

(1933) 02 CAL CK 0053
In the Calcutta High Court

Nirmala Sundari Debi

APPELLANT

Vs

Golap Bashini Debi

RESPONDENT

Date of Decision : 09-02-1933

Acts Referred:

Citation : AIR 1934 Cal 49 : 150 Ind. Cas. 68

Hon'ble Judges : Mitter, J;M.C. Ghose, J

Bench : Full Bench

Judgement

Mitter, J.—This is an appeal against an order of remand made by the District Judge of Dacca on 24th March 1932. The learned District Judge evidently purported to act under the provisions of Order 41, Rule 23, Civil P.C. The point in this appeal raises a question as to whether the remand was justified by the provisions of the said order and the said rule. It appears that the plaintiff who is the appellant before us instituted the present suit for setting aside a previous award and decree on various grounds. Her case is that the defendant brought a suit based on a right of easement against her in the Munsif's Court at Dacca and that after several adjournments in that suit the plaintiff's husband, without her consent and knowledge, referred the matters in dispute in that suit in addition to other matters which were outside the suit to arbitration; that the arbitrators submitted an award and a decree followed on the award; that the plaintiff knew nothing of these proceedings and that she came to know about the award later and commenced the present suit in which this appeal arises. Her contention is based on various grounds. She submitted in the first instance that the reference to arbitration was without her consent and knowledge and authority, that she took no part in the arbitration proceedings, that the award was vitiated by fraud and misconduct, and further that the award and the decree following on it were without jurisdiction, fraudulent, null and void and liable to be set aside.

2. These facts were challenged by the defendant in the suit and several issues were framed of which it is necessary to refer to issue 5 which challenged the validity of the previous award and decree on the ground of want of jurisdiction

and raised the contention that the award and decree were nullities. The Munsif took up this issue first and he was of opinion that the award was without jurisdiction. He accordingly decreed the plaintiff's suit. He held that the decree in a previous Title Suit No. 1087 of 1929 passed by the sixth Court of the Munsif was null and void and was without jurisdiction and ought to be set aside. With regard to the prayer for permanent injunction the Munsif was of opinion that the question of the permanent injunction against the execution of the decree did not arise as the decree was set aside by him.

3. Against this decision an appeal was taken to the Court of the District Judge of Dacca,. The learned District Judge was of opinion on this issue?issue 5? that the award was not a nullity and he sent back the case to the Munsif's Court for trial of the other issues in the case. Against this decision the present appeal has been preferred and it has been contended by Mr. Brojolal Sastri who appears for the appellant, that the order of remand is bad seeing that the provisions of Order 41, Rule 23, do not apply to the present case, as the decision of the first Court was not on a preliminary point within the meaning of that rule but was a decision on the merits of the case. A question arises as to whether this contention is right or not. It is to be noticed that the decision on issue 5 was really a decision affecting the merits of the case. The plaintiff challenged the previous decree and award on various grounds and various allegations of fact and those facts were challenged by the defendant in the course of the suit and upon which several issues were joined.

4. The Munsif thought that after having decided issue 5 which affected the merits of the case it was not necessary to decide the other issues, more particularly issues 2 and 3, as to whether the plaintiff assented to a reference to arbitration or not. It is argued for the respondent by Mr. Sen that as the Munsif did not decide all the issues in the case the decision must be taken to be a decision on a preliminary point. His contention, really is that the entire suit has not been decided. That contention cannot be given effect to. The suit was decreed although it was not necessary for the Munsif to decide all the issues in the view that he took of issue 5. The true test of deciding as to whether a decision of issue 5 was a decision of a preliminary point or not is to see whether the decision of this issue prevented the decision on the other issues. It could not be said that the decision of other issues was prevented by a decision of issue 5 as the Munsif distinctly said that as the plaintiff succeeded on one of the grounds of attack of the arbitration and the proceedings following the arbitration it was not necessary to deal with the other grounds of attack of the arbitration proceedings and the award and the decree following the same.

5. We are of opinion that the meaning of the words "preliminary point" has been correctly laid down by the decision of a Pull Bench of the Madras High Court in the case of Malayath Veetil Raman Nayar v. Krishnan Nambudripad AIR 1922 Mad 505. Schwabe, C.J., pointed out in that case that the true test in cases of this kind is that laid down by the very learned Judge, Mahmud, J., in an early

Allahabad case, viz., the case of Ramnarain v. Bhawanidin (1882) 9 All 29, where the learned Judge points out that the words "preliminary point" are not confined to such legal points only as will be applied as a bar in suit but comprehended all such points as may have prevented the Court from disposing of the case on the merits whether such points are pure questions of law or pure questions of fact. Old field, J., pointed out in the same case that a preliminary point must be one which must be independent of the merits. It can hardly be said in this case that a decision of issue 5 was not a decision on the merits. The view we take also receives some support from the decision of this Court in a recent case?the case of Banka Behari Deb Vs. Birendra Nath Dutta and Another, , as he then was, took the same view.

6. We are of opinion therefore that the order of the learned District Judge must be set aside and he is directed to rehear the appeal in accordance with law. It is to be noticed that there are certain mistakes in the original judgment of the appellate Court due perhaps to the mistake of the typist. It appears that the learned District Judge dictated this judgment and in four places of his judgment he has used the expression "the suit was dismissed" although as a matter of fact the suit was decreed by the Munsif. No order is made on the application. The costs of the appeal will abide the result, hearing-fee in this Court being assessed at two gold mohurs.

M.C. Ghose, J.

7. I agree.