

# CALCUTTA HIGH COURT

Abani Bhusan Chakravarty

Vs

Hem Chandra Chakravarty

(Sharpe ,J.)

12.06.1946

## JUDGMENT

### Sharpe, J.

1. This appeal is directed against the decision in appeal of the Additional District Judge, Barisal. In the trial Court the plaintiffs asked for a declaration of a right of way over a certain path and for an order directing the removal therefrom of certain obstructions caused by the defendants. Their suit was decreed with costs. On appeal by the defendants, and on the joint petition of the appellants and the respondents, the entire subject-matter of the dispute between them was referred to the arbitration of 3 local pleaders on 19-12-1940. The arbitrators filed their award on 21-3-1941, and after hearing objections to the award, the learned Additional District Judge dismissed the appeal in terms of the award, which modified to some extent the decree made by the trial Court.

2. The plaintiffs have now appealed to this Court and the only point which has been urged by Mr. Guha for the appellants is that the lower appellate Court had no authority to refer the dispute to arbitration, and consequently that the decree made by him in terms of the award is without jurisdiction and should be set aside. In support of this contention, Mr. Guha has referred to the earlier decisions in regard to references to arbitration at the appellate stage, and has maintained that those decisions which accepted the view that such references could be made by the appellate Court were based on the provisions for arbitration contained either in the Code of Civil Procedure or in the Schedules to the Codes applicable at the time. Since the present law of arbitration is contained in the new Act (10 [X] of 1940) and contains no provision for any reference to arbitration by an appellate Court, the previous decisions are, he contends, no longer applicable. For the respondents on the other hand, it has been argued that the definition of "Court" in Clause (c), Section 2, and the provisions of Sections 21 and 41, Arbitration Act, are, when read together, sufficient authority for holding that an appellate Court has ample jurisdiction in an appeal, which it is said, is only a continuation of a suit, to refer to arbitration the matters in dispute between the parties.

3. The question is not free from difficulty and requires careful consideration. The earliest decision on a question of this nature was by a Full Bench of the High Court in Juggeshur Dey v. Kritartha Moyee Dossee ('74) 12 Beng. L.R. 266 and was that an appellate Court has no power

under the Code of Civil Procedure to refer a case to arbitration even on consent of the parties. That decision was based on Section 312 of the Code of 1859 which was in the following terms: If the parties to a suit are desirous that the matters in difference between them shall be referred to the final decision of one or more arbitrator or arbitrators they may apply to the Court at any time before final judgment for an order of reference. In dealing with the matter Couch C. J. after referring to the different sections relating to references to arbitration observed: I have said already that these sections apply to the Court in which the suit is brought, the primary or original Court. They can be made applicable to a Court of appeal by Section 37 of Act 23 [XXIII] of 1861 and I think that section does not make them applicable to it. It provides that unless when otherwise provided, the appellate Court shall have the same powers in cases of appeal which are vested in Courts of original jurisdiction in respect of original suits. In his opinion the word "power" did not include a reference to arbitration, and consequently the matter was decided as indicated above.

4. In the Code of Civil Procedure, 1877, Section 582 included the provisions of Section 37 of Act 23 [XXIII] of 1861 and in addition a provision that the appellate Court shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction. In view of this additional provision it was held in *In re Sankaralingam Pillai* ('81) 3 Mad. 78 (79) that a Court of appeal has the power with the consent of parties of referring to arbitration matters in dispute in an appeal. This view was followed by this Court in *Bhugwan Dass v. Nund Lall*<sup>1</sup> and in *Suresh Chunder v. Ambica Churn*<sup>2</sup> and has been accepted as the correct legal position so long as the general provisions in regard to arbitration were contained in the Code of Civil Procedure or in the Schedule thereto.

5. The general provisions for arbitration in suits are now contained in Chap. IV, Arbitration Act (10 [X] of 1940) and Section 21 of that Act provides: Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference. This section is almost the same in language as para. 1, Schedule II, Civil P.C., 1908, which has been repealed by the Arbitration Act, the only material difference being the addition of the words "in the suit" underlined (here italicised) above which were introduced, apparently, to emphasise that the differences which could be referred to arbitration must be confined to differences in the suit and could not include any extraneous matters. In its present state however it seems clear that the section does not in itself provide for any reference to arbitration in the appellate stage and it has to be seen therefore whether the Act contains any other provisions which would extend the provisions of Section 21 so as to include references to arbitration by an appellate Court.

6. As noted above, the reasons which led to the previous decisions that the appellate Court was competent to refer to arbitration the matters in dispute between the parties to a suit were the special provisions which are now contained in Section 107, Civil P.C., 1908, whereby the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein. The only provisions in the Arbitration Act for extending the Code of Civil Procedure generally to arbitration matters are contained in Section 41 of the Act. The portion of that section material for the present purpose is as follows:

Subject to the provisions of this Act, and of rules made thereunder-

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court and to all appeals, under this Act. In cases of the nature which we are at present considering there are no appeals under the Act before the appellate Court but the appeals are preferred to the lower appellate Court under the ordinary provisions of the Code of Civil Procedure relating to appeals from original decrees. Unless therefore applications for reference to arbitration come within the words "proceedings before the Court," there would seem to be nothing in the Arbitration Act to attract the provisions of Section 107, Civil P.C., so as to enable an appellate Court to exercise the same powers and perform the same duties as are conferred and imposed on Courts by Chap. IV of that Act.

(b)

7. The material question for consideration therefore is whether "Court" as defined in the Arbitration Act is wide enough to include an appellate Court exercising the ordinary jurisdiction provided for Courts hearing appeals from original decrees. "Court" according to Clause (c) of Section 2 of the Act, means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court. The jurisdiction of lower appellate Courts is derived from chap. III or IV, Bengal, Agra and Assam Civil Courts Act, 1887. Under Section 21 of that Act appeals from the decisions of Subordinate Judge in cases in which the value of the suits do not exceed Rs. 5000, and from the decisions of Munsifs in all cases lie ordinarily to the District Judge. Other Courts subordinate to the High Court have ordinarily no inherent power of hearing appeals. This jurisdiction to do so is a special one derived from the transfer of appeals to them for disposal by the District Judge in exercise of the powers conferred by Section 22, Civil Courts Act. The lower appellate Courts have of course the power to enter into and to decide questions of fact and to that extent it may be said that they have jurisdiction to decide questions forming the subject-matter of the reference, but this jurisdiction is the special jurisdiction of an appellate Court and in that capacity they would have no jurisdiction to decide those questions if they had been the subject-matter of a suit. In this view of the matter we do not think that a "Court" as defined in the Arbitration Act will include an appellate Court.

8. In addition to the foregoing consideration, there is also the question of the pecuniary jurisdiction of the Courts. By virtue of Section 18, Bengal, Agra and Assam Civil Courts Act, 1887, a District Judge or Subordinate Judge has jurisdiction to try all original suits for the time being cognizable by civil Courts save as otherwise provided by any enactment for the time being in force, but that jurisdiction is subject to the provisions of Section 15, Civil P.C., which lays down that "every suit shall be instituted in the Court of lowest grade competent to try it." It would therefore be a question of fact in every case whether the appellate Court had in the exercise of its ordinary jurisdiction the necessary pecuniary jurisdiction to enable that Court "to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit." The very fact that the matter is before the Court in appeal would ordinarily imply that the Court had not by reason of the provisions of Section 15, Civil P.C., jurisdiction to decide the subject-matter of the suit, since otherwise the matter would have come before it in its ordinary and not in its appellate jurisdiction, and we cannot think that it was ever intended that the question whether an appellate Court was empowered to refer matters to arbitration should depend on any such question as whether that Court had pecuniary jurisdiction to decide the questions at issue if they had formed the subject-matter of a suit.

9. For these reasons we think that "Court" as defined in the Arbitration Act does not include an appellate Court and consequently that there is nothing in that Act which enables an appellate Court to refer to arbitration the matters in dispute between the parties. We feel too that in view of the earliest decisions which indicated the difficulty in the exercise of powers of reference to arbitration by an appellate Court without some enabling provisions of the nature of Section 107, Civil P.C., 1908, the Legislature would have made some clear provisions in the Arbitration Act for such references if it had been intended that these should be made at the appellate stage.

10. In our opinion, therefore, the reference to arbitration in appeal in the lower appellate Court and the subsequent proceedings were without jurisdiction. This appeal is consequently allowed and the judgment and decree of the lower appellate Court are set aside. The appeal will be sent back to that Court for disposal in accordance with the ordinary provisions of law. In the nature of the case, and since both parties asked for reference to arbitration, we make no orders as to the costs of this Court. Future costs will abide the result of the appeal after rehearing in the Court below.

**B.K. Mukherjea, J.**

11. I agree and desire to add a few words. We have got to take it that the Legislature when it introduced the new Arbitration Act were aware of the decisions under the Civil Procedure Code of 1908 and the previous Codes of 1882 and 1859. Section 21, Arbitration Act, 1940 (Act 10 [X] of 1940) occurs in chap. IV which is headed "Arbitration in Suits", and the wording of the section has been taken almost verbatim from Para, 1(l), Schedule n to the Code of Civil Procedure, 1908, as it existed prior to 1940. It is not possible to say that the Legislature contemplated that even apart from a provision like that contained in Section 107, Civil P.C., an appellate Court would be competent to refer a case to arbitration on the language of Section 21, Arbitration Act, itself. It cannot also be argued that the Legislature overlooked Section 107, Civil P.C., which entitles the appellate Court to exercise the powers and perform the duties of the original Court as laid down in the Code itself.

12. The definition of "Court" as given in Section 2(c), Arbitration Act, itself, as has been pointed out by my learned brother, in no way alters the position. This definition, it seems, was framed with an eye to cases coming primarily under chaps. II and III, Arbitration Act, where arbitration takes place without the intervention of a Court or with the intervention of the Court but not in pending suits, In such cases there being no pending suits, the Court under whose supervision the arbitration proceeding is going on or which can exercise the functions of a Court as laid down in this chapter, is the Court which has jurisdiction to hear the dispute between the parties if it had been the subject-matter of a suit. If, however, reference to arbitration is made in a pending suit under chap. IV, Arbitration Act, 1940, the Court before which the suit is pending if it has jurisdiction to try the suit, would obviously be competent to refer a case to arbitration, as under Section 21, Arbitration Act, 1940, only matters in dispute between the parties in the suit itself, and not outside the suit, could be the subject-matter of a reference to arbitration.

13. As has been pointed out by my learned brother, whether an appellate Court is competent to try the subject-matter of dispute between the parties as an original suit or not is a question to which no uniform answer could be given and it could not have been the intention of the Legislature to make the power of an appellate Court to make a reference to arbitration dependent upon circumstances which must vary from case to case. If we apply this test, this Court sitting on

appeal would not clearly be a 'Court' within the meaning of the Arbitration Act, 1940, as it has no jurisdiction to decide as a suit any point in controversy between the parties. It is difficult to say whether this matter escaped the notice of the Legislature when they passed the new Act. Undoubtedly, it may be argued that there is no reason why if the parties consent no reference to arbitration could be made when the case is pending before the appellate Court. On the other hand, opinion has been expressed by eminent authorities that if parties are allowed to refer matters to arbitration after a case has been finally decided by a Court of justice, such a proceeding might tend to bring the lower Courts into contempt. Vide the observations of Kemp, J. in ('74) 12 Beng. L.R. 266 at p. 274.

14. Whatever the proper view might be, we are bound to apply the law as it stands, and as the power of referring a case to arbitration is is not one that is inherent in a Court, we must hold that in the absence of any express provision, the appellate Court is not competent to exercise it. I, therefore, agree with my learned brother that this appeal should be allowed, the judgment and decree of the lower appellate Court set aside and the case sent back to that Court for disposal according to law.

#### Cases Referred.

1('86) 12 Cal. 173 (177)

2('91) 18 Cal. 507 (509)