

(1911) 05 MAD CK 0004
In the Madras High Court

Nanjappa and Another and Basuvaraju and Another APPELLANT
Vs

Nanja Rao and Others
Basuvaraju alias Virachokka Rao RESPONDENT
Vs Nanja Rao

Date of Decision : 01-05-1911

Acts Referred:

Citation : 16 Ind. Cas. 478

Hon'ble Judges : Sadasiva Iyer, J; Miller, J

Bench : Division Bench

Judgement

1. These are three connected appeals. The Appeals Nos. 10 and 75 of 1911 have been fully argued before us. The decision in Civil Miscellaneous Appeal No. 228 of 1910 naturally follows from the conclusions, we have arrived at in the two former Appeals Nos. 10 and 75 of 1911.

2. The facts are somewhat complicated, but, for the purpose of our decision, might be shortly stated thus,

(a) Nanja Rao as plaintiff brought Suit No. 9 of 1907 in the Salem Sub-Court for recovery of the impartible Palayapet of Berikai and its appurtenant moveable and Immoveable properties against the rival claimant, Puttusawmi, and the Court of Wards who supported Puttusawmi. That suit afterwards became Order Suit No. 2 of 1908 on the file of the District Court of Salem. Puttusawmi (the 1st defendant) was himself appointed as Receiver pending the disposal of this Suit No. 2 of 1908. Two sureties deposited Rs. 30,000 in Court as security for Puttusawmi's proper management as Receiver.

(b) During the pendency of the suit, the plaintiff (Nanja Rao), the 1st defendant (Puttusawmi) and the plaintiff's four sons executed a muchilika, Exhibit I, dated the 10th July 1903, in favour of the then. Tahsildar of Hosur and of four members of the Taluq Board Office in order to enable them to settle all kinds of disputes "between the parties with reference to" the Palayapet and properties which were the subject-matter of the Suit No. 2 of 1908 then "pending in the

Civil Court." The five arbitrators met in the house of the Deputy Collector (Mr. Bower) and gave their award, Exhibit II, on the 11th July 1908.

(c) On the 1st September 1908 (within two months of the award), the 1st defendant, Puttusawmi, presented a petition u/s 375 of the CPC in Suit No. 2 of 1908, representing that by reason of the private reference to arbitration in July 1908 and the award thereon. The Suit No. 2 of 1908 had been adjusted or compromised. The 1st defendant prayed the Court to pass a decree in accordance with the adjustment of compromise evidenced by the reference and award (Exhibits I and II) so far as it related to the Suit No. 2 of 1908 between the plaintiffs and the 1st defendant. This petition u/s 375 of the CPC was numbered as First Appeal No. 71 of 1908.

(d) As another string to his bow, and simultaneously with the petition u/s 375, the 1st defendant (Puttusawmi) filed a petition against the plaintiff (Nanja Rao) and his four sons u/s 525 of the Civil Procedure Code, praying that the award (Exhibit II) might be filed in Court. This application was registered as an independent Suit No. 23 of 1908 (between the 1st defendant in Suit No. 2 of 1908 as plaintiff and the plaintiff in Suit No. 2 of 1908 Nanja Rao and his sons as defendants).

To avoid confusion, we might continue to style Puttusawmi as 1st defendant and Nanja Rao as plaintiff though in Suit No. 23 of 1908 their positions are reversed and though Puttusawmi died after Suit No. 23 of 1903 was filed, his legal representatives having been allowed to continue the litigations.

(e) While the petition First Appeal No. 71 of 1908 (under Section 375) was pending, the sureties of the 1st defendant put in petitions Nos. 45 and 77 of 1909 in March and April 1909 to be relieved of their obligations and for return of their deposit of Rs. 33,000.

(f) The learned District Judge dismissed the 1st defendant's Petition No. 71 of 1908 (filed u/s 375) on the ground that the award did not constitute an "adjustment by legal agreement or compromise." He dismissed the 1st defendant's Suit No. 23 of 1908 and refused to file the award Exhibit II on the grounds:

(f1) That the award Exhibit II was not a reasoned judicial decision.

(f2) That the five arbitrators allowed the Deputy Collector (Mr. Bower) to be "the real president of the whole (arbitration) proceedings" and the co operation of Mr. Bower, without authority "is a material irregularity which nullified the award."

(f3) That the decision of the question of the allowances to be made to Nanja Rao (plaintiff) in O.S. No. 2 of 1908 was based on materials supplied by Puttusawmi's (1st defendant's) clerk to which the other side was not allowed access.

(f4) That the arbitrators having been guilty of these, irregularities, they were

guilty of "misconduct" though there was "no reason to impute bad faith" to them and hence the award was not legally enforceable, and

(f5) that the award is farther illegal because "when once a dispute has been brought before a Court of justice by suit" (in this case Suit No. 2 of 1908), it cannot be referred to arbitrators except by order of the Court u/s 506; and a private reference in a pending suit is illegal and the award made on such a private reference cannot be filed in Court u/s 525.

(g) The learned District Judge decided on the Petitions Nos. 45 and 77 of 1909, filed by the sureties of 1st defendant, that they should forfeit Rs. 15,000 of the Rs. 30,000 deposit because 1st defendant had caused loss to the estate to the extent of about Rs. 14,000 by his management as Receiver.

3. Civil Miscellaneous Appeal No. 75 of 1911 before us is against the dismissal of First Appeal No. 71 of 1908 filed by 1st defendant (under Section 375). Civil Miscellaneous Appeal No. 10 of 1911 is against the order refusing to file the award Exhibit II, the order having been made in Original Suit No. 23 of 1908, brought by 1st defendant u/s 525. Civil Miscellaneous Appeal No. 228 of 1910 is by the two sureties of 1st defendant against the order making them forfeit Rs. 15,000.

We think (differing from the learned District Judge) that the award, Exhibit II, is a legally valid award. Taking first for consideration the objection to the award marked above as (f5), that there is no provision of law which prevents parties from agreeing to refer the disputes pending in a suit between them to private arbitration without making an application to the Court u/s 506 just "as there is nothing to prevent them from making any other agreement or adjustment or compromise pending the suit. Especially (as in this case) where the parties to the private reference to arbitration include not only the parties to the suit but include also persons other than the parties to the suit, should such a reference not be prohibited, for, it would be inequitable to prevent third persons from settling their disputed claims by arbitration, simply because the parties in a pending suit are also interested in such claims and have to join in the reference. They (the third parties) cannot join in an application u/s 506, as they are not parties to the suit. An involved argument has been addressed to us by the respondent's (plaintiff's) learned Vakil based on some passages in the judgments in *Ghulam Khan v. Muhammad Hassan* 29 C.P 167 : 29 I.A. 51 : 25 P.R.1902 : 12 M.L.J. 177 : 4 Bom. L.R. 161 : 6 C.W.N. 226 and *Tincowry Dey v. Fakir Chand Dey* 30 C.P 218 : 7 C.W.N. 180.

In *Ghulam Khan v. Muhammad Hassan* 29 C.P 167 : 29 I.A. 51 : 25 P.R.1902 : 12 M.L.J. 177 : 4 Bom. L.R. 161 : 6 C.W.N. 226 their Lordships of the Privy Council classify the provisions in Sections 506 to 528 of the old CPC under three heads,-

1. Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit, in which case all proceedings are under the

supervision of the Court.

2. Where parties, without having recourse to litigation, agree to refer their differences to arbitration and it is denied that the agreement of reference should have the sanction of the Court, in which all further proceedings are under the supervision of the Court and (3) where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award.

In class (2), the words "without having recourse to the litigation" are not italicised by their Lordships of the Privy Council but we have italicised them, because the learned Chief Justice of the Calcutta High Court seems to have laid stress on these words in coming to the conclusion in *Tincowry Dey v. Fakir Chand Dey* 30 C.P 218 : 7 C.W.N. 180 that "Section 523 (of the old Procedure Code) does not apply to the case of an agreement to refer, when there is a pending litigation."

We do not think that their Lordships of the Privy Council intended by their classification (2), which included some, references u/s 523, to lay down that all references coming u/s 523, could be made only by persons who were not then parties to a pending litigation probably, the phrase "without having recourse to litigation" was intended to cover all cases where parties agree to refer their disputes to arbitrators "without the intervention of the Court" which latter is the phrase used in the third classification.

The Allahabad High Court, in *Sheo Dat v. Sheo Shanker Singh* 27 A.P 53 : (1904) A.W.N. 160 held that Section 523 could be applied even in respect of a reference pending suit. But it is unnecessary to express a final opinion on the question, as we have to deal at present with a state of facts coming: not under classification (2) of the Privy Council but under classification (3), (that is, a state of facts where there has been not only a reference out of Court but also an award made out of Court and the assistance of the Court is sought only in order to give effect to the award). Hence that obiter dictum of Maclean, C.J., that Section 523 does not apply to a reference of disputes in a pending litigation is not useful for the decision of this case. On the other hand, there is a passage in lines 2 to 4 of the judgment of Maclean, C.J. himself in *Tincowry Dey v. Fakir Chand Dey* 30 C.P 218 : 7 C.W.N. 180 in favour of the view that the assistance of the Court could be validly invoked u/s 525 in such a case. In none of the cases quoted to us on the respondent's side, has it been decided that Section 525 cannot apply to an award made on a reference pending suit, and we are unable to follow the respondent's Vakil's argument that because Section 523 has been considered in some obiter dicta as inapplicable to a reference by agreement to arbitration out of Court of a pending suit, Section 525 is likewise inapplicable to an award made on such reference. An award is always binding on the parties who made the reference provided the arbitrators were not guilty of misconduct; *Jadu Nath Chowdhury v. Kailas Chunder Bhattacharjee* 37 C.P 63 : 14 C.W.N. 75 : 2 Ind. Cas. 414 : 10 C.L.J. 41.

4. Coming to the objections (f) to (f4) to the award, arbitrators are not bound to give "a reasoned judicial decision" and are merely bound to give an intelligible decision which determines the rights of the parties in relation to the subject-matter of the reference. (Redman on Arbitration, IV Ed, page 163). They are not bound to give reasons at all, and there are cases, which we think it unnecessary to quote, which have held that they should not even be asked for the reasons which have led to their decision (see Redman on Arbitration, page 140). Having heard the evidence read and commented on by both sides, we do not think that the five arbitrators surrendered their judgments to Mr. Bower in such a manner that, against their own view of the rights of the parties, they adopted Mr. Bower's view and acted merely as his mouth-piece. "When he suggested Rs. 14,000 as the reasonable sum payable to the plaintiff (Nanja Rao), the arbitrators increased it to Rs. 15,000, Mr. Bower says as Court Witness No. 1: "I understood that the arbitrators had full discretion and were quite unfettered, that the award was to be the work of the arbitrators but that I was to represent to the arbitrators any points that would tell for or against either side." The Tahsildar (D.W. No. 1 who was the principal arbitrator and who afterwards became a special Deputy Collector) says that Mr. Bower helped the arbitrators by his opinion in arriving at a decision. The evidence of the Tahsildar and of plaintiff's witnesses Nos. 1 and 2 (two of the arbitrators) clearly shows that they and the other arbitrators made inquiries of, and obtained statements from, the parties and checked account statements, discussed with the parties as to income and expenditure of the estates and the debts and expenses of Nanja Rao's side (family) another proper amount to be allowed for Nanja Rao's maintenance, took into consideration the previous history of the litigation, consulted Mr. Bower and finally came to their own conclusions and made their award. In Redman on Arbitration, IV Ed. (pages 124 and 125), it is said that while "arbitrators cannot, without the consent of the parties, agree beforehand to be bound by the opinion of a third person without exercising their own judgment upon the point" arbitrators are at liberty to consult others and adopt their opinions as evidence which satisfied their minds upon the point" and that arbitrators "can adopt the opinion of another person" as their own. They cannot delegate or surrender their own judgments and conscience but if they do not act "contrary to their own judgment", they can get the help of others" opinions in order to arrive at their own opinions.

We hold that the award was the work of the arbitrators and the mere fact that Mr. Bower gave help to the arbitrators to enable them to arrive at their decision does not vitiate the award. As regards the last objection that some "material" was supplied to the arbitrators by Puttusawmi's clerk "to which the other side was not allowed access," we are satisfied from the evidence that the plaintiff and his sons had notice of the material" so supplied and there is no proof that they were refused access to that material. In Buta v. Municipal Committee of Lahore 29 C.P 854 : 29 I.A. 168 : 4 Bom. L.R. 673 : 87 P.R. 1902 : 7 C.W.N. 82 the Privy Council held that where the arbitrators innocently applied for and accepted

the advice of the defendants' Counsel without notice to or knowledge of the plaintiff, in respect of the construction of the agreement to refer, the arbitrators were not guilty of misconduct see also *Holland v. Cassidy* (1888) 13 A.C. 770 : 57 L.J.P.C. 97 : 59 L.T. 873.

5. Lastly, we might state that there is clear evidence to show that all objections to any irregularities in the arbitrators' procedure were completely waived by the plaintiff and his sons. Mr. Bower says that all parties were present when the award was read out, that Nanja Rao was satisfied with the award and made namaskarams to Mr. Bower and that Nanja Rao and one of his sons thanked Mr. Bower for the part he had taken in the arbitration proceedings (D.W. No. 1). The Tahsildar says that the plaintiff and his elder son expressed satisfaction when the award was read out (in the presence of 100 people according to P.W. No. 1) and made namaskarams to Mr. Bower. P.W. No. 2 also says that the parties were quite satisfied with the award when it was read out. Under these circumstances, the award could not now be impeached on account of alleged irregularity in the procedure of arbitration (see *Redman on Arbitration*, page 155, where it is said that not only irregularities but even improper conduct" on the part of arbitrators might be waived and that all objections as to irregularities known to the parties before the pronouncement of the award must be made before the delivery of such award).

As regards the other objections to the award, (except one to be mentioned presently), put forward by Nanja Rao and his sons in the lower Court and repeated before us, we entirely agree with the learned District Judge that they are unsustainable. One objection, however, to the award, namely, that it determines some matters not referred to arbitration seems to us to be sustainable. Nanja Rao's third son, Chocka Rao, seems not to have been a party to the arbitration as supposed by the learned District Judge. The 6th paragraph of the award, so far as it declares that he has no right in the property in dispute in Suit No. 2 of 1908, cannot be supported. But it could be separated without affecting the other portions of the award [see Article 14(a), Schedule II, Act V of 1908 and *Redman on Arbitration*, IV Edition, 205 and *Khurshed Ali v. Wazir-un-nissa* 7 A.L.J. 778 : 6 Ind. Cas. 857 and does not affect the validity of the remaining portions. The sixth paragraph of the award will, therefore, be made so as to read "that in future neither Nos. 2 to 6 nor their heirs claiming under them in their rights shall have any right and interest, etc."

6. In the result, we set aside the order of the District Judge in Civil Suit No. 23 of 1903, refusing to file the award, Exhibit II, and we direct that it be filed subject to the amendment above set out and that judgment and decree shall follow in the terms of the amended award. The respondents will pay the plaintiff's costs in Civil Miscellaneous Appeal No. 10 of 1911 in both Courts.

As regards Civil Miscellaneous Appeal No. 75 of 1911, the cases, in *Pragdas v. Girdhardas* 26 B.P 76 : 3 Bom. L.R. 431; *Brojodurlabh Sinha v. Ramnath Ghose* 24 C.p 908 : 1 C.W.N. 597; *Lakshmana Chetty v. Chinnathambi Chetti* 24 M.p

326 are clearly authorities for the proposition that a private reference to arbitration in a pending suit followed by a lawful award is a lawful agreement, compromise and adjustment u/s 375 and effect ought to be given to such an adjustment in the suit, so far as the award relates to the suit. There are certain remarks in the nature of obiter dicta by Beaman, J. in *Rukhanbai v. Adamji* 33 B.p 69 : 10 Bom. L.R. 366 : 1 Ind. Cas. 622 tending to throw doubts on the validity of the reasoning in the above three decisions, but we need only remark that we are unable to take the view that the reasoning of the learned Judge has displaced their authority. Whether a mere agreement to refer to arbitration will itself be an adjustment u/s 375 so that a decree might be passed under the section, referring the suit to arbitration as per the agreement, (as distinguished from a mere order of reference u/s 506 on application of the parties), is a doubtful question, though the Privy Council has accepted such a decree as a proper decree and as putting an end to the suit. See *Mirza Sadiq Hussain v. Nazir Begam (Kaniz Zohra Begam)* 33 A. 743 : 15 C.W.N. 1005 : 10 M.L.T. 173 : (1911) 2 M.W.N. 132 : 13 Bom. L.R. 826 : 8 A.L.J. 1164 : 14 O.C. 280 : 21 M.L.J. 1151 : 12 Ind. Cas. 15 and also the observations of Hill, J. in *Tincowry Dey v. Fakir Chand Dey* 30 C.p 218 : 7 C.W.N. 180. But it is unnecessary to go into that point in this case where an award has followed the reference.

7. In the result Civil Miscellaneous Appeal No. 75 of 1911 will also be allowed with costs (the question of the validity of the award being *res judicata* by our decision in Civil Miscellaneous Appeal No, 10 of 1911).

The award Exhibit II and the reference Exhibit I shall be recorded as the agreement effecting a compromise and adjustment of the Suit No. 2 of 1908 as between the plaintiff and the 1st defendant's representatives so far as the terms of the award apply to the disputes in the suit. The plaintiff must pay the costs of this appeal and of the inquiry into Petition No. 71 of 1908 in the lower Court to the 1st defendant's representatives.

8. We now come to Civil Miscellaneous Appeal No. 228 of 1910. Under the decisions given as above, Suits Nos. 2 and 23 of 1908, following the award Exhibit II, the plaintiff (Nanja Rao) is adjudged to have DO interest in the suit Palayapet and its appurtenant properties.

The 1st defendant's mismanagement of the estate, even if proved, could not have prejudiced the plaintiff in Suit No. 2 of 1908 in any degree and the sureties, who gave security for the management of the estate by the Receiver (1st defendant), have a right to be re-imbursed by the Receiver (1st defendant), who is, under the decree in the suit, declared entitled to the Palayapet and its appurtenances (except the two villages mentioned in the award which the plaintiff enjoys and which did not go into the hands of the Receiver). Hence the petitions of the sureties for re-payment of the sums deposited as security ought to be allowed wholly. The Appeal No. 223 of 1910 is, therefore, allowed but without costs.