PATNA HIGH COURT

Sia Kishori Kuer

Vs

Bhairvi Nandan Sinha

A.F.O.D. No. 416 of 1946

(Reuben, C.J. and Sarjoo Prosad, J.)

04.09.1952

JUDGMENT

Reuben, C.J.

1. This appeal by the defendants is directed against a preliminary decree for partition. The appellant No.1 Shiakishori Kuer is the widow of Lachminandan Sinha, one of whose sons is Ratneshwarinandan, defendant No.1. whose sons Parmeshwarinandan and Awadheshwarinandan are defendants Nos.5 and 6. Lachminandan had another son Vindeshwarinandan, deceased, whose sons are Bisheshwarinandan, defendant No.2, Ishwarinandan, defendant No.3 and Kameshwarinandan, defendant No.4. Bhairvinandan, plaintiff No.1 and Kamleshwarinandan, plaintiff No.2, are the sons of Kalikanandan, deceased, the brother of Lachminandan. Baidyanathnandan, father of Lachminandan and Kalikanandan, had a brother Girjanandan, who died leaving no heirs.

2. The family was formerly a joint Hindu family governed by the Mitakshara law. There was a severance of the joint status in 1939 when, by an unregistered 'ekrarnama', dated 28-10-1939, the bulk of the immovable property was partitioned between the different branches. According to the plaintiffs, from this time they and their father formed a joint Hindu family and the defendants 1 to 6 formed another joint Hindu family, and the undivided property specified in Schedules B and C to the plaint remained in the common possession of the two families. On 9-7-1940, the two families appointed Rai Saheb Satruhan Prasad Sahi as sole arbitrator to decide certain disputes pending between them and to divide such of the movable and immovable properties that still remained common to them. The arbitrator made an award on 23-5-1941. By this award he directed as regards the property in Schedule B, which is land and the house standing thereon at Sitamarhi, that if the plaintiffs paid to the defendants the sum of Rs.2000/- within six months as compensation for expenditure incurred by the defendants in excess of their proper share for construction of the building after the earthquake of 1934 out of their own funds, the plaintiffs would be entitled to a half-share in the property with the right of joint ownership and possession, failing which it would vest exclusively in the defendants. As regards the property in Schedule C which consists of a gold and silver 'tamjan' and a gold and silver 'houdah', he directed that they be kept between the parties, but the 'tamjan' would remain in the custody of the defendants and

the 'houdah' in the custody of the plaintiffs, each item of property to be made available to the other party when required by it. The plaintiffs pleaded that within the time specified by the arbitrator they sent Rs.2000/- by money order to the defendants, but the money was refused by them; also, that the defendants have not delivered the custody of the 'houdah' to the plaintiffs. On these facts the plaintiffs prayed that

> "a decree for partition to the extent of the plaintiffs' half share in the properties as mentioned in Schedules B and C be passed in plaintiffs' favor against the defendants and the plaintiffs may be allowed to deposit Rs.2000 in court according to the terms of the award to the credit of the defendants."

3. Originally Siakishori Kuer defendant No.7 was not impleaded. She was brought on the record in consequence of the defence taken that the property in Schedule B is really her property, having come to her from her father Nemdhari Singh as part of the Athari estate. They also pleaded that the movable property described in Schedule C had already been divided in 1939, the 'houdah' being allotted to the plaintiffs and the 'tamjan' to the defendants. They admitted the reference to arbitration, but disputed its validity on the ground that some of the defendants, then majors, were treated as minors and were, therefore, not properly represented. They further contested the validity of the award asserting that the signature of the arbitrator had been obtained on it by fraud. They also pleaded that certain property, which should have been brought into the partition had been omitted, a defect which was removed by the plaintiffs by a petition for amendment filed on the 24th July, 1946, and allowed by the Subordinate Judge by an order of the same date by which this property was added at the foot of the plaint in Schedule D.

4. The deed of reference to arbitration and the award made by the arbitrator have not been put in evidence and the Subordinate Judge, observing that although the plaint was mainly based on the award the plaintiffs were not seeking relief on the basis of the award, refrained from investigating the validity of the reference and the award. He rejected the defence story as regards the house at Sitamarhi and the alleged division of the property in Schedule C and decreed the suit for partition accordingly.

5. The decision of the Subordinate Judge covers the property in Schedule D. Owing to an omission of the office of the Subordinate Judge to amend the plaint in accordance with the order dated 24-7-1946, the decree has been wrongly drawn up and the property in Schedule D is omitted therefrom. The necessary correction will now have to be made in both the plaint and the decree. Mr. Lalnarayan Sinha, who represented the appellants, made it clear that the appeal does not relate to the property in Schedule D. So far as that property is concerned, therefore, the decree is not challenged.

6. Three grounds have urged before us: (1) that the suit as regards the properties in Schs.B and C is barred by reason of the award made by the arbitrator; (2) that the suit being based on an award which was not filed under the provisions of Section 14, Sub-Section (2), Arbitration Act, 1940, is not maintainable; and (3) the findings of fact in relation to the properties in Schs. B and C are incorrect.

7. The third point is really disposed of. As regards the property in Schedule B, the evidence is

overwhelmingly in support of the finding of the Subordinate Judge. It is not necessary to set out the evidence at length because this has been done very fully by Subordinate Judge. As long ago as 1898 the house was recorded in the name of Lachminandan Singh (Ext.13 'khatian') and since then it has stood recorded in the papers of the superior landlord in the names of one or other male member of the family. Among the persons, in whose name the property has stood is Girjanandan Sinha who is not in the line of Lachminandan Sinha at all, but is his uncle. It is extremely unlikely, if the property was really the property of Siakishori Kuer, that it would be allowed to stand in the name of Girjanandan. The account books of the family exhibit 2 series and Exhibit 7 series, show that property has been treated as the property of the family. Expenses incurred on it have come out of the family fund and income derived from it have gone into the family fund. There is only one entry in these accounts, Exhibit E(5), to support the contrary inference, and it was made at a time when the 'karta' was Ratneshwarinandan, defendant No.1. A few municipal receipts, Exhibit A series, were produced by the defence in the name of Siakishori Kuer, but they relate to a period after dispute between the parties had commenced. Certain 'jamabandis', Exhibit C series, of the superior landlord have been produced, and it is contended that they show that in 1295 and 1297 Fasli the property stood in the name of Nemdhari Singh, father of Siakishori Kuer. The identity of the property to which those entries relate is not clear. But even if it be accepted that the entries relate to the property in Schedule B, the fact that the property then stood in the name of Nemdhari Singh would not establish that the property now belongs to his daughter and would not explain away the numerous papers which support the case of the plaintiffs that this was the family property of the plaintiffs and their agnates. A letter, Ex.6, written by Braj Bihari Sinha, the manager of the Sheohar estate, which is the estate belonging to the family of the plaintiffs, relates to the property in Schedule B and mentions that Ratneshwarinandan had directed that the bricks of the house which had collapsed during the earthquake be given to one Ramdeo Babu. A note on this letter made by Kamleshwarinandan, plaintiffs No.2, states that he is writing to Ramdeo Babu about it, and "as I myself am erecting my house at Sitamarhi on the same site, it is no more possible for me to return the bricks at this stage." The letter and the note thereon are dated sometime in November, 1937. They are not consistent with the property being the property of Siakishori Kuer. Finally, there is the deed of surrender, Exhibit 8, by which Musammat Ramsakhi, widow of Nemdhari Singh, surrendered the properties of the Athari estate in favor of Siakishori Kuer. The property in Schedule B is excluded from this deed. Oral evidence is hardly sufficient to outweigh the documentary evidence, and in this case the oral evidence, which is very scanty, has on its own merits been rejected by the Subordinate Judge. For these reasons I would accept the finding of the Subordinate Judge as regards this property.

8. As regards the property in Schedule C, the finding of the Subordinate Judge is not seriously challenged. This is not surprising because the case attempted to be made out in evidence is not consistent with that pleaded in the written-statement and the list of divided property, Exhibit D, on which the defense rely, is of the year 1951, though the division is said to have taken place in 1941. I would, therefore, accept the findings of the Subordinate Judge on this point also.

9. For his contention that the suit is barred by the award Mr. Lalnarayan Sinha relied on the decisions reported in - *'Krishna Panda v. Balaram Panda*[1]*',* and - *'Bhajahari Saha v. Behary Lal*[2]*',* The Madras case arose out of a suit for partition. The parties were formerly members of a joint Hindu family. There was a severance of joint status in 1875 and in 1882 a reference was made to arbitration to effect a division of the family property. The arbitrators made an award to which neither party agreed and which was never enforced. Their Lordships held that the suit was

barred, observing:

> "An award 'duly passed' in accordance with the submission of the parties is equivalent to a final judgment. To give effect to it the subsequent consent or approval of neither party is required. After an award made for partition of joint property neither party can sue for partition any more than he could if a decree in a suit for partition had been passed. (The italics (here into ' ') are mine).

10. In - 'Bhajahari Saha's case', 33 Cal 881 an award was made in 1893 on a private reference to arbitration regarding the title to and possession over certain immovable property, but was not made a rule of the Court. Subsequently one of the parties sued to recover possession of the property on title by purchase and, alternatively, on the title created and recognised by the award. Their Lordships held that, while the suit was not maintainable on title by purchase, the rights of the parties having merged in the award, it was maintainable on the award itself. Mookerjee, J., who delivered the leading judgment, explained the true effect of an award of arbitrators:

> "This decision - *'Muhammad Niwaz Khan v. Alim Khan[3]',* clearly shows that, 'if an award is valid', it is operative even though neither party has sought to enforce it by a regular suit or by the summary procedure. This conclusion is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect, which is due to the judgment of a court of last resort. The award is in fact a final adjudication by a court of the parties' own choice and until impeached upon sufficient grounds in an appropriate proceeding, an award, 'which is on the face of it regular', is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive. See - *'Commings v. Heard[4]',* - *'Sweet v. Morrison[5]',* and - *'Harris v. Social M. Co[6].',* To put the matter in another way, as the ordinary rule, 'a valid award' operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand; See - *'Curley v. Dean[7]'.* - *'Walsh v. Gilmer', 3 Harris and Johnson[8],* and - *'Clegg v. Dearden[9]'.* It is a mistake, therefore, to contend that, if an award has been validly made, as it has been found to have been made in this case, it does not become operative until it has been enforced by suit or application, in reality, it possesses all the elements of vitality even though it has not been formally enforced, and it may be relied upon in a litigation between the parties relating to the same subject-matter; obviously, if such reliance is placed upon the award, it is open to the party, against whom it is sought to be used, to question its validity; but if it is established to be a valid award', it is binding upon the parties as embodying an adjudication of their rights." (The italics (here into ' ') are mine).

11. The case of - 'Muhammad Niwaz Khan', 18 Cal 414 (PC) to which Mookerjee, J. referred is interesting as the award, also on a private reference to arbitration, was made the subject of an unsuccessful application under Section 525, Civil Procedure Code, 1882. Nevertheless, it was

held that it could be relied on as a defence in a suit relating to the subject-matter dealt with by it, their Lordships of the Judicial Committee pointing out that in the proceedings under Section 525 the validity of the award as an award was not directly and substantially in issue, and so the failure of the application under Section 525 left the award to have its ordinary legal validity. Their Lordships proceeded thereafter to consider and reject the contention that the award was invalidated by the misconduct of the arbitrators.

12. The decisions to which I have referred illustrate the state of the law previous to the coming into force of the Arbitration Act 1940. A valid award was an operative award by itself and there were two ways in which it could be enforced. It might be made a rule of the court by an application under the Civil Procedure Code or under the Arbitration Act, 1899, as the case might be, or the party might be, or the party might treat it as an independent source of title and enforce it by suit. In either case it was open to the opposite party to challenge the validity of the award. The remedy by suit was taken away by Section 32 of the Arbitration Act, 1940, which provides:

> "Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

13. The effect of this section was considered In - *'Ramchander v. Munshi[10]',* in which Ramaswami, J. relied on - *'Moolchand Jothajee v. Rashid Jamshed Sons and Co[11].',* - *'Deokinandan v. Basantlal[12]',* and - *'Ratanji Virpal and Co. v. Dhirajlal Manila[13]',* for the proposition that a suit will not lie to enforce an award. Mr. Lalnarayan Sinha's contention is that a distinction must be drawn between a right and the remedies open for enforcing it; Section 32 has taken away one of the two remedies available in respect of an award of arbitrators, but the legal effect of the award as a decree finally determining the rights of the parties remains and, therefore, - *'Krishna Panda v. Balaram Panda[14]',* and - *'Bhajahari Saha v. Behary Lal[15]',* are still good law. This contention is supported by the process of reasoning in - *'Dewaram v. Harinarain[16]',* and - *'Jagdish v. Sunder[17]',* in which, on the principle that a private award is operative even if it is not made a rule of the Court, it was held that it is not exempt from the
provisions of Section 17, sub-section (1), clause (b), Registration Act. Manohar Lall, J., in the former case rejected Mr. Lalnarayan Sinha's argument that by the amendment of the law in 1940 an award is operative only when it is made a rule of the Court. In reply Manohar Lall, J., pointed out that under Section 33 of the Act an award can be questioned in Court without being filed under Section 14 of the Act, a view which is contrary to that taken in - *'Deokinandan v. Basantlal[18]',* - *'Ratanji Virpal and Co. v. Dhirajlal Manilal[19],* and - *'Lachhmi Prasad v. Gobardhan Das[20]',* Manohar Lall, J., also relied on the necessity for registration to pass title in the event of the parties accepting the award, and acting on it without making it a rule of the Court. With respect, this reasoning appears to me to have no bearing on whether the award has an operative force without being made a rule of the Court. In - *'Jagdish v. Sunder', 27 Pat 86(Supra)* in which the leading judgment was delivered by me, the learned counsel relied on the amendment, as between the 1940 Act and Schedule 2, Civil Procedure Code, 1908, in the procedure by which the award is made a rule of the Court. I rejected the contention as I considered that there was no substantial difference in the two sets of provisions. But my attention was not drawn in this connection to the effect of Section 32 of the 1940 Act. In - *'Moolchand Jothajee v. Rashid Jamshed Sons and Co.', AIR 1946 Madras 346(supra)*, Leach C.J. observed:

"The scheme of the Act (the Arbitration Act, 1940) is to prevent the parties to an arbitration agitating question relating to the arbitration in any manner other than that provided by the Act," and as a reason for holding that a suit will not lie to enforce an award he said that such suit raises question with regard to the existence and validity of the award, which is contrary to Section 32 of the 1940 Act. The question of the existence and validity of an award arises also if the award is pleaded by way of a defence. This explains the observation of Chagla, C.J., in - *'Moolchand Jothajee v. Rashid Jamshed Sons and Co.', ILR (1946) Bom 45*2(Supra) which was cited with approval by Ramaswami, J., in - *'Ramchander v. Munshi', 28 Pat 569*(supra)

"Further, under the present Act no proceedings can be taken on the award till after it has been filed, and I fail to see how a party can possibly be prejudiced by the existence of an award which has not been filed in Court. Under the old Arbitration Act it was competent to a party who obtained an award without filing it to file a suit thereon. Further, the award became enforceable as a decree as soon as it was filed. But under the present Act all proceedings with regard to the arbitration agreement or the award have to be taken as provided by the Act and before the tribunal indicated by the Act. Section 32 specifically provides that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award, be set aside, amended, modified or in any way affected otherwise than as provided in the said Act, and under Section 17 of the Act the Court has to pronounce judgment according to the award and a decree follows. It is only this decree that can be executed."

In other words, the award only becomes operative when it is made a rule of the Court. In - *'Dewaram v. Harinarain', 26 Pat 437(Supra)* and - *'Jagdish v. Sunder', 27 Pat 86(supra)*, the question at issue was whether a private award is exempt from the necessity forregistration. If that question arises again it may be necessary to reconsider those decisions, but I do not regard them as authorities on the point now under consideration. Apart from what I have said above, the contention that the award operates as 'res judicata' breaks down for the reason given by Leach, C.J., in - *'Moolchand Jothajee v. Rashid Jamshed Sons and Co.', AIR 1946 Madras 346(Supra)*. As is clear from the words which I have placed in italics in the citations from - *'Krishna Panda v. Balaram Panda', 19 Mad 290(supra)* and - *'Bhajahari Saha v. Behary Lal', 33 Cal 881(supra)*, the award can operate as 'res judicata' only if it is a valid award. Thus, the question of its validity necessarily arises and it is contrary to the provisions of Section 32 of the 1940 Act to consider this point in a suit. It has been contended that the effect of such an interpretation would be to defeat the purpose of the Arbitration Act, 1940. In my opinion, the effect would be just the contrary. Under the law as it stood before the 1940 Act, what would otherwise have been perfectly good claim might be met by a plea of an arbitration award dating so far back that the claimant might be unable, owing to lapse of time, to establish circumstances rendering the award an invalid one. This is a situation which may easily arise in a case like - *'Krishna Panda v. Balaram Panda', 19 Mad 290(Supra),* where neither party attempts at the time when the award is made to act on the award. The present Act, by insisting that within the time limited by Article 178 of the first schedule to the Indian Limitation Act, 1908, an application

must be made in Court for the filing of the award, makes for certainty and minimises the danger of an injustice occurring. As a test of the correctness of the view which I am inclined to take the question was suggested whether a suit on his original title filed by a party to an award within the period limited by Article 178 is maintainable. I do not see why such a suit may not be entertained. This will not defeat the Act of 1940 because it would be open to the defendant to make an application to get the award filed in Court, and pending the disposal of that application, he could ask for a stay of the suit. Then, as soon as the award is made a rule of the Court, it is available to the defendant as a bar to the suit.

14. This disposes of Mr. Lalnarayan Sinha's first point, and I turn to his second point, namely, that the suit, being based on an award which was not filed under Section 14, sub-section (2), Arbitration Act, 1940, is not maintainable. I have already noticed that - *'Ramchander v. Munshi', 28 Pat 569* (Supra)is an authority for the proposition that such a suit does not lie and it is merely a matter of interpretation to determine whether in the present case the suit is based on the plaintiffs' original title or on their rights as determined by the award. At first sight it would appear that the suit is based on the award and this was the interpretation which the Subordinate Judge appears to have been inclined to place upon it. It is noticeable, however, that the plaintiffs have not placed on the record, or produced at any time during the suit, the award itself although according to paragraph 6 of the plaint the arbitrator sent one copy of the award to each of the parties. The subordinate Judge mentions in his judgment that the trial Counsel for the plaintiffs stated that the claim was not based on the award. Apart from anything which may have been said at the trial and the conduct of the plaintiffs during the suit, a careful perusal of the plaint shows that the claim is not based on the award. (His Lordship then considered several paras of the plaint and concluded:) My interpretation is supported by para 16 of the plaint which says that

> "the cause of action arose to the plaintiffs on 30-4-44 when the last demand for partition was made".

(I should mention that the award is said to have been made on the 23rd May, 1941). It is true that in the prayer for relief which I have cited at page 3 the plaintiffs ask for permission to deposit Rs.2000/- "according to the terms of the award". This, however, is not by way of asking the Court to enforce the award. The plaintiffs are merely showing their 'bona fides' by expressing their willingness to comply with the condition imposed by the arbitrator. On the admitted genealogy the plaintiffs were entitled to claim a half share in the property without subjecting themselves to this condition. In view of the award of the arbitrator they have thought fit to cut down their right. This is no reason why the Court should hold that the plaintiffs are not entitled to any relief at all. In my opinion, they are entitled to the relief as sought by them.

15. For the reasons which I have given this appeal fails and will be dismissed with costs. As directed at the commencement of my judgment, the plaint and the decree will be amended by inserting the property in Schedule D in accordance with the order of the Subordinate Judge dated 24-7-1946.

Sarjoo Prosad, J.

16. I concur.

Appeal dismissed.

Cases Referred.

[1]19 Mad 290
[2]33 Cal 881
[3]18 Cal 414 (PC)
[4](1869) 4 QB 669: 10 B. and S. 606
[5]116 NY 19: 15 Am. St. Rep. 376
[6]41 RI 133: 5 Am. Rep. 549
[7]4 Coun. 259: 10 Am. Dec. 140
[8]383: 6 Am Dec 502
[9](1848) 12 QB 576: 17 LJQB 233 : 76 RR 360
[10]28 Pat 569
[11] AIR 1946 Mad 346
[12]45 Cal WN 881
[13] ILR (1942) Bom 452
[14]19 Mad 290
[15]33 Cal 881
[16]26 Pat 437
[17]27 Pat 86
[18]45 Cal WN 881
[19] ILR (1942) Bom 452
[20] AIR 1948 Pat 171