

(1927) 01 CAL CK 0041
In the Calcutta High Court

(Srimati) Saroj Bala and Others

APPELLANT

Vs

Jatindra Nath Bose and Others

RESPONDENT

Date of Decision : 05-01-1927

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 5, 110

Citation : AIR 1927 Cal 619 : 103 Ind. Cas. 625

Hon'ble Judges : Rankin, C.J;C.C. Ghose, J

Bench : Full Bench

Judgement

C.C. Ghose, J.—This is an application for leave to appeal to His Majesty in Council against a final order made by this Court on the 28th of July 1926 in Appeal from Original Order No. 53 of 1924 arising out of Title Suit No. 191 of. 1920 in the Court of the 2nd Subordinate Judge of the 24 Perganas the order complained of is one which affirmed the decision of the Court immediately below. As regards the amoun for value of the subject-matter of the suit in the Court of 1st instance and in dispute on appeal to His Majesty in Council, it is more than Rs. 10,000. In these circumstances the only question that has got to be enquired into is whether the appellant for leave to appeal to His Majesty in Council has satisfied this Court that the appeal involves soma substantial question of law. The facts shortly stated are as follows.

2. On the 18th of August 1920, the said suit was filed in the Court of the 2nd Subordinate Judge of the 24-Perganas by the plaintiff Profulla Kumar Bose against four defendants for partition of the estate of one Priya Nath Bose who was the grandfather of the plaintiff and the father of Defendants Nos. 1 and 2 and the father-in-law of Defendants Nos. 3 and 4. It is unnecessary to mention the names of the defendants other than the Defendants Nos. 3 and 4. Defendant No. 3 is Sm. Niroj Sundari Bose, the widow of the eldest son of the testator and the applicant for leave to appeal to His Majesty in Council is Defendant No. 4 Sm. Sarojbala Bose.

3. It appears that on the 21st of June 1921, a petition of compromise to which

the Defendant No. 3 was no party, was filed before the Subordinate Judge. The testator Priya Nath Bose had left a Will under which the Defendant No. 3 was entitled to a maintenance of Rs. 25 a month and a right of residence in the family dwelling house No. 73, Amhereat Row. As stated above she was no party to the petition of compromise and she had at no time entered appearance in the suit itself. There was no dispute, however, as regards the rights of the Defendant No. 3 in the estate left by the testator Priya Nath Bose. When the petition of compromise was brought to the notice of the learned Subordinate Judge, he came to the conclusion that as the plaintiff had not adduced any evidence whatsoever as against the Defendant No. 3, the suit should stand dismissed as against her and he passed an order accordingly. As regards the parties to the petition of compromise, the learned Subordinate Judge finding that there was no dispute as regards the shares of the other parties in and to the estate of the testator and further that the parties had waived accounts as against each other, passed a preliminary decree in accordance with the petition of compromise. One of the terms, being Clause 9 of the petition of compromise, provided for a reference to certain arbitrators named therein to partition the estate of the testator by metes and bounds.

4. The arbitrators, under the reference to them, made an award which was filed in Court on the 27th of October 1922. Upon the said award being filed, the learned Subordinate Judge passed the following order: "Inform the pleaders of both sides. Put up for final orders on the 10th November next." It appears from the original record which we have examined for ourselves that two of the pleaders engaged in the case signed their names against the said order in the order sheet. It is suggested that the pleader for the Defendant No. 4 who is the present applicant before us did not sign the order sheet. Be that as it may, if appears from the evidence of the pleader of the Defendant No. 4 Jiva Priya Roy (see in this connexion page 104 of the paper-book) that the Bench Clerk of the Subordinate Judge informed him of the fact of the filing of the award in Court by the arbitrators and that thereupon he took time from the Court to inform his client of the fact of the award having been so filed. After certain adjournments had been granted by the learned Subordinate Judge a final decree in accordance with the award was passed by him on the 22nd of November 1922.

5. Thereafter on the 20th of December 1922 two petitions were presented to the learned Subordinate Judge by the present applicant one under Order 9, Rule 13 Civil P.C., asking for the setting aside of the said final decree and another under para. 15 Schedule II of the CPC praying for the setting aside of the award made by the arbitrators. Those two petitions were heard together and the learned Subordinate Judge came to the conclusion that no case had been made out for the setting aside of the final decree or for the setting aside of the award. Against this judgment an appeal was brought to this Court and, as stated above, their Lordships Mr. Justice Suhrawardy and Mr. Justice Mallik by their judgment dated the 28th of July 1926 dismissed the said appeal.

6. At the hearing of the present application the learned Advocate General who appeared on behalf of the applicant urged two points, namely, (1) that the reference to the arbitrators was illegal inasmuch as Defendant No. 3 who was a party to the suit had not joined in the reference to arbitration and (2) that no notice of the filing of the award had been given to the parties under para, 10 Schedule II of the Code of Civil Procedure.

7. As regards the first point, as will appear from what has already been stated above, there was at no-time any dispute as regards the rights to which the Defendant No. 3 was entitled under the will of the testator. She had not appeared in the suit and the plaintiff had not adduced any evidence as against her. In these circumstances the Subordinate Judge dismissed the suit as against the Defendant No. 3 and the reference to the arbitrators proceeded on the footing that there was and could be no question as regards the rights to which the Defendant. No. 3 was entitled under the will of the testator.

8. As regards the 2nd point there can be no doubt on the record before us that there was a notice in writing of the fact of the filing of the award by the arbitrators. The only question that therefore remains for our consideration is whether such notice was communicated to the parties in this suit or rather to the present applicant.

9. The present applicants' pleader in the Court below has stated definitely in unambiguous language that the fact of the filing of the award of the arbitrators, was duly communicated to him by the Bench Clerk. It follows that the order made by the learned Judge must have been shown to the applicant's pleader. It may be that his signature was not obtained to the order sheet against order No. 38 dated the 27th of October 1922 ; but the evidence of the pleader taken with the order itself is, in my opinion a sufficient compliance with what has been described as the mandatory provisions of para. 10, Schedule II of the Code of Civil Procedure. In this connexion reference may also be made to Order 3 Rule 5, of the Code of Civil Procedure.

10. In my view, therefore, the learned Advocate General has failed to satisfy the condition of the last clause of Section 110 of the Code of Civil Procedure, in other words, the points urged before us do not in my opinion, involve any substantial question of law. In these circumstances the present application must stand dismissed and dismissed with cost-hearing fee, five gold mohurs.

Rankin, C.J.

11. I agree.