

Capt. (Now Major) Ashok Kshyap

Vs

Mrs. Sudha Vasisht and Another

Criminal Appeal No. 314 of 1987

(Sabyasachi Mukharji, S. Natarajan JJ)

04.02.1987

JUDGMENT

SABYASACHI MUKHARJI, J. -

1. Special leave is granted. The appeal arises from the judgment and order of the High Court of Delhi dated May 16, 1986 whereby the award of the arbitrator was adjudged incapable of being made rule of the court and no decree in terms thereof was passed under Section 17 of the Arbitration Act, 1940, (hereinafter called the 'Act'). The High Court, however, held that the award was not liable to be set aside but only that it could not be made a rule of the court.

2. In order to appreciate the contentions urged, it is necessary to note a few facts. The father of the parties involved in the matter, Shri S. Lal, died on November 13, 1975 leaving behind him his two daughters, Mrs. Sudha Vasisht and Miss Shail and Capt. [now Major] Ashok Kshyap, the son. The wife of the said deceased Shri S. Lal predeceased him. Mrs. Sudha Vasisht is the eldest child and Major Kshyap is the youngest, who is the son. Mrs. Sudha Vasisht is married, Miss Shail is a spinster and Major Kshyap is also married. The said S. Lal left only one immovable property, namely, premises No. F-4, Green Park, New Delhi and some movables including about Rs. 8000 in the Punjab National Bank, Green park, New Delhi. It was claimed that Miss Shail was not capable of managing her affairs. Indeed one of the objections against the award was that Miss Shail who was the unmarried sister of Major Kshyap and Mrs. Sudha Vasisht was of unsound mind and due to her mental incapacity the arbitration agreement, arbitration proceedings and the resultant award were all bad in the eye of law. The arbitration agreement was, however, signed by all the three parties. It may be noted that disputes and differences arose between the parties and arbitration agreement was entered into by the three parties to settle these on June 9, 1976, soon after the death of their father, Shri S. Lal. The arbitration agreement recited that their father died intestate leaving behind him premises No. F-4, Green park, New Delhi and the sum of Rs. 8000 in the Punjab National Bank. Further it was recited that disputes and differences had arisen in between them with regard to the immovable as well as movable property left by their father, and Shri S. Lal died without making any will and the parties were desirous to get their disputes and differences settled through arbitration to maintain family peace, harmony and goodwill amongst themselves and to avoid unnecessary litigation by arriving at a "family settlement" through arbitration. The agreement, thereafter nominated and appointed one Shri D. C. Singhanian, advocate, as the arbitrator and to enter upon the reference and to decide all the disputes and difference existing between them "pertaining to or relating to or in any manner touching upon the matter or inheritance and/or division of all movable and immovable property" left behind by their late father, Shri S. Lal.

3. The agreement, further recited that the parties undertook that the decision given by the arbitrator

would be accepted as final. The arbitration proceedings have been filed before this Court. The son, the appellant, gave evidence and stated that two houses, one at Meerut and one at Hapur were inherited by him from his mother Smt. Sarla Devi, which she got from her parents without leaving any male issue behind them. These houses were sold for Rs. 21,000 which sum according to Major Kshyap was invested by the father in the construction of the house in question. Major Kshyap further claimed that he had invested a further amount of Rs. 10,000 out of his savings of his service as a Commissioned Officer. This amount, according to him, was spent on wood work, painting of two rooms etc. The father, Shri S. Lal was a teacher in a school and in order to realise his pension, according to Major Kshyap, he paid to his father a sum of Rs. 4440.93 which the father had drawn to build the house. Major Kshyap further claimed that he had purchased a geyser for Rs. 887 and he had spent certain amount of money for certain other expenses. Mrs. Sudha Vasisht gave evidence stating that her father died without making any will and she was entitled to 1/3 share in the house left behind him. Miss Shail deposed before the arbitrator that during her lifetime, she was not to be financially dependent upon anybody but after her death, her share in the house should go to her brother. She further asserted that she always wanted that the complete house should go to her brother. It is not necessary to give the break-up of the expenses of the houses as appearing from the evidence. All the parties agreed, the arbitrator noted, that there could be no exact and feasible division of the house. Mrs. Sudha expressed her desire that if she was given a fair share in money, she would not insist for the division of the house, according to the arbitrator. Her other alternative suggestion was that the house has got ten rooms or nine rooms in the sense that one big room on barsati floor has been divided in two and as such each person could be given three rooms each. According to Miss Shail, the division of the house was not at all feasible, since there was a lot of bad blood and differences between the parties. According to her, the deposition states, it is not at all in the interest of anybody that all should live in one house.

4. The other important thing to note in the arbitration proceeding was that Capt. Kshyap stated that the house could not possibly be divided into three parts. It did not have three kitchens. Miss Shail stated that if the house was divided into three parts, there would always be quarrels and disputes amongst them. She could not say whether the house could be divided into three parts or not. Miss Shail further stated that she would like to live with her brother Capt. Kshyap or whatever arrangement he made for her, that would be acceptable to her. Mrs. Sudha Vasisht stated that she would not like to live or associate with Miss Shail in any manner. Miss Shail further stated that her share of the property, if any, might be allotted to her brother or whatever otherwise considered proper.

5. It is further noted that according to Major Kshyap, the house could not be divided into three parts. He would not like to share it with his sister, Mrs. Sudha Vasisht who is now married. He further stated, at that time in the deposition that he still had to serve in the army for about another 21 years. He was prepared to have his share in the property in cash also. He further asserted that he wanted to keep and maintain his sister Miss Shail. He further asserted that he was also prepared to pay his sister Mrs. Sudha Vasisht in cash whatever share was considered to be due and payable to her. According to him, he was not in a position to pay both of his sisters in cash for their shares in the property. But he could pay his sister Shail, her share in cash gradually. Mrs. Sudha Vasisht stated that she was not in a position to pay the share either of her brother or her sister Miss Shail in cash. She further stated, she had no money nor any arrangement for the same.

6. All this narration is necessary in order to judge whether the award was just and fair because a contention was advanced about the mental capacity of the unmarried sister Miss Shail. The award made on February 12, 1977, stated that the appellant should pay Rs. 40,800 to Mrs. Sudha Vasisht

and upon payment Mrs. Sudha Vasisht would vacate the house. In view of the contentions raised, it is necessary to set out the relevant part of the award which is as follows :

NOW, THEREFORE, I hereby make and publish, my award as follows :

1. Capt. A. Kshyap, shall pay an amount of Rs. 40,800 to Mrs. Sudha Vasisht by way of her share in the said property No. F.4, Green park and other assets left behind by late Shri S. Lal and on payment of this full amount she shall vacate the house.

2. Mrs. Sudha Vasisht shall be entitled to live in the portion of the house already in her occupation till the full amount of Rs. 40,800 has been paid to her and she will also not be liable to pay any rent for occupation of the portion of the house so far occupied by her and further until the total amount of Rs. 40,800 is paid to her by Capt. A. Kshyap. On payment of this amount she will have no right to live in the house and also have no right to live in the house and also have no other interests left in the said property as legal heir of Shri S. Lal.

3. Miss Shail shall have a right of residence in the said house, i.e. F-4, Green park throughout her life or till she is married and in addition to her right of residence in the house, Capt. Kshyap shall also pay her an amount of Rs. 350 per month for her maintenance till she is married.

4. In case Miss Shail is married, Capt. Kshyap shall pay her a lumpsum amount of Rs. 40,800 and thereafter she will also have no right to live in the house or get any maintenance from Capt. Kshyap on full payment of said amount.

5. Capt. A. Kshyap shall be liable to pay all the outstanding amount of loan along with interest due thereon taken by late Shri S. Lal from LIC and also bear estate duty, if any, already paid or to be payable with regard to the movable and immovable assets left behind by Shri S. Lal. He shall also be entitled to have all other movable and immovable assets including withdrawal of an amount of about Rs. 8500 or so, along with interest if any due thereon, laying deposited to the credit of late Shri Lal in Punjab National Bank, Green Park.

7. The award was filed by the arbitrator on March 10, 1977. Respondent 1 filed objections to the same on October 11, 1977. Major Kshyap and Miss Shail accepted the award before the Deputy Registrar, Delhi High Court on May 11, 1977. This position is stated in the petition for special leave and this is not denied in the affidavit filed on behalf of Mrs. Sudha Vasisht. Mrs. Sudha Vasisht filed an objection on tow grounds, namely, that the award being unregistered could not be made a rule of the court and the other, Miss Shail being mentally retarded could not be a party to the arbitration proceedings. The High Court rejected the contention about the invalidity of the award on the ground of mental capacity of Miss Shail but held that the award could not be made rule of the court because it was an unregistered award.

8. In view of the submission made on behalf of the respondent that Miss Shail was of unsound mind and as this contention was advanced before us in support of the order of the High Court, we may briefly deal with it. We have gone through the evidence considered by the learned judge about the mental capacity of Miss Shail. It is an unfortunate case of borderline intellectual retardation which was one part of the diagnosis in respect of her and on the other hand the arbitrator had noted that

Major Kshyap had come into the witness-box and he had also examined one Brig. Dr. Sangat Singh Syalee who is a medical practitioner. The testimony of Capt. Kshyap showed that the arbitration agreement was executed in the office of the arbitrator and that the arbitration proceeding used to be attended by himself, Miss Shail, Mrs. Sudha Vasisht and her husband, and the proceedings used to be signed by all the parties. He had further stated that Miss Shail's case was of borderline mental retardation but she could perform her duties satisfactorily, intelligently and socially and she knew what was good and what was bad for her. She had been living all alone in house F-4, Green park from 1977 to 1980 and had been doing everything for herself. It is true that story of this spinster living alone in Green Park house in Delhi belonging to her late father, does not make pleasant reading, yet from the evidence which the learned judge has exhaustively examined, he found that the medical record obtained from the All India Institute of Medical Sciences indicated that Miss Shail was suffering from schizophrenia and even in the years 1974-1981 she was suffering from mental retardation. But the arbitrator noted that Miss Shail was never given any ECT treatment. She was never hospitalised and Mrs. Vasisht did not at any point of time object to the arbitration because of Miss Shail's mental capacities. The arbitrator expressed his opinion that the objection against the mental capacity of Miss shail during the period from June 9, 1976 to February 12, 1977 could not be accepted.

9. We may not that before us all the parties were present. We had asked counsel for Miss Shail to ascertain from her whether she accepted the award with a free will ? We did so not because we found any defect in the evidence or in the order of the learned judge of the High Court but being an appeal under Article 136 of the Constitution even if there was no legal material in these aspects, the court was entitled to be satisfied. Though it is difficult to hazard an opinion on the metal capacity of lady by her looks, it appeared to us that though she was not of a very cheerful deposition, it would perhaps be unfair to conclude that she was mentally incapable. We watched her manner during the time the proceedings were going on in the court and observed that she was understanding what was happening in the court. We have not any material to disagree with the views of the learned judge on this aspect. Therefore, we cannot accept this submission urged on behalf of respondent 1, Mrs. Vasisht, about the mental capacity of Miss Shail.

10. The High Court noted the part from the question of registration and the question of mental capacity, no other contentions were raised.

11. Therefore the only other question is, was this award bad not having been registered under there law under Section 17 of the Registration Act, 1908 ? Before we deal with that point, we might record that a submission was made that even if the award was not property registered as required under Section 17 of the Registration Act, in view of the facts and circumstances of the case and further in view of the facts that the award was filed within a period of one month of making of the award and further in view of the fact that four months' time was there to have the award registered by the arbitrator when the award came to the court from the date of making of the award the court should have exercised its powers under Section 15(b) and under Section 16(1)(c) of the Act. We are unable to accept the submission urged on behalf of the appellant in this behalf. Section 16 of the Act, we are of the opinion, does not apply to the facts of this case. There is no objection to the legality of the award apparently. We are in agreement with the views expressed by the learned judge on this aspect. The factum of registration of the award does not pertain to the decision of the arbitrator on its merits and is de hours the award and for this purpose the award cannot be remitted to the arbitrator under Section 16 of the Act. The principles enunciated by this Court in Rikhabdas v. Ballabhadras (1962 Supp 1 SCR 475 : AIR 1962 SC 551) are applicable to the facts of this case. The purpose of remitting the award is to enable the arbitrator to reconsider the decision where the

legality was connected with the decision as contained in the award. It must not relate to a matter which has no connection with the decision or decree. See in this connection the observations of the Calcutta High Court in the case of Nani Bala Saha v. Ram Gopal Saha (AIR 1945 Cal 19 : 48 CWN 721). The award is also not imperfect in terms of section 15(b) of the Act as rightly held by the High Court. Therefore, in our opinion, there was no scope, in the facts and circumstances of the case, of exercising its powers by the High Court under Section 15 of Act and powers under Section 151 of the Code of Civil Procedure could also not be exercised in this case. The objection against the award was filed by Mrs. Sudha Vasisht on October 11, 1977; after that more than eight months (sic years) have expired and there was no prayer to the court to extend the time for registration.

12. The main contention, however, that requires consideration is whether the award could not be made a rule of the court because it effects the partition of immovable property and affects rights in immovable property. We are of the opinion that the High Court was not right in the view it took on this aspect of the matter. The document in question did not effect the partition if read properly.

13. Section 17(1)(b) of the Registration Act enjoins that any non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property should be registered. Therefore, the question is, does the document itself extinguish or purport to create or declare any right in immovable property. It certainly declares the share of the parties in the property but it enjoins that only upon payment of Rs. 40,800 Mrs. Vasisht would vacate the house. It further enjoins that "she will be entitled to live in the house in the portion occupied by her till the full payment of Rs. 40,800 is made to her and she will not be liable to pay any rent for the occupation of the portion and on the said payment, she will not have any right and also no interest left in the said property". So her right in the said property and her interest in the property ceases on payment of the amount of Rs. 40,800 and not otherwise, not by the operation of document itself. The document itself creates a right by itself to get Rs. 40,800 and right to obtain the payment and on payment the obligation of relinquishment of her right or interest in the property. It does nothing more.

14. A similar position arose before the Judicial Committee in the case of Rajangam Ayyar v. Rajangam Ayyar (AIR 1922 PC 266 : 27 CWN 561 : 44 MLJ 745 : 50 IA 134) where dealing with a document of similar nature the Judicial Committee observed that that document was not a document by itself creating, declaring, assigning, limiting or extinguishing any right, title or interest in the immovable property. It merely creates a right in the person claiming the relief. There was a memorandum of agreement which specified the shares and provided for a further deed effectuating the partition. It was held that it did not required to be registered. In our opinion, the entitlement of the members namely Miss Shail as well as Mrs. Vasisht in the property and the cessor of interest in the properties on payment of the money in case of Mrs. Vasisht and other conditions in case of Miss Shail were indicated in the award.

15. This position was again reiterated by the Judicial Committee in Upendra Nath Bose v. Lall (AIR 1940 PC 222 : 45 CWN 204). There the document recited that the ownership of the second party in one half of the Raitar would not come till after the payment of a sum of Rupees sixty one thousand and four hundred as well as the amounts mentioned in the statement Ex. B together with interest specified in respect of both be fully paid up. The question before the Judicial Committee was whether the last sentence of para 2 of the award purported to confer upon "the second party" a right, title or interest which commenced with the award and came to an end when the sum of Rs. 61,400 with interest was paid or whether it intended merely to provide that the interest which arose from

the exercise of the option should remain unaltered unit Rs. 61,400 and interest had been paid or whether they intended merely to provided that the status quo should remain unaltered (i.e. the contractual interest which arose from the exercise of the option) would remain unaltered until Rs. 61,400 and interest had been paid. The Judicial Committee was of the view that the latter was the true view. The sentence was not framed as one which purports to create or confer any interest. This court in the unreported judgment in the case of Sheonarain Lal v. Rameshwari Devi (Civil Appeal No. 296 of 1960 dt. 6-12-1962) had also to deal with a similar situation. There fifth clause of the award was as follows :

Shri Sheo Narain Lal and his heirs should execute as early as possible a registered document in respect of the shop let out on rent to Beli Sao Sukhdeo Prasad, in favour of Shri Prabhu Chand for which Shri Prabhu Chand will have to pay nothing as consideration. He will pay only costs of stamp etc.

This Court had to deal with this clause and to consider the question whether this clause purported or created or declared or assigned, limited or extinguished any right. This court held that the award merely provided that some right could be created in future by means of a document to be executed. Therefore, this Court was of the view that it did not require registration. We are of the opinion that the same principal should be applicable here.

16. Two decisions upon which reliance was placed by the High Court to which our attention was drawn by the learned counsel, firstly, Satish Kumar v. Surinder Kumar ((1969) 2 SCR 244 : AIR 1970 SC 833) and the second one Was Ratan Lal Sharma v. Purushottam Harit (((1974) 3 SCR 109 : (1974) 1 SCC 671 : AIR 1974 SC 1066) do not help the respondent. In the first case Hegde, J. observed that for the purpose of section 17(1)(b) of the Registration Act, it was necessary to determine whether the award purported to create rights in the immovable property. If it did, it was necessary to have it registered. As it was found by the court that it did, it needed compulsory registration. But the facts of this case are entirely different. Here the award did not create right to get the money, the award only declared that the right to get the immovable property was dependent upon the payment of the amount. A right to the property was not created by the award itself, a right to certain property was declared. A right to get the property was declared on the payment of the money. The award did not create any right to the property to extinguish any right to the property, which was not there. It quantified in terms of money the value of that right and declared the method of working out those rights.

17. In the second case, the question was whether assignment of the share in the partnership required registration ? The share of partner in the partnership which has also immovable property is movable property and assignment of that share did not require registration under Section 17 of the Registration Act. But the award in that case expressly made an exclusive allotment of the partnership assets including factory and liabilities over Rs. 100 to the appellant. It went further and made the appellant absolutely entitled to the same. That is not the position in the instant case. In that view of the matter, though there is no dispute about the propositions, these two decisions would (Sic not) be applicable to the facts of the instant case, we are of the opinion on an analysis of the award that it did not create any right in any immovable property and as such it was not compulsory to register it.

18. Though the above should be sufficient to dispose of the order as it is an appeal under Article 136 of the Constitution, we should see in the interest of justice to the interest of all the parties and we must protect as far as practicable the interests of all the parties. A submission was made on behalf of

Miss Shail that Rs. 350 per month which has been fixed for the maintenance to be paid by Major Kshyap was inadequate. It was further submitted that Rs. 40,800 which was the share of the money to be allotted to either Mrs. Vasisht and also to Miss Shail for getting their relinquishment of their property in the event mentioned in the award is also not proper.

19. In view of the present position of inflation and rise in price of life and living, we are of the opinion that so far as Miss Shail is concerned, we would dismiss this appeal with the directions that she will be entitled to a monthly maintenance of Rs. 500 instead of Rs. 350 and that this sum should from a charge on the share allotted to Major Kshyap. Furthermore we direct that in the contingencies mentioned in clauses (1) and (2) of the award, Mrs. Vasisht should be paid Rs. 75,000 instead of Rs. 40,800. Similarly in the contingency mentioned in clause (4) of the award, Miss Shail should be paid Rs. 75,000 instead of Rs. 40,800. The appeal is allowed and the award as modified with the aforesaid direction is made a rule of the court.

20. In the facts and circumstances of the case, the parties will pay and bear their own costs except that the cost on behalf of Miss Shail should be paid by Major Kshyap.

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