

(1925) 05 CAL CK 0041

Calcutta High Court

Case No: None

Birendra Nath Basu Thakur and
Another

APPELLANT

Vs

Basanta Kumar Basu Thakur and
Others

RESPONDENT

Date of Decision: May 28, 1925

Acts Referred:

- Contract Act, 1872 - Section 23
- Registration Act, 1908 - Section 77

Citation: 91 Ind. Cas. 624

Hon'ble Judges: Hugh Walmsley, J; B.B. Ghose, J

Bench: Division Bench

Judgement

Hugh Walmsley, J.

This appeal is preferred by the plaintiffs. They are Sirendra Nath and Surendra Nath, Basu Thakur, members of the Malkhanagar Basu family. The principal defendants, and most of the pro forma defendants belong to the same family.

2. The none of contention is the Taltola hat and bazaar, an old established hat of considerable repute. It was held on land belonging to the Basu family, on the bank of the Dhaleswari River. Its site had to be changed from "time to time" owing to the action of the river, but all went well until the only available site was on land not in the possession of any members of the Basu family. This untoward event happened in the latter part of 1916. The site to which the hat had to be removed was on some land belonging to a Mussal man family, and held by it as chirdgi; lakhiraj. Relations were at the time strained between the plaintiffs and the principal defendants, and each side endeavoured, to defeat the other. Various members of; the Mussalman family executed eight kobalas in favour of the plaintiffs and others executed nadabipatras, while the principal; defendants secured five -documents of each kind. All this activity took place within the space of a few weeks. The aggregate, of the

shares sold and relinquished exceeds sixteen annas. One member of the Mussalman family, Abdul Aziz, is claimed as a vendor by both parties. He admitted execution of the kobala in favour of the plaintiffs on November 9, a few days later, he denied, execution of a kobala in favour of the defendants. On December 9th, however, he, appeared before the Sub-Registrar and admitted execution a few days later he declared that the admission was untrue and had been wrung from him by improper means. Just before he did so, however, one Rohini, a servant of the plaintiffs presented a complaint before the Magistrate in which he accused thirteen persons of forging the kobala produced by the defendants. Among the accused were several of the principal defendants Paresh, Gopal, Krishna and Benoy also Kamini, son of Ananta Kumar Bose deceased. The substance of the charge was that Paresh, Gopal, Krishna and Benoy with the assistance of a stranger named, Harendra (Jhendra De, had forged the kobala, and that the others had acted as attesting witnesses. The Magistrate called for evidence before issuing process. Meanwhile the defendants had taken steps before, the Registrar for registration of the document executed in their favour by Aziz, and they afterwards instituted a suit against Aziz u/s 77 of the Registration Act. It does not appear when the suit was instituted, but it was decreed ex parte on March 21st, 1917.

3. The criminal charge served to bring matters to a head, and in December it was decided that the quarrel should be referred to the arbitration of one Aswini Kumar Basu, a member of the family, and a retired Subordinate Judge. This gentleman did make an award. There is no dispute about the fact that he did so, or about, the terms. The award was followed by an ekrarnama which was signed by some but not all of the principal defendants. The plaintiffs say that they were put in possession under the terms of the award and of the ekrarnama and that they shared in the baslu puja which was celebrated a few weeks later at the beginning of the Bengali year. This, however, is denied by the defendants. They say that after the arbitration possession remained unchanged, although the criminal proceedings, were dropped, and that they lost no time in taking up the position, which they have taken up in defending the suit, that an arbitration made under such conditions is void.

4. The learned Judge has held that the submission to arbitration was inoperative because the consideration of the agreement was contrary to public policy, that the five executants of the ekrarnama had not authority to bind other members of the family, that the valid purchases by the plaintiffs only amounted to 1 anna 4 gandas share of the whole and that the plaintiffs must bring a suit for partition to get possession 1 of that share.

5. For the plaintiffs it is urged that they are entitled to the share mentioned in the arbitrator's award: that if they are not entitled to that share as against all the defendants, they are, at any rate, entitled to that share as against those who made the reference to the arbitrator and those who executed the ekrarnama; that if their claim on the award or the ekrarnama is disallowed, they should have their title to a

share of 6 annas declared by virtue of purchases from different members of the Mussalman family; and that, whatever their share may be found to be they should be given a decree for joint possession.

6. The first question is whether the reference to arbitration amounts to an agreement for stifling a prosecution. The Statute Law of this country on that subject is contained in Section 23 of the Contract Act, and is as follows: "The consideration or subject of an agreement is lawful, unless...the Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void," and the illustration bearing on this sub-clause is this: "A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken." The agreement is void as its object is unlawful.

7. The essential element in what is described by English lawyers as stifling, a prosecution" is the tampering with the administration of justice by a private individual. It is quite true that in this case, a complaint of a criminal offence was laid by the plaintiffs servant against several of the defendants, and that after the award had been made, no steps were taken to produce the evidence for which the Magistrate had called. The defendants, however, were never brought before the Court as accused persons: on the contrary the learned Magistrate expressed grave doubts about the truth of the complaint, and directed the complainant to establish a prima facie case before he issued process; and he dismissed the complaint u/s 203, Cr.P.C. when the complainant said that his witnesses had been gained over. In these circumstances I do not think it can be said that a prosecution was dropped still less do I think that there was any tampering with the administration of justice by the complainant, or that the complainant usurped the functions of the Judge.

8. Again, looking at the broader features of the case I should be very reluctant to hold that the institution of the complaint rendered void the reference to arbitration. On the one side the defendants had recourse to the summary provisions of the Registration Act, and afterwards to a suit u/s 77 of that Act, while the plaintiffs filed a complaint about the truth which the Magistrate was not satisfied. It would be carrying the doctrine of public policy to an absurd length to hold that the presentation of the complaint debarred the parties from restoring to the sensible method of arbitration.

9. As for the argument that the complaint put pressure upon the defendants, and that in consenting to arbitration they were acting upon coercion, it is abundantly clear that the complaint had no such effect. The defendants knew that Abdul Aziz had expressly admitted execution of the document which was alleged to have been forged, and they had no reason to think that his later repudiation could wipe out the effect of that admission: they knew that the Magistrate had received the complaint with scepticism, and they knew that the actual forgery was attributed to a stranger

of unknown parentage without an address, while the accusations against the others were of the vaguest description. Lastly one of the defendants admits that Ananta Bjabu, now dead, but at the time the chief man on defendants' side, entered into the compromise with the avowed intention of repudiating it afterwards on this very ground. It is impossible to hold that the defendants were not acting with complete freedom of Will.

10. In my opinion, therefore, the agreement to refer the dispute to arbitration cannot be treated as void.

11. The plaintiffs ask for a declaration of their right to a share of 3 annas 12 gandas, in accordance with the award and the ekrarnama that followed it. It appears, however, that there was no proper submission to arbitration, such as would bind all the defendants. Ananta, Benoy, Paresh and Krisfina Kumar pressed Aswini Babu to settle the dispute, and they said that they represented the absent defendants. In spite of his legal experience the arbitrator accepted these assurances, but, of course, they were not sufficient. Apart from the ekrarnama, and that was executed only by five of the defendants, there is no evidence on which it can be held that the defendants other than the four mentioned agreed to refer the dispute to arbitration. The plaintiffs, therefore, cannot succeed on the basis of the award against more than four of the defendants.

12. The award, however, was succeeded by an ekrarnama, executed by Ananta Kumar Basu, now dead, Joyanto Kumar Basu, Debendra Kumar Basu, Sanat Kumar Basu and Surendra Kumar Basu, (defendants Nos. 3, 5, 10 and 6). This is a formal document: the executants declared that they were satisfied that Birendra and Surendra had no title to a share of 3 annas 12 gandas: they promised for themselves and their co-shareis to execute an appropriate deed in regard thereto, and they also undertook, if they failed to persuade their co-sharers, to execute a deed "making up your 3 annas 12 gandas share from our own shares alone." Their shares amounted to 4-annas, as Ananta had 1 anna 5 gandas, Joyantahad 15 gandas and the other three 2-annas between them.

13. The ekrarnama cannot bind those who were not parties to it, but there is no reason why the executants should not be bound by the undertaking made for themselves.

14. The case for the plaintiffs is that possession to the extent of 3 annas 12 gandas was actually given to them. The arbitrator" says that Benoy, defendant No. 14 told him so, but Benoy says this is incorrect. More important evidence is a letter written by Birendra to Ananta on Chaitra 21, 1323: this letter contains an assertion of possession and a suggestion that both parties should let the hat to one jarodar for the ensuing year. On the back is an answer said by the plaintiffs to be in the Writing of Bipin and signed by Ananta. A witness deposes that he took the letter/heard Ananta dictate and saw Bipin write and Ananta sign. Against this evidence there is

only Joyahta's half-hearted denial. I have no doubt that the endorsement is genuine, and the only interpretation that can be put upon it is that Ananta recognised that possession had been given to the plaintiffs to the extent of 3 annas 12 gandas. As the plaintiffs have expressly asked for their share to be fixed on the basis of the award or the ekrarnamu, I do not think it necessary, after the finding's are recorded, to deal with their alternative prayer for a declaration of their title on the basis of their transfers from various members of the Miissalman family. On that point I only " wish to say that as the case was put before us the claim was for a fraction over 6-annas and not for the 10-annas mentioned in the plaint.

15. The remaining question is as to the form of relief to be granted to the plaintiffs. The learned Judge has held that he cannot go beyond declaring their title. Whether that view was right or not on the findings recorded by him, I need not discuss, because my findings are different. On the undertaking set out in the ekrarnama, supplemented by the facts that the plaintiffs were actually put in possession and that they remained in possession for a time I think it is clear that they are entitled to a decree directing that they be put in possession to the extent of 3 annas 12 gandas jointly with the defendants.

16. The result is that the appeal is allowed in a modified form. The judgment and decree of the lower Court are set aside; the plaintiffs' title to the extent of 3 annas 12 gandas is declared as against the defendants, Benoy Chandra Basu (No. 14),. Paresh Chandra Basu (No. 16), Krishna Kumar Basu (No. 18), "the two representatives" of the late Ananta Kumar Basu (Nos. 2 and 2ka), Jpyanta Kumar Basu (No. 3), Debendra Kumar Basu No. 5), Surendra Kumar Basu (No. 6),. Sanat Kumar Basu (No. 10). Their suit is dismissed as against the other defendants except to the extent that the plaintiffs, will get joint possession with them.

17. The plaintiffs are also entitled to recover mesne profits (to be ascertained by the lower Court hereafter) from the defendants named, above for the period as claimed in the plaint that is for the period from the, 31st August 1917 up to the date of delivery of possession or until the expiry of three years from this date whichever event first occurs.

18. The plaintiffs will be entitled to recover their costs in both Courts from the defendants mentioned above. The defendants will bear their own costs in both Courts.

19. The cross-objections are dismissed but without costs.

Ghose, J.

20. I agree.