
(1910) 08 BOM CK 0007
In the Bombay High Court
Case No : Appeal No. 19 of 1910

Purshotumdas Ramgopal

APPELLANT

Vs

Ramgopal Hiralal

RESPONDENT

Date of Decision : 18-08-1910

Acts Referred:

Arbitration Act, 1940 — Section 10
Civil Procedure Code, 1908 (CPC) — Section 104

Citation : (1910) 12 BOMLR 852

Hon'ble Judges : Batchelor, J; Basil Scott, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Basil Scott, Kt., C.J.—The question arises in this case at the outset whether any appeal will lie.

2. The appeal is preferred against an opinion expressed by the learned Chamber Judge upon a special case stated to him, purporting to be stated in the matter of an arbitration between the plaintiff and the defendants in suit No. 781 of 1908, pursuant to a Consent Judge's Order of the 16th July 1909 and in the matter of the Indian Arbitration Act, 1899, and an arbitration between Purshotumdas Ramgopal, and Ramgopal Hiralal, Badrinarayan Ramgopal and Keshavdeo Ramgopal, pursuant to an agreement between them dated the 9th July 1909. The parties to this last-named agreement are the parties to Suit No. 781.

3. The special case states that the suit was instituted for partition of the properties other than the Immovable properties situate outside the jurisdiction of the Court belonging to the joint family consisting of the plaintiff and the defendants. On the 9th of July 1909 two agreements were entered into between the parties,

4. Clause 3 of the special case states :-

By the first agreement the parties agreed inter alia to refer to the award,

determination and final arbitration of Messrs. Tribhuwandas Narotamdas Malvi and Merwanji Kaikhusro Alpaiwalla, Attorneys of this Honorable Court, to ascertain and determine the moveable properties and assets specified in the said agreement belonging to the said joint family in which the said arbitrators might hold the said Purshotum Ramgopal entitled to the reliefs claimed in the above suit and to effect a partition of the said properties between the parties on the footing that each of them was entitled to an equal one-fourth share therein.

5. Clause 4 says:-

By the second agreement the parties agreed to refer to the award, determination and final arbitration of the said Messrs. Tribhuwandas Narotamdas Malvi and Merwanji KaiUhusro Alpaiwalla to ascertain the properties other than those that may be held by the said arbitrators to be covered by the aforesaid suit and to take necessary accounts in respect thereof, and to effect a partition thereof between the parties on the footing aforesaid.

6. Clause 5 states:-

By a Consent Judge's Order dated the 16th July 1909 made in the said suit, the said first agreement of reference was declared to be for the benefit of the third defendant and sanctioned, and it was ordered that the matters mentioned in the said agreement of reference be referred to the arbitration of the said arbitrators.

7. Then the case proceeds to state certain questions which have arisen as to whether moneys should be set apart for the marriage expenses of certain male and female members of the family and for the maintenance of a girl named Ratni. Clauses 12, 13 and 14 are as follows :

12. The arbitrator Tribhuwandas Narotamdas Malvi awards that no sum should be set apart for the expenses of marriage of Keshavdeo, or for the expenses of marriage and " Moklava " and maintenance of Katni; nor, in the alternative, any sum presented to her which may be appropriated for her marriage expenses.

13 The arbitrator Merwanji Kaikhusro awards that a reasonable sum should be set apart for the expenses of marriage of Keshavdeo and for the expenses of marriage, " Moklava" and maintenance of Batni; or, in the alternative, a reasonable sum may be presented to her out of the joint family property which may be appropriated for her marriage expenses.

14. The questions of law for the opinion of the Court are whether before partitioning the said joint family properties a reasonable sum should be set apart by the arbitrators out of the said properties;

(1) To provide for the marriage expenses of the third defendant Keshavdeo, the unmarried son of Bamgopal Hiralal, the first defendant, and

" (2) To provide for the maintenance, marriage and "Moklava" expenses of Bai Batni, the unmarried daughter of the first defendant,

" (3) Or, in the alternative, a reasonable sum may be presented to her which may be appropriated for her marriage and " Moklava" expenses.

8. It was necessary to provide for the reference to the arbitrators by the two agreements because owing to want of jurisdiction all the questions between the parties could not be raised in the suit in which the Consent Order was made.

9. Now, where there is a reference with the intervention of a Court of justice, the provisions of the Indian Arbitration Act do not apply, and the powers of the arbitrators are governed by the second Schedule of the Civil Procedure Code. (See the preamble to the Indian Arbitration Act and Section 89 of the Civil Procedure Code). Therefore, with regard to the arbitration so far as it affects the subject of the suit, the arbitrators could only take the opinion of the Court under Rule n of Schedule II of the Civil Procedure Code, which provides that upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon and shall order such opinion to be added to and form part of the award. With regard to the other agreement of the 9th of July the provisions of the Indian Arbitration Act apply. The only section of that Act, which gives the arbitrators power to take the opinion of the Court, is Section 10(b), which provides that they shall have power to state a special case for the opinion of the Court on any question of law involved.

10. It is conceded that if the arbitrators are merely stating a a case for the opinion of the Court before they have made an award no appeal lies, as has been decided, in England with reference to Section 19 of the Indian Arbitration Act of 1889, in *In re Knight and Tabernacle Permanent Building Society (arbitration)* [1892] 2 Q.B. 613 and *In re Holland Steamship Company and Bristol Steam Navigation Company* (1906) 95 L.T. 769. It is, however, contended that this special case is an award in the form of a special case which the arbitrators were competent to submit either under Rule 11 of the second Schedule of the CPC or Section 10 of the Indian Arbitration Act, and that an appeal is expressly provided for by Section 104 of the Civil Procedure Code.

11. With reference to the scope of Section 10 (b) of the Indian Arbitration Act, it is material to note that in the English Arbitration Act, upon which the Indian Arbitration Act was based, there are two sections providing for references to the Court by arbitrators, namely a. 7 (b). which permits the arbitrators to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court, and Section 19, which permits them to state, in the form of a special case for the opinion of the Court, any question of law arising in the course of the reference. It appears to us that the legislature in framing Section 10 (b) of the Indian Arbitration Act has deliberately followed the wording of Section 19 of the English Act and in framing Rule 11 of the 2nd Schedule of the CPC has followed the wording of Section 7 (b) of the English Act.

12. According to the decisions of the Court of Appeal in England in *In re Knight and Tabernacle Permanent Building Society* [1892] 2 Q.B. 613 and *In re Kirkleatham Local Board and Stockton and Middlesborough Water Board* [1893] 1 Q.B. 375, an appeal lies from the opinion of the Court expressed upon an award stated in the form of a special case, and that is provided for by Section 104 of the Civil Procedure Code.

13. It has, therefore, been necessary for counsel on behalf of the appellant to argue that the special case with which we are concerned is an award stated in the form of a special case. This argument is only material with reference to the arbitration proceeding under the Consent Judge's Order of the 16th of July. The agreement which was adopted by that order provides that "the arbitrators are authorised from time to time to make an interim award or awards or make or direct partial distribution or distributions of the said property and in case the said arbitrators shall by reason of disagreement or any other cause fail to make an award or determine any matter or matters hereby referred to them, the matter or matters as to which there shall be such failure be and they are hereby referred to the umpirage and decision of such person as the said arbitrators shall before entering upon this reference appoint to act as umpire who shall likewise have authority to make an interim award or awards." The agreement, therefore, provides that in the case of disagreement between the arbitrators which prevents them from making an award such as is contemplated in the agreement, the matter in difference is to be referred to an umpire who shall make the award.

14. Now, the special case discloses a difference of opinion between the arbitrators, and there has been no reference to any umpire; and we are unable to hold that the mere use (in our opinion, a mistaken use) of the word "award" in Clauses 12 and 13 of the special case, converts a reference to the Court for its opinion upon a difference between arbitrators into an award in the form of a special case. The special case is in no sense an award. The award would have to provide, if any provision is in law necessary for the expenses of the marriage of Keshavdeo or of Ratni, what sum should be set aside; but no sum is mentioned in the case as having been agreed upon between the arbitrators as a reasonable and proper sum. Again, the special case leaves it open to the Court to take a view which is not the view of either of the arbitrators upon the questions submitted.

15. There is, therefore, no award which can be adopted by the Court by the mere expression of its opinion, and the case can only be, as it is expressed to be in Clause 14, a statement of question of law for the opinion of the Court.

16. We, therefore, are of opinion that this is not a case which falls under Rule 11 of the second Schedule of the Civil Procedure Code; but that it falls u/s 10 of the Indian Arbitration Act in so far as it relates to the agreement which was not the subject of the Court's order of the 16th July 1909; and that, therefore, no appeal lies.

17. We dismiss the appeal with costs.