PATNA HIGH COURT

Kokil Singh

Vs

Ramasray Prasad Choudhary

(Das, C.J. Ross, J.)

24.01.1924

JUDGMENT

Ross, J.

1. This is an appeal from a judgment of the Subordinate Judge of Darbhanga ordering an award to be filed and a decree to be prepared in its terms. The defendant was a Tahsildar under the plaintiffs and their co-sharers. The plaintiffs brought a suit against the defendant for accounts from 1319 to 1324. An agreement was entered into between the parties to refer the matter to arbitration and to withdraw the suit and the suit was accordingly dismissed on the 27th of February, 1922. The agreement to refer the dispute to arbitration is dated the 25th of February, 1922. It recites the institution of the suit and declares that "It has been now agreed that the suit be decided by arbitration." Chaudhary Ram Khelawan Rai was appointed arbitrator. The procedure to be followed in the arbitration was prescribed, and the 30th of Baisakh 1329 was fixed, as the date on which the award should be given. It was agreed that if Ram Khelawan Rai should be unwilling or unable to act as arbitrator, then his brother Ghaudhary Ram Rup Rai should act as arbitrator on the same terms. On the 11th of April, 1922, a notice is said to have been given by Ram Khelawan Rai to each of the parties, to the effect that on account of illness he would be unable to go to the villages and was unable to act as arbitrator, and, therefore, he had made over the arbitration agreement to his brother Ram Rup Rai who would act as arbitrator; the parties were directed to go to him with their evidence. On the 2nd of May, 1922, a fresh agreement was made between the parties with regard to the arbitration. This agreement recites the suit above mentioned and the previous agreement of the 25th of February. It also recites that Ram Khelawan Rai had expressed his inability to act as arbitrator by-notice sent under a registered cover, and, therefore, Ram Rup Rai had worked as arbitrator in the presence of the executants up to the 22nd of April and had done a good deal of work in connection therewith. But the arbitrator could not pass his award by the date fixed. It was, therefore, necessary to execute an agreement for extension of the date and it was agreed that Ram Rup Rai should act as arbitrator and pass his

award in accordance with the stipulations of the registered deed of agreement, dated the 25th of February, 1922, by the 29th of Sawan 1329. It should be mentioned that both these agreements were registered. On the 3rd of August, 1922, the arbitrator made his award which refers to the hearing of the arbitration in the presence of both parties on several dates as attested by the signatures of the parties and to the production of the oral and document tary evidence of both parties. It then declares that the defendant is to pay to the plaintiffs Rs, 18,741. The plaintiffs on the 15th of September, 1922, applied to the Subordinate Judge under paragraph 20 of the Second Schedule to the Civil Procedure Code, that the award be filed in Court. Cause was shown by the defendant and various objections were taken but the Subordir nate Judge, after going into evidence, overruled the objections and made the order which is the subject of this appeal.

2. The objections taken before the Sub? ordinate Judge and again in this Court are objections on grounds both of fact and law. The main objections on facts are, first, that Ram Khelawan Rai never refused to arbitrate and that the defendant agreed to the arbitration of Rup Rai on the strength of a falsa notice which he believed to havQ been signed by Ram Khelawan Rai, but which in fact was not signed by him, secondly, that the arbitrator refused to accept the defendant's evidence, and in particular, a safinama or acquittance which, if admitted, would have shown that he had received a full discharge from the plaintiffs and, thirdly, that the arbitrator refused to hold, a local, enquiry as requested by the defendant. The objections in law are, first, that the agreement to refer to arbitration having been arrived at while a suit was pending, and being without leave of the Court, it cannot be the basis of an award which can be filed under Schedule If, nor of a certificate of adjustment under Order XXIII, Rule 3, and, secondly, that an obvioust point of law has not, been considered by the arbitrator, namely, that the defendant having been appointed both by the plaintiffs and by their co-sharers, the plaintiffs alone could not call him to account.

3. I shall deal first with thequestions of fact. The principal question, is the question whether Ram Khelawan Rai gave notice of his inability to work as arbitrator. The principal, witnesses on each, side are Ram Rup Rai for the plaintiffs and Ram Khelawan Rai for the defendant; two copies of notice have been produced, one by the plaintiffs (Exhibit 5) and the other by the defendant (Exhibit A). Ram Rup Rai says in his evidence that, his brother did not arbitrate owing to ill-health. The witness was then asked to arbitrate and his brother told, him that he would serve notice on the parties to that effect Ram Khelawan on the contrary says that he gave no notice to the parties refusing to arbitrate, although he admits in cross-examination that he did think it necessary to give notice. He also admits that his brother Ram Rup is honest. He denies that the notice (Exhibit A) produced by the defendantwas signed by him. Now it is to be observed that the notice produced by the plaintiffs was not denied, by Ram Khelawan, it was not put to him. It may be noted also, in view of the evidence of Singheswar Prasad, to be presently referred to, that

Ram Khelawan was not asked whether Ram Rup Rai was in the habit of signing for him and further that Ram Rup Rai was not cross-examined on his denial that the signature on Exhibit A was made by him. The notice alleged to have been seived on the defendant (Exhibit A) is said in the defence, evidence to have been written by the witness Singheswar Prasad at the request of Ram Rup and to have been signed by Ram Rup in his presence. It is, therefore, common ground that Exhibit A was not signed by Ram Khelawan Rai and it was, therefore, not the notice which was served on the defendant, if any notice by Ram Khelawan Rai was served. If the evidence of Singheswar Prasad was credible then a case of fraud would be established, but, in my opinion that evidence is wholly woithless. The, learned Subordinate Judge has disbelieved the witness holding that he is no better than a tout. Singheswar Prasad admits that he asked Ram Rup why he was signing for Ram Khelawan and the answer was that he signed many papers for him. But the remarkable feature of this particular signature is that it purports to be by Ram Khelawan Rai by his own pen. Therefore, Singheswar Prasad, if his evidence, was true, was by his own showing a party to a forgery. I can see Absolutely no leaeon why this forgery should have been committed. The parties had agreed that if Ram Khelawan was unable to act his brother should act in his place. They were, therefore, quite willing to accept the arbitiation of Ram Rup Rai and I cannot see why a forged notice should have been resorted to in order to obtain Ram Rup's arbitration, especially as it is an undoubted fact that Ram Khelawan Rai was suffering from leprosy and would, therefore, quite probably be unable to act. In the second agreement, extending the time for making the award the receipt of the notice is referred to the arbitrator held the last seven sittings at his own house where his brother Ram Khelawan lives. Ram Khelawan, no doubt, says, that he was not there, having gone en pilgrimage, but this statement is denied by Ram Rup. The fact seems to be that there is hostility between the plaintifs and Musammat Alakhrupi Kuar, the mother of their co-sharer Baleswar. Alakhrupi is evidently supporting the defence as appears from the fact that she is said to have given the defendant an acquittance. Her daughter is married to the son of Ram Khelawan and the defendant massages her affairs. It appears that for these reasons Ram Khelawan Rai has come to support a wholly false defence that he gave no notice about the arbitration. It is incredible that this protracted arbitration should have been carried through by Ram Rup Rai openly and in the presence of the parties if in fact his brother had not given them notice of his own inability to do the work. There is no reason to doubt the genuineness of the notice (Exhibit 5) and if notice was given to one party, I can see no reason why it should not have been given to both. I hold, therefore, that Ram Rup Rai properly became the arbitrator in this matter.

4. The second ground is no better. The arbitrator kept notes of his proceedings from day to day which were signed by the parties and he also gave notices of the dates fixed. Thus the first sitting was notified to be held at the deorhi of Babu Baleswar Prasad Chaudhary and the parties were

directed to appear there with their oral and documentary evidence. Now this is where the defendant, if he relied on his safinama, might have been expected to produce it; and, if he wanted the evidence of Musammat Alakhrupi Kuer, he might have had it taken there. But although the safinama was produced before the arbitrator, as he says, the lady's evidence was not required by the defendant, the reason being, as the arbitrator says, that the defendant did not ask him to examine the lady "as she was a big person." Exhibit 7 is a notice by the parties, including the defendant, to the arbitrator, asking him to alter one of the dates because the defendant had business on the date fixed. Exhibit I is a notice of one of the dates, issued by the arbitrator and acknowledged by the defendantas well as by the plaintiffs. With regard to the proceedings themselves, there is a note by the defendant on the 22nd April that he had filed two lists of his evidence for, the arbitration. Again on the 18th July, there is a note that he had examined all his witnesses in the arbitration before the Thakurjee at Havi Bhawar, that is, the residence of the arbitrator. On the 19th of July, the defendant signs a note of the proceedings of that date and again on the 20th, 21st, 22nd and the 23rd; and on the 24th the following note "the arbitration proceedings...have been taken in presence of both the parties and have been completed to-day." It is true that the defendant denies his signatures on these notes, but on this point I prefer the evidence of the arbitrator himself. The arbitration was protracted, it was held in the presence of the parties, and it is impossible that important evidence should have been refused. The learned Subordinate Judge has compared the signatures of the defendant on these notes with his admitted signature and he finds that the writings of the defend" ants which are of a peculiar nature, are identical. These notices and notes conclude this part of the case against the defence.

5. With regard to the question of local enquiry, there is simply oath against oath. The arbitrator says that the defendant never requested him to make enquiries in the villages. Only one question was put to him in cross-examination on this point and he said that he would have gone to the locality if the defendant had requested him to do so. I can see no, reason to doubt this evidence, and disbelieve the statement of the defendant that he asked the arbitrator to go to the villages but he did not do so, in view of the undoubted falsity of the rest of his deposition.

6. I now turn to the objections to the order of the Subordinate Judge in point of law. The contention of the appellant is that there cannot be a reference to arbitration out of Court "when a suit is pending, because in a pending suit the arbitrator gets his authority both from the parties and from the Court; and that if the parties decide to refer a pending suit to arbitration, they must apply to the Court for an order of reference and keep the suit pending so, that the Court may have control over the arbitration. A number of cases were referred to in the argument. In the leading case *Ghulam Jilani v. Muhammad Hassan*[1] the Privy Council observed that "Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit,...all proceedings from first to last are under the supervision of the Court." In *Tincowry Dey v. Fakir*

Chand[2] Maclean, C.J., said that Section 523 (paragraph 17 of Schedule II) does not apply to a case of reference to arbitration where there is pending litigation. In *Vyankatesh Mahadev v. Ram Chandra Krishna*[3] it was said that "Where the Court is seized of a cause, its jurisdiction cannot be ousted by the private and secret act of parties, and if they, after having invoked the authority of the Court, and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first sixteen clauses of the Second Schedule." In *Venkatachallam Reddi v. Rungiah Reddi*[4] it was held that paragraph 17 of the Second Sched ule to Civil Procedure Code covers only cases where parties without, having recourse to litigation agree to refer their difference to arbitration; and that an agreement to refer to arbitration in a pending litigation made without the intervention of the Court could not be filed under paragraph 17 of the Second Schedule. In *Shavaksha Dinsha Davar v. Tyab Haji Ayub*[5] it was held that a decree could not be made on an award under Order XXIII, Rule 3. But Macleod, J., went on to observe as follows: "An arbitration between the parties to a suit without an order of the Court has not been excluded and must, therefore, come under the provisions which deal with arbitration without the intervention of the Court. I do not see myself why the words without the intervention of the Court' should not refer to cases where the agreement of reference is made out of Court although the parties to the agreement are already parties, to a suit, and, in my opinion, Section 89 is now conclusive on the question." The learned Judge, therefore, alloAved the application to be treated as an application under paragraph 20. In *Mani Lal Motilal v. Gokal Das Rowji*[6] however, the same, learned Judge came to the conclusion that that order was wrong, but he did not agree with the Trial Judge who had said that an award in a reference by the parties, to a suit without the intervention of the Court could not be a valid award. In *Amar Chand Chamaria v. Banwari Lal*[7] Rankin, J., has expressed the opinion that the rules in paragraphs 20 and 21 cannot be applied in such a case. The authority is clear that no assistance can be obtained from Order XXIII, Rule 3, Civil Procedure Code. As to paragraph 20 of the Second Schedule, these decisions, in my opinion, have no application to the present facts. On the 25th of February, 1922, the following petition was filed before the Court in the suit: "On the advice of well, wishers it has been agreed by the parties to get the suit decided by arbitrators. The petitioners have, therefore, executed an ekrarnama dated 25th February, 1922. Therefore, they do not like to prosecute this case. This suit may be dismissed without trial. Costs may be borne by the parties." In this the Subordinate Judge passed the following order: "The suit is dismissed in terms of the solehnama." This order is final and cannot be questioned now and, in any case, I can see nothing illegal in it. I see no reason why the suit should not have been withdrawn by consent of the parties. The euit then was at an end but the agreement to refer to arbitration stood. There is nothing illegal in such an agreement being made pending litigation; Nanjappa v. Nanja Rao 16 Ind. Cas. 478, where it was held that there may be an agreement to refer to arbitratiyi in a pending suit without the intervention of the Court. See also *Shavaksha*

Dinshd Davar v. Tyab Haji Ayub[8] *and Mani Lal Motilal v. Gokal Das Rowji*[9] quoted above. Paragraph 1 of the Second Schedule is not mandatory, it is permissive. If the parties apply to the Court for an order of reference then the Court must keep control over the proceedings np to the end. But it is not necessary for the parties to take this course and there is nothing to prevent their getting the suit dismissed by consent. Then the whole matter is at large. The point is that in all the cases cited above there was a suit pending at, the time when the award was made, and the question was how the award was to be dealt with in the suit; and the better opinion seems to be that it can only be dealt with by being pleaded as a bar to the further continuance of the suit. But where there is no suit pending when an, application is made to the Court under paragraph 20, I can see nothing to bar the procedure under paragraph 23 in the fact that the original agreement to arbitrate was made while a suit was pending. Paragraphs 20 and 21 provide for an adequate check of the proceedings before the award becomes a rule of the Court. This is all that is necessary. The present, proceedings fall directly within the terms of paragraph 2) because the matter wi3 referred to arbitration without the intervention of the Court. The Court made no order in the matter of arbitration in the original suit which was simply dismissed.

7. But here there is another fact. The original agreement to refer to arbitration provided by its fourth clause that the arbitrator should pass his award by 30th Baisakh 1329. As the arbitration was not completed by that date a fresh agreement was enterel into between the parties extending the time till the 23th of Sawan, 1329. This enlargement of time is equivalent to a fresh submission to arbitration. See Halsbury's Laws of England Vol. I, page 463 and *Stephens v. Lowe*[10] *and Watkins v. Phillpotts*[11] This agreement was not made during the pendency of any suit and was free from the objection that has been urged against the first submission.

8. Finally, as to the error of law said to have been committed by the arbitrator in making, an award when all the co-sharers were not plaintiffs, it is sufficient to say that the suit was at an end and that the submission to arbitration was a submission of the dispute between the present plaintiffs and the defendant. There was, therefore, no question of law for the arbitratorto, consider, and, even if there was, then, as, was pointed out by the Judicial Committee *in Ghulam Jilani v. Muhammad Hassan*[13] arbitrators are Judges of law as well as Judges of fact and an error of law certainly does not vitiate their award.

9. My opinion, therefore, is that on all grounds this appeal fails and it must be dismissed with costs. The stay application is dismissed.

10. Das, J.--I agree.

Cases Referred.

129 C. 167 : 6 C.W.N. 226 : 4 Bom. L.R. 161 : 12 M.L.J. 77 : 29 I.A. 51 : 8 Sar. P.C.J. 154 (P.C.)

230 C. 218 : 7 C.W.N. 180

327 Ind. Cas. 46 : 38 B. 687 : 16 Bom. L.R. 653

412 Ind. Cas. 372 : 36 M. 353 : 10 M.L.T. 248; (1911) 2 M.W.N. 249 : 21 M.L.J. 990

537 Ind. Cas. 140 : 40 B. 386 : 18 Bom. L.R. 559

659 Ind. Cas. 53 : 45 B. 245 : 22 Bom. L.R. 1048

769 Ind. Cas. 808 : 49 C. 608; (1922) A.I.R. (C.) 404

837 Ind. Cas. 140 : 40 B. 386 : 18 Bom. L.R. 559

950 Ind. Cas. 53 : 45 B. 245 : 22 Bom. L.R. 1048

10(1832) 9 Bing 32 : 2. M. and Scott 44 : 1 L.J. (N.S.) C.P. 150 : 35 R.R. 512 : 131 E.R. 526

11(1825) M'Cle. and. Y. 393 : 29 R.R. 809 : 148 E.R. 465

1229 C. 167 : 6 C.W.N. 226 : 4 Bom. L.R. 161 : 12 M.L.J. 77 : 29 I.A. 51 : 8 Sar. P.C.J. 154 (P.C)