

(1991) 10 PAT CK 0011

In the Patna High Court

Case No : Miscellaneous Appeal No. 219 of 1982

Sri Kishum Singh and Others

APPELLANT

Vs

Kamta Ram and Others

RESPONDENT

Date of Decision : 30-10-1991

Acts Referred:

Citation : (1991) 10 PAT CK 0011

Final Decision : Allowed

Judgement

Binod Kumar Roy, J.—In this Miscellaneous First appeal u/s 39 of the Arbitration Act; 1940 the Plaintiffs assail the validity of the judgment dismissing their suit filed for setting aside an arbitration award.

2. In view of the main short submission made by Mr. Keshari Singh, learned Counsel for the Appellants, namely, that the trial court in paragraph 19 of its judgment has erred in refusing to set aside the award on the ground that an un-probated will can be acted upon, it is not necessary to state facts in detail which have already been stated in the impugned judgment.

3. The land in question belonged to one Sri Kishun Ram who according to the Appellants had died on 12.4.73 in Sasaram Hospital leaving behind his widow Most. Nagia Kuar and daughter Paudharo Devi (who however were not made parties to the petition filed by the Appellants for setting aside the award in question). The Appellants derived title of the suit properties on the basis of the sale deeds dated 28.2.1974 (Ext. 5 and 5/A) executed by the widow and daughter after permission of the Consolidation Authority as required under the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956. The Defendant 1st party, however, started claiming the lands in question on the basis of a will said to have been executed on 24.4.1973 (Mr. Singh states that it should be on 21.4.1973; that is to say after the death of Kishun Ram and, thus, it is forged and fabricated, besides that as no probate has been obtained, it conferred no title on them. The said dispute was referred to five arbitrators who, however, refused to arbitrate on the ground that the reference itself has become time

barred. It however, transpired later on that out of five arbitrators three came in collusion with the Defendants 1st and IIInd parties and pronounced their award on 16.8.1985 and registered which for the reasons aforesaid is illegal, void and liable to be set aside.

4. In defence the allegations made by the Appellants were denied by the Appellants stating, inter alia, that Kishun Ram had died on 0.5.1973 that a probate case has been filed before the District Judge, Arrah which is (sic) that notices were given by the (sic) and they pronounced their award according to law. It was also asserted that the applicants have no right in the suit (sic)

5. The trial court framed the following nine issues after re-cast:

1. Is the suit as framed maintainable?
 2. Have the Plaintiffs got valid caused action for the suit?
 3. Is the suit barred by law of limitation?
 4. Whether the suit is hit by the period pies of waiver, estoppel and acquiescence?
 5. Whether the suit is hit by Section 34 of the Specific Reliefs Act?
 6. Is the suit bad for non-joinder or mis-joinder of parties?
 7. Whether the panches have (sic) themselves or the proceeding and acted against the provisions of law?
 8. Is the award in question invalid illegal?
 9. To what reliefs or relief, if any, are the Plaintiffs entitled to?
6. Evidence was also led by the parties.

7. By the impugned judgment the Appellants' case that Kishun Ram had died on 12.4.1973 was disbelieved. It was also held that it can not be said that the arbitrators has mis-conducted themselves or in the proceeding or did not assess the evidence of the Plaintiffs (Appellants) correctly. In paragraph 19, the argument made on behalf of the Appellant that without probate the will could not be relied upon was rejected by placing reliance on a decision of the Allahabad High Court reported in AIR 1978 All (sic) Bhaiyo Ji v. Jageswar Dayal Bajpai. The judgment shows issues Nos. 1 and 3 to 6 (sic) pressed.

The Submissions:

8. Mr. Singh, learned Counsel for the Appellants, in support of the appeal, submit as follows:

(i) The Arbitrators erred in ignoring the law that an un-probated will vested no title in the Defendants 1st party and this aspect of the matter was illegally ignored by them. In this regard he places reliance on a decision of the apex court in the case of Continental Construction Co. Ltd. Vs. State of Madhya Pradesh,

The court below committed an error of law in not applying the law declared by this Court in this regard and erred in placing reliance on the decision of the Allahabad High Court.

(ii) The trial court erred in not considering the fact that the Appellant's title and possession was amply supported by their sale deeds and rent receipts etc.

9. No one appears to contest the appeal though Mr. Rajesh Kumar, Advocate had filed vakalatnama on behalf of the Respondent nos. 1 to 4.

My Findings:

10. In *Continental Construction Co. Ltd. T. State of Madhya Pradesh {supra}*, relied upon by Mr. Keshari Singh, the apex court held as follows:

The arbitrator is not a conciliator and can not ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to "decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Court provided his error appears on the face of the award.

(Emphasis added)

11. So far as the law as declared by this Court is well settled that no right on title can be founded on an un-probated will see Division Bench decision in *Mahabir Das Vs. Udit Narain Verma and Others*, a learned single Judge decision in *Jangli Singh and Ors. v. Inder Singh and ors.* 1953 B.L.J.R. 479, and again a Division Bench decision in *Babulal Mandal and Others Vs. Sm. Abala Bala Dasya and Others*, (paragraph 6).

12. From paragraph 19 of the judgment, it is clear that no probate was granted to the will in question. The will, thus, was not admissible in evidence for the purpose of conferring any title in the disputed lands on the Defendants 1st party, as claimed and thus the arbitrators committed an apparent error of law in making their award in favour of the Defendants 1st party. I, thus, hold that the award in question was illegal and that the court below erred in holding to the contrary. The trial court was bound by the law declared by this Court and it erred in placing reliance on the decision of the Allahabad High Court reported in *Bhaiya Ji Vs. Jageshwar Dayal Bajpai*, ignoring the decisions of the court.

13. Mr. Singh also states that Title Suit 9 of 1974 filed for grant of letters of administration of the will in question was also dismissed by the judgment dated 16th November, 1981 but he is not in a position to state that as to whether any appeal was filed or not. Be that as it may since the judgment is not on the record I do not attach any importance to this fact.

14. The claim of title of the Defendants having failed, they were not competent to challenge the title of the Appellants in the absence of any pleading and proof of acquisition of title by adverse possession and the trial court erred in not holding the Appellants title on the basis of the sale deeds Exts. 5 and 5A. The

deeds could at best be challenged by the transferors or any other legal owner. According to the Defendants they used to do cultivation work of those lands. This defence was dead against any valid defence of possession. The trial court had also erred in brushing aside the rent receipts Ext. 3 series by placing reliance on oral testimony of D.Ws. 4, 5, 10, 16 and 31. Merely because sharadh was allegedly performed by a relation, the recitals in the deeds executed by the legal representatives were Dot falsified. Accordingly I hold that the Appellants acquired valid title on the basis of Exts. 5 and 5A.

15. I hold that the award was vitiated by an apparent error of law and the Appellants were entitled to the reliefs claimed for and the" court below had erred in dismissing their suit. Findings to the contrary recorded by the court below are, thus, set aside.

16. This appeal is, thus, allowed. The impugned judgment and decree are set aside and the suit decreed. However, as, no one has appeared on behalf of the Respondents to contest there shall be no order as to cost.