

(1935) 01 CAL CK 0049
In the Calcutta High Court

Sarafuddin Nur Ahmad Mazumdar and Another	APPELLANT
Vs	
Jibannessa Khatoon and Others	RESPONDENT

Date of Decision : 31-01-1935

Acts Referred:

Citation : 163 Ind. Cas. 347

Hon'ble Judges : R.C. Mitter, J

Bench : Single Bench

Judgement

R.C. Mitter, J.—This appeal is on behalf of the plaintiff and arises out of a suit for declaration of title, confirmation of possession, in the alternative for a conveyance of the properties described in schedules ga and gha of the plaint on the basis of the provisions of para. 48 of an award which was followed by a decree. His suit has been dismissed by both the Courts below. Hence the present appeal.

2. The relevant facts are these. The plaintiff and the defendants were co-sharers. In 1919, a suit for partition was instituted in which the plaintiff and the defendants as also their other co-sharers were parties. This suit was numbered as Title Suit No. 6 of 1919. The subject-matter of the suit was referred to arbitration and the arbitrators filed the award in Court on December, 22, 1920. The award was accepted by the Court and a decree was passed on it. By the award, the arbitrators allotted different portions of the joint property to the different co-sharers. The plaintiff was given in his Saham certain lands representing 2-3rds share of a taluq and all the lands of 8,hoivla. The land of schedule ga of the plaint is a holding originally held by Safaraddi which fell within the 2-3rds of the taluq included in the plaintiff's allotment. The land of schedule gha is also a holding held by Safaraddi and fell within the howla which was allotted to the plaintiff at the partition. In Clause 48 of the award, the arbitrators make a provision that none of the co-sharers, thereby meaning the parties to the suit, would be able to purchase or acquire any interest in any subordinate tenancy falling within the allotment of any other co-sharer and if he acquired

such an interest he would be bound to convey the same without receiving any price what so ever to the other co-sharer within whose allotment the lands of the tenancy are situate. This clause further provides that the co-sharer" so purchasing would amicably make the conveyance and if he refuses to do so amicably, the other co-sharer would be entitled to enforce the rights given by this clause and obtain a conveyance. In the last portion of this clause, the arbitrators state that they felt a doubt whether they could include a provision of this nature by the terms of the reference to them. They then say that the parties themselves before them agreed to the aforesaid terms and they accordingly embodied the same in the award. Paragraph 48 of the award really embodies the contract between the parties in this respect. In contravention of these terms defendant No. 1 purchased in the benami of defendant No. 2 the two holdings described in schedules ga and gha of the plaint on March 20, 1922. On July 22, 1924, the plaintiff purchased from defendant No. 2 in the benami of the Haran Chandra Chakravarty the properties described in schedules ga and gha. After this purchase, defendant No. 1 brought a Title Suit No. 189 of 1927, against the heirs of Saferaddi, defendant No. 2, and Haran Chandra Chakravarty, the plaintiff's benamdar. In that suit, he prayed for a declaration that he himself was the beneficial owner and not the defendant No. 2 and that Haran Chandra Chakravarty did not acquire any title. He also prayed for possession. This suit was decreed on July, 4, 1927, the question as to the effect of Clause 48 of the award being left open as between the parties. The plaintiff's case is that after this decree he required the defendant on July, 14, 1929, to execute a conveyance in his favour in respect of the two properties but there was a refusal. On July 24, 1929, he instituted a suit out of which this appeal arises. The Court of first instance dismissed the plaintiff's suit mainly on the ground that there was no consideration which would support the provisions of Clause 48 of the award. The lower Appellate Court has affirmed the decree made by the learned Munsif but on different grounds. It has stated that inasmuch as Clause 48 provided for a transfer of title from defendant No. 1 to the plaintiff without any payment being made for the transfer to the plaintiff by the defendant No. 1, the provision contained in Clause 48 is against public policy and cannot be forced. It has further held that Clause 48 offends against the rule of perpetuities. On these two grounds the said Court dismissed the plaintiff's suit deciding in his favour other questions raised by the defendant, namely, the question of the validity of the award, the question of res judicata and the question of limitation.

3. Before me, the learned Advocate who appears on behalf of the respondents supports the decree made by the learned Subordinate Judge not only on the grounds mentioned by him but also on two grounds, namely, Clause 48 ought to have been held to be inoperative, as being beyond the reference to the arbitrators and secondly, the suit is barred by limitation.

4. Before dealing with the points made by the learned Subordinate Judge, it would be convenient to deal with the further points raised by the learned Advocate for the respondents for, in my opinion, there is no substance in any of

them. In my judgment, there is no substance in the question of limitation. As I have already stated, Clause 48 of the award really embodies the contract between the parties and that is also the finding of the learned Subordinate Judge. If it be so, a suit to enforce the rights arising under that clause would come under Article 113 of the Limitation Act. Inasmuch as no time was fixed for the purpose of enforcing the obligation mentioned in the said clause, limitation would run from the date of refusal of the defendant to perform his part of the contract. The plaintiff in his plaint stated that he made a demand from the defendant on July 4, 1929. There is a vague denial of the said statement in the written statement. In these circumstances, the plaintiff came to the box and he stated that he did make a demand in July 1929, requiring the defendant No. 1 to execute the conveyance in his favour but that demand was not complied with. There is no cross-objection directed to this pari; of the evidence of the plaintiff nor did any of the witnesses examined on behalf of the defendant challenge this statement of the plaintiff. I must, therefore, take it that there was the refusal on the part of the defendant to convey the properties to the plaintiff in July 1929. In that view of the matter, the suit is well within time and there is no substance in the point of limitation. The lower Appellate Court stated that Article 141 would be the article applicable and it was for the defendant to prove adverse possession but I do not agree with the learned Subordinate Judge and I think that there is no scope for the application of Article 144 on the ground that a person cannot prescribe with regard to his own property, the property having been conveyed to defendant No. 2 for the benefit for defendant No. 1, the possession of defendant No. 1 would be the possession of a rightful owner and not of a wrongdoer. Although I do not support the reason of the learned Subordinate Judge when he over-ruled the plea of limitation, I do hold that the suit is not barred by limitation for the reasons I have indicated above. Assuming that para. 48 embodies the decision of the arbitrators and not the contract between the parties) Article 120 would be the proper article to apply and the cause of action would arise from the date of the refusal of the defendant to convey the properties to the plaintiff. In this view of the matter, the suit is not barred by limitation.

5. The learned Advocate for the respondents has further argued that it was the duty of the plaintiff, as has been remarked by the learned Munsif, to examine one of the arbitrators, at least to prove that the provision of para. 48 came within the scope of the reference to them. I do not see any substance in this contention. If any of the parties want to challenge an award on the said ground, the only way in which they can do it is by taking objections to the award in the course of the suit in which the award has been made. In this view of the matter I am fortified by the decision of Air. Justice D.N. Mitter, elated March 30, 1933, and pronounced in Appeal from Original Order No. 133 of 1932 (Jnanendra Nath Bhadury v. Rabindra Chandra Chakravarty). Besides the learned Subordinate Judge has found as a fact that the parties did agree before the arbitrators to the provisions of Clause 48 being inserted in the award. Clause 48 of the award, therefore, really embodies the contract and if it cannot be so regarded certainly there was

enlargement of the original authority given to the arbitrators.

6. I would now deal with the reasons given by the learned Subordinate Judge in dismissing the plaintiffs suit. I do not see how the provisions of para. 48 of the award can be said to be without consideration. The suit was being settled and the settlement of the disputes involved in the partition suit is the consideration which supports each one of the clauses mentioned there. I do not see either how those provisions would be against public policy. In the case of *Janson v. Driefontein Consolidated Mines* (1902) A.C. 484 : 71 L.J.K.B. 857 : 87 L.T. 372 : 51 W.R. 442 : 7 Com. Cas. 268 442, Lord Davey observed at page (1902) A.C. 500 to the following effect "Public policy is always an unsafe and treacherous ground for legal decision". The true scope of the doctrine is stated by Lord Halsbury in the same judgment at page (1902) A.C.491 and by Sir George Jessel in the case of *Print in a and Numerical Registering Co. v. Sampson* (1875) 19 Eq. Cas. 462. Sir George Jessel makes this observation:

It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and their contracts when entered into freely voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore with this paramount public policy to consider that you are not lightly to interfere with this freedom of contract

7. Lord Halsbury at page (1902) A.C. 491 in *Janson's case* (1902) A.C. 484 : 71 L.J.K.B. 857 : 87 L.T. 372 : 51 W.R. 442 : 7 Com. Cas. 268 , makes these remarks when dealing with the contention that a contract of insurance providing against capture of the insured treasure during transit by a foreign estate was opposed to public policy says thus:

I do not think that the phrase "against public policy" is one which in a Court of Law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. But I do not think the Law of England does leave the matter so much at large as seems to be assumed. In treating of various branches of the law, the learned persons have analysed the sources of the law, and have some times expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any Court can invent a new head of public policy; so contract for marriage brokerage, the creation of perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King's enemies are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a Judge or Court have a right to declare that such and such things are in his or their view contrary to public policy.

8. I do not see having regard to these principles how the provisions of para. 48 of the award can infringe any rule of public policy. That clause is evidently put in for the peaceful enjoyment of a co-sharer the lands allotted to his share on partition, by preventing the intrusion of a disagreeable co-sharer on his property through the artifice of purchasing tenancy rights. One of the objects of settling the partition suit amicably was to restore peace amongst the co-sharers and Clause 48 of the award is one of the clauses intended to effect that object. How could it be against public policy, I fail to see. Simply because the co-sharers had not to pay the price which the other co-sharers had paid for purchasing the property from the tenant would not make it against public policy. The purchasing co-sharer in the position of the defendant had no business to get into allotment of his other co-sharer, namely, the plaintiff in this case.

9. The last question that has to be decided now is whether the clause offends against the rule against perpetuity. The award which is a document covering a large number of pages does not contain a general clause that the rights given to the parties under the award are to be available to the heirs and legal representatives of the parties. In Clause 48 also there is no mention that the right of pre-emption if I may use that expression, is given to the parties to the suit and their heirs, assigns or legal representatives. Reading pi. 48 fairly, I come to the conclusion that the rights conferred by that clause and the corresponding obligations imposed by the clause are limited to the parties to the suit. They are in the nature of personal covenant as between parties to the suit. In this view of the matter, no question of perpetuity arises, and the contract is valid and enforceable as between the parties to the suit of the year 1919. The plaintiff was admittedly a party to that suit. The observations in the case of *Kala Chand Mukherjee and Another Vs. Jatindra Mohan Banerjee and Others*, , fully support the view of the law that I am taking.

10. The result is that this appeal is allowed, the decrees of the Courts below are set aside and in lieu thereof the following decree is made. Defendant No. 1 is directed to execute the conveyance at the cost of the plaintiff in respect of the properties described in schedules ga and gha of the plaint within two months of the arrival of the record to the Court of first instance. If the defendant refuses to execute the conveyance within the time so limited, the learned Munsif would execute the conveyance on behalf of the defendant No. 1. The plaintiff's possession in the properties is also confirmed. As the plaintiff has succeeded in his suit he will have the costs of the Court of first instance, the costs of the lower Appellate Court and the costs of this Court. Let the records of this case be sent down to the Court of first instance as early as possible. Leave to appeal under the Letters Patent asked for is refused.