(1926) 03 AHC CK 0030

Allahabad High Court

Case No: None

Ram Devi and Others		APPELLANT
	Vs	
Ganeshi Lal and Others		RESPONDENT

Date of Decision: March 2, 1926

Hon'ble Judges: Walsh, J; Dalal, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Dalal, J.

This is an appeal from an order of the Second Additional Subordinate Judge of Aligarh, ordering an award by an arbitrator without the intervention of a Court to be filed, under para. 21 of the 2nd Schedule of the Civil Procedure Code. Ganeshi Lal, one of the parties to the reference to arbitration, applied for the filing of the award, while Mt. Ram Devi, widow of Sheo Prasad, for herself and her minor son, a second Mt. Ram Devi, wife of Bhola Nath, Jai Deo Prasad for himself and his minor nephews and Ganga Prasad, showed cause why the award should not be filed. The objectors other than Mt. Ram Devi, wife of Bhola Nath, have appealed and the applicant Ganeshi Lal has contested the appeal.

2. The property in dispute, which is revenue paying and ancestral property, belongs to Bijai Indar Singh. He was adjudged an insolvent and a receiver was appointed of his property. The contesting parties to this appeal are all his secured creditors. He had unsecured creditors also, who are represented by the receiver in insolvency. The insolvent was out of possession and in the opinion of the receiver some of the properties were fictitiously sold. Litigation therefore arose between the receiver and certain persons in possession of the insolvent''s property. Finally the secured creditors, the persons in possession of the property and the receiver entered into an agreement, on 28th February 1923, to refer the matter relating to the payment of the secured and unsecured debts and to their amount to arbitration. The first arbitrator died in the following September, and on 4th November 1923, the parties,

with the exception of two (who are therefore not bound by the award), appointed B. Manni Lal, pleader, as new arbitrator. The award under discussion was made by him on 4th June 1924. The parties had entered into certain agreements both before the first arbitrator and before the second arbitrator; they will be examined when the objections of the appellants are considered.

3. The contention of the appellants is that the award is illegal on the face of it and therefore the Court should refuse to file it. The alleged reasons for illegality are threefold. (1) That it gives an illegal direction to the parties for the settlement of pending suits and existing decrees. (2) That the direction given to the receiver by the arbitrator to bring the property to sale and realize the sale proceeds through Court is illegal having regard to the provisions of Section 60 of the Provincial Insolvency Act. (3) That the arbitrator has disregarded the agreement between the parties of giving priority to three claims, one under the decree No. 55 of 1913 in favour of the widow of Sheo Prasad, another under a mortgage of 1st March 1911, resulting in a decree of 24th September 1923, in favour of the widow of Sheo Prasad and the wife of Bhola Nath, and a third under the mortgage of 1st February 1912, resulting in a decree of 7th April 1924, in favour of Sheo Prasad''s widow, Jai Deo Prasad and Ganga Prasad.

4. Courts in India have interpreted the provisions of para. 21 of Sch. 2 of the CPC as precluding the remission of an award to the arbitrator for reconsideration: Mustafa Khan v. Phulja Bibi (1905) 27 All 526 Hari Kuar v. Lachmi Ram AIR 1916 All 113 and Babu Kunj Lal Vs. Babu Banwari Lall and Others, There may be some reason for a distinction between the proceedings in arbitration with the intervention of a Court and those is arbitration without the intervention of a Court, but the distinction is difficult to understand between proceedings when reference to arbitration is filed in Court and those where no such reference is filed but only the final award is desired to be filed. In the present case, if one of the parties had taken action under para. 17 and filed the reference to arbitration of 28th February 1923, the Court would have been clothed with the power of remitting the award under para. 14. We do not think that necessity will arise for the remission of the award to the arbitrator. We, however, desire to draw attention to this defect in the legislation (if there is one) with a view to possible future amendment of the law. There is no apparent reason to discourage arbitration without the intervention of a Court by penalizing it to this extent: that a slight mistake therein, which could easily be rectified by a remission to the arbitrator, would completely invalidate the award. In our opinion an award given without the intervention of the Court should be treated with greater indulgence and larger opportunities for its rectification should be given as in such a case the arbitrator acts without any guidance from a Court of law. In the present case it so happens that the arbitrator is a practising lawyer, but such is not the usual qualification of an arbitrator chosen by parties.

5. We shall take up the objections enumerated above one by one. It was first urged that the direction in the award to the parties to modify the decrees duly passed by Courts of law amounted to an ousting of the jurisdiction of the Court and was therefore illegal. Reference was made to a Bench judgment of the Calcutta High Court in Ram Prosad Surajmull Vs. Mohan Lal Lachminarain, In delivering the judgment of the Court the learned Judge, Mukerjee, placed reliance on the case in Doleman v. Ossett Corporation, Ltd. (1912) 3 KB 257 and explained the views adopted by Fletcher Moulton, L.J., and Far well, L.J. In that case there is a difference in the view enunciated by the two learned Judges and the Calcutta High Court was inclined to adopt the view of Fletcher Moulton, L.J.; the point, however, did not arise in that case of accepting one view in preference to the other. The English case referred to an action upon a contract which contained a provision for reference to arbitration. According to Fletcher Moulton, L.J., the law would not enforce the specific performance of an agreement to refer to arbitration, but if duly appealed to, it has the power in its discretion to refuse to a party the alternative of having the dispute settled by a Court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action, or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision and by its decision alone, that the rights of the parties are settled. It follows that in the latter case, the private tribunal if it has ever come into existence, is functus officio. There cannot be two tribunals, each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. The view adopted by Far Well, L.J. did not carry the right of the jurisdiction of the Court to that length. He agreed that the plaintiffs cannot be deprived of the right to have recourse to the Court when the agreement is a mere agreement to refer, but he added that they can deprive themselves of such rights by their own act after writ, as, for example, by going on with the arbitration and obtaining an award; but when nothing has been done by them since writ and the only matter relied upon is an award made since writ, without their knowledge or consent, under an agreement antecedent to the, action the plea is in fact and in truth a plea of the agreement and is bad, because were is no act of the plaintiffs sub-sequent to the writ on which reliance can be placed.

6. It is obvious to us that the present case falls within the exception formulated by Farwell, L.J. In the agreement itself to refer to arbitration there was a provision that if a case be pending at the time between the parties relating to debts due by or property belonging to Bijai Indar Singh, it would be deemed to have been disposed of according to the award, meaning that a decree in terms of the award would be accepted by the parties, and that if during the pendency of the arbitration proceedings a decree be passed, the decree of the Court would be subject to the award and would be modified in accordance with the award. There was an obvious necessity for this clause because otherwise certain claims may become time-barred during the pendency of the arbitration proceedings and fail on the proceedings

proving abortive. The fear was justified. The agreement was entered into on the 28th February 1923, the award was delivered nearly sixteen months later, on 4th June 1924, and now, nearly 21 months after award, it has not been found possible to take action thereon. More than three years have elapsed since the parties entered into the agreement to refer to arbitration and possibly it may take as many years more before the objectors find it impossible to prevent action being taken under the award. The appellants who were plaintiffs in two suits continued to take part in the arbitration proceedings subsequent to the suits. There was thus, to follow the opinion of Farwell, L.J., nothing illegal in the arbitrator delivering his award in spite of the decrees of Court and directing that the decrees may be modified by the parties in terms of the award. The situation apprehended by Fletcher Moulton, L.J., of two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept their decision does not arise here. The parties themselves had the decrees of Court in contemplation and in anticipation of those decrees had agreed that they would execute the decrees in a particular form and not in the form in which they would be granted by Court. As the plaintiff had agreed to such an agreement, he cannot compel the defendant and judgment-debtor of those decrees to accept the decision of the Court.

7. In our opinion the award is an adjustment of the decrees under Order 21, Rule 2, Civil P.C. Both the decree-holder and the judgment-debtor are entitled to draw the attention of the executing Court to an adjustment after the decree. So far as we understand the facts of the case, decrees have been obtained by the appellants on foot of two mortgages and the third claim is in itself a decree. The observations of Mr. Justice Walsh in a case where the matter in dispute was referred to arbitration, during the pendency of an appeal without the intervention of the Court and the appellate Court was desired to pass a decree in terms of the award, may be quoted: Gajendra Singh Vs. Durga Kumari

Speaking for my own part, I am not satisfied that any question of law arises at all, The agreement before us is such that upon general principles of law I am not satisfied that it is necessary to apply any provision of the Code. The provisions of the Code only apply to such proceedings as purport to be taken thereunder. It happens from time to time that things are done by the consent of parties without reference to any special provision of the Code. It also happens sometimes that the parties are governed by some general principles of law, analogous to a provision in the Code, which is not actually to be found in the Code, The most familiar illustration of that is where there is a binding decision in interlocutory proceedings in the course of a suit, and one of the parties seeks to question it at a later stage. The Privy Council have held that the decision between the parties in the course of a suit is governed by the principles of res judicata, independently altogether of the special provisions of Section 11 of the Code, and indeed there is no provision of the Code which applies to it.

8. In that case, which was heard by a Bench of three Judges, the majority of Judges held in favour of the award being binding on the parties.

9. We have dealt so far with the modification of decrees of Court. If any suits are pending, the award may be filed by way of defence and a decree can be obtained on foot thereof. Such was the opinion of a Bench of the Bombay High Court in Manilal Motilal Vs. Gokaldas Rowji, It was held that the award could not be regarded as invalid merely because it was made in a reference by parties to the suit without the intervention of the Court, but that the Court should have tried the issue whether the award was not binding upon the parties under the general principles of the law of contract by proceeding under Order 23, Rule 3. The procedure laid down by the Bench in such a case was of an order to the defendants to file a written statement pleading the award. In his judgment Fawcett, J., has quoted the words of Farwell, L, J,, in the case of Doleman & Sons (1912) 3 KB 257 already referred to, that it is always possible to settle the differences between the parties as they please. On the observations of Fletcher Moulton, L.J., already quoted, the learned Judge comments as follows:

But he expressly excepts the case where the parties agree dia novo that the dispute should be tried by arbitration as in the case where they agree that the action itself shall be referred. His objection that the Court''s jurisdiction cannot be ousted applies to a case (like the one there under consideration) where there was a reference to arbitration subsequent to the commencement of the action, without the consent of one the parties.

10. It was suggested by the appellants'' learned Counsel that the defendant (the applicant here) Ganeshi Lal ought to have applied under para. 18 of the second schedule for stay of proceedings on the ground that the matter was referred to arbitration. It is difficult to understand how this would have helped Ganeshi Lal when it is objected by the appellants'' learned Counsel that a Court is not bound by an award given by an arbitrator upon a reference outside the Court. The learned Counsel objected to pending suits being decided on the basis of the award. The contention of the learned Counsel practically amounts to this: that there cannot possibly be an arbitration in a case like the present where the length of the arbitration, and its failure ultimately may deprive parties to the arbitration of their rights. The arbitrator cannot ignore the agreement of the parties that the decrees and the claims would be modified in accordance with the award, and the arbitrator accepting the agreement cannot pass an award to the effect that the decrees and claims may be modified in terms of the award. This would be putting an unjustifiable restriction on agreements between parties otherwise than by compromise. The aim of a Court of law is to satisfy parties and not to foment litigation. Now we come to the second objection. One of us expressed the opinion from the Bench that it suggested itself to the learned Counsel for the appellant, Mr. Peare Lal Banerji, during a night''s further study of the case. No such objection was

made in the lower Court in the grounds of appeal or when the case was opened by the learned Counsel on the first day. We do not think that the objection is so formidable as it looks at first sight. u/s 60 the receiver cannot sell ancestral and immovable property paying revenue to Government, but has to submit a statement to the Collector who may act under paragraphs 2 to 10 of the third schedule of the Civil P.C., and farm or manage the property and pay the income to the receiver. The parties to these proceedings however are all secured creditors and the order of adjudication does not bind them. It is enacted in Section 28 which details the effect of an order of adjudication that nothing in that section shall affect the power of any secured creditor to realize or otherwise deal with a Security in the same manner as he would have been entitled to realize or deal with it as if this section had not been passed. Section 47 deals with rights of secured creditors who can realise the security and prove only for the balance due. They can of course prove for the whole debt on relinquishing the security but in the present case the secured creditors have obtained decrees and there is no allegation that they have relinquished the security. The arbitrator who was a man of law has provided for the receiver failing to sell the property within a certain time (which has long expired by now) by empowering the decree-holders to bring the property to sale in execution of the decrees, to realize the sale proceeds in terms of the award and to get the decrees struck off as having been satisfied in full. The Insolvency Act has no provision to prevent secured creditors from acting accordingly. We however do not suggest that this should be done. Possibly the better way would be to obtain the insolvent''s discharge u/s 38 and deal with the property outside the jurisdiction of the insolvency Court. The receiver will then cease to be a receiver under insolvency but he is a person vested by the arbitrator with authority to sell the property under the arbitration provisions and would be able to sell the property under the terms of the award.

11. The last objection will not hold us long. It was said that the parties admitted the priority of the three debts mentioned above while the arbitrator decided that no question of any claim being prior or subsequent arose. The agreement referred to is that of 18th February 1923 filed with the first arbitrator and subsequently confirmed in the presence of the second arbitrator. If that agreement had been binding on the parties on the date of the delivery of the award, the award would certainly have been defective, and if no remission thereof is permitted it could not be filed. The arbitrator however has explained in great detail how this agreement was cancelled by another agreement of the 15th March 1924. His observations under Issue No. 1 should be read to understand what happened. It appears that during the conference on that date parties wore in an accommodating frame of mind and by relinquishing 1/4th part of the debts claimed up to 31st January 1924, they discovered that the assets of the insolvent would nearly equal the value of his properties. They therefore came to an agreement that the amounts fixed upon at the time may be paid in cash to each party and that no party will have any right to object to it. The argument of the learned Counsel for the appellant on this subject

may be divided into two parts: (1) that the arbitrator did not correctly interpret this agreement; and (2) that one of the appellants, the wife of Sheo Prasad, had not given her consent to the agreement. To meet the first objection, it is sufficient to quote the observations of their Lordships of the Privy Council in the case of AIR 1923 66 (Privy Council) They held that:

An error in law on the face of an award such as will justify the Court in setting it aside must be an error in Some legal proposition to which the arbitrators have tied themselves the same being found in the award or a document actually incorporated therein and which is the basis of the award.

12. An error of law on the face of an award means, in their Lordships'' view, that we can find in the award or in a document actually incorporated thereto, as for instance a note by the arbitrators stating the reasons for their judgment, some legal proposition which is the basis of the award and which we can then say is erroneous. There is no such legal proposition here which may be said to be erroneous. The arbitrator has described in detail the agreement as to allowing priority and the Subsequent change of attitude of the parties removing all dispute as to priority. The existence of an agreement of 16th March 1924 is admitted and this Court cannot question the arbitrator''s interpretation of that agreement. There is no legal flaw on the face of the award in this matter. We are not a Court of appeal enquiring into the correctness or otherwise of the findings of the arbitrator. If need were, we would hold that the interpretation put on the agreement of 16th March 1924 by the arbitrator is correct. We are more convinced of this because it was never specifically stated either in the lower Court or in the grounds of appeal here that the arbitrator had failed to include in the award an agreement between the parties granting priority to the three claims of the appellants. We have however not rejected the plea merely on the ground of its omission in the lower Court and in the grounds of appeal.

13. In the portion of the award already referred to the arbitrator has given his reasons for holding that the widow of Sheo Prasad was also bound by the agreement. One of the persons present was Bhola Nath, who was acting on behalf of his wife (another lady of the same name Mt. Ram Devi.) He consulted Mt. Ram Devi, widow of Sheo Prasad. Before recording his statement, he told the arbitrator that he would go to the house of Sheo Prasad and consult her and on his return accepted the agreement. Bhola Nath was a clerk of B. Sheo Prasad who was a pleader. We are therefore of opinion that the arbitrator rightly held the widow of Sheo Prasad to be bound by the agreement of 16th March 1924. It is admitted that Ganga Prasad, who was not present on 16th March 1924 accepted the agreement subsequently on 7th April 1924.

14. For the sake of clearness we may note that the first ground of appeal, as it is worded, has no force. The award first gives a narration of the facts and the issue framed. In the narration and the issues the question of priority is raised. The

narration however includes narration of events prior to 16th March 1924 and the issues were also framed prior to that date. The mention of the agreement as to priority and the framing of an issue on the subject do not amount to a finding by the arbitrator in favour of priority of the three debts due to the appellants. It is therefore wrong to say as it is stated in the first ground of appeal, that the earlier portion of the award gives priority to certain debts while the latter portion takes it away. As to ground No. 3 the arbitrator does decide the issue of priority to the effect that none will be recognized. The fifth ground of appeal was not separately argued by the appellants'' learned Counsel.

15. No affidavit either of Sheo Prasad''s widow or of Bhola Nath, whose wife objected to the filing of the award, was submitted to the lower Court to ever that she did not consent to the agreement of 16th March 1924. Technical objections were put forward through pleaders but not one appellant made an affidavit to the effect that the relinquishment of priority for the appellants'' claims was not contemplated by them on that day.

16. Our attention was drawn to the low valuation Rs. 5,100, of the subject-matter in dispute made by Ganeshi Lal, applicant. This point was raised in the trial Court also and is obviously justified. The amount due to Ganeshi Lal alone is over Rs. 10,000, so the subject-matter in dispute before the trial Court was in any case of a larger value than Rs. 10.000. The learned Subordinate Judge has written an able judgment and we are in entire agreement with the findings recorded by him.

17. The appeal is dismissed with one set of costs to Lala Ganeshi Lal and another set to be divided among any of the respondents who may have put in an appearance.

Walsh, J.

18. I have read the judgment of Mr. Justice Dalal and agree with it and with the order proposed.