

(1909) 11 CAL CK 0011
In the Calcutta High Court

Rai Charan Purkait and Others

APPELLANT

Vs

Amrita Lal Gain and Others

RESPONDENT

Date of Decision : 25-11-1909

Acts Referred:

Citation : (1909) 11 CAL CK 0011

Judgement

1. This is an appeal on behalf of the plaintiffs in an action commenced by them, u/s 525 of the Code of 1382, to file in Court, an award made upon a private reference to arbitration. The suit has been dismissed by both the Courts below on the ground that the award was inoperative and unenforceable inasmuch as it was the result of an invalid reference to arbitration, the object and effect of which were to stifle a criminal prosecution for a non-compoundable offence, a purpose, it is urged, which will not be countenanced by any Court of Justice, as it is entirely opposed to public policy. This decree of dismissal has now been assailed before us substantially on three grounds, namely, first, that it was not competent to the Courts below to examine the legality of the reference to arbitration, inasmuch as this is not one of the grounds mentioned in Sections 520 of 521 of the Code; secondly, that the reference to arbitration was not invalid, because on the face of it, it does not show that the object was to stifle a Criminal prosecution; and thirdly that there is no evidence to show that, if it was an agreement of that description, the Criminal prosecution was in respect of a non-compoundable offence.

2. In support of the first ground it has been urged that Section 526 of the Code specifies and strictly limits the grounds which may appropriately be taken to the validity of an award. This contention must, in our opinion, be overruled. It is beyond dispute that an award cannot have validity if the reference which leads to the award is itself illegal. Section 526 of the Code, no doubt, provides that if the ground, such as is mentioned or referred to, in Section 520 or 521, be shown against the award the Court shall order it to be filed. But this refers clearly to matters of procedure only, and is not exhaustive; it does not affect the inherent jurisdiction of the Court to decide a fundamental objection which goes to the root

of the matter like the one taken before us, namely, that the agreement on which the award is based was itself against public policy and thus not enforceable in any Court of Justice. If any other view were adopted, the consequence would be singularly anomalous. If the agreement itself had been sought to be enforced u/s 523 of the Code, an objection to its validity might clearly have been successfully taken. But if the view urged on behalf of the appellant is well founded; as soon as the agreement is followed by a private award the Court is powerless and may be compelled to give effect to the award though based on an agreement which no Court of Justice would recognize or enforce. We are not prepared to impute to the legislature an intention that this was the object of Section 526. The view we take is supported by the cases of *Mahomed Wahid-ud-din v. Haakiman* 25 C. 757 757 (F.B.), *Chintamallayya v. Thadi* 20 M. 89, *Amrit Ram v. Dasrat Ram* 17 A. 21 (F.B.), *Ganesh Singh v. Kashi Singh* 28 A. 621, *Gobardhan Das v. Jaikishen Das* 22 A. 224; which lay down the Rule that the Court has the power to determine all questions relating to the existence and validity of the agreement to refer to arbitration. In fact even the High Court of Bombay, where the opposite view has been adopted *Tejpur Dewchand v. Mahomed Jamal* 20 B. 596, does not hold that when the Court is invited to enforce the award it should ignore the objection as to the validity of the agreement and summarily enforce the award; it merely says, down that the applicant should be referred to a regular suit. The first ground must, therefore, be overruled as supported by neither principle nor authority.

3. In support of the second ground, it is urged that as the agreement on the face of it is not one to stifle a Criminal prosecution, no objection can be taken to its validity; it is further suggested that the object of the reference to arbitration was really to settle the matters in dispute between the parties so far as their Civil rights were concerned. No doubt the agreement on the face of it does not expressly provide that in consideration of the reference to arbitration, the plaintiff would discontinue the Criminal prosecution then pending against the defendant. But the Court is obviously not concluded by what appears merely on the face of the agreement, it must examine its true nature. If this is done, we are unable to say that the finding of the Courts below as to the real object of the agreement is not based upon any evidence. There can be no possible dispute as to the circumstances upon which the Courts below have relied in support of the conclusion that although the agreement was not expressly described, as one to stifle a criminal prosecution, the transaction amounted in its essence to a bargain not to carry on a criminal prosecution and is thus within the mischief of the rule. In the first place there is no question that a criminal prosecution was pending as against the defendant and that it had been commenced at the instance of the plaintiff. In the second place, there is no question that there was a reference to arbitration; in fact the agreement was filed in the criminal Court and on the back of the petition, we find an order, recorded apparently by the Magistrate, referring the matter to the arbitration. In the third place we find that shortly after the reference, the criminal proceedings were discontinued. Under these

circumstances we are unable to say that there" is no evidence to justify the view that the true object of the agreement was to stifle the criminal prosecution. In support of this view reference may be made to the observations of Sir Arthur Strachey, C.J., in the case of Gobardhan v. Jai Kishen 22 A. 224. But it was argued on behalf of the appellant that the same transaction may give rise to a Civil liability as also a Criminal liability, and a reference to arbitration for the settlement of the Civil dispute is valid if the object of the reference to arbitration is not to stifle a criminal prosecution. This need not be disputed and is indeed borne out by cases of the highest authority. To take one illustration, in Keir v. Leeman 6 Q.B. 308 : 66 R.R. 392 : 72 R.R. 298 : 9 Q.B. 371 : 13 L.J.Q.B. 359 : 8 Jur. 824 : 15 L.J.Q.B. 360 : 10 Jur. 742, Tindal, C.J. observed as follows: "We have no doubt that in all offences, which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit." This doctrine has been recognised in this country in the cases of Jaikumar v. Gaurinath 28 A. 718 and Nanak Chand v. Durant 9 P.R. 1906 : 19 P.L.R. 1906. But these cases are clearly distinguishable for here, as found by the Courts below, the object of the agreement was not merely to settle a Civil dispute but also to stifle a criminal prosecution. In this view of the true nature of the reference to arbitration in this case we must overrule the second contention of the appellants.

4. The third contention of the appellants is that there is no legal evidence to support the conclusion drawn by the Courts below that the criminal prosecution which it may be assumed was stifled was one for a non-compoundable offence. Here it may be observed that according to the decision of this Court in Amir Khan v. Amir Jan 3 C.W.N. 5, the authority of which had not been challenged before us on behalf of the respondent and which accords in principle with the cases of Hosein Shah v. Nur Ahmed 81 P.R. 1875, Shah Rahman v. Ismail 82 P.R. 1904, Pudishary v. Karampally 7 M.H.C.R. 378 and Daisukhram v. Bretton 28 B. 326, it was essential for the defendant to prove that the Criminal prosecution was for a non-compoundable offence, that is for an offence of a character the compromise of which is regarded by the criminal Code as forbidden by law or as against public policy. Now it appears from the proceedings in the Court below that the records of the Criminal case were not called for at the trial. We have not before us either the petition of complaint or the statement of facts by the complainant before the Magistrate nor have we the order made by the Magistrate when the summons was issued. The Court below has proceeded on the assumption that upon the facts stated by both the parties to this litigation the prosecution must have been for theft. We are unable to, accept this view, and to overlook the circumstances that the case was treated as a summons case, though if the contention of the respondent is correct, the case ought to have been tried as a warrant case. We may further observe that no foundation was laid for the reception of secondary evidence of the content of the record of the Criminal case. There is no suggestion that the records went not available or that certified

copies might not have been produced. In our opinion it is obviously unsafe under these circumstances to rely upon oral evidence in support of the suggestion that the criminal proceeding, which was discontinued as a result of the reference to arbitration, must have been in respect of a non-compoundable offence. The third ground taken by the appellant must consequently prevail.

5. The result, therefore, is that this appeal is allowed, the decree of the Court below set aside and the suit decreed with costs throughout. We direct that the award be filed u/s 523 of the Code of 1882 and that it do take effect as an award made under the provisions of Chapter XXXVII of that Code.