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Calcutta High Court

Case No: Appeal From Appellate Decree No. 2111 of 1927

Durga Charan Debnath and Others		APPELLANT
	Vs	
Ganga Dhar Debnath and Others		RESPONDENT

Date of Decision: March 28, 1930

Final Decision: Dismissed

Judgement

Mitter, J.

This is an appeal by the Plaintiffs and arises in a suit for partition. There were numerous Defendants to the suit; Defendants. Nos. and 14, however, did not enter appearance in the suit; the other Defendants filed their written statements and on the 2nd of April 1925 issues were settled. Nearly a year after an application was filed by all the parties to the suit except Defendants Nos. 12 and 14 in which they prayed to the court for referring the matter in dispute to arbitration. The Court acceded to the application and referred the matter in dispute between the parties to arbitration on the 7th of April 1926. The arbitrators submitted their award. Some of the Defendants objected to the award on the ground that the reference was invalid as all the parties to the suit, namely, Defendants Nos. 12 and 14 did not join in the application for reference to arbitration. The objection was overruled by the Subordinate Judge on the ground that Defendants Nos. 12 and 14 were not interested in the subject-matter of the litigation within the meaning of sec. 1 of the second schedule of the CPC and relied on the statements of Defendants Nos. 10, 11 and 13 to the effect that the share of Defendants Nos. 12 and 14 in the suit lands was transferred in their favour and that they are no longer interested in the disputed lands. The accordingly confirmed the award and decreed the suit in terms of the award. Against this decree two appeals were preferred to the District Judge of Tipperah by Defendant No. 12 and Defendants Nos. 10, 11, 13, 15, 16, 17, 18 and 23 respectively. The Lower Appellate Court has set aside the award on the finding that Defendants Nos. 12 and 14 were interested in a part of the property in suit and as they did not join in the reference to arbitration the Court had no jurisdiction to make

the reference. He accordingly remanded the case to the Court of first instance.

2. Against this decision the present appeal has been brought and it is contended that no appeal lay against the decree of the Subordinate Judge to the District Judge as no appeal lies from a decree passed in accordance with an award and the Lower Appellate Court acted without jurisdiction in entertaining the appeal and setting aside the decree passed in accordance with the award and reference is made in this connection to sec 16 (2), of the second schedule of the Code of Civil Procedure. In our opinion this ground is not tenable. For it is conceded in this case that Defendants Nos. 12 and 14 were interested in a part of the disputed property and as a matter of fact plot No. 1226 in which Defendants Nos. 12 and 14 are interested has been directed to be partitioned by the arbitrators in their award, and as these persons did not join in the reference there was no valid reference to arbitration and the award was wholly infructuous. In our opinion the Court had no jurisdiction to make the reference and sec. 16 contemplates an award made in a case where there has been a valid submission to arbitration.The appeal lay to the District Judge as the reference itself is impugned for want of consent of the parties interested. This view is supported by a decision of this Court in Fanindra Nath Roy v. Dwarka Nath Roy 25 C.W.N. 832 (1918). It is argued, however, that whatever view might have been taken with regard to the right of appeal under the Code of 1882 there can be no question that under the Code of 1908 even if the award is invalid by reason of there not having been a proper submission by all the parties interested, no appeal would lie against the decree based on such invalid award and in support of this contention reliance is placed on a decision of the Lahore High Court in the case of Balkishan v. Sohan Singh Ladha Ram I.L.B. 10 Lahore 871 (1929).This decision no doubt supports the contention of the Appellant but it dissents from the decision of this Court referred to above. We are bound to follow the decision of our Court in preference to the decision of the Lahore Court. It is plain that before the jurisdiction of the Court to make an order of reference is invoked, there must be an agreement, between all the parties interested, that the matter in difference between them shall be referred to arbitration. In the present case two of the Defendants were not parties to the agreement; consequently the Court was not competent to make a valid order of reference. It is also plain that if there is no valid agreement to form the basis of reference in the terms of paragraph 1 of the second schedule to the Code there is no valid award whereon a decree can be based in accordance with paragraph 16. It is argued that the words "otherwise invalid " in cl.(c) of sec. 15, sub-sec. (1) shew that even if the award was invalid when there is no valid reference to arbitration a decree based on such an invalid award comes within the provision of sec. 16, cl. (2) and no appeal shall lie on such a decree except in so far as the decree is in excess of the award. We do not agree with this argument, for sec. 15 obviously assumes a valid reference to arbitration and only contemplates cases where the property of an award on the basis of such a reference is in question. An examination of cl. (c) of sub-sec. (1) of sec. 15 will show that the words "or being otherwise invalid " must

refer to invalidity of the kind referred to in the preceding sentences of the said clause as for instance the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court. As has been pointed out by Sir Lancelot Sanderson, Chief Justice (now of His Majesty''s Privy Council) that all the grounds for setting aside the award mentioned in sec. 15 shew that the Act contemplated in the first instance a valid reference. See Dooly Chand v. Mamuji Musaji 21 C.w.N. 387 (sic)25 C.L.J 339 (1916). The following observations in the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of Ham Fro-sad Chamria v. Durga Prosad Chamriu L.R. 53 I. A.1 (1925) furnish another instance of an award which is otherwise invalid. Lord Blanesburgh delivering the judgment of their Lordships said this:--"In their Lordships" judgment the decision of this appeal really turns upon the effect of that order properly interpreted. It was an order made in pursuance of secs. 1 and 2 of Schedule II to the Code of Civil Procedure, 1908, and in the exercise of a power thereby given to the Court to refer to arbitration matters in difference in a suit defined by itself in the order of reference. It is incumbent upon arbitrators acting under such an order strictly to comply with its terms The Court does not thereby part with its duty to supervise the proceedings of the arbitrators acting under the order. An award made otherwise than in accordance with the authority by the order conferred upon them is, their Lordships cannot doubt, an award which is ''otherwise invalid'' and which may accordingly be set aside by the Court under sec. 15 of the same schedule." These observations suggest that the power is given to the Court to refer to arbitration where the conditions of secs. 1 and 2 of Schedule II to the CPC 1908 are fulfilled, and that the words " otherwise invalid " must be read ejusdem gene In our opinion there was no award on which the Court could make a decree. The decree was based on something which was not an award and was therefore appealable. The view we take is in accordance with the decision of Mr. Justice Chatterjee and Mr. Justice Walmsley in the case of Girija Nath Roy v. Kanai Lal Mittra (5). In the case of Dooly Chand v. Mamuji Musaji (3) referred to above, Mr. Justice Mukherjee pointed out that the award based on a reference not contemplated by the Court was inoperative, and that the true view was that that was not a case of an improper award but of an invalid reference to arbitration. It seems to us that the foundation of the jurisdiction of the Court to make the reference is cut away as soon as it is shewn that the parties have failed to comply with, the fundamental requirement of the statute embodied in the first paragraph of the second schedule of the Code. In this view we think that an appeal lay to the District Judge and that his order setting aside the award must be affirmed. The appeal is dismissed with costs to be paid to Defendant No. 12 only.

3. The application is also dismissed.

Graham, J.

I agree.