

(1914) 03 PRI CK 0002

In the Privy Council

Mt. Amir Begam, Defdt.

APPELLANT

Vs

Syed Badr-ud-din Husain and others

RESPONDENT

Date of Decision : 27-03-1914

Acts Referred:

Citation : (1914) AIR(PC) 105

Hon'ble Judges : Ameer Ali, John Edge, Parmoor, Lords Sumner, JJ.

Advocate : Hunter, Watkins, Douglas Grant, G.R. Lowndes, Upjohn, B. Dube, DeGruyther, for the Appearing Parties.

Judgement

Lord Parmoor

This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated the 15th August, 1911, reversing a decree of the Subordinate Judge of Lucknow passed by him upon an application by respondent 1 for the filing of an award.

On the 6th of May, 1909, one Khwaja Farid-ud-din Husain (hereinafter called the testator) died at Lucknow, leaving considerable property, and has as heirs, according to Muhammadan law, a full sister (the appellant herein), two stepbrothers-respondents 2 and 3, two stepsisters respondents 4 and 5, and a widow respondent 6. Shortly before his death, the testator made a will by which he appointed respondent 1 his executor, and, as he was entitled to do by Muhammadan law, bequeathed him one third of his property. After the death of the testator disputes arose between the parties interested, and litigation was commenced. On the 6th August, 1909, the matters in dispute were referred to the sole arbitration of Munshi Sakhawat Ali under a submission of reference in the following forms :-

"Whereas there exists a dispute amongst us, the executants, regarding the estate of Khwaja Farid-ud-din, deceased, and the deed of will, dated the 30th April, 1909, we, the executants, have, of our own accord, appointed Munshi Sakhawat Ali, as a referee for the purpose of settling the matter in dispute. We

agree and record that the said referee may decide it in whatever way he may deem proper, we, the executants, shall remain bound by the award. Therefore we have executed these few presents by way of a deed of agreement so that they may serve as an authority."

The arbitrator entered upon the reference and published his award on the 16th July, 1910. He confirmed the appointment of respondent 1 as executor, and gave him one third of the property. The remaining property fell to be divided according to Muhammadan law. The parties were entitled in the following shares :- The appellant to a third share, the respondents 1 and 6 jointly to a moiety, the respondents 2 and 5 to a sixth share. The arbitrator then proceeded to distribute the property in proportion to the shares to which the respective parties were entitled and for this purpose to make a valuation. The property so valued amounted in the aggregate to 91,942 rupees. There was a further item of 4,000 rupees, which was in no sense an ascertained or settled amount, but was based on a right to claim a rendition of accounts from a certain Ahmad Khan, and this item, for what it was worth was allotted to the appellant. The respondents 1 and 6 in respect of their joint half share were allotted property valued at 45,010 rupees. The appellant in addition to the above item of 4,000 rupees was allotted property valued at 30,879 rupees, and respondents 2 and 5 were allotted property, valued at 15,153 rupees. On the face of the award the distribution appears to be fairly made. So far as there is any advantage it is in favour of the appellant. This apparent advantage is referred to and explained by the arbitrator in his award.

At the time of the testator's death there was a considerable mortgage (20,000 rupees) affecting certain portions of his property. The arbitrator recognized that the allottees of the mortgaged property would be under a disadvantage with an apprehension of possible loss. He therefore decided that the debt of 20,000 rupees and its interest should, as among the parties entitled under the will, be a charge on the entire property of the testator, and proportionately on all the co-sharers, and that each co-sharer should be liable to pay in proportion to this share, and that each co-sharer should as soon as possible pay his proportionate share, both capital and interest, to the creditor. Whether this provision in the award did give full protection to the allottees of the mortgaged property, it is not within the province of their Lordships to decide. It is sufficient that matter was considered by the arbitrator and his decision cannot be questioned unless the charge of corruption or misconduct is established. The award further purported to assign specific land in the zamindari of Rasulabad by way of partition, a matter clearly outside the power of the arbitrator, and which would render his award invalid, unless this portion of his award is separable from the rest. In the opinion of their Lordships there is no difficulty whatever in separating this portion of the award from the rest. It is well recognized law that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained. In this respect their Lordships agree with judgment of the Court of the Judicial Commissioner of Oudh, and it becomes necessary to consider the grounds on

which the remainder of the award has been attacked.

On the 10th June, 1910, respondent 1, made an application to the Court of the Subordinate Judge of Lucknow to file the award in Court under paragraph 20 of the second schedule of the Code of Civil Procedure (Act V of 1908). On such an application the Court, if satisfied that the matter has been referred to arbitration, and that an award has been made thereon, and that no ground such as is mentioned or referred to in paragraphs 14 and 15 is proved, shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paragraph 14 states the grounds on which the Court may remit the award to the reconsideration of the same arbitrator or umpire. Paragraph 15 states the grounds in which alone an award shall be set aside. The first of these grounds is corruption or misconduct of the arbitrator or umpire. It was on this ground that the Subordinate Judge refused to order the filing of the award and disallowed the application of the respondent 1 who had been treated as plaintiff in the proceedings.

On the 7th September, 1910, issues were framed by the Subordinate Judge. The only material one is : is the award vitiated by the misconduct of the referee as alleged under the paragraphs 9 to 20 of the first defendant's (the appellant's) written statement?

The misconduct alleged against the referee was twofold :-

(1st) That the referee had acted corruptly and dishonestly in his capacity of judge.

(2nd) That the proceedings in the reference had been conducted in such a way that the matters in dispute had not been properly tried.

Their Lordships will deal first with the less important point of irregularity of procedure.

If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. In the present case it was alleged on behalf of the appellant that there had been no proper inquiry, since the parties had not been properly summoned to appear before the arbitrator, and the appellant had not had an opportunity of meeting the case set up by the respondent 1. The burden of proving this allegation was upon the appellant and other defendants at the trial before the Subordinate Judge. The only relevant witness called on behalf of the appellant was Shaban Ali, who admitted in cross-examination that he was sent for by the arbitrator on several occasions and questioned in respect of the value of immoveable property. As against this evidence, which in itself is quite insufficient to prove the alleged irregularities, the arbitrator stated on oath that he invited all parties to put in written statements before him, but that they declined to do so; that he was never asked by any of the parties to hear oral evidence and that no oral evidence

was tendered at any time and that he got little or no assistance from any of the parties in making his inquiries. It is, however, unnecessary in their Lordships' opinion to further analyse this evidence, since they agree with the Court of the Judicial Commissioner of Oudh that the allegations of irregularity in procedure were not proved against the arbitrator, and that there is no justification for the strictures passed by the Subordinate Judge upon the conduct of the arbitrator. Further, severe comment was made that the arbitrator did not make and retain any adequate notes of the proceedings. No doubt it is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before him; but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure, and who did not make any protest until after the making of the award with the terms of which she was not satisfied.

The last point, and the most important, is the grave charge that the arbitrator acted dishonestly and with partiality in conducting the inquiry and making his award. This charge was found to be established by the Subordinate Judge. The main evidence relied upon to support this conclusion was that given by the arbitrator himself in cross-examination. An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence, and where charge of dishonesty or partiality is made, any relevant evidence which he can give is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality, is not used for a different purpose; namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction, and on which his decision is final. The limitation applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case of *Buccleuch v. Metropolitan Board of Works* (1871) 5 H. L. 418 = 27 L. T. 1 = 41 L. J. Ex. 137, but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established.

In the opinion of their Lordships the Subordinate Judge did not take sufficient care in the discrimination of the purpose for which the evidence was admissible, and utilized evidence relevant on the charge of corruption to criticize methods adopted by the arbitrator in determining the quantum of his valuations. The course adopted in the cross-examination of the arbitrator was not satisfactory. There was a prolonged and critical examination into the details of figures used by the arbitrator in making his award, but the charge of corruption was not put fairly and squarely to him, so as to enable him to give a direct answer or explanation. It is not surprising that a cross-examination so conducted should lead to a certain amount of confusion and contradiction, but their Lordships cannot find in this respect any warrant for supporting the grave charges of corruption and partiality.

The distribution and valuation of the testator's property amongst the parties entitled are stated without ambiguity on the face of the award. In the first place the arbitrator sets out the details of the property allotted to respondent 1 and in each instance his estimation of value. The first property allotted is the entire Village of Mohi-ud-dinpure alias Hajiganj and the estimated value is 23,785 rupees.

In respect of this allotment and valuation three charges are made against the arbitrator. It is said, first, that Hajiganj was a choice portion of the property of the testator and that its allotment to respondent 1 showed partiality in his favour to the detriment of the appellant. The arbitrator's answer is that it was undesirable to divide Hajiganj and that the only way in which division could be avoided was by its allotment in entirety to respondent 1. The explanation is in itself reasonable and effectively answers the charge.

The second allegation is of undervaluation. The arbitrator is said to have dishonestly assessed this property at a low valuation intending to give an unfair preference to respondent 1. The evidence adduced in support of this charge is that the valuation was made on the patwari's figures to the rejection of those appearing in the accounts of the testator, the former figures giving a lower rate of profit income, and thereby diminishing the capitalized value. Their Lordships can see no reason for not accepting the arbitrator's explanation given in cross-examination. He considered the patwari's figures more likely to form an accurate basis for valuation than those in the private accounts, and stated that there were reasons which made him think that the private accounts were not satisfactory. This is just one of the matters on which an arbitrator is bound to exercise his discretion in estimating value, and the evidence is quite insufficient to prove that the arbitrator's choice of materials was influenced by a corrupt motive. Apart from the charge of corruption, it was beyond the competency of the Subordinate Judge to scrutinize the estimate of value appearing on the face of the award. Their Lordships can find no reason for coming to the conclusion that the basis of valuation suggested by the Subordinate Judge is preferable to that of the arbitrator.

The third charge made under the head of Hajiganj is that in the valuation, no account was taken of the zamindar's office said to be worth 500 rupees. The arbitrator's answer is that it was included as part of the village property, and that in any case it was covered by the addition of 2,000 rupees which he had made to the value of the village as a whole.

The second property allotted to respondent 1 consists of houses at Lucknow. It was said that the arbitrator had unfairly under-valued this property to the detriment of the appellant, and that he had included in his valuation a house which belonged to the appellant and not to the testator. There is no weight in the criticism made by the Subordinate Judge of the valuation of this property when the actual method adopted by the arbitrator is understood. The arbitrator having a difficulty in obtaining any satisfactory basis for fixing a valuation invited the

parties to send in tenders, stating the price they would be prepared to pay for each of the houses. The only party who tendered for all the houses was respondent 1, whose tender in the aggregate amounted to a price of 11,900 rupees. The appellant sent in a tender for three of the houses at a slightly lower figure under each head, but the difference is so small as to be negligible. The arbitrator fixed the value at 11,800 rupees, reducing the tender price in the case of two houses by the comparatively insignificant sum of 50 rupees. The method of valuation adopted by the arbitrator was within his discretion, and it is impossible to find that the small alteration in the case of the two houses was inconsistent with honesty and impartiality.

It was necessary for the purpose of making his award that the arbitrator should determine whether or not to include in his distribution of property the house at Lucknow claimed by the appellant. He gave his reasons for the decision at which he arrived. He knew that the house in question had been assigned to the appellant many years ago under a deed of compromise, but found that the testator had not given up possession, always treating the house as his own and mentioning it in his will as portion of his estate. He came to the conclusion that the testator, notwithstanding the deed of compromise, had a good title by adverse possession, and that the appellant's claim could not be sustained. He may have been right or wrong in the conclusion he arrived at, but their Lordships find no warrant for the inference that he was in any way actuated by a dishonest motive. If he was wrong and the house was not the property of the testator, its inclusion in the award might be detrimental to respondent 1, but could have no effect whatever in defeating the title of the true owner. In addition to Hajiganj and the house property the arbitrator allotted to respondent 1 certain properties of comparatively small importance. Having regard to the decision at which their Lordships have arrived on the more important portions of the property allotted to respondent 1 it is unnecessary to follow under these heads the criticisms of the Subordinate Judge, which denote no more than a difference of opinion from the arbitrator on questions not within the jurisdiction of the Subordinate Judge to determine. No attack was made on the allocation of household furniture, cash and ornaments in Lucknow, or on their estimated value of 4,200 rupees.

Having allotted his share to respondent 1, the arbitrator next proceeds in his award to allot her share to the appellant, and to estimate the value of such share. There are three heads : the entire village of Kundri; a share in the village of Rasulabad; and a sum of 4,000 rupees. The testator's share in the village of Rasulabad was at this time subject to a considerable mortgage of 20,000 rupees, and it is alleged on behalf of the appellant that the arbitrator acted dishonestly in allotting to the appellant property subject to the disability of the mortgage; that he unfairly overruled the testator's property in Rasulabad; and that he must have known that the allocation of the sum of 4,000 rupees was practically illusory. In the allotment of the testator's share in the village of Rasulabad, the arbitrator was asked by respondents 2 to 5 to give them a share in Rasulabad, adjoined to their share in Mahal Pachhim which they already possessed. The

award shows that he complied with this request. The question, therefore, arises whether there is any evidence of dishonesty in his allotting the remaining share of the testator's property in the village of Rasulabad to the appellant. The appellant was already a co-sharer in mauza in Rasulabad and holding a share in co-tenancy with the testator. It was, therefore, quite reasonable that the arbitrator should assign a share to the appellant of the testator's property in that village. If the allocation under the above circumstances was properly made, the disability attached to the mortgage could not be avoided. It was necessary that some of the parties should be subject to this disability, and the matter was obviously present to the mind of the arbitrator, who in his award provided against an apprehension of loss by deciding that the mortgage-debt and its interest should be a charge on the entire property of the testator, and proportionately to all the co-sharers, each co-sharer being liable to pay in proportion to his share, and that each co-sharer should so soon as possible pay his capital and interest to the mortgagee. Their Lordships have already referred to this portion of the award, indicating their opinion that the arbitrator had dealt with the liability of the mortgaged property, providing what in his opinion appeared to be the best remedy. Under these circumstances their Lordships can find no evidence for the alleged dishonesty in the allotment of a share of the mortgaged property to the appellant, and agree in the decision of the Court of the Judicial Commissioner.

Their Lordships have found some difficulty in understanding on what ground the Subordinate Judge has based his finding that the Rasulabad property was dishonestly over-valued. In his criticism on the valuation he states that the referee has valued the entire estate of the deceased at 95,042 rupees, but this in itself is an error, since it is clear on the face of the award, that the estate was valued for distribution at 91,042 rupees, and that the additional sum of 4,000 rupees was only thrown in as an item which might possibly be recovered on a claim for a rendition of accounts from Ahmad Khan. This initial mistake affects the subsequent inference, and their Lordships can find no evidence of dishonesty in the detailed criticism of the arbitrator's figures. The Subordinate Judge places considerable weight on the allotment of 4,000 rupees to the appellant as an element of misconduct in the arbitrator. It was objected that this was at best a doubtful item and ought not to be estimated in calculating the value of the appellant's share. The answer to this objection appears on the face of the award. In calculating the value of the appellant's share of the testator's property, this sum was not taken into account, but thrown in as an additional item after the appellant had been allotted property estimated at 30,879 rupees, in itself rather more than her third share of the valued property.

Ahmad Khan was a Karinda in the employ of the testator, and had been collecting his rents. It was alleged before the arbitrator that this man had money in his possession which was owing to the estate, and for which he had not accounted. Some figures were placed before the arbitrator, but there was no reliable evidence either of liability or of amount. Ahmad Khan refused to appear before

the arbitrator to give any explanation of his accounts, and he was not called at the trial before the Subordinate Judge. The respondent (1) had given Ahmad Khan acquittance for any sums that might be due to him, and the arbitrator was informed by Mr. Muhammad Fasih, a pleader, and the son-in-law of the appellant, that he, too, had given Ahmad Khan discharges as he desired to get Ahmad Khan in his power to support the appellant's claim for mutation. Under these circumstances, what was the arbitrator to do? If he had made no reference to the matter in his award no question would have arisen, and, on the face of the award, the appellant would have had a full one-third share of the valued property. The course he took was evidently intended to be in favour of the appellant for what it was worth, and the finding of the Subordinate Judge that there was evidence of dishonesty appears to be founded on a misapprehension of the terms of the award in relation to the distribution of this item.

It was argued before their Lordships by counsel for the appellant that, although in each instance the evidence of dishonesty might not amount to more than a case of suspicion, the aggregate effect would support the charge of corruption, since in every instance the decision was given in favour of respondent 1, and to the detriment of the appellant. In their Lordships' view, this is not an accurate summary, but in any case, there would be no sufficient ground to infer such a grave charge as dishonesty and partiality against an arbitrator unless much stronger evidence was adduced in support of the particular instances relied upon than was forthcoming in the present case. It is just to the arbitrator to say that, in their Lordships' view, the charges of dishonesty and partiality have entirely failed.

The Lordships agree with the judgment of the Court of the Judicial Commissioner of Oudh, and will humbly advise His Majesty to dismiss the appeal with costs.