these claims in dispute between the parties with reference to these accounts no material was produced before him on which he could decide that there was any liability from one party to another. The effect of this finding if the award is filed will be that no party to these proceedings could make any claim against any other party in respect of these accounts. They had an opportunity to make out their claims and they failed to take advantage of it. They cannot in any subsequent proceeding again raise such claim. It, therefore, follows that the arbitrator's award is final for all time settling the dispute between the parties relating to these accounts. We, therefore, hold that no ground mentioned in para. 14 has been proved, since the award has not left undetermined any of the matters referred to arbitration.

10. We hold, therefore, that the objections taken by the appellants fail and that the order of the lower Court directing the award to be filed should be upheld. The

appeals are dismissed with costs.

11. We assess the hearing fee in each appeal at ten gold mohurs.