

(1944) 09 AHC CK 0006
In the Allahabad High Court
Case No : Misc. Appeal No. 58 of 1940

Sher Bahadur Singh alias Sham Sher Bahadur Singh	APPELLANT
Vs	
Ram Narain Singh and Others	RESPONDENT

Date of Decision : 11-09-1944

Acts Referred:

Arbitration Act, 1940 — Section 48

Citation : (1944) 09 AHC CK 0006

Hon'ble Judges : Madeley, J;Bennett, J

Bench : Division Bench

Advocate : M. Wasim, for the Appellant; Niamatullah and Aziz Uddin, for the Respondent

Final Decision : Dismissed

Judgement

Bennett and Madeley, JJ.—This is a miscellaneous appeal u/s 39(6) of the Arbitration Act (X of 1940) from an order passed by the Civil Judge of Partabgarh setting aside an arbitration award dismissing the Appellant's suit. It is prayed that if the appeal be considered incompetent it may be treated as an application in revision u/s 115 of the Code of Civil Procedure.

2. Learned Counsel are agreed that as a question of jurisdiction is involved an application in revision would lie, but it is contended for the Respondents that an appeal does not lie.

3. The reference to arbitration was made under the provisions of the Second Schedule of the Code of Civil Procedure. The arbitrator's award is dated the 21st March, 1939, and the judgment of the Civil Judge is dated the 12th August, 1940. The Act came into force on the 1st July, 1940.

4. Learned Counsel for the Appellant conceded that no appeal lay under the Second Schedule, but he relied on the fact that an appeal was provided by the Act before judgment was pronounced. Learned Counsel for the Respondents referred to Section 48 of the Act under which

"the provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before commencement of this Act shall, notwithstanding any repeal effected by this Act, continue to apply."

5. He argued that the reference remained pending until judgment was pronounced.

6. We are unable to agree. No doubt the suit remained pending, but we think a distinction must be drawn between the reference and the suit, and that proceedings on the reference were complete when the award was made. If the award had been remitted by the Court to the arbitrator under paragraph 14 of the Second Schedule the reference would remain pending until the arbitrator had reconsidered it, but that is not the position here. The appeal is not therefore in our opinion barred by Section 48, the reference not being pending when the Act came into force.

7. As regards the effect of an enactment which he provides an appeal during the pendency of a suit, where previously no appeal lay, we need only refer to the Full Bench decision of this Court in *Debi Prasad v. Phundan Lal* 1942 O.A. 189 : A.W.R. (C.C.) 177 : O.W.N. 251, which is clear authority for the view that an appeal will lie, unless barred by the terms of the enactment, in a suit which was not finally decided when the new provision came into force.

8. We hold therefore that an appeal lies in the present case.

9. The suit before the Civil Judge was instituted under Paragraph 17 of the Second Schedule upon an application to file in Court an agreement for reference to arbitration. It was admitted by Mr. Krishnanand Pande who was then the Civil Judge. His order, dated the 31st May, 1937, is almost illegible, but we understand from it that "the dispute described in the agreement" was referred to the arbitration of Mr. Sital Prasad who was directed to file his award accompanied by proper partition chitthis and partition maps" within three months. It was added that as the partition involved the partition of 19 villages in all six chitthis and six maps (that being the number of parties to the agreement) would have to be made in respect of each village. There was no consideration of the question whether the Civil Judge had jurisdiction to entertain the application.

10. The case came before Mr. Qadir Hasan, the Civil Judge whose order is appealed against, after the award had been filed, and he dismissed the suit on two grounds, failure to register the award and want of jurisdiction of the Civil Judge. Both grounds have been challenged in this appeal.

11. As regards the first ground learned Counsel for the Respondents conceded that in view of the authorities cited on the other side he could not support the Civil Judge's view. The Civil Judge relied on *Chimanlal Girdhar Ghanchi Vs. Dahyabhai Nathubhai Ghanchi*, . The facts of that case are not quite clear, but it is suggested that arbitration in that case was resorted to without the intervention

of the Court. The judgment, however, does not make any distinction between the different modes of procedure provided in the Second Schedule and the Civil Judge was no doubt justified in considering it authority for his view.

12. In some other cases cited a distinction has been drawn for this purpose between awards made with the intervention of the Court and awards made without, only the latter being held invalid on account of non-registration. The three different modes of procedure provided in the Set and Schedule and the powers of the Court in dealing with each were explained by their Lordships of the Judicial Committee in *Ghulam Jilani v. Mohammad Hassan* (1902) 29 I.A. 51. In *Jitendranath De v. Nagendranath De* (1935) 62 Cal 201, it was held that registration is necessary where an arbitrator is appointed without intervention of the Court, and that view has not been disputed by the Appellant's learned Counsel, though it was held by a learned single Judge of the Allahabad High Court in *Sheo Ram v. Ram Datt* 1937 A.W.R. 1218 : A.L.J. 1303, that registration was not required even when the arbitration takes place without the intervention of the Court and the assistance of the Court is afterwards sought only in order to give effect to the award. The law, we think, we correctly laid down by a Bench of the Rangoon High Court in *Kya Hla Pru v. Ma Pan Mra Pru* (1935) 154 I.C. 557, where it was said

"Had the reference to arbitration been a private one, outside the Court, then the reference to arbitration together with the award of the arbitrators would constitute a pair of documents which would in themselves purport to effect the partition and an award of this nature would no doubt be of no effect unless registered, but an award made by arbitrators appointed by the Court with a view to having its terms incorporated in a decree of the Court is not an award which can be compulsorily registerable".

13. This view is adopted by Mulla in his commentary on the Registration Act (4th Ed. p. 103) and we feel no doubt that it is the correct view. We accordingly hold that the Civil Judge was not justified in rejecting the award on this ground.

14. Coming to the second ground, want of jurisdiction, we must first explain that litigation between the parties for partition was initiated by the institution in the Civil Court of a suit for the partition of joint family property of various kinds, moveable and immoveable. The record of this suit is not before us, but the parties are agreed that a decree was passed on compromise on the 16th July, 1936, and that thereafter an arbitrator was appointed for the division of the cash and jewellery.

15. The decree has not been placed before us and the learned Counsel for the Respondents has argued that in these circumstances we are entitled to presume that it was in terms of Order 20 Rule 18, that is, that in so far as it related to moveable property it was a preliminary decree, but that in so far as it related to an estate assessed to the payment of revenue to the Government it declared the rights of the several parties interested in the property, and directed the partition

to be made by the Collector in accordance with such declaration and with the provisions of Section 52. If so the Civil Court was divested of further jurisdiction. The parties could have applied for the actual partition to be carried out by an arbitrator, but it was necessary to make the application to the Collector u/s 113 of the U.P. Land Revenue Act.

16. For the Appellant it is contended that no such presumption as regards the nature of the decree should be drawn. learned Counsel stating that the decree did not deal specifically with the revenue paying property while admitting that the suit was for partition of such property as well as of moveable property. He suggests that it may have been of a preliminary nature in both cases, without prescribing subsequent procedure.

17. As the procedure which should have been adopted is clearly indicated in Order 20 Rule 18 we consider that it would be justifiable to presume that it was adopted, and that to rebut the presumption the Appellant should have produced the decree.

18. We might therefore dismiss this appeal on the finding that the Civil Court had no further jurisdiction in the matter after passing this decree of the 16th July, 1936. It is pointed out that the application to refer to arbitration did not purport to be made in the course of any pending proceedings. It was an application under Paragraph 17 of the Second Schedule. We doubt whether this makes any difference, but even if it was open to the applicant to make such an application after the passing of the decree we consider that the application is such that the Civil Judge should have at once realised that he had no jurisdiction to entertain it.

19. It is clear that Mr. Sital Prasad, the Advocate who was appointed arbitrator, realised the difficulty. He saw that he could not make the partition in the way desired by the parties and in these circumstances he made it in a way which he thought would meet the difficulty. But even if it did, did the award is open to the objection that it is not in accordance with the reference.

20. In his award Mr. Sital Prasad referred to the wish of some of the parties that partition be carried out by metes and bounds. With regard to this he said:

"I had no objection in coping (Sic) with their views but the law compels me not to carry out the partition by actual division. Civil Courts have no power to carry out the actual partition of revenue paying mahals. All the khatas involved in this case are revenue paying. I cannot therefore carry out the partition by metes and bounds."

21. The Appellant's learned Counsel has argued that what the arbitrator did is not outside the jurisdiction of a Civil Court. He has discussed at length the implications of Section 54 of the Code of Civil Procedure, citing cases of the Calcutta, Madras and Patna High Courts. On the other side it has been pointed out that the earlier cases cited relate to a time prior to the present Code in which Rule 18 of Order 20 has been added to the provisions of the previous Code, and

that the later cases do not consider the effect of this rule. Reliance is placed on the provisions of Section 233(k) of the U.P. Land Revenue Act which are not, it is said, to be found in the same terms in the relevant enactments in force in other provinces.

22. On the view which we have taken of these proceedings it is clearly unnecessary to consider these arguments. If we did consider them it would be necessary first to ascertain and show exactly what the arbitrator did, and this the Appellant's learned Counsel himself seemed to have some difficulty in appreciating. He was unable to explain the award except in general terms. It will be apparent that the arbitrator's difficulty in making an award within the scope of the powers of a Civil Court were very real when we mention that according to the award "in the villages to be divided there are certain khatas which are jointly held by the parties and other persons who are not parties to the suit"; and that in a certain village, where one co sharer was in possession of a very large area of sir and khudkasht, the arbitrator had tried to give each co-sharer some land as desired by them.

23. The last objection taken on behalf of the Appellant to the order appealed against was that the setting aside of the award is not justified by any of the grounds specified in Paragraph 15 of the Second Schedule. But this objection does not arise on the view that the award is void because the whole proceedings commencing with the application under Paragraph 17 were without jurisdiction. Moreover there is in Paragraph 15 the general ground "otherwise invalid", and an award which is not in accord with the agreement to refer or the Court's order thereon may be held to be invalid.

24. We accordingly dismiss this appeal with costs.