

**(1910) 06 CAL CK 0028**  
**In the Calcutta High Court**

Jai Nath Jha and Others

APPELLANT

Vs

Kamala Nath Jha and Another

RESPONDENT

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**Date of Decision :** 23-06-1910

**Acts Referred:**

**Citation :** 7 Ind. Cas. 31

**Hon'ble Judges :** Vincent, J; Brett, J

**Bench :** Division Bench

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### Judgement

1. The present appeal is preferred by the plaintiffs (appellants) seeking to have set aside the decision of the District Judge of Durbhanga, dismissing an application made by them u/s 525 of the old Code of Civil Procedure, that an award be filed in Court. The plaintiffs are the members of the elder branch of a Hindu family of which Mon Mohan Jha was the original head and the defendants are members of the junior branch. The plaintiffs are grandsons of Mon Mohan Jha through his elder son Ganganath Jha and the defendants are one Kamala Nath Jha, the grandson of Mon Mohan Jha through his younger son Tej Nath Jha, and Sib Nath Jha his grandson through Poovinath Jha the son of Tej Nath Jha. The family was originally a joint Hindu family governed by the Mitakshara Law: and on the death of Mon Mohan Jha, Ganganath Jha, his elder son, became the karta. On the death of Kamala Nath, his elder son, Poovinath, is said to have become guardian of his younger brother Kamala Nath and on his death Ganga Nath became guardian of Kamala Nath and Sib Nath. Kamala Nath attained majority before the year 1898 and Baidya Nath a son of Ganga Nath is said to have been appointed guardian of Sib Nath.

2. On the 31st December 1898, an ekrarnama is said to have been executed by Ganga Nath Jha, on the one side as representing his branch of the family and by Kamala Nath Jha, on his own behalf and as guardian for Sib Nath Jha, as representing the younger branch. In that document it was stated that though the family had been all along joint, the two branches had agreed to separate and that they had in consequence become separate in mess some short time

previously. Accordingly from that day the two branches had separated and the document was executed with the object of dividing the properties and debts of the family between the two branches. In pursuance of that object three persons were appointed as arbitrators for the purpose of honestly and faithfully dividing the properties and debts between the two branches of the family. The award was not delivered till the 25th May 1905 and only one of the three arbitrators who submitted the award was included in the three arbitrators originally selected. It was this award that the plaintiffs applied to have filed in Court.

3. The suit was instituted in the Court of the Subordinate Judge on the 1st November 1905 and after frequent postponements it was, on the 28th January 1907, transferred to the file of the District Judge.

4. Objections were taken by the defendants to the validity of the reference to arbitration, to the right of the two of the arbitrators to act as such, to the conduct of the arbitrators as vitiated by corruption and partiality and to the legality and validity of the award. Issues on these points were framed by the Sub-Judge but the learned District Judge has considered one question only, namely, whether Kamala Nath Jha had legal and proper authority as guardian to refer the matter to arbitration on behalf of his nephew Shibnath. Holding that Kamla Nath had not such authority and, therefore, that the agreement was not binding on the minor as he was not properly represented, the District Judge dismissed the application. Shibnath Jha was represented in the lower Court by Babu Joy Gopal Mukherjee, pleader, appointed as his guardian ad litem by the Court.

5. The plaintiffs have appealed.

6. We have heard the arguments of the learned pleaders on both sides and we are of opinion that the judgment of the District Judge cannot be maintained. The object of the partition was admittedly to divide the family property into two shares, one of which was to go to each of the two branches of the family; it was not to effect a separation of all the members of the family. The separation was effected by mutual consent of the members of the family on the date of the execution of the agreement and at the same time there appears to have been between the members of each branch of the family inter se an agreement or intention to remain joint or to re-unite. [See the judgment of the Privy Council in *Bala Bux v. Rukhmabai* 30 C. 729 : 5 Bom. L.R. 462 : 7 C.W.N. 642 : 30 I.A. 130]. For the single joint family, there were substituted from that time two joint families each governed by the Mitakshara Law and under that law Kamala Nath, as the eldest male member of that branch and the only member of full age, became the karta of that branch of the family. That being so, he alone was under the law entitled to manage the joint family property and a guardian of the joint property of the minor Shibnath could not have been appointed under the Guardians and Wards Act VIII of 1890 or under the Old Act XI of 1858: [See *Sham Kuar v. Muhanunda Saho* 19 C. 301 and *Gharibullah v. Khalak Singh* 30 I.A. 165 : 7 C.W.N. 681 : 8 Bom. L.R. 478 : 25 A. 407]. Whether Baidyanath Jha had been appointed guardian of Shib Nath or whether he had been discharged is

immaterial as under the law Kamala Nath, as karta of that branch of the family, had full power to act as guardian of the joint property of Shibnath and to deal with it for the purpose of making the reference to arbitration.

7. We hold, therefore, that the decision of the District Judge is wrong in law and we set it aside.

8. It has been pressed before us that in remanding the application to the lower Court for re-hearing on the merits, we should direct that proper issues be framed with the view of determining the most important question, namely, whether the reference to arbitration was legal and valid so as to be binding on Kamala Nath and Shibnath. It is pointed out that at that time Kamalanath had only just attained majority and that Shib Nath was an infant. It is urged that in determining whether the reference was valid and proper, it will be necessary for the Court to consider whether Kamala Nath was acting as a free agent with full knowledge and understanding of the nature and effect of his action so as to constitute the reference valid in law and binding on him and his brother or whether he was misled by or subject to the influence of Ganganath and so did not act with an intelligent knowledge and understanding of the nature and consequences of his act in which case the reference would not be binding on him.

9. In our opinion this is a matter which the lower Court should enquire into and determine in the first instance in dealing with the application. Such a view is supported by principle and by authority. Manifestly the person, who secured a reference to arbitration by misrepresentation and undue influence, should not be allowed to benefit by his wrong doing and it is manifestly unjust that a person affected by an award so obtained should be precluded from contesting its validity in the present suit and be driven to a separate regular suit. This too is the view adopted by a Full Bench of this Court in the case of Mahomed v. Haikiman 25 C. 757 and by a Full Bench of the Allahabad High Court in the case of Amrit Ram v. Dasrat Ram 17 A. 21. Further we are of opinion that in disposing of the application the lower Court should also decide definitely whether the reference to arbitration was for the benefit of the minor so as to be binding upon him [See In the matter of Roman Kissen Sett v. Huro Loll Sett 19 C. 334 and Balaji Narayan Gokhale v. Nana Bin Babji Ghatge 27 B. 287].

10. Accordingly in setting aside the judgment and decree of the lower Court and in remanding the case for re-hearing on the merits, we direct that the lower Court do frame proper issues and do proceed to first determine whether the reference to arbitration was good and valid in law, and for the benefit of the minor and then, after deciding those points, to proceed to decide, if necessary, the other objections taken to the award by the defendants on the grounds mentioned in Sections 520 and 521 of the old Code of Civil Procedure, corresponding to paras. 14 and 15 of the 2nd Schedule of the new Code.

11. The appellants will recover their costs in the appeal from the respondents. The costs in the lower Court both before and after remand will follow the result.

The appellant will be entitled to refund of the Court-fees paid on this appeal as the suit was disposed of on preliminary points.

12. The rule is discharged.