

PRIVY COUNCIL

Chhabba Lal

Vs.

Kallu Lal

P.C.A No.29 of 1944

(Lord Thankerton, Lord Goddard and Sir John Beaumont. JJ.)

21.01.1946

JUDGMENT

SIR JOHN BEAUMONT J.

1. This is an appeal from a decree of the High Court of Judicature at Allahabad dated 8th September 1939, which set aside a decree of the Subordinate Judge of Cawnpore dated 3rd November 1933, passed in a partition suit and sent the case back to the Subordinate Judge with directions to re-admit it under its original number and to decide it in accordance with law. The question for decision is whether a reference to arbitration made in this suit, and an award made thereon, were valid as the Subordinate Judge held, or invalid as the High Court of Allahabad held in appeal. The question arises in the following circumstances.

2. The plaintiff brought this suit for division of the property of a Hindu family governed by the Mitakshara. The plaintiff was the son of one Mukta Prasad, and the first three adult defendants, Kallu Lal, Sohan Lal and Sewak Lal were the sons of the only brother of Mukta Prasad, whilst defendants 4 and 5 Ram Lal and Jainarain, were the minor sons of Kallu Lal. The plaintiff alleged that the family had separated in status, but that the property had not been divided, and he claimed partition of the property and that a half share be allotted to him. In their written statement, the adult defendants alleged that the family was still joint, but the claim for partition was not disputed. In the suit, Sohan Lal was appointed *guardian-ad-item* of the minor defendants, and as such he adopted the written statement of the adult defendants. On 1st September 1933, an application was made to the Subordinate Judge by Kallu Lal, Sewak Lal and the plaintiff stating that the parties had appointed Shri Swami Ramanandji who was the Guru of the parties, a referee for the decision of all the facts

in dispute in the suit and also for the decision in respect of the costs of the suit and they asked that the Swami might be appointed a referee under section 20, Evidence Act. On 2nd September 1933, Sohan Lal appeared before the learned Subordinate Judge and verified this application and the learned Judge made the following note:

"This application was verified to-day by Sohan Lal, defendant, on being identified by Babu Munna Lal, Vakil, after hearing and understanding the same."

3. On 4th October 1933, the learned Judge made an order that according to the application of the parties, Shri Swami Ramanandji was appointed a referee under section 20, Evidence Act, for deciding this case and directed him, after deciding the case, to present himself in Court or send in writing, his statement in respect thereof. On 7th October 1933, the referee made his report dividing the family property into two parts allotting one part to the plaintiff and the other to the defendants. Objections to the report on behalf of the minors were lodged on 17th October 1933, the two principal objections being first that the guardian of the minors did not purport to act as a guardian entering into the agreement for reference and that as no previous sanction of the Court had been obtained the agreement was not binding on the minors, and secondly that the alleged agreement in terms only constituted Swami Ramanandji a referee under section 20, Evidence Act, and that as such he could only make statements and had no authority to make a division of the property. Objections were also filed on behalf of the adult defendants alleging fraud against the Swami but it is not necessary to consider these objections. On 3rd November 1933, the learned Subordinate Judge, having held that the reference to arbitration and the award were valid, passed a decree in the terms of the award. From this decree an appeal was brought to the High Court of Allahabad which on 8th September 1939, allowed the appeal, set aside the decree of the lower Court and sent the case back to the lower Court to readmit under its original jurisdiction and to decide in accordance with law. From this decree the present appeal is brought. Neither the learned Subordinate Judge nor the High Court dealt with the objection that the reference was not justified by Section 20, Evidence Act. That section is in these terms:

"Statements made by persons to whom a party to a suit has expressly referred for information in reference to a matter in dispute are admissions."

4. It is obvious that a reference to an outside party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute, and if the reference is to be regarded as made only under Section

20 it was a bad reference. However, the reference might have been made under the provisions of para. 7 This reference here seems to be a mistake for paragraphs 1 and 3-Ed. (1) and (3) of Schedule II, Civil Procedure Code, and their Lordships will treat the reference as so made, as the Courts in India seem to have done, and regard the allusion to Section 20, Evidence Act, as a mistake. The second objection requires more consideration. Order 32, Rule 7 provides :

"(1) No next friend or guardian for the suit shall, without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. (2) Any agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

5. The learned Subordinate Judge explained in his judgment disposing of the objections what took place in relation to the application for reference. He said that Sohan Lal in the first instance had not signed the application for a reference, and accordingly the learned Judge directed that Sohan Lal should be brought before him the next day. Sohan Lal duly appeared the next day and verified the agreement. The learned Judge considered that, since Sohan Lal signed the agreement without qualification, that is without specifying whether he was acting in his own capacity or as *guardian-ad-item* of the minors he must be taken to have signed in all capacities in which his signature was required, and their Lordships are disposed to accept that view. The learned Judge further considered that by referring the matter to arbitration the Court must be taken to have been satisfied that the reference would be for the benefit of the minors. There was indeed no reason to doubt this because the interest of the minors was identical with that of the other defendants, their father and uncles, and there was no reason to suppose that the interest of the minors was likely to be sacrificed. At the same time, it is clear that the terms of Order 32, Rule 7, were not complied with. There was no formal application by the *guardian-ad-item* for the leave of the Court to his entering into the agreement for reference to arbitration, nor was any such leave formally given, or expressly recorded in the proceedings. The note on the record quoted above does not show that the Judge realized that he was dealing with the *guardian-ad-item* of minors. The requirement in Order 32, Rule 7 that the leave of the Court be expressly recorded in the proceedings was added in 1908, and Sir Thomas Strangman for the appellant says that the addition to the rule merely gave statutory effect to the previous practice. Be that as it may, the rule is imperative and in their Lordships' view its terms must be strictly complied with. Their Lordships agree with the view of the High Court following on this point, a ruling of a Full Bench of the

Allahabad High Court, ILR (1937) ALL 317,1 disagreeing with certain other Indian rulings, that Order 32, Rule 7 applies to an agreement to refer matters in dispute to arbitration. Such an agreement, which removes the decision of a matter in dispute from the jurisdiction of the Court and refers it to some outside party is clearly an agreement with reference to the suit and not only falls within the terms of the rule, but comes within the mischief at which the rule appears to be aimed. The interests of minors might well be sacrificed by an improper reference to arbitration and it is necessary that their interest be protected by the Court. If minors successfully challenge an agreement to refer as not made in compliance with sub section (1) of rule 7, it is avoided against all parties under sub section (2).

6. Sir Thomas Strangman has taken a second point, namely that it is too late to challenge the award since no appeal lay from the decree of the Subordinate Judge made in terms of the award. In support of his argument he relies on the provisions of para. 16 (2) of Schedule II, Civil Procedure Code. The section is one of a group of sections conferring powers upon the Court in relation to an award made on a reference in a suit. Section 12 gives power to the Court to modify the award in certain cases. Section 14 empowers the Court to remit the award or any matter referred to arbitration to the reconsideration of the arbitrator in the cases specified. Section 15 provides that no award shall be set aside except on the specific grounds mentioned, or the award "being otherwise invalid." Section 16 provides that where the Court sees no cause to remit the award and no application has been made to set aside the award or the Court has refused such application the Court shall after the time for making such application has expired proceed to pronounce judgment according to the award. Then sub section (2) provides that upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, and not in accordance with, the award. The argument of Sir Thomas Strangman is that under the section the decree of the Subordinate Judge is final, and for this he relied on the case in *Mariam Bibi v. Mt. Amina Bibi*.¹

7. The ruling of the Court in that case that Order 32, Rule 7 applies to an agreement to refer to arbitration has already been noted with approval. A further question referred to the Full Bench was "whether an objection to the validity of reference to arbitration comes within the provisions of para. 15 of Schedule II, Civil P. C." The learned Chief Justice and Harries J., considered that it did, relying on the words "being otherwise invalid" in para. 15; Iqbal Ahmad J., considered that it did not. Upon this question their Lordships agree with the view of Sir Iqbal Ahmad. In their opinion all the powers

conferred upon the Court in relation to an award on a reference made in a suit presuppose a valid reference on which an award has been made which may be open to question. If there is no valid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding. By way of contrast the language of para. 21 of Schedule II, may be noted. That paragraph empowers the Court to pronounce judgment according to an award made on a reference out of Court, and the opening words require the Court to be satisfied that the matter has been referred to arbitration. There are no such words in para. 16. In their Lordships' view, therefore, an appeal lay to the High Court in this case. For these reasons their Lordships think that the decision of the High Court was right and they will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondents.

Appeal dismissed.

Cases Referred.

1. AIR 1937 Allahabad 65 : ILR (1937) All 317 : 166 IC 99 (FB),