
(1951) 02 MAD CK 0030

In the Madras High Court

Case No : A.A.O. No"s. 3 and 168 of 1948

Johara Bibi and Others

APPELLANT

Vs

Mohammad Sadak Thambi Marakayar and Others

RESPONDENT

Date of Decision : 03-02-1951

Acts Referred:

Arbitration Act, 1940 — Section 14, 30

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 7, Order 32 Rule 7(2)

Citation : AIR 1951 Mad 997 : (1951) 2 MLJ 56

Hon'ble Judges : Govinda Menon, J; Basheer Ahmed Sayeed, J

Bench : Division Bench

Advocate : R. Gopalaswami Ayyangar, for the Appellant; R. Kesava Ayyangar, for the Respondent

Final Decision : Dismissed

Judgement

Basheer Ahmed Sayeed, J.—These two appeals are against the orders of the learned Subordinate Judge of Ramnad at Mathurai setting aside an award passed by the arbitrators in O.S. No. 16 of 1946. O.S. No. 16 of 1946 was filed by the plaintiffs for partition and separate possession of their share in the properties belonging to the estate of one deceased Mukkani Muhammad Abdulla Marakayar. First plaintiff is the widow and plaintiffs 2 and 3 are the sons of one of the deceased sons of Muhammad Abdulla Marakayar. Plaintiffs 2 and 3 are minors and are represented by their mother, the first plaintiff. The first defendant is the widow of the propositus, the second defendant is the daughter and the third defendant is the surviving son of the said deceased Muhammad Abdulla Marakayar. The rest of the defendants, defendants 4 to 10 are the heirs of another deceased son of the said Muhammad Abdulla Marakayar. The three schedules attached to the plaint set out the immovables, movables and the outstandings respectively belonging to the deceased. The second defendant who is the daughter of the deceased claimed one item of the properties mentioned in schedule I to the plaint as her exclusive stridhana property. The third defendant claimed items 1, 4 and 5 of schedule 1 as his separate properties. Defendants 3

and 5 claimed several items of the first schedule as the separate properties of the third defendant and the son of the fifth defendant. There was also dispute between the parties in regard to the outstandings mentioned in the third schedule to the plaint. The plaint also set out the shares that each party was entitled to, but it must be stated that the shares so set out were not quite correct and not in accordance with the Muslim law governing the parties. On the pleadings, several issues were framed in the suit. The suit was posted for trial and after several adjournments, the parties wanted to settle their disputes outside the Court. Five persons were appointed as Panchayatdars by the parties and in February 1947 all the parties executed a muchilika in favour of the said Panchayatdars, which is marked as Ex. D-I in the suit, dated 17th February 1947. Representations were made to the Court that the parties desired to have the matter settled through arbitration and when the matter stood adjourned to the 29th March 1947, the parties put in an application I.A. No. 145 praying to the Court that the matter might be referred to the five Panchayatdars in whose favour the parties had already executed a muchilika. Thereupon, the learned Subordinate Judge referred the matter to the said five arbitrators and directed that the award should be returnable on the 5th April 1947. After some extensions of time for the return of the award, the suit was posted to the 26th June 1947 and on that day the award was filed by the arbitrators but it was signed only by four of them out of the five.

2. Defendants 2 and 3 who were not satisfied with the award filed I.A. Nos. 209 of 1947 and 210 of 1947 respectively seeking to set aside the award on several grounds. All these grounds were gone into by the learned Subordinate Judge who has discussed them at great length in his order dated 27th October 1947 and finally set aside the award upholding the contentions of defendants 2 and 3. It is against this common order in both the applications that these two appeals are now preferred.

3. Mr. Gopalaswami Aiyangar learned counsel for the plaintiffs appellants has taken us through the plaint, the written statements and the affidavits filed by the respondents in these appeals and also through Exs. B-2, B-3, B-4, A-I and D-I.

4. We have also read through the depositions of the witnesses that were examined in the lower Court on behalf of the respondents including the arbitrators. We do not think it is necessary for us to enter into any detailed discussion of every one of the points that have been raised by Mr. Gopalaswami Aiyangar in the course of his elaborate arguments before us. For most of the points raised by the defendants 2 and 3 before the lower Court, we think there were no substantial grounds and they were not well founded. The only point that needs some consideration is as to whether the learned Subordinate Judge was right in setting aside the award on the ground that it was signed only by four of the arbitrators instead of by five. On this point, we feel that the learned Subordinate Judge was not justified in setting aside the award for the mere reason that it was not signed by one of the five arbitrators. From a reading of the

evidence and the material facts that have been placed before us concerning the various stages of the enquiry conducted by the arbitrators until the award was pronounced and filed in Court, we are convinced that there has been no legal misconduct on the part of the arbitrators so far as this point is concerned, that the decision contained in the award is the outcome of the joint deliberations of all the five arbitrators, that the award itself was pronounced after due notice to all the parties by all the five arbitrators and that the arbitrator who did not sign the award wilfully refused to sign the same after it was made "and pronounced and on that account the award could not be attacked as being invalid. The signing of the award is only a formality after it had been made and pronounced and the arbitrator who had refused to sign having taken part throughout the arbitration proceedings and having been a party to the decision and the pronouncement of the award, it was not open to him to refuse to sign the award and his refusal to put his signature to the award after it had been engrossed cannot be a valid ground to set aside the award which has been validly given. It is not therefore vitiated by any legal misconduct on the part of the arbitrators. In *Palaparthi Venkataramayya and Others Vs. Duggina Papayya and Others*, Horwill J. has held that the omission or failure to sign by one of the arbitrators is only a superficial defect and cannot invalidate the award which has been validly made and pronounced. Even so, in *Tara Prasad Singh and Another Vs. Raja Singh and Others*, failure of one of the arbitrators to sign after the arbitrators had made the award has been held to be not a case of misconduct. In "*Raghubir Pandey v. Kaulaesar*", 23 Pat 719 the learned Judges have held that signing is not a Judicial act but is merely the record of that which has already been done in the Judicial exercise of the functions of the arbitrators. What is crucial in the matter of arbitration proceedings is the making of the award and not the formality of signing the same after it has been made. In *Aboobaker Latiff Vs. The Reception Committee of the 48th Indian National Congress*, it has been held that an erroneous breach of duty on the part of an arbitrator will constitute misconduct and the rejection of any material piece of evidence which might affect substantially justice in the case may also constitute misconduct. But in the present case, we do not find that any such misconduct could be alleged on the part of the arbitrators . In "*Appayya v. Venkataswami*", (1918) Mad. W N 477 it has been held that failure to sign by one of the arbitrators may be an illegality, but there the refusal to sign was on account of the fact that the arbitrator did not take part in the proceedings. Even so in "*Nemichand v. Kesarimull*", 56 Mad L Jour 35 it has been held that an award not signed by an arbitrator, who is himself not a party to the making of the award itself, is an illegality and on that ground the award could not be made a rule of Court. It is certainly reasonable to hold that where one of the several arbitrators appointed has not taken part in the proceedings and has not been a party to the making of the award as such and has therefore refused to sign an award such an award cannot be held to be valid as if made by all the arbitrators. But this does not appear to be the case in the present appeals. So far as the present case is concerned, it is clear that the mere non-signing of the award by one of the arbitrators who has been throughout a

party to the making of the award cannot vitiate the award.

5. In this connection, Mr. Gopalaswamy Aiyangar also invites our attention to the terms of the muchilika, Ex. D-I, wherein it has been expressly provided by the signatories that the parties to the muchilika would be bound by any decision the arbitrators may give either unanimously or by a majority in regard to their properties irrespective of the excess or the deficiency in regard to the allotment and also that the parties would be bound by any decision the arbitrators may give even without reference to the parties. Relying on this Mr. Gopalaswami Ayyangar argues that even if it were contended that the decision of the arbitrators was not unanimous, still under the terms of the muchilika the majority decision has to prevail and the parties must be deemed to be bound by it. There is considerable force in this contention, for even if we interpret the act of one of the arbitrators to amount to a refusal to abide by the decision of the rest of the arbitrators under the terms of the muchilika executed by the parties, the parties must be held to be bound by the decision of four of the arbitrators out of the five. It will therefore be not open to the respondents to question the award on the ground that it is not the unanimous decision of the five arbitrators, because the muchilika itself contemplates that if there is no unanimity, among the arbitrators, the majority decision should prevail. So on this ground also there is no foundation for the lower Court to reject the award for the reason that it is not signed by all the five arbitrators appointed by the parties.

6. If these appeals were to be decided on these points alone, certainly we would have had no hesitation to set aside the order of the learned Subordinate Judge and declare that the award is a valid one. But Mr. Gopalaswami Ayyangar has to reckon with the objection raised by Mr. Kesava Ayyangar appearing for the respondents in the course of his arguments before us. In the first instance Mr. Kesava Ayyangar contends that the proportions in which the shares have been allotted to the respective parties by the arbitrators who made the award, are not in accordance with the Muslim Law governing the parties. In the second place, he has also invited our attention to the fact that the arbitrators have failed to give their findings on the respective claims of the defendants to the properties. In the third place, Mr. Kesava Ayyangar raises a legal point against the award, in that the reference to the arbitrators has been without the leave of the Court as required by Order 32. Rule 7 of the CPC in view of the fact that two of the plaintiffs are minors. That is to say there should have been specific sanction of the Court as minors were parties before a reference could be made to arbitration and on that ground the award must be considered to be a nullity.

7. Taking the last point first, we think that this objection that Order 32, Rule 7 of the CPC has not been complied with has to be upheld and it must be fatal to the validity of the award. Order 32, Rule 7 is in the following terms :

"(1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or

guardian"

(1-A) Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability is represented by counsel or pleader the counsel or pleader shall file in Court with the application and certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter to which a minor or other person under disability is a party shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24 in Appendix D to this schedule (2). Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

In this case, though the plaintiffs are minors and no leave of Court has been expressly recorded in the proceedings authorising the guardian or the next friend to enter into the agreement to refer the matters in dispute to arbitration it is obvious that the Court has not applied its mind, when the order was made on the application of the parties that the matter should be referred to arbitration, to the question of the existence of minors and as to how far it was beneficial to the interests of the minors that the matter should be referred to arbitration. It is also in evidence that no application has been made to the Court for leave to enter into the agreement or compromise to refer the suit to arbitration on behalf of all the minors. Nor has there been on record any certificate filed by the counsel appearing for the minors to the effect that the agreement to refer to arbitration was in the opinion of the counsel for the benefit of the minors. These essentials required by the law not having been complied with the contention of the learned counsel for the respondents is that the reference to arbitration is a nullity and therefore the award itself cannot be said to toe of any effect. In support of this contention, learned counsel for the respondents has invited our attention to the decision in "Ghulam Khan v. Muhammad Hassan", 29 Cal. 167 where the Judicial Committee has held as follows :

In cases where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit in which case ail proceedings from first to last are under the supervision of the Court, the agreement to refer and the application to the Court founded upon it must have the concurrence of all the parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point. In cases where parties without having recourse to litigation agree to refer their differences to arbitration ana it is desired that the agreement of reference should have the sanction of the Court, in that case all further proceedings are under the supervision of the Court and the proceedings described as a suit and registered as such must be taken in order to bring the matter--the agreement to refer or the award as the case may be--under the cognisance of the Court. That is or may

be a litigious proceeding. Cause may be shown against the application and it would seem that the order made thereon is a decree within the meaning of that expression, as denned in the Civil Procedure Code.

In this case the agreement for reference was made in the course of the litigation and the Court made an order of reference on the agreement brought before it and fixed a time for delivery of the award. But in so far as there were minors, and sanction of the Court was expressly required by Order 32, Rule 7 of the Civil Procedure Code, such a sanction for the agreement to refer the matters in dispute to arbitration had not been obtained. In the absence of such sanction for the agreement to refer the matters to arbitration, it cannot be stated that the application to the Court for reference is founded upon the concurrence of all the parties concerned, there being minors in the suit. (The absence of such a sanction on behalf of the minors for the agreement to refer to arbitration makes the raference a nullity and the reference itself being a nullity, the award could be of no legal effect. In "Golnur Bibi v. Abdus Samad", 58 Cal. 628 which was a case of muslim parties it has been held that

"Natural guardians of minor defendants, who have been appointed guardian-ad-litem at the date of the reference to arbitration, though not on the date of the application are competent to enter into the agreement for reference to arbitration and that some same principle that governs the voidability of a compromise decree where minors are concerned, also applies to the case of a decree based upon an arbitration award".

On the strength of this decision, it is argued by the learned counsel for the respondents that in so far as the first plaintiff in the present case had not been appointed the guardian ad-litem either on the date of reference to arbitration or on the date of the application, the first plaintiff was not competent to enter into the agreement for reference to arbitration, and in the absence of such competency the agreement for reference was a nullity and the award itself could not be an enforceable award. In "Mohammad Ejaz Hussain v. Muhammad Iftikhar Hussain", 32 Mad. 410 the Judicial Committee has held that :

"Under the Muhammadan Law, the mother is not (in the absence of an appointment by the father or by the Court under the guardian and Wards Act) the legal guardian of her minor children. When she is not so constituted the legal guardian, she has no power or authority, in her capacity merely as the "de facto" guardian of the minors to alienate or otherwise deal with their property, and she is equally incompetent to enter on their behalf into an agreement to refer to arbitration any disputes relating to the division and distribution of the property of the deceased father and an award made on such arbitration would not bind the minors".

Applying the principles of these decisions to the facts of the present case, it is evident that the mother not being the legal guardian at the time of the agreement to refer the matters in dispute to arbitration and also not having been

appointed the guardian ad-litem by the Court, the agreement to refer to arbitration cannot be valid nor bind the minors. In so far as the requirements of Order 32, Rule 7 insisting upon leave of the Court being granted on a proper application with the necessary certificates to be filed by the advocate or the pleader appearing for the minor, not having been satisfied, the reference itself must be considered to be a nullity and consequently the award cannot be considered too be a valid one. Similarly in "Chhabba Lal v. Kallu Lal, I L R(1946) All 193 the Judicial Committee while approving the ruling in "Mariam Bibi v. Amna Bibi, I L R (1937) All 317 held that :

"Rule 7 of Order 32 of the CPC applies to an agreement to refer matters in dispute to arbitration and the terms of the rule, which is imperative, must be strictly complied with.

* * * * Where therefore, there is no valid reference the purported award is a nullity and can be challenged in any appropriate proceedings". The Judicial Committee has made a further observation in these terms :

"All the powers conferred on the Court in relation to an award on a reference made in a suit presuppose a valid reference on which an award has been made which may be open to question".

At page 193 the Judicial Committee has again observed as follows :

"At the same time, it is clear that the terms of Order 32, Rule 7 were not complied with. There was no formal application by the guardian ad litem for the leave of the Court to his entering into the agreement for reference to arbitration, nor was any such leave formally given, or expressly recorded in the proceedings. The note on the record quoted above does not show that the Judge realised that he was dealing with the guardian ad litem of minors. The requirement in Order 32, Rule 7, that the leave of the Court be expressly recorded in the proceedings was added in 1908, and Sir Thomas Strangman, for the appellant, says that the addition to the rule merely gave statutory effect to the previous practice. Be that as it may, the rule is imperative and, in their Lordships' view, its terms must be strictly complied with. Their Lordships agree with the view of the High Court following on this point a ruling of a Full Bench of the Allahabad High Court in "Marian Bibi v. Amna Bibi, ILR (1937) All 317, disagreeing with certain other Indian rulings, that Order 32, Rule 7, applies to an agreement to refer matters in dispute to arbitration. Such an agreement, which removes the decision of a matter in dispute from the jurisdiction of the Court and refers it to some outside party, is clearly an agreement with reference to the suit, and not only falls within the terms of the rule, but comes within the mischief at which the rule appears to be aimed. The interests of minors might well be sacrificed by an improper reference to arbitration, and it is necessary that their interest be protected by the Court. If minors successfully challenge an agreement to refer as not made in compliance with Sub-rule (1) of Rule 7, it is avoided against all parties under Sub-rule (2)".

8. In the light of the observations in the above decisions it cannot be contended that the imperative requirements of Order 32, Rule 7, Civil P. C. have been complied with in the present case and consequently it must follow that the award is not one which could be upheld. The learned counsel for the appellants Mr. Gopalaswami Aiyangar contends that under Sub-rule (2) of Rule 7 of Order 32, any agreement or compromise entered into without leave of the Court so recorded shall be voidable against all parties other than the minor and therefore the reference in the present case can only be voidable against all the parties other than the minors in the absence of sanction of the Court for leave to refer the matters in dispute to arbitration. A number of decisions have been cited by the learned counsel for the appellants commencing from "Tangor Majhi v. Jaldhar Deari, 5 I C 691 onwards and ending with "Ramanatha Chettiar v. Kumarappa Chettiar, (1940) Mad. WN 191. A perusal of these authorities cited by the learned counsel would show that all these decisions have proceeded on a basis different from the one which we find in the present case. In "Tangor Mahji v. Jaldhar Deari, 5 I C 691 a decree was passed on a compromise not properly sanctioned by the Court against a minor not properly represented. In that case it was held, that :

"The decree was not a nullity; that the only person who can avoid it is the minor; that until it is avoided it is good against all the world as a final order of the Court and that it is not open to third parties to question it".

In "Jita Singh v. Man Singh, 2 Lah 164 the learned Judges have held as follows :

"If a compromise is entered into by a guardian on behalf of a minor without the leave of the Court and a decree is passed in accordance with the terms of the compromise, such a decree is not a nullity, but is voidable at the instance of the minor".

In this case, the minor was not represented by his natural father who was also appointed as his guardian in the suit and in that case it was opined;

"That an application by a guardian or next friend of a minor for an order of reference to arbitration will, unless the leave of the Court has been obtained, have the same effect and be open to the same objections as would any other agreement or compromise entered into by such guardian or next friend without leave, and that where the leave of the Court had not been obtained the reference to arbitration would not necessarily be void, but that it would be open to the minor to affirm and ratify it".

In "Umar v. Mahabir Lal, 18 Pat 708 the case arose in execution proceedings relating to a decree which was based on an award made on a reference which was in contravention of Order 32, Rule 7 of the CPC and it was held that such a decree was not void, but voidable at the instance of the minor and therefore cannot be impeached in execution proceedings relating to that decree. The learned Judges have also observed as follows :

"Where a guardian for a minor defendant appears in the suit and effectively represents him, although no formal order of appointment; is made, the decree cannot be said to be invalid against the minor unless prejudice is shown".

The next authority cited by the learned counsel for the appellant is "Mariam Bibi v. Amna Bibi, ILR (1937) All 317 which has been already referred to by us in the earlier parts of this judgment. In addition to this, the learned counsel for the appellants has invited our attention to the decision in "Ramanatha Chettiar v. Kumarappa Chettiar, 1940 Mad W. N. 191, wherein Abdur Rahman J. has held that ; "If a guardian refers a matter to arbitration, on behalf of a minor without obtaining the leave of the Court, the award would be void against all the parties at the option of the minor. This option is not given to the very person who may enter into an agreement or compromise in contravention of the rules with the next friend or the guardian of a minor. It is the minor alone who can resile from the agreement or compromise if he may choose to do so, either on attaining majority or even before through his next friend or guardian". Here again it is the guardian who refers the matter to arbitration on behalf of the minor without obtaining leave of the Court and he is the guardian appointed by the Court. But he made no application to the Court for granting him leave to compromise the matter in suit. The learned Judge has observed that if a guardian acts in contravention of the provisions of Sub-clause (1) of Rule 7 and enters into an agreement or compromise on behalf of a minor without obtaining such leave, such agreement or compromise would be voidable against all the parties and presumably not at their option, but at the option of the minors. The question seems to be as to the persons who are given the option to avoid such agreements or compromises and in that connection it is observed that it is the minor alone who had the option and not the third party. In the decision already cited above Horwill J. has held that an arbitration to which a minor is a party is not in itself void, but is voidable at the instance of the minor and it is not open to the first defendant a major to that award made at his instance to set it aside on the ground that a minor is concerned in the arbitration. The learned Judge did not give any reasons for his holding that the arbitration to which a minor is a party was not in itself void, but was voidable at the instance of the minor and the real point on which the decision has turned seems to be whether it was proper on the part of the arbitrator to have examined the plaintiff's next friend in the absence of the first defendant and whether it would not amount to misconduct. On this point the learned Judge has observed that the ex parte examination did not amount to misconduct when it was known to all the parties that the first defendant in that suit was not available owing to his incarceration.

9. As pointed above the cases cited by the learned counsel for the appellants do not seem to be of great assistance if it were remembered that in the present case the arbitration was at the instance of the next friend who was the mother of plaintiffs 2 and 3, who under Muslim Law had absolutely no authority to act on behalf of the minors. The mother had not got herself appointed as guardian, nor had she obtained leave of the Court to enter into an agreement to refer the

matters in dispute to arbitration. It must also be observed that the case of a Hindu father or of a mother who is the natural guardian of minors is different from the case of a mother in Muslim Law who in the present case is neither a natural guardian nor even a guardian ad-litem. In view of this important fact, the argument of the learned counsel for the respondents that the agreement entered into by the mother of the minors is a void contract and that Order 32, Rule 7 (2) of the Civil P. C. cannot have any applications seems to have much substance in it. If the contract is voidable certainly until it is declared void, it can hold good. But if the contract is "ab initio" void, where it is entered into by a mother of Muslim minors who has no authority whatsoever to act upon the minors' behalf in any way, then certainly the contract or agreement to refer the matters in dispute to arbitration is a nullity and the question of voidability provided for in Sub-rule (2) of Order 32, Rule 7 CPC cannot arise. It does not appear to be the intention of Order 32, Rule 7 (2) that void agreements should be made voidable as would be the case if the contention of the learned counsel for the appellants is to be accepted. In the present case, the mother has no status as the guardian and she cannot, under the law enter into a compromise on behalf of the minors without first getting herself appointed as the guardian and obtaining leave of the Court as such guardian to enter into the compromise or agreement on behalf of the minors. In this view, we think that the contract entered into by the mother cannot be upheld as a valid one and consequently the award based on that invalid reference must also be held to be not legal.

10. Besides this point, there is also the further point which has been brought to our notice and which arises from the terms of the award itself. The award does not seem to have kept in view the extent of the share that each party would be entitled to under the Muslim Law. According to Muslim Law, the first defendant and the second defendant would be entitled to an equal share, but a perusal of the award would show that the first defendant had been given properties set out in the B schedule of the value of Rs. 7,000/- whereas the second defendant had been allotted to enjoy the properties set out in C Schedule which are of the value of Rs. 5,050. No reasons are given as to why this difference has been made in regard to the allotment of the properties of different valuations to the two parties who are entitled to equal shares. There is no provision either in the award to compensate for the difference in the valuations of the properties allotted to the parties. On this ground it has been rightly contended by the learned counsel for the respondents that the award is not in accordance with the law governing the parties. There is also the further point that the award does not give any finding on the various claims put forth by the different parties to exclusive interest in certain items of the properties. From this point of view also, the award seems to be defective and is not a proper award.

11. We feel that an award of the type that is now under consideration in view of the defects pointed out above, is not likely to prove to be a final adjudication of all the rights between the parties and there appears to be still scope for litigation at any time in the future. In the light of all these considerations and in the

interests of justice and for a proper adjudication of the rights of the parties "inter se", we think it is just and proper that the award should be set aside and the learned Subordinate Judge of Ramnad at Mathurai be directed to proceed with the trial of the suit and dispose of it according to the law ignoring the award in question. We accordingly dismiss the appeals, but in the circumstances we do not think that we should award costs to the respondents either in this Court or in the Court below.