

NAGPUR HIGH COURT

Sheodutt

Vs

Pandit Vishnudatta

Misc. First Appeal No. 154 of 1949. decided on 1.7.1954

(R. Kaushalendra Rao and Bhutt, JJ.)

30.08.1949 01.07.1954

JUDGMENT

R. Kaushalendra Rao, J.

1. This appeal is by the applicant whose application under section 33 of the Arbitration Act for declaring that reference to arbitration made on 19-7-1945 was a nullity and the award given in pursuance thereto was also a nullity was rejected by the learned trial Judge.

2. In his application the appellant alleged 'inter alia' that the reference was void for indefiniteness and vagueness and also because the reference failed to specify exactly the nature of the dispute or the property with respect to which the relief of partition was claimed. The appellant also alleged that two of the arbitrators expressed unwillingness to act and signed a piece of paper giving up their authority under agreements of reference and requested one of the arbitrators to send the same to the parties. Nothing was done in the direction of making a partition. The appellant learnt that the arbitrators were colluding with the respondents-non-applicants. So the appellant sent a registered notice to one of the arbitrators to inform the former if there was a completed award and calling upon him to file the award, if any. No reply being received, the appellant made the present application. He alleged that the award, if any, was invalid because the arbitrators did not act together in giving the decision, and their deliberations were made in the absence of the appellant and without his knowledge. Further, it was alleged that the arbitrators ignored all law of procedure in sitting, hearing and examining evidence and even went outside the reference in that the arbitrators acted on their personal knowledge.

3. The non-applicant-respondents denied the allegations and alleged that the arbitrators made and signed the award on 1-8-1945, published it and gave notice of the award and sent its copies to the appellant and the respondent on 6-8-1945. They pleaded that the applicant's right to challenge the award was barred by time.

4. The learned trial Judge dismissed the application negating the objections raised by the appellant to the validity of the reference and the award and further holding that the application was barred by time.

5. In appeal it was contended by the appellant that the learned trial Judge was in error in holding that the application was barred by time. It was submitted that there was no valid reference to the arbitrators and consequently the award itself was a nullity. It was further contended that the award was vitiated by reason of the arbitrators' examining the non-applicant and taking evidence behind the back of the appellant, by their importing personal knowledge in giving the award, and, finally, by their failure to act together in making the award.

6. The first point for decision is whether the application was barred by time. The learned trial Judge held that time began to run from 6-8-1945 when notice was given to the appellant by the arbitrators under Section 14(1), Arbitration Act. The learned Judge was presumably of the view that the application was governed by Article 178, Limitation Act, because he reckoned limitation from the date of the service of the notice of the making of the award. But the application in question is not one for filing in Court the award but one under Section 33. That being so, Article 178 has no application to the case. In fact, the learned counsel for the respondent did not dispute this. He, however, strenuously contended that the application should have been thrown out as premature and incompetent because it was made before the filing of the award in Court. The learned counsel relied upon - '*Ratanji Virpal and Co. v. Dhirajlal Manilal*¹', - '*Bengal Jute Mills Co. Ltd. v. Jewraj Hirallal*²', and - '*Bishun Prasad v. Gopal Das*³', These cases are however distinguishable. The application in question in each of the cited cases was held to be incompetent and rejected because the award was not filed in Court before the disposal of the case. In the present case, the award was filed by one of the arbitrators, Raghuwir Prasad, along with his statement on 1-10-1946. It is well established that Article 178 has no application to an arbitrator filing the award: - '*Gendalal v. Mathuradas*⁴', Once the award was filed in Court before the disposal of the case, the application could not be rejected on the ground that it was made prior to the filing of the award. The Court was bound to consider the application on merits and pronounce on the validity of the award. See - '*I.G.H. Ariff v. Bengal Silk Mills Ltd.*⁵', and - '*Damari Rai v. Rampirit Ahir*⁶',

7. In the result, we hold that the learned trial Judge was in error in holding that the application was barred by time. We further hold that there is no force in the contention for the respondents that the application was liable to be thrown out on the ground that it was incompetent or premature.

8. The next point for consideration is whether there was a valid reference to arbitration. The arbitration agreement is contained in two documents Exhibit A-1 (a) and Exhibit A-5, executed on the same date by Sheodutt and Srinivas respectively. The attack against the agreement is that it did not define the dispute or the property to be partitioned. On a reading of Exhibit A-1(a) it would appear that Sheodutt made the reference for a settlement of the dispute regarding partition of the property. Sheodutt alleged that he was a co-sharer with his brother who was the lambardar. In settlement of the dispute regarding partition between the two brothers Sheodutt desired the panchas to make a division of whatever movable and immovable property there was. The reference by Srinivas under Ex. A-5 was on the footing that there was a private partition between the two brothers in the years 1931 or 32 but that therein settlement about some property remained to be effected between the two. The reference was made 'only' for obtaining the settlement in respect of the property which remained to be partitioned.

9. According to the learned trial Judge, originally the two deeds of reference Ex. A-1(a) and Ex.

A-5 were in the same form but the portion, "Jiska Apsi Batwara San 1931 Ya 32 Me Ham Done Jhanoka Hogaya Tha, Magar Jisme Kuchh Jaydad Taspiya Hone Ham Done Jhaneke Darmiyan Rah Gaya Tha" was cut out from Ex. A-1 (a) after its execution by the appellant. The learned Judge observed that the appellant did not plead as to when the alteration was made in the original draft. The learned Judge further observed - and erroneously - that even in the evidence the appellant did not depose about the time of the alteration.

10. The normal presumption with regard to an alteration in a deed is that the alteration was made prior to the execution of the deed. See - '*Doe d. Tatum v. Catomore*⁷', and - '*Simmons v. Rudall*⁸', In the present case the appellant explained as to how the alteration came to be made. As A.W.2 he deposed that the document had already been written before his arrival on the scene (vide para 17). When he read the document, he did not approve of the portion now found scored out. He asked the petition-writer to score it out and he did it. Though the appellant did not say in so many words, it is evident that he signed the document after it was scored out. In fact, no suggestion was made to the contrary in the cross-examination of the appellant. The scribe of the document, Bishal Singh, was not examined. But two of the arbitrators, Chandrikaprasad and Raghuwirprasad (N.A. Ws.1 and 2) spoke about the alteration. The inference of the learned trial Judge from para 20 of the deposition of Chandrikaprasad (N.A.W.1) that the alteration was made after Sheodutt had signed the original draft is, in our opinion, improper. Chandrikaprasad first tried to show that he did not notice the difference in the agreements on the date of the agreements (vide paras 17-19). It was later (para 20) that he had reluctantly to admit that on the date of giving the agreements the appellant said he would not accept the clause about the previous partition in 1932, and got the clause removed and erased from the document which he had executed. Chandrikaprasad cannot be believed. According to Raghuwirprasad (N.A.W.2), Sheodutt wanted to remove some clause from the agreement and make some alteration. The witness then said that Sheodutt might do it. If an agreed reference was already made that only property not divided in 1931-32 should be partitioned, it was unlikely that Raghuwirprasad would have permitted Sheodutt to score out the clause from the agreement or Vishnudutt who was present would not have protested then and there. So, reading the evidence as a whole, we find that it is not established that the alteration was made after the execution of Ex. A-1 (a), or much less after Sheodutt delivered the document to the arbitrators.

11. It is evident that the parties were not 'ad idem' about the dispute to be decided by the arbitrators and consequently there was no valid arbitration agreement. While Sheodutt wanted the arbitrators to make a partition as though there was no partition whatever earlier, Srinivas wanted a partition to be made 'only' of the property remaining for partition after the partition of 1931-32. In brief, according to Srinivas it was not open to the arbitrators to go into the question whether there was not a partition in 1931-32. In any case, the agreement of reference as evidenced by the two documents is bad for indefiniteness and uncertainty as to the exact dispute referred to arbitration and consequently the award is also bad. See - '*Babu Lal v. Badri Lal*⁹', and - '*Bindessuri Pershad Singh v. Jankee Pershad Singh*¹⁰', The award on the basis of an invalid reference was a nullity and could be challenged in an appropriate proceeding. - '*Chhabba Lal v. Kallu Lal*¹¹', and - '*Haji Ebrahim Kassim Cochinwala v. Pannalal Johurmull*¹²',

12. The next point for consideration is whether the award was vitiated because the arbitrators proceeded behind the back of the appellant. It is clear that the arbitrators could not proceed

amicably. One of the five died, and the four examined as witnesses, two on each side, are not agreed as to how they proceeded on the reference. The arbitrators themselves fell out before the completion of the award complaining against one of themselves namely Chandrikaprasad. According to Sonu (A.W.1) the parties were not called together and they were not heard together. Sonu's evidence was supported by another arbitrator Buttusao (A.W.3) and by the appellant as A.W.2. On the other hand, the evidence of Chandrikaprasad (N.A.W.1) is to the effect that everything was transacted in the presence of all the panchas and when both the parties were present, and that nothing was done in their absence. The matter, however, does not rest in that state of uncertainty. The 'sirpanch', Raghuwir Prasad, who was called as a witness by the respondents gave support to the case of the appellant. His assertion in examination-in-chief that all the parties used to be present when the arbitrators recorded the statements and conducted the proceedings cannot be reconciled with what he had to admit in his cross-examination. He deposed as under: "I do not know if the statements of the two brothers were recorded the same day or on different days. We did not make any other inquiries. Now says we had asked the villager Fatesingh Dirghansing, Kashiprasad Taj Mohamad about the previous partition. They affirmed that there had been a previous partition. We did not inquire from other men. The persons named above told orally that they had witnessed the partition of all the moveables etc. Details of the partition were not asked or told. We did not record their evidence. 'We asked the witnesses wherever we saw them.' Now says they came to Chandrika where we were sitting and there we asked. They did not come all together but separately. We did not call them. Seodutt and Srinivas had orally told us that those men knew of the previous partition and hence we questioned them when we saw them going by the house of Chandrika. We did not record this part of the statements of the two brothers in their statements. They told us the above two or three days after recorded their statements." The assertion in the last sentence sounds improbable. The rest of the evidence goes to support the allegation of the appellant that enquiries were made behind the back of the appellant though the deed of reference-either Ex. A-1(a) or Ex. A-5 did not authorise such a procedure.

13. On 29-7-1945 Shrinivas asked the arbitrators to make an enquiry from the people of the 'mohalla' whether there was a partition in 1932-33 (vide para 1). There is nothing to show that the appellant consented to such a procedure. It is true that the arbitrators are not bound to meticulously copy the procedure of a Court. But they are not free to depart from the rule that no enquiry into the case should be undertaken behind the back of a party. In the circumstances, we hold that the proceedings of the arbitrators suffered from a grave defect in that they disregarded a fundamental rule in examining the parties in the absence of the other. The arbitrators made private enquiries and collected evidence. No record was made of it. The award was however based on enquiries so made. The appellant had no opportunity to meet and controvert the evidence thus collected. No value can be attached to the statement of Chandrikaprasad (N.A.W.1) that the parties were asked to give evidence but declined to do so. Admittedly, no such record was made in the minutes of the proceedings. We hold that the award was vitiated. '*Tikaram v. Hansraj*¹³'; '*Sanyasi Rao v. Venkat Rao*¹⁴', '*Ram Chandar v. Hans Ram*¹⁵', and '*Vengamma v. Kesanna*¹⁶,

14. The next point for consideration is whether the arbitrators imported their own personal knowledge in making the award. One of the arbitrators, Chandrikaprasad (N.A.W.1), cited by the respondent, deposed:

"In the award I have mentioned that we inquired and after making inquiry we gave the award. Inquiry referred to was made from amongst us the panchas only. We had some 'personal information and knowledge' and with its help we gave the award.

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Vijay pancha has his lands at Mahali. He also belongs to the family of the parties and he knew about the affairs of the family. We consulted him about the division of the Mahali lands. We did not record his statement. We did not tell the parties what information the pancha Vijay gave about the division of the lands at Mahali. We consulted each other (the panchas). The parties were not there.

No pancha was present at the time of the partition of 1932 but Vijaya was present as he was a man of their family. Vijaya is no more."

The arbitration agreements did not authorize the arbitrators to use their personal knowledge. It was accordingly contended for the appellant that the arbitrators were not entitled to import into the consideration of the case their own knowledge. Reliance was placed on - '*Mt. Bari Bahu v. Pratap Singh*¹⁷', '*Lachmi Narain v. Sheonath Pande*¹⁸', '*Palavesam Chettiar v. Narayana Aiyar*¹⁹', '*Gopalam v. Suryanarayana*²⁰', and - '*Chidambaram v. Ayyappa*²¹', The last two rulings are very pertinent in the instant case.

15. Relying on- '*Ramanuja Chariar v. Thathachariar*²²', the learned counsel for the respondents submitted that where an arbitrator was chosen presumably because of his personal knowledge of the controversies between the parties, the award could not be set aside on the ground that the decision was based on such a knowledge. The case cited is distinguishable in that the reference there was to a sole arbitrator who was the sister's husband of the parties and who was intimately connected with the family and was necessarily aware of its status and to some extent of its properties. Here, five arbitrators were chosen - not all from the family circle. Though there is a statement in the evidence of Sheodutt (A.W.2) that the arbitrators were chosen because they knew the parties and their affairs, it is evident from what Chandrikaprasad (N.A.W.1) deposed that only Vijay being from the family circle was taken by the other arbitrators to have some special knowledge of the affairs of the family and the partition of 1932. He was supposed to be present at the partition. The arbitrators used the personal knowledge of but one of them about the disputed partition in 1932 admittedly without communicating the information so derived to the party adversely affected by it. Besides, no opportunity at all was given to the appellant to adduce his evidence on so vital a question. He was thus prejudiced. Yet the arbitrators found in favour of the disputed partition in 1932. In the circumstances, the award must be held to be vitiated by misconduct.

16. The last question for consideration is whether all the arbitrators acted together in making the award. Two of the arbitrators, Sonu (A.W.1) and Buttusao (A.W.3), called as witnesses by the appellant, were illiterates. Sonu could not even sign. Buttusao is illiterate though he can make his signature. Sonu complained that Chandrikaprasad took on 1-8-1945 his thumb mark on a paper representing that it was to the effect that he and Buttusao would no longer like to be panchas. Buttusao also deposed that he signed the document without its contents being read to him on Raghuwir Prasad and Chandrikaprasad saying that he should sign the document if he did not

want to act as pancha. This story was rejected by the learned trial Judge who observed that no such case was put forward in the application. Though there was some suggestion to that effect in Para.7 of the application, it cannot be said that the point made by Sonu and Buttusao was raised with the particularity necessary for an allegation of fraud. What the two arbitrators were deposing to was nothing short of fraud on the part of the other arbitrators. No specific issue was also framed on the point. So we agree with the learned trial Judge that this aspect of the question whether the award was signed in the circumstances alleged by Sonu and Buttusao (A.Ws.1 and 3) could not be gone into. It is therefore not necessary to pronounce an opinion on the merits of the allegation. We may, however, observe that the evidence of Buttusao (A.W.3) is not quite consistent with that of Sonu (A.W.1) in that the former stated that the award was read over to him after obtaining his signature.

17. This does not however conclude the question raised by the appellant which is whether all the arbitrators acted together in giving the decision. Sheodutt (A.W.2) deposed:

"On some occasions I was not present at the time of the proceedings. Chandrika used to call me and tell me that he had written the proceedings of that date and I should sign. I did it."

If this was the only evidence in the case, it may not be regarded as conclusive. There is, however, another significant circumstance and also the evidence of the arbitrator Raghuwir Prasad (N.A.W.2) called by the respondents as his witness which lend support to the allegation of the appellant that there was no joint deliberation of all the arbitrators. The award contains the signatures of the four arbitrators and the thumb mark of the fifth on 1-8-1945. It was later that the property falling to the share of each in the partition of 1932-33 was specified in the award. This portion of the award was only signed by three of the arbitrators. One of the three (N.A.W.2) was called as a witness by the respondents. Raghuwir Prasad (N.A.W.2) deposed-

"Notice of award up to what was written before was alone given to the parties and not of the addition made to it. The addition was made at Bilaspur either the same day or next morning. Chandrika did not make the addition after consulting me. I do not know what he added."

So even Raghuwir Prasad merely signed the addition in the award subsequent to 1-8-1945 without taking part in the decision.

18. It seems to us that Chandrikaprasad dominated the proceedings and took undue advantage of the two illiterates. In view of the fact that two of the arbitrators were illiterates, we are left with an uneasy feeling that all the arbitrators did not jointly deliberate in the proceedings or in the making of the award. This would also vitiate the whole award. - '*Lord v. Lord*²³', - '*Nand Ram v. Fakir Chand*²⁴', (X); - '*Thammiraju v. Bapiraju*²⁵', and - '*Fazalally v. Khimji Poonji and Co*²⁶.';

19. The learned counsel for the respondents submitted that the portion of the award giving in detail property falling to the shares of the parties in the partition of 1932-33 was not material, and, in any event, separable. So the award can stand Counsel relied on - '*Het Lall v. Upendra*

*Nath*²⁷, The case is distinguishable because the portion of the award there which was held to be bad was considered to be separable. In the circumstances of the present case, we cannot accept the contention.

20. The portion of the award dealing with the property falling to the shares of the parties, which was added subsequent to 1-8-1945, cannot be viewed as mere filling in of the details of what was already contained in the award. Prior to 1-8-1945 the award did not show what properties fell to the shares of the respective parties. Indeed in para 3 the arbitrators held that a private partition of the lands at Mahali and Dhopghatti had already been effected between the parties. In para 4 they observed:

"As regards paragraph No.3 if both the objectors desire to partition the lands at Mahali and Dhopghatti into half and half, they can do it."

So on 1-8-1945 not only did the arbitrators not mention the properties falling to the share of each party, but they gave no indication that they were going to give a finding on that point. Therefore, the rest of the award after 1-8-1945 by only two of the arbitrators - because Raghuwir Prasad admitted that he did not know of the addition - was an alteration of or an addition to the award given by the five earlier. The decision about the various items of the property falling to the share of each of the parties in a dispute about the partition was a material and inseparable portion of the award which was vitiated by the failure of all the arbitrators to jointly deliberate in making the decision.

21. The learned counsel for the appellant did not press the point about the partiality of some of the arbitrators; nor did he press the various other points raised in the application as vitiating the award. Accordingly it is not necessary to consider them.

22. In conclusion, we are of opinion that all things considered this is a case in which though the appellant might not have succeeded in establishing personal turpitude on the part of the arbitrators, he at any rate has established that there was such a "mishandling of the arbitration" as to result in substantial miscarriage of justice. See per Lord Atkin (Atkin J. as he then was) in - '*Williams v. Wallis and Cox*²⁸',

23. In the result, we hold that the learned trial Judge was in error in rejecting the application. We further hold that there was no valid reference, the award was a nullity and was also liable to be set aside. We order accordingly. The appeal is allowed with costs in both the Courts.
Appeal allowed.

Cases Referred.

¹ AIR 1942 Bom 101

² AIR 1944 Cal 304

³ ILR (1950) All 50

⁴ AIR 1951 Nag 32

⁵ AIR 1949 Cal 350 at pp.356, 357

⁶ AIR 1950 Pat 376

⁷(1851) 117 ER 1066

- ⁸(1851) 61 ER 45 at p.53
⁹ AIR 1919 Pat74 at p.76
¹⁰ 16 Cal 482 at pp. 486-87
¹¹ AIR 1946 PC 72 at p.75
¹² ILR 1949-1 Cal 245 at p.250
¹³ AIR 1954 Nag 241 at p.245
¹⁴ AIR 1923 Mad 301
¹⁵ AIR 1931 Lah 111
¹⁶ AIR 1953 SC 21 at p.22
¹⁷ AIR 1920 Nag 129
¹⁸ AIR 1919 All 98
¹⁹ AIR 1925 Mad 1086
²⁰ AIR 1926 Mad 752 at p.754
²¹ AIR 1935 Mad 152
²² AIR 1943 Mad 172
²³(1855) 119 ER 531 at p.532
²⁴7 All 523 at p.528
²⁵12 Mad 113 at p.114
²⁶ AIR 1934 Bom 476 at pp. 484-485
²⁷ AIR 1937 Pat 214
²⁸1914-2 KB 478 at p.485