
(1969) 10 SC CK 0083

In the Supreme Court Of India

Case No : Civil Appeals Nos. 23102311 Of 1966

Prakash Narayan Moda and Others

APPELLANT

Vs

Durgadutta Moda and Others

RESPONDENT

Date of Decision : 10-10-1969

Acts Referred:

Citation : (1970) 3 SCC 290

Hon'ble Judges : K. S. Hegde, J;J. C. Shah, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

K.S. HEGDE, J.-These appeals by certificate arise from the decision of the High Court of Orissa in Misc. Appeals Nos. 103 and 104 of 1962 on its file which were directed against the decision of the learned subordinate Judge of Guttak in TS Nos. 36 and 50 of 1959 both of which were instituted with reference to the arbitration agreement executed by the members of the family of one Ghasi in favour of 9th defendant, on January 3, 1959. The 9th defendant gave his award (Ext. 1) on April 28, 1959, after duly notifying the parties about the making and signing of the award. The said award was registered on April 29, 1959. Defendants 1 to 3 and 7 challenged the award. Defendants 6 and 8 supported the award. Defendants 4 and 5 did not file any written statement challenging the award but supported it in appeal.

2. The validity of the award was challenged mainly on four grounds viz. (1) that the arbitrator was partial to the branch of Gopiram, (2) that he failed to decide about the truth and the validity of the adoption of Defendant 3, Debi Prasad, (3) that he failed to divide the properties amongst all the executants of the arbitration agreement and (4) that the properties allotted to the various branches were arbitrarily valued by him. The trial court rejected all these contentions and made the award a decree of Court. The High Court in appeal rejected the contention that the arbitrator was partial to the branch family of Gopiram but accepted the other three contentions. It accordingly set aside the

decree of the trial court and dismissed the suits.

3. The arbitration agreement to the extent material for our present purpose reads as follows:

"This agreement of reference is made on the 3rd day of January, Nineteen hundred fifty-nine, between (1) Gopiram Moda, aged 52, alias Gopilal, son of Bholanath Moda, deceased, (2) Durgadutt Moda, aged 44, and (3) Sibaprasad Moda, aged 38, sons of Rai Saheb Giridharilal Moda, deceased, (4) Debiprasad Moda, aged 35, son of Raghunathrai Moda, deceased, (5) Gokulchand Moda, aged 45, and (6) SatyaNarayan Moda, aged 41, and (7) Shyam Lal Moda, deceased, (8) Mohara Devi, aged 64, widow of Giridharilal Moda, deceased, and (9) Gobindi Devi, aged 40, widow of Radhakishan Moda, deceased, all by caste Agarwalla, residents of Choudhuri bazar, town Cuttack."

Whereas the parties abovenamed were at one time members of a joint undivided family but separated their business, movables and mess in the year 1939, but their properties which were all originally the outcome of their old business concern started and carried on by the name and style of M/s Ghasiram Bholanath, since extinct, have undergone several transfers.

Whereas the properties described in Schedule "A" below were acquired out of the separate fund of Parties No. D-1, D-2 and D-3 and properties described in Schedule "B" below were acquired out of the separate funds of the party No. 1 Gopiram and properties described in Schedule "C" below though mortgaged to Banwarilal Moda deceased have been re-deemed and released by party No. 1 Gopiram alone and properties described in Schedule "D" below though sold to Gourishankarlal Moda for Rs 20,000 was subject to a contract for reconveyance and properties described in Schedule "E" below were acquired by parties Nos. D-4, D-5 and D-6 out of their separate funds and the properties described in Schedule "F" below stands in the name of Giridharilal Moda deceased.

Whereas differences have arisen and disputes have cropped up between the parties abovenamed as to the share and the rights and possession and liabilities of each member in said properties.

Whereas the parties are not agreed as to the share, rights, possessions and liabilities of each in these properties.

Whereas the parties abovenamed have agreed to refer the disputes about the division of shares, rights, possession and liabilities of each to the sole arbitration of their common relation and well-wisher Sri Balmukundji Rate-ria of P. 11, Chitpurspur, Calcutta.

4. Now this Agreement of Reference witnesses as under:

"1. That the Arbitrator shall be entitled to ascertain the value of the properties both past and present, and shall determine the manner in which the properties should be allotted to each party and to impose any conditions which he may

think proper and reasonable.

2. That the Arbitrator shall have full power to divide and allot by lots or otherwise the properties amongst the parties mentioned above after determining the share and liability of each party and the extent and nature of rights which each will enjoy.

* * *

Admittedly the arbitrator did not divide the suit properties amongst the parties mentioned in the agreement. Mr Bishan Narain, learned Counsel for the appellant contended that on a true reading of the arbitration agreement, it would appear that the arbitrator was only required to divide the properties among the branches of Giridharilal, Gopiram and Radhakrishna and not among the parties mentioned to the arbitration agreement. This contention appears to us to be wholly untenable. The language of clause (2) of the agreement is plain and unambiguous. It says "that the arbitrator shall have full power to divide and allot by lots or otherwise the properties amongst the parties mentioned above after determining the share and liability of each party and the extent and nature of rights which each will enjoy".

In view of this clause it was incumbent on the arbitrator to divide and allot the properties mentioned in the agreement amongst all the parties to the agreement. Mr Bishan Narain is also not right in his contention that the contesting parties did not take up the plea in their pleadings that the arbitrator was required to divide and allot the properties mentioned in the agreement amongst all the parties to the agreement. A specific plea raising that contention had been taken by some of the contesting defendants.

5. In order to divide the properties as provided in clause (2) of the agreement, it was necessary for the arbitrator to go into the question of the alleged adoption of Debi Prasad by Raghunath. The share to which parties to the agreement are entitled depended upon the decision on that question. Admittedly the arbitrator has not decided that question. He has left that question open. Without deciding that question, it was not possible for the arbitrator to decide the share to which each one of the parties is entitled to.

6. In view of our above conclusion, it is not necessary for us to go into the question whether the High Court was right in its decision that the arbitrator had valued the properties arbitrarily as a fresh division of the properties is necessary.

7. For the reasons mentioned above we agree with the High Court that the suit award is liable to be set aside but the parties before us are agreed that this is a fit case for being referred to the arbitrator named in the agreement, namely, 9th defendant under Section 16 of the Arbitration Act, 1940, for deciding the question left undecided by him namely the share to which each one of the parties to the agreement is entitled and what properties should be allotted to each one of them. We order accordingly. The arbitrator shall submit his decision to the trial

court within six months from this date. In the circumstances we make no order as to costs of these appeals. Case remanded.