
(1929) 02 CAL CK 0035
In the Calcutta High Court

Tara Prosanna Bal and Others

APPELLANT

Vs

Asoke Prosanna Bal and Another

RESPONDENT

Date of Decision : 12-02-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 3(2), 5(2)

Citation : AIR 1929 Cal 370 : 118 Ind. Cas. 854

Hon'ble Judges : Mitter, J; Jack, J

Bench : Full Bench

Judgement

Mitter, J.—The facts on which this rule depends may be briefly stated thus: The plaintiffs who are the petitioners before this Court instituted a suit for partition. The parties to the partition proceedings agreed ultimately to settle their differences on certain terms which were embodied in a petition. That petition was filed in Court and, on the basis of that agreement a preliminary decree was passed on 17th September 1928 . The order runs as follows:

Parties have filed a petition of compromise. Ordered that the suit be decreed in terms being in preliminary form and that the petition of compromise be made a part of the decree and that the case be put up for orders on 17th January 1929.

2. On 24th September 1928, the preliminary decree was signed and sealed. It is necessary to set forth some of the terms of the petition of compromise in order to understand the points raised in this rule. The first ten paragraphs of the petition of compromise adjusted the rights of the parties to the moveable and immovable properties which formed the subject-matter of partition and they also related to the adjustment of the claim for accounts Para. 11 and the subsequent paragraphs related to the procedure which was to be adopted for the purpose of working out the rights of the parties as agreed to and settled by the first ten paragraphs. Para. 11 stated that the division of the moveable and immovable properties with reference to which the parties had settled their rights in the earlier paragraphs of the petition of compromise was to be made by two arbitrators of the name of Babu Satya Ranjan Guha and Babu Sasi Kumar Bose,

latter being a relation of the parties. It was also stated that the division was to be made within six months from the date of the compromise. It was further stated that whatever award the arbitrators might make would be binding on the parties. It was also recited in the petition that, in case there was a difference of opinion between the two arbitrators, the matter was to be referred to a third person as umpire and, if again there was difference of opinion between these three persons, the opinion of the majority would prevail. Para. 12 recited that, if the arbitrators were unable to finish their work within six months, it would be open to them to apply to the Court to have an extension of time. If for any reason, para. 13 recited, the arbitrators were unable or were unwilling to carry on the work of arbitration, then it would be open to the civil Court to appoint a commissioner for the purpose of effecting the partition of the divisible properties. It is not necessary to refer in detail to the subsequent paragraphs of the petition of compromise. It is sufficient to state that some of these provisions referred to the appointment of a common manager to carry on the management of the estate sought to be partitioned so long as the works of the arbitrators were not finished. There is nothing in this petition of compromise which suggests that the parties were to apply to the Court for a reference to arbitration, and, as a matter of fact, while this petition of compromise was made a part of the decree of Court, no orders were passed by the Court with reference to arbitration and that was done, it seems to me, for a very good reason because the petition did not refer to any application for arbitration nor was the Court's attention drawn by the advocates on both sides to the necessity of an order of reference to arbitration. The plaintiffs themselves apprehended that the petition of compromise was not sufficient in itself to show that there was a clause by which the parties agreed to apply to the Court for reference to arbitration; for, I find that on 27th November 1928, the plaintiffs put in a petition asking for a formal order of reference to arbitration. They stated in their petition that they had already appointed Babu Satya Ranjan Guha and Babu Sasi Kumar Bose as arbitrators by a solenama and that, therefore, it was necessary that the Court should direct a reference to the arbitrators to arbitrate; otherwise, technical and subtle difficulties might arise. This application, it is necessary to state, was made without notice to the other side the defendant opposite party, and was heard in his absence and the Court made this ex parte order:

It seems that a formal order of reference should be drawn up and sent to the arbitrators so that no technical questions may arise in future.

3. As soon as the defendant came to know of this order, he moved the Court on 29th November 1928 and filed two petitions complaining of the illegality of the order of reference made on 27th November and pointed out in para. 3 of his petition that, as there was no stipulation in the petition of compromise to the effect that the parties were to apply to the Court with reference to arbitration, the Court was not right in making the reference. This application of the defendant was heard in the presence of both sides and the Court passed an order on 19th December 1928 revoking the reference to arbitration. This order forms

the subject-matter of the present rule.

4. It is contended by the learned advocate for the petitioners that it was not open to the Court to revoke the reference to arbitration as none of the causes which are mentioned in Section 5, Schedule 2, Civil P.C., existed in the present case. The Subordinate Judge came to the conclusion that there was no valid reference in this case. He remarked that "the preliminary decree is no doubt binding upon the parties; but as matters stand now, I do not think that it would be proper to have the partition effected by the two gentlemen mentioned in the petition of compromise."

5. The Subordinate Judge also stated that it was not right to allow Babu Sasi Kumar Bose to work as common manager of the parties. It is necessary to note here one circumstance, namely, that notwithstanding the provision in the petition of compromise to the effect that Sasi Babu was not to employ, for the management of the property sought to be partitioned any officer of any of the parties, the said gentleman appointed one of the plaintiffs and his officers to collect the rents of the estate and it is said that it was in distinct violation of the agreement on which the preliminary decree was based. The Subordinate Judge accordingly ordered that the common manager should also be removed from the common managership and directed him to file all the papers that were in his custody relating to the estate. On these facts, the main question which falls for determination is as to whether there has been a valid reference to arbitration within the meaning of Section 3, Schedule 2, Civil P.C. On behalf of the opposite party, Sir Binod Mitter has contended that, in order to find the jurisdiction of the Court to refer a particular matter to arbitration, two elements are necessary. The first element necessary is that there must be an agreement between all the parties to the suit that any matter in difference between them shall be referred to arbitration and the second element necessary is that the parties must apply to the Court for an order of reference. It is said that the second element is wanting in the present case. I think this contention of the learned Counsel for the opposite party must prevail. From what I have stated above it is apparently clear that there was no mention in the petition of compromise of any application which the parties were to make to the Court for the purpose of referring the matter which formed the subject-matter of dispute between them to arbitration. The plaintiffs discovered that subsequently and tried to remedy the defect by putting in the application of 27th November without notice to the opposite party. It is an elementary rule of law obtaining in every system of jurisprudence that no one is bound by an order which was made in his absence. When the defendant came to know of the order, he was quite justified in saying that the ex parte order which was made in his absence was not binding on him and the Court after hearing both sides made the order which is now complained of. It is said on behalf of the petitioners that there has been a substantial compliance with the first part of Section 1, Schedule 2 seeing that the petition of compromise was filed before the Court and the Court passed a preliminary decree on it. I do not think that there has been any compliance at all; for, it does not appear that the

Court's attention was drawn to the fact that the parties had applied to the Court for an order of reference. As I have already pointed out, no such terms could be found in the petition of compromise. All that the Court did was to pass a preliminary decree in accordance with the terms of the compromise which were presented by the parties. The Court's function ended then and there and it was not asked to do any other thing. In these circumstances, I think that this rule ought to be discharged in the view that there was no valid order of reference as is found by the learned Subordinate Judge.

6. It is then said on behalf of the petitioners that this is a course which will have the effect of setting aside a compromise decree in part and it will be extremely prejudicial to the plaintiffs petitioners seeing that the opposite party will be entitled to retain the benefit of the compromise in part and will not be bound by the terms which are not favourable to him. It is also said that it is not possible to divide the petition of compromise into two parts so as to make the order made by the Court effective for any purpose. I do not think that there is any force in this contention. Reading the petition of compromise it appears to me that the first ten paragraphs refer to the rights of the parties in the moveable and immovable properties which formed the subject-matter of the partition suit and the other paragraphs relate to the mode in which the partition was to be effected. It is true that all the stipulations in the agreement formed an integral part of the same agreement; but as it is possible to divide it into two parts and to treat the first part as relating to the rights of the parties and the subsequent part as relating to the machinery by which those rights are to be worked out no practical difficulty will arise in carrying out the order made by the Court below. That such a course is permissible receives ample support from a decision of the Privy Council which has been cited to us namely, the case of *Cameron v. Cuddy* [1914] A.C. 651 where in somewhat similar circumstances Lord Shaw observed as follows:

When an arbitration for any reason becomes abortive, it is the duty of a Court of law in working out a contract of which such an arbitration is part of the practical machinery to supply the defect which has occurred. It is the privilege of a Court in such circumstances and it is the duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character and it furnishes by an appeal to a Court of justice the means of working out and of preventing the defect of bargains between the parties. It is unnecessary to cite authority on the subject but the judgment of Lord Watson in *Hamlyn and Co. v. Talisker Distillery* [1894] A.C. 202 might be referred to.

7. It is said on behalf of the petitioners that whatever might be said with regard to the agreement these principles cannot apply to a case where on the basis of the agreement a decree of Court is passed. But it has now been firmly established on high authority that an agreement is none the less an agreement because superadded to it is the command of the Judge. This agreement although embodied in a decree of the Court, possesses all the infirmities of an ordinary

contract. Therefore, the same principle which is said to govern the agreement in the case before the Privy Council just referred to will also govern the present case, although the agreement in the present case has been followed by decree of Court. For these reasons, I am of opinion that the rule must be discharged with discharged with costs, hearing-fee five gold mohurs.

Jack, J.

8. I agree.