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(1939) 02 CAL CK 0001

Calcutta High Court

Case No: None

Raj Kumar and Another	APPELLANT
Vs	
Shiva Prasad Gupta and Others	RESPONDENT

Date of Decision: Feb. 3, 1939

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 96

Citation: AIR 1939 Cal 500

Hon'ble Judges: Lort-Williams, J; Lord Williams, J

Bench: Division Bench

Judgement

Lort-Williams, J.
The parties in this suit are members of a Hindu family governed by the Mitekshara School of Hindu law, whose common ancestor was one Badanlal. Their relationship is shown in the pedigree annexed to the plaint. At the time of the institution of the suit both the plaintiffs were minors. Bajkumar has since attained his majority. The plaintiffs ask for a declaration that a decree dated 26th February 1926, made in the Miscellaneous Case No. 13 of 1926 in the Court of the Subordinate Judge of Allahabad, by which effect was given to a partition award, is void against or voidable by the plaintiffs, for a decree setting aside that decree and consequently the partition and for consequential reliefs, including partition and accounts. Prom the time of Badanlal onwards the members of the family lived as members of a joint Hindu family, but on 30th April 1921 the defendant, Shivaprasad Gupta gave notice of his intention to separate and to obtain a partition of the family property. At that time the co-parceners were Raja Motichand C.I.E., who subsequently became Raja Sir Motiohand Kt., C.I.B. and died in 1934. (2) The defendant Gooul Chand. (3) The defendant Krishna Kumar, (4) The plaintiff Raj Kumar. (5) The plaintiff Bejoy Kumar. (6) The defendant Jyoti Bhusan. (7) The defendant Harak Chand. (8) Jagat Bhusan, then an infant under the age of 18 years, who died in or about the month of February 1936. (9) Rai Mukund Lal Bahadur, originally a defendant, who has

died since the institution of the suit. (10) The defendant Shashi Bhusan, another infant under the age of 18 years. (11) The defendant Indu Bhusan. (12) The defendant Shiva Prosad Gupta.

2. Thereafter it was agreed between the adult members of the family that partition should be given effect to as from 10th October 1921 and a draft deed of partition was prepared. But the parties could not come to terms, and on 25th May 1922 it was agreed in writing between (a) Raja Motichand and the defendant Gooulchand and Krishna Kumar.... First Party (b) The defendant Harakchand.... Second Party (c) Rai Mukundlal Bahadur.... Third Party (d) The defendant Shiva Prosad Gupta.... Fourth Party, that matters in difference between the parties should be referred to the arbitration of Pandit Madan Mohan Malviya and Pandit Baldeo Earn Dave. A copy of this agreement is annexed to the plaint. The defendant Goculchand purported to act for himself and also as father and natural guardian of the plaintiffs and as the natural guardian of the defendant Jyoti Bhusan who was then a minor. It is contended inter alia by the plain. tiffs that Goculchand had no authority so to act because Raja Motichand was then the elder brother of Goculchand and was the head of that branch of the family. Further that their interests were adverse to those of Goculchand and that the reference to arbitration was not for their benefit and that Pandit Madan Mohan Malviya was for various reasons strongly biased in favour of the defendant Shivaprosad Gupta and other defendants, and consequently, that there was no proper reference to arbitration on their behalf and that the reference and subsequent award are not binding on them. The arbitrators published their award on 30th November 1925, a copy of which is annexed to the plaint. The plaintiffs con. tend that it was not for their benefit and that the arbitrators were guilty of misconduct, and that Pandit Madan Mohan Malviya''s self-interest and his duty as arbitrator were in conflict.

3. The real and substantial cause of the dispute between the parties to the present suit centres round a part of the family property, namely a mill known as the Bharat Abhyuday Cotton Mill. The plaintiffs contend that this and the business connected therewith was an asset of uncertain and fluctuating value, but the arbitrators allotted this property, upon the basis of a gross overvaluation, to the plaintiffs branch of the family instead of to all the branches according to their respective shares. On 19th January 1926 the defendant Shivaprosad Gupta made an application in the Court of the Subordinate Judge of Allahabad for an order directing the arbitrators to file the award, and for judgment and for a decree in accordance therewith. A copy of this application is annexed to the plaint. Goculchand was appointed to act as guardian-ad-litem of the plaintiffs and Motichand and Gooulchand and others filed petitions to the effect that they had no objection to the decree, which was passed on 26th February 1926. The plaintiffs allege that this was a consent decree and contend that it is not binding on them because the leave of the Court was not obtained or recorded under the provisions of Order 32, Rule 7, Civil P.C. Further they contend that their interests were adverse to those of Goculchand, and consequently that they were not properly represented, that the decree was not for their benefit that the Court made no inquiry to ascertain whether it was for their benefit and did not so certify

and that Goculchand was negligent in failing to draw the attention of the Court to these facts and otherwise in failing to protect their interests. The defendants deny all these contentions and allegations. A number of issues were raised and settled but the most important one is founded upon the plaintiffs'' allegation that the parties came to an agreement of compromise in or about the first half of the month of February 1926 and that in consequence thereof the decree of 26th February 1926 was passed by consent. In the first place they contend that certain letters (Ex. E) which passed between Raja Motichand and Shivaprosad on 30th January 1926 and 11th and 12th February 1926 amount to such an agreement.

4. In my opinion these letters do not disclose any concluded agreement. In the last letter, Raja Motichand makes certain counter-offers or requests, to which there was no reply from or acceptance by Shivaprosad. Secondly, the plaintiffs allege that the parties met at Benares on 13th or 14th February 1926 and made an oral agreement to compromise. Upon this issue a considerable amount of evidence both oral and documentary was given and tendered. I do not propose nor is it necessary to discuss this evidence in detail. The onus of proof lay upon the plaintiffs. On this issue the two chief protagonists were Goculchand and Shivaprosad. They and other witnesses were trying to recollect a meeting and con. versations which had taken place, if at all, over twelve years previously. I have given earnest consideration to this very important issue and to the evidence upon it and I have come to the conclusion that I must accept the recollection of Shivaprosad and his witnesses as being the more likely to be accurate. In doing so, I have been influenced to a large extent by the demeanour of the witnesses. The memories of Shivaprosad and the other witnesses struck me as being more definite and accurate than those of Goculchand and the other witnesses called on behalf of the plaintiffs, whose memories appeared to be somewhat vague and indecisive. I was struck favourably especially by the evidence of Shri Prakash who was a mutual friend of the parties and acted throughout as a go-between and mediator. Moreover, though some of the documentary evidence was in my opinion inadmissible, the rest, which was both admissible and relevant undoubtedly supported the defendant''s story.

5. In addition there is the fact that through, out these and other relevant proceedings, prior to the hearing, the plaintiffs had been unable to state with any degree of precision, though pressed to do so, the date or dates upon which it is alleged that this oral agreement of compromise was arrived at. And lastly I cannot believe that if such an important agreement had been made it would not have been reduced forthwith into writing. The third contention of the plain, tiffs upon this issue was that the letters to which I have referred (Ex. B) coupled with the language of the petitions filed by Raja Motichand and Goculchand on 16th February 1926, show that the decree was a consent decree. In his letter of 30th January 1926 Raja Motichand had said that he would not file any objection to Shivaprosad''s petition for a decree and was not going to contest it, and in his letter of 12th February 1926 he had said that he was making an application to the effect that he accepted the award, but as I have already held, these letters (Ex. E) did not

contain any concluded agreement. In the petitions the petitioners stated that they had no objection to Shivaprosad"s application or to the award. And in the order of the Subordinate Judge it was stated inter alia that Baja Motichand and all the other parties had accepted the award, and it was therefore ordered that a decree should be drawn up in terms of the award.

6. But in my opinion these facts do not show that the decree was a consent decree. In a consent decree it should be and generally is stated that it is "by consent." But there is nothing in the decree to suggest that it was made by consent. Such a statement is necessary and important because Section 96, Civil P.C. provides that no appeal shall lie from such a decree. To constitute consent there must be a bargain between the parties and not a mere acceptance of the order offered. Davis v. Chanter (1846-48) 2 Phill 545, Aldam v. Brown (1890) W.N. 116, Hadida v. Fordham (1893) 10 T.L.R. 139. In this case, as I have already found, there was neither compromise nor agreement. With the defendant Harakchand who also filed a petition the plaintiffs do not even allege an agreement, nor with Mukundlal. Motichand and Gooulchand had come to the conclusion after consulting their legal advisers that it was hopeless and a waste of money to resist the making of the decree and that resistance would jeopardize their hopes of obtaining some concessions from Shivaprosad and the other defendants, which hopes were in fact subsequently realized and concessions made. The provisions of Order 32, Rule 7 therefore were not attracted, and in such circumstances the Court was under no necessity to sanction anything as a condition precedent to filing the award and passing a decree upon it. Hanmantram Radhakisan Vs. Shivnarayan Asuram, ; Venkata Narashinha Naidu v. Bhashyakarlu Naidu (1899) 22 Mad. 538.

7. Before making the decree the Court required Goculchand to state expressly that he accepted the award on behalf of the plaintiffs of whom he had been appointed guardian ad litem. Upon the question whether the plaintiffs were properly represented by Goculohand both in the submission to arbitration and upon the application for a decree, I am of opinion that they were. It is true that Raja Motiohand was the social head of the plaintiffs" branch of the family. But he had become a figure-head so far as management was concerned. For some years Goculchand had become the active manager of the branch, and of its property and business affairs. Moreover, all that Goculchand did was done with the approval and consent and at the instigation of Raja Motichand who was himself a party to all the proceedings:

A father or other manager has power to refer to arbitration disputes relating to joint family property provided such reference is for the benefit of the family. The other members of the family including minors are bound by the reference and by the award made upon it.

If the minor is a member of a joint family governed by the Mitakshara law, the father as karta (manager) is entitled to the management of the whole co-parcenary property including the minor"s interest: Mulla"s Principles of Hindu Law, Edn. 8 at pp. 282 and 566.

8. The decision of Shivaprosad to separate had not affected the joint status of the members of the plaintiffs" branch of the family inter se. I have been unable to appreciate the plaintiffs" contention that their interests were adverse to those of Gooulehand. In my opinion, there was not, and in the circumstances could not have been, any adverse interest. Moreover, what was done was clearly for the benefit of the branch and therefore of the plaintiffs. The submission to arbitration was for their benefit, and the award could not have been upset. There is no evidence of negligence or of wrongful or fraudulent conduct on the part of Gooulchand, and I have been unable to find any evidence of anything amounting in law to misconduct on the part of the arbitrators. Raja Motichand had wanted the mill property and business to be allotted to his branch at the time of the original negotiations for partition, and the arbitrators so decided. In so doing, it is possible that they were guilty of some error of judgment, because there seems to have been evidence to show that the property had depreciated in value between 1921 and 1925, and it might have been better to have divided this property among the coparceners according to their shares. But this did not amount to misconduct within the meaning of the law of arbitration. The plaintiffs have for many years enjoyed benefits under the decree, of which restitution cannot now be made, and the parties cannot now be restored to their original position. In these circumstances, for the reasons already stated, the plaintiffs are not entitled to have the decree set aside, nor to the other reliefs claimed by them, and there must be judgment for the defendants with costs.