(1959) 02 KL CK 0030

High Court Of Kerala

Case No: A.S. No. 334 of 1958

Kochunarayana Pillai and Others		APPELLANT
	Vs	
Kochupadmanabha Pillai		RESPONDENT

Date of Decision: Feb. 13, 1959

Acts Referred:

- Arbitration Act, 1940 - Section 8

Citation: (1959) KLJ 616

Hon'ble Judges: K. Sankaran, C.J; T.K. Joseph, J

Bench: Division Bench

Advocate: T.K. Narayana Pillai N, for the Appellant; D. Narayanan Potti and T.S. Krishnarnoorthy Iyer, for the Respondent

Final Decision: Allowed

Judgement

Joseph, J.

This appeal arises from an order of the District Judge, Alleppey, dismissing the prayer of the appellants for the appointment of an arbitrator. The appellants and the respondent are members of the Aroor Kizhakkedathu tarwad. On 19-5-1950 they entered into an agreement Ext. A, regarding division of their properties. The properties were to be divided into 9 shares; It was agreed that for convenience of enjoyment certain properties belonging exclusively to the respondent were to be allotted to the appellants and that other properties of equal value were to be given to him in exchange. It was provided in Ext. A that an arbitrator should be appointed for this purpose. Accordingly the parties executed an agreement Ext. B on 19-5-1950 appointing Shri K. Madhavan Pillai, Advocate, as arbitrator. After the arbitrator entered on his duties, the respondent informed him that he was not prepared to abide by the agreement and he also issued a written notice to him resiling from the agreement On receipt of this the arbitrator withdrew and the appellants then sent a notice to the respondent asking him to nominate another arbitrator. He declined to do so and the appellants therefore filed a petition before the District Judge for

appointing another arbitrator u/s 8 of the Travancore Arbitration Act, which corresponds to section 8 of the Indian Arbitration Act. The respondent opposed the prayer, contending that there was no dispute to be referred to an arbitrator and that the court had therefore no jurisdiction to appoint one. The learned District Judge upheld the contention of the respondent and dismissed the petition. The only question which arises for decision in this appeal is whether there was a dispute between the parties which could be referred for arbitration. The court below held that all the disputes regarding division of properties were settled by Ext. A and all that remained to be done was the division of properties in the manner agreed to by the parties. It was therefore held that there was no scope for appointing an arbitrator as the work of division of properties was to be done by a commissioner. It is urged on behalf of the appellants that this view of the court below is not correct. The properties to be divided comprised those obtained in partition of the main tarwad as well as certain properties acquired by the respondent in his name. Some of these were in Vaikom and the others in Shertallai Taluk. It was agreed by the parties that Arackal Maliekal puraidom and house belonging to them jointly were to be deemed to belong to Padmanabha Pillai but that the same were to be allotted to the appellants and that the respondent was to be given other properties of equal value instead. It was also provided in Ext. B that for convenience of enjoyment certain properties belonging to the Respondent in Shertalal Taluk were to be allotted to the appellants and that the latter was to be given other properties instead. Another provision was that the arbitrator was to see that the respondent''s wife who had some interest in the properties to be allotted to the appellants executed a release of the same. The arbitrator was also to make provision for discharge of debts, if any, charged on the properties of the respondent which were to be taken by the appellants. The arbitrator was directed by Ext. B to assess the value of the properties and to divide them by metes and bounds, keeping in view the provisions mentioned above. The decision of this case depends on the construction of Ext. B. According to the learned Judge, all the disputes among the parties were settled when Ext. A was executed, and Ext. B could therefore be treated as an arbitration agreement. Reliance was placed on a decision of Wadia J., in Dawoodbhai Abdulkader Vs. Abdulkader Ismailji, , holding that the existence of a dispute is a condition precedent to a valid arbitration agreement. This proposition is quite unexceptionable but what has to be seen as pointed out by Waida, J., is whether on the facts a dispute exists : Radhey Lal v. Kanhai Lal (AIR 1939 Patna 526) is a case similar to the present one. That was a suit for partition of properties movable and immovable and on the application of the plaintiff a commissioner had been appointed to make an inventory of the joint properties. The plaintiff and the defendant filed a compromise petition before the Commissioner agreeing to take the properties in certain definite shares and appointing three persons as arbitrators to effect the division accordingly. The arbitrators gave an award and a decree was passed on the basis of the same. The defendant preferred an appeal from the decree. As no appeal lay from a decree based on an award except in so far as the

same was in excess of or in accordance with the award, the question arose whether the appeal was maintainable. It was contended on behalf of the appellant that the parties having reached an agreement as regards their respective shares, there was no longer any matter in difference between them and that the appointment of the arbitrators and the decree based on the award made by them were without jurisdiction. Fazl Ali, J., who delivered the leading judgment, held that the expression "the matter in difference between the parties" in the definition of an arbitration agreement was quite general and that it covered the case. Reference was made to the distinction between an arbitrator and a commissioner appointed to divide properties, as pointed out in Bholanath Roy Vs. Bata Krishna Roy and Others, . So far as this case is concerned it is clear that the parties were not able to agree as to the manner in which the division was to be effected and the adjustments effected. The question whether there is difference between the parties on any matter is one to be decided on the facts of each case. Here the properties were to be divided into 9 shares and two shares were to be given to the respondent. This was not the only thing to be done. The division had to be effected by allotting certain properties of the respondent to the appellants and the former was to be given other properties in exchange. Convenience of enjoyment was also to be taken into account in making the allotment of properties. The question as to what all were the properties to be given to the respondent in lieu of those surrendered by him had also to be decided. The parties felt that they could not agree among themselves on these matters although they were agreed as to the respective shares and the properties to be divided. It was on account of this difference that they appointed an arbitrator. On the facts of this case we are of opinion that the decision in Radhey Lal v. Kanhai Lal applies to this case and that the view taken by the court below that no dispute or difference existed cannot be supported.

2. Learned counsel for the respondent brought to our notice the decisions mentioned below in support of the contention that no dispute existed. The first of these is In re Srikrishna Khanna (A.I.R. 1934 Sind 29) where it was held that arbitration agreement should be strictly construed. As a proposition of law this is quite sound but as pointed out earlier, the question whether a dispute exists has to be decided on the facts of each case. Hormusji and Daruwalla v. District Local Board, Karachi (A.I.R. 1934 Sind 200) is another case referred to by the respondent''s counsel. It was held in that case that one of the essential ingredients of a submission to an arbitration was that the dispute to be referred should be determined in a quasi-judicial manner and that if it was not to be so determined, the agreement did not amount to a submission to arbitration. The distinction between an agreement for submission to arbitrator and an agreement to accept the decision of a valuer or appraiser was also pointed out. This decision also has no application to the facts of this case as the function of the person appointed under Ext. B to effect division was not that of a mere appraiser. He had to decide the question of allotment in a quasi-judicial manner. Another decision relied on is Des Ram v.

Secretary of State (A.I.R. 1936 Sind 201). It was held in that case that a mere agreement between two persons to be concluded by a decision of a third person did not by itself constitute such third person an arbitrator and that to give him that character it should be intended that such person should determine the dispute in a quasi-judicial manner. We do not see how this decision can help the respondent. We may also observe that it was held in that case that the intention of the parties in any particular case should necessarily depend upon the true construction of the agreement between them. We have already pointed out that differences remained after the execution of Ext. A and that the same were intended to be decided by the arbitrator who was to take into account several factors. These decisions cannot support the view taken by the court below. We hold that Ext. B is a valid arbitration agreement and that the court has jurisdiction to appoint an arbitrator as prayed for by the appellants.

3. In the result we allow the appeal, set aside the order under appeal and remand the petition to the court below for appointing an arbitrator as prayed for In the circumstances of the case we make no order as to costs.