(1965) 07 CAL CK 0006

Calcutta High Court

Case No: Appeal No. 226 of 1964 and Matter No. 336 of 1963

Arati Paul		APPELLANT
	Vs	
Registrar, O.S., High Court and Others		RESPONDENT

Date of Decision: July 27, 1965

Acts Referred:

- Constitution of India, 1950 - Article 133(1)

Citation: AIR 1966 Cal 129 : (1966) 2 ILR (Cal) 165

Hon'ble Judges: H.K. Bose, C.J; B.C. Mitra, J

Bench: Division Bench

Advocate: M.N. Banerjee and M.N. Roy, for the Appellant; D. Das and Nirmal Ch. Choudhary, for the Respondent

Final Decision: Dismissed

Judgement

B.C. Mitra, J.

This is an application for a certificate under Article 133(1) of the Constitution. The petitioner and the respondents Nos. 3, 4 and 5 are the daughter and sons respectively of one Srish Chandra Paul, since deceased. The petitioner is the youngest daughter of the deceased and the respondents Nos. 3, 4 and 5 are three of his surviving sons.

2. In 1946, the widow of the said Srish Chandra Paul executed a deed of gift in favour of her three sons, but later she instituted a suit in this Court being Suit No. 1045 of 1957, for cancellation of the deed of gift, and for partition of the estate, left by her deceased husband. In 1958, the widow died leaving a will whereby she bequeathed her entire estate to the petitioner and her youngest son Gour Chandra Paul, who is respondent No. 5 in this application. The petitioner was transposed to the position of ft plaintiff in the said suit. In February, 1960, file petitioner also applied for grant of letters of administration in respect of the estate left by her

mother. This application being contested was marked as a contentious cause and was numbered as Testamentary Suit No. 12 of 1962.

3. The Testamentary Suit and the Partition Suit appeared in the list of Mallick, J., and oral evidence was taken in the Testamentary Suit, but before the hearing of this suit was concluded an order was made by Mallick, J., on January 4, 1963, in the following terms:

"It is recorded that all the parties consent to this testamentary suit as well as the partition suit being suit No. 1045 of 1957 and all the disputes involved in these two matters be settled and referred to the sole arbitration of the Hon''ble Mr. Justice Mallick and the parties agree to abide by any decision that will be given and no evidence need be taken except as to what his Lordship might desire and the evidence need not be recorded in any formal manner. Parties agree that his Lordship would have all the summary powers including the power to divide and partition the properties and to make such decrees as his Lordship thinks fit and proper and for the purpose of partition, if necessary, to engage or appoint surveyors and commissioners as his Lordship thinks best.

It is recorded that all the parties have referred this matter to the learned Judge in what is known as extra cursus curiae jurisdiction of this Court.

It is further recorded that all the parties agree that they will not prefer any appeal from or against the decree or order that may be passed by his Lordship the Hon''ble Mr. Justice Mallick."

On April 1, 1963, Mallick]., passed an order in the said Suit No. 1045 of 1957 adjudicating upon various disputes between the parties. The laid pronouncement made by Mallick, J., was filed in due course, and a draft was issued to the parties for settling the same, with a view to drawing up a decree thereon. Thereupon the petitioner moved a writ petition in this Court for a writ in the nature of mandamus directing the Registrar, Original Side of this Court to recall, cancel and withdraw the filing of the pretended award dated April 1, 1963, or to forthwith take off the said pretended award from the file and/or the records of the said suit. On September 5, 1963, Banerjee, J., made an order rejecting the prayer for a rule nisi. After various proceedings, to which it is not necessary to refer, for the purpose of this application, Sinha and A.K. Mukherjee, JJ., allowed the petitioner''s appeal against the said order of Banerjee, J., and directed the issue of a rule nisi. This rule was heard by Mallick. J., who by his judgment dated August 26, 1964, discharged the rule. An appeal was preferred against this order discharging the rule and this appeal was disposed of by this Bench by a judgment dated February 18, 1965, Arati Paul Vs. Registrar O.S.H.C. and Others, whereby the appeal was dismissed with costs. It is from this judgment that the petitioner proposes to prefer an appeal to the Supreme Court and for that reason she prays for the certificate mentioned above.

4. Mr. M.N. Banerjee, learned counsel for the petitioner, contended that the amount or value of the subject matter of the dispute in the Court of the first instance and also in the appeal, was and is not less than Rs. 20,000. He also submitted that the value of the properties involved in the said suit No. 1045 of 1957 in which the said order dated April 1, 1963, was made several lakhs of rupees, and the petitioner''s application under Article 226 of the Constitution was in regard to this order made on April 1, 1963. It was also submitted by Mr. Banerjee that the case was a fit one for appeal to the Supreme Court under Article 133(1)(c) of the Constitution.

5. The order made by us on February 18, 1965, affirmed the judgment and order of Mallick, J., dated August 26, 1964 and therefore, the petitioner must satisfy us that the appeal involves a substantial question of law, before a certificate can be issued as prayed for. The learned counsel for the petitioner contended, that the question involved in the appeal was regarding the nature and character of the pronouncement made by Mallick, J., on April 1, 1963, in the said Suit No. 1045 of 1957, namely, whether it was to be treated as an award made by the learned Judge acting as an arbitrator or whether it was to be treated as a pronouncement made extra cursum curiae or whether it was a judgment delivered by the learned Judge as a Judge dealing with a cause before him. That being the nature of the question involved in the appeal, Mr. Banerjee argued, it was a substantial question of law as between the parties. It was argued that there was, therefore, a sufficient compliance with Article 133(1) of the Constitution.

6. In the order made by Mallick, J., on January 4, 1963, it was recorded that all the parties gave their consent to the Testamentary Suit and the Partition Suit, and all the disputes in these two matters, being referred to the sole arbitration of Mallick, J., and the parties agreed to abide by any decision that would be given by the learned Judge. It was also recorded in the said order that the parties referred the matters to the learned Judge in what is known as extra cursum curiae jurisdiction.

7. The principal contention of the learned counsel for the petitioner was that the said pronouncement was an award made by the learned Judge as an arbitrator, or it was a pronouncement in the nature of an award, and this pronouncement should have been filed, not as a judgment delivered by a Judge of this Court dealing with a cause pending before him, but as an award made by the Judge upon a reference made to him as an arbitrator. This contention on behalf of the petitioner was rejected by us on the ground that in order to be an award, the pronouncement must be preceded by a valid reference to arbitration, and such a reference could be made only if all the parties agreed that all matters in dispute between them in the suit should be referred to arbitration. We also held that in the absence of any agreement between the parties there could be no valid reference to arbitration. The case made out by the petitioner in her writ petition, however, was that she never gave her consent either expressly or impliedly to any purported reference of the disputes to arbitration or for disposal of such disputes by the Judge acting extra cursum curiae.

She went further and alleged in her petition that she had no knowledge of any purported agreement to refer the said dispute in the said suit to the arbitration of Mallick, J. These allegations regarding absence of consent were repeated by the petitioner in the affidavit-in-reply filed by her in the writ proceedings. We held that as she denied that she never gave her consent to the reference of the dispute to the suit to the arbitration of Mallick, J., it was not open to her to contend before us that the pronouncement made by Mallick, J., on April 1, 1963, should be treated as an award and should be filed as such under the Arbitration Act, 1940.

8. In this petition, Mr. Banerjee contends, that the question discussed above is a substantial question of law as between the parties. In our opinion, there is no merit in this contention. The question whether the disputes between the parties in a pending suit can be disposed of by an award of an arbitrator without a reference of such disputes made to the arbitrator by consent of parties, is by no means a substantial question of law. Consent of the parties to the dispute is the foundation of a reference to arbitration. As the petitioner''s positive case was that she did not give such consent, and was not even aware of a reference to arbitration, it was not open to her to contend in her writ petition that the pronouncement should be treated as an award, although she came to Court with a petition in which she emphatically denied that such consent was ever given. As her case was that no consent was given by her either expressly or impliedly to the disputes being referred to the arbitration of the learned Judge or to the matter being dealt with by the learned Judge extra cursum curiae, it was not open to her to contend that the pronouncement should be filed as an award and should be treated as such, in order to afford her an opportunity of challenging the validity and the legality of the award under the Arbitration Act.

9. In support of his contention Mr. Banerjee relied upon several decisions to which I should refer. Mr. Banerjee firstly referred to the decision of the Judicial Committee in AIR 1927 110 (Privy Council) for the proposition that it was not necessary that the question of law involved must be of general importance and that it would be enough if there was a substantial question of law as between the parties. This decision is of no assistance to the petitioner as the question discussed above is not, in our opinion, a substantial question of law even as between the parties.

10. The next case relied upon by Mr. Banerjee is a Full Bench decision of the Madras High Court reported in Rimmalapudi Subba Rao Vs. Noony Veeraju and Others, in which it was held that though every question of law affecting the rights of the parties was not by itself a substantial question of law. but a difficult or important question, would be such a substantial, question and that even if a question was not important or difficult, if there was room for reasonable doubt or difference of opinion on the question, then it would be a substantial question of law within the meaning of Article 133 of the Constitution. This decision again is of no assistance to the petitioner because there can be no doubt or difference on the question, namely,

whether a valid award can be made by an arbitrator, without a reference being made to him by consent of all the parties to the dispute. The petitioners case as made out in the petition was that she never gave such consent and was not even aware of any reference to arbitration. There can be no scope for any argument on the question whether having made such a case, if she will still be allowed to contend that the pronouncement should be treated as an award and should be filed as such.

11. The next case relied upon by Mr. Banerjee is a decision of the Allahabad High Court reported in Chail Behari Lal Vs. Muncipal Board, in which it was held that if cases of a particular nature came before the Courts frequently and if the precise question which came up for the Court''s consideration arose in such cases, it could not be denied that the question was a substantial question of law of general importance. This decision again does not support the petitioner''s contention. The question whether the petitioner in the facts of this case should be allowed to contend that the pronouncement made by the learned Judge should be treated as an award, and should be allowed to be filed as such, is so elementary that such a question would seldom, if ever at all, be raised in a Court of law.

12. Mr. Banerjee next relied upon a decision of the Supreme Court in A.M. Allison Vs. B.L. Sen, . In that case, however, the question as to what is a substantial question or law under Article 133(1) of the Constitution was not raised at all and this decision has no application to the question at issue before us in this application.

13. Reliance was placed upon another decision of the S. C. in Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., in which it was held that the proper test for determining if a question of law is a substantial question would be whether it was of general public importance or whether it directly and substantially affected the rights of the parties and if so, whether it was either an open question as it was not finally settled by the Supreme Court or the Privy Council or the Federal Court, or was not free from difficulty or called for discussion of alternative views. It was further held that if the questions were settled by the highest Court or the general principles to be applied in determining the question were well settled and there was a mere question of applying those principles or that the plea that was raised was palpably absurd, the question would not be a substantial question of law. This decision, in our opinion, is entirely against the contention of Mr. Banerjee. The general principles to be applied to a valid award are not only well settled but the contentions raised on behalf of the petitioner that the pronouncement of the learned Judge should be treated as an award, although according to her she never gave her consent to the reference of the dispute to arbitration, is palpably absurd. The question, therefore, according to the test laid down by the Supreme Court cannot be regarded as a substantial question of law between the parties.

14. Reliance was also placed upon another decision of the Supreme Court in Hanskumar Kishanchand Vs. The Union of India (UOI), . In that case it was held that

there was a sharp distinction between a decision pronounced by a Court in a cause which it hears on the merits and one which is given by it as an award. It was further held that a pronouncement made by a Court in a case was a judgment, decree or order rendered in the exercise or its normal jurisdiction as Civil Court and it was appealable under the general law. But where the parties agreed to have their disputes settled by arbitration, the effect of such an agreement was to take the lis out of the hands of the ordinary Courts and to entrust the dispute to the decision of a private Tribunal and pronouncement of such a Tribunal was an adjudication with the imprimatur of the Court stamped on it and to the extent that the award was within the terms of the reference it was final and not appealable. There was no difference in the position if the reference was made under a statute to a Court as arbitrator, as in such a case the Court hears the matter not as a Civil Court but as a persona designata and its decision will not be an award open to appeal under the ordinary law applicable to the decision of the Court. This decision is of no assistance to the petitioner as the Supreme Court considered the question of a Court acting as a persona designata in a reference made under a statute which provided that the Court should act as an arbitrator. In this case, there is no question of the Court acting as an arbitrator under a statute.

15. Appearing for the respondents Mr. Das contended that the relief prayed for in the writ petition was a writ in the nature of mandamus directing the Registrar of this Court to recall, cancel and withdraw the filing of the pretended award dated April 1, 1963, and also directing him to forthwith take off the said pretended award dated April 1, 1963, from the file and/or the records of the said Suit No. 1045 of 1957. Mr. Das also referred to the said pronouncement of Mallick, J., dated April 1, 1963, and submitted that the learned Judge made it clear that that pronouncement was to be treated as a preliminary decree in the suit. Reference was also made to the judgment of Mallick, J., dated August 26, 1964, by which the rule nisi was discharged. In that judgment the learned Judge made it abundantly clear that by the pronouncement dated April 1, 1963, he passed a preliminary decree. I set out below the relevant portion of the said judgment:

"It is crystal clear from the offending order that I passed a preliminary decree in the suit in express terms. I was asked by the parties to pass a ''preliminary decree'' and I passed a decree. There is no room for doubt on that point. Whether I was right or whether I was wrong is beside the point. In any event, it is not the business of the Registrar or any other Officer of the Court to sit in judgment on a decree or order passed by the Court. Yet, this is exactly what the petitioner wants. She wants the Registrar to refuse to file the decree, on the ground that I was wrong in passing a decree. Rules of this Court make it obligatory on the Registrar to file a decree passed by the Judge. It is not for him to decide whether the Judge was entitled to pass the decree or whether it is according to law. Whoever else is competent to question it, the Registrar was not. The Registrar is bound in law to file it."

Relying upon the orders made by Mallick, J., Mr. Das contended that it was not for the Registrar to construe an order, judgment or pronouncement made by a Judge of this Court. If the Registrar is prima facie satisfied that the pronouncement he was required to file by the rules of this Court, was a preliminary decree in a suit, he was bound to file it as such, on a requisition by the parties. In this case the pronouncement of Mallick, J., made on April 1, 1963, made it clear that the learned Judge passed a preliminary decree in the suit. It was not for the Registrar, Mr. Das contended, to take upon himself the task of construing the character of the pronouncement made by a judge of this Court, namely, whether such a pronouncement was an award or a pronouncement in the nature of an award or a judgment or a pronouncement made extra cursum curiae. The question whether the Registrar of this Court has the power or the jurisdiction to construe the character of a pronouncement by a Judge of this Court, even when he is prima facie satisfied that the pronouncement was a preliminary decree, is not, Mr. Das submitted, a substantial question of law at all. We think, there is good deal, of force in this contention of Mr. Das. The Registrar of this Court acting under the rules in Ch. XVI of the Original Side Rules of this Court is bound to file a judgment and draw up a decree thereon, on a requisition by a party, if he is prima facie satisfied that the pronouncement is a judgment passed by a Judge of this Court who had jurisdiction to deal with that matter. He could not take upon himself the task of treating the pronouncement, which on the face of it stated that a preliminary decree was passed thereby, as an award made by an arbitrator or a pronouncement made extra cursum curiae. In-deed, if the Registrar declined to file the judgment, treating it as an award, or pronouncement: in the nature of an award, even though the pronouncement made it clear that it was a preliminary decree, he would have acted contrary to the rules and in violation thereof. The question, therefore, if the Registrar should file the pronouncement as a judgment is not a substantial question of law.

16. The learned counsel for the petitioner, however, contended that the question involved in the appeal was a determination as to the character of the pronouncement made by the learned Judge on April 1, 1963. He argued that the writ petition out of which the appeal arose was in substance an application for a determination by this Court that the said pronouncement of Mallick, J., dated April 1, 1963, was not a judgment delivered by the learned Judge in the said Suit No. 1045 of 1957. There is hardly any force in this contention of the learned counsel for the petitioner. A determination by the Court on the character of the pronouncement is not within the scope of the writ petition. The writ petition was directed against the act of the Registrar of this Court in riling the said pronouncement dated April 1, 1963, as a judgment delivered by Mallick, J., in the .said Suit No. 1045 of 1957. The only question before the Court was whether the petitioner as the appellant was entitled to the relief prayed for in the writ petition, namely, that the Registrar should recall, cancel and withdraw the filing of the pretended award dated April 1, 1963,

and that this Court should issue a writ in the nature of mandamus directing the Registrar to take off the said pretended award from the records of the said Suit No. 1045 of 1957. That was the only matter before the Court in the writ petition. A determination or a declaration as to the character of the pronouncement dated April 1, 1963, was not prayed for and the petitioner was not entitled to the same in the writ petition. The scope of the writ petition was limited to the filing by the Registrar of the judgment delivered by Mallick, J., on April 1, 1963, and nothing beyond it.

17. The next contention of the learned counsel for the petitioner was that principles of natural justice had been violated as the writ petition involved interpretation of the said pronouncement dated April 1, 1963, and that being so, Mallick, J., should not have heard or dealt with the writ petition. It was argued that Mallick, J., in dealing with the writ petition was virtually sitting in appeal over his judgment dated April 1, 1963. There is, however, neither merit nor substance in this contention. The merits of the pronouncement of Mallick, J., dated April 1, 1963, were not challenged in the writ petition. There was no allegation that the learned Judge was wrong in his conclusions or in the order made by the pronouncement dated April 1, 1963. The contention in the writ petition was that the said pronouncement could not be filed by the Registrar of this Court as a pretended award in Suit No. 1045 of 1957. Mr. Das on the other hand contended that a writ petition was in substance and in effect a judicial review and, therefore, Mallick, J., was quite competent to entertain an application for review of his own judgment. We cannot, however, accept Mr. Das''s contention that the writ petition was an application for a review of the judgment delivered on April 1, 1963. Nor can we accept the contention that in all cases a writ petition is an application for a judicial review of an administrative, judicial or quasi judicial act. But the contention raised by Mr. Banerjee, namely, that there had been a. violation of the principles of natural justice raises a larger question whether such a question is to be treated as a substantial question of law for the purpose of Article 133(1) of the Constitution. The petitioner contends that principles of natural justice had been violated as Mallick, J., who made the pronouncement dated April 1, 1963 also dealt with the writ petition and this must be treated as a substantial question of law. We cannot accept this contention of Mr. Banerjee Mallick, J., in dealing with the writ petition was not concerned with the correctness of his decision in his pronouncement dated April 1, 1963, and he was by no means sitting in appeal over the judgment delivered by him on April 1, 1963. The scope of the writ petition, as I have noticed earlier, was limited to the act of the Registrar in filing the said pronouncement as a judgment in the said Suit No. 1045 of 1957 and nothing beyond it. This contention on behalf of the petitioner, therefore, must fail.

18. It was contended by Mr. Das that the question, namely, whether the Registrar should or should not file the pronouncement dated 1-4-1963, was purely academic as a decree had been drawn up on the said pronouncement and was filed on September 3, 1964. Our attention was drawn to paragraph 26 of the petition in

which the petitioner stated that the decree was endorsed and signed by Mallick, J., on September 1, 1964 and filed on September 3, 1964 before the petitioner could obtain an order for slay from the appropriate Court. Mr. Das argued that there remained nothing to be done by the Registrar of this Court, as not only the pronouncement dated April 1, 1963, was filed, but a decree had been drawn up on the same and this decree also had been filed as required by Ch. XVI of the Original Side Rules, us admitted by the petitioner herself. It was argued that far from there being any substantial question of law, the whole question was purely academic. The petitioner should have taken steps for an order staying the drawing up and filing of the decree as required by the rules of this Court, and this not having been done, the decree has been filed as a decree in the said Suit No. 1045 of 1957. In our opinion, this contention of Mr. Das is well founded. A decree having been drawn up and filed on the basis of the pronouncement of Mallick, J., dated April 1, 1963, in our opinion, there is no substantial question of law in the appeal.

19. Mr. Das next contended that even if the petitioner''s contention that the appeal involved a question of construction of the pronouncement made by Mallick, J., on April 1, 1963, was accepted, such a question cannot be regarded as a substantial question of law. He argued that a question of construction of an instrument of title could be regarded as a question of substantial question of law, but the construction of a judgment delivered by a Judge of this Court cannot be regarded as a substantial question of law as required by Article 133(1) of the Constitution. In support of this contention reliance was placed upon a Bench decision of this Court reported in Ram Lakshman Singh Vs. Girindra Mohan Hazra, . There is good deal of force in this contention on behalf of the respondents.

20. It was next contended by Mr. Das that the order from which an appeal is proposed to be preferred to the Supreme Court is not a final order within the meaning of Article 133(1) of the Constitution. The suit still remains a cause pending in this Court. A preliminary decree only has been passed and that decree has to be worked out and a final decree has to be passed in the suit. Therefore, Mr. Das contended that the order form which the appeal is proposed to be taken not being a final order, no certificate can be granted to the petitioner as prayed for. In support of this contention, Mr. Das relied upon several decisions reported in Thacker''s Press and Directories Ltd. Vs. Metropolitan Bank Ltd., ; Pankaj Kumar Pakhira Vs. Nanibala Pakhira, ; Shivaram Poddar Vs. Income Tax Officer, ; Farbenfebriken Bayer Aktiengesellschaft Vs. Joint Controller of Patents and Designs and Another, . These decisions, in our view, have no application to this case. It is, however, not necessary for us to go into the question whether the order is a final order within the meaning of Article 133(1) of the Constitution, as in our opinion there is no substantial question of law involved in the appeal and we, therefore, refrain from expressing any opinion on the question whether the order is a final order as required by Article 133(1) of the Constitution. We also hold that the case is not a fit one for appeal to the Supreme Court.

21. For the reasons mentioned above, this application fails and is accordingly dismissed with costs.

22. Let all further steps in the proceedings subsequent to the decree be stayed for three weeks from this date and this is subject to further order of the Supreme Court.

Let this order be drawn up expeditiously.

Bose, C.J.

23. I agree.

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