(1925) 12 BOM CK 0042

Bombay High Court

Case No: Second Appeal No. 640 of 1924

Daulatsing Bapusing Raul		APPELLANT
	Vs	
Ratna Anandsing		RESPONDENT

Date of Decision: Dec. 18, 1925

Citation: (1926) 28 BOMLR 986 : 97 Ind. Cas. 673

Hon'ble Judges: Marten, J; Madgavkar, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Marten, J.
This is an appeal from the judgment of the District Judge of Khandesh affirming the order of the Subordinate Judge of Nandurbar, who had decreed the plaintiffs'' claim and directed that they should be put in possession of certain lands for their maintenance.

2. There are two main disputes advanced in the appeal before us, namely, first, whether the lower Courts were entitled to come to the conclusion which they did in favour of the plaintiffs having regard to the pleadings in the case and the issues which were raised, and, secondly, whether, in any event, their claim was barred by an arbitration award in favour of the defendant. I will deal with the second point first.

3. This arbitration award has been set aside on the ground of the alleged misconduct of the arbitrator in taking into consideration his personal knowledge of the history and customs of the family, in which certain disputes had occurred between the plaintiffs and the defendant, and of which family the arbitrator was himself a member.

4. To understand the position, I must state a few facts as briefly as I can. Admittedly, up to the date of the Mamlatdar''s order of June 26, 1916, the plaintiffs had been in possession of the suit land. The plaintiffs claimed that they held that land by reason

of a partition arrived at some one hundred and forty years ago by reason of one of their ancestors being a junior member of a particular family called Raul. The defendant''s case was that the plaintiffs had never obtained these lands on any partition, nor, indeed, were members of the family of Raul, but that they had been given these lands on condition of performing certain services, and as they had recently declined to perform those services any longer, the defendant was entitled to resume possession of the land. Disputes having thus broken out, the present defendant took proceedings in the Mamlatdar''s Court, which resulted in the order of June 26, 1916, in his favour, which I have already mentioned.

5. After an unsuccessful application to the High Oourt in January 1918 to discharge this order, the plaintiffs filed the present suit in effect to sat aside this order of the Mamlatdar and to recover possession of the land, It is important to note that they framed their plaint on the basis that they were entitled to possession by reason of the share, which had fallen to them on the above-mentioned partition. Subsequently, on June 17, 1919, they applied for leave to amend and to plead that the share was obtained either by partition or for maintenance. (See Exhibit 60). That amendment was refused by the then Subordinate Judge, Mr. Desai, on July 5, 1919.

6. Thereafter, namely, on December 20, 1919, there was a consent order by which Sirdarsing Dalpatsing Raul was appointed arbitrator to decide the suit. Now, this arbitrator seems to have been appointed because he was a member of the Raul family. It was urged in the Oourt below and also before us and the learned District Judge has apparently acquiesced in the view, that the arbitrator was chosen because "the fact of his being in possession of such information was known to both the parties, when they chose him as arbitrator, this being, in fact, the main reason for their choice." The arbitrator made his award on February 24, 1920, and it is Exhibit 115. That award was against the plaintiffs and he dismissed their suit. In the course of that award, he found, in the first place, that the suit land was not given to the plaintiffs, as alleged in the suit, for their share in the partition, Further, it was not satisfactorily proved that the plaintiffs were, in any way, related to the Raul family of the defendant. Accordingly, his finding on the second issue was that the plaintiffs had not proved their ownership of the suit land.

7. Then the arbitrator proceeded to consider the remaining issues Nos. 3, 4, 5, 7 and 8 which had been stated in the suit. He takes them together and then he proceeds to deal generally with various Raul Inams in East Khandesh. He says:

There are 12 1/2 Raul Inams in Khandesh. All these Inams are impartible and go only to the senior branch of the family. No Raul has the right or authority to divide it. It is customary to give some land out of the Raul Watan for the maintenance of the near relatives of the Haul family. According to my information Raul Narayansing alias Navesha Bhan has inherited from his forefathers nearly one-third share on partition of the Raul Watan of Sindkheda only. This has been so held for many years, viz., for more than one hundred years and is still continued with the same family. There has

been a partition deed about this and I have seen it, I have not seen any other Raul Watan similarly divided. My finding on the fourth issue, therefore, is that it has not been proved that a Raul has the right to partition the Raul Inam land. My finding on the fifth issue is that the plaintiffs hold the suit land as servants and that it is liable to be resumed from them if they decline to do the service and that the defendants have a right to recover possession. My finding on the seventh issue is, that no Raul has the right to transfer a Raul Inam land beyond his life-time.

8. Then there were certain other findings arrived at.

9. The point of these findings is to show that the lands could not have been partitioned in-what I may call perpetuity-in the way which the plaintiffs allege. At the most, they could only be given for maintenance for a limited period, namely, for the life of the particular Raul making the grant and that they could be resumed by the succeeding Raul even in cases where the persons were members of the Haul family.

10. The main argument addressed to us is that the arbitrator had no right to use his personal knowledge of the Raul family and of these other Raul Inams in Khandesh, and that he could only make his award on the evidence actually before him. It was said that an arbitrator is in exactly the same position as a Judge, and that he can no more act on his own knowledge than a Judge can. We were referred, in support of this proposition, to a passage in Russell on Arbitration, 11th Edn., at page 394, where it is said, " Arbitrators are bound by the same rules of evidence as the Courts of law " and reference was made to In re Enoch and Zaretzkey, Bock & Co. [1910] 1 K.B. 327 a decision of the Court of Appeal in England, where the head-note runs:-" Arbitrators are bound to observe the rules of evidence no less than judges"." But that rule, like other rules, must be taken subject to certain recognised exceptions. For instance, there is a further passage in Russell at page 397, which illustrates what I mean. It runs :-

Where a submission recived that the arbitrator had been appointed on account of his skill and knowledge of the subject), and one of the parties brought before him a statement of certain facts which he alleged to be material, and offered to support it by proof, the House of Lords held that the arbitrator was justified in refusing to receive it, if, taking all the matbers alleged be be facts into consideration, with his own local knowledge to guide him, and all the circumstanoes in his view, he felt that such facts would have no effect upon his determination : Johnston v. Cheape (1817) 6 Dow. 247 .

11. Similarly, there is a reference to the judgment of Lord Cran-worth where certain surveyors were appointed to settle the amount of rent and other terms of a lease of a coal mine. Lord Cranworth said :-

I do not agree in the suggestion that it was incumbent on the arbitrators to examine witnesses, I do not think that is the meaning, when a matter is referred be surveyors and people of skill be settle what the value of the property to be bought or let is.

Necessarily they are entrusted, from their experience and their observation, to form a judgment which the parties referring be them agree shall be satisfactory. Therefore I do not think there was anything of importance in their not examining witnesses, provided, bona fide, they meant to say, We know sufficient of the subject to decide properly without examining witnesses. Eads v. Williams (1854) 24 L.J. Ch. 531, 533.

12. Then reference is made to Wright v. Howaon (1888) 4 T. L R. 386 where an arbitrator experienced in cloth was held justified in deciding a dispute as to quality upon inspection of samples only.

13. And, indeed, every day practice tells us that in many important commercial matters such as in the sale of goods by sample, the whole benefit of referring a dispute to expert arbitrators would be almost nullified, if it was essential for them to decide the ease solely by witnesses called on the one side or the other as to the comparison between the goods tendered and the sample. In the present case, we consider that the arbitrator, Mr. Raul, was appointed by the parties because he was a man acquainted with the history and customs of the Hauls and the manner in which the lands of the various branches of the family were held. Otherwise, we can see little advantage in referring a dispute of this sort to a layman, who, on his own showing, did not profess to have any knowledge of technical law.

14. And, if one looks at the award as a common-sense document, there seems a great deal to be said in its favour from the way in which the arbitrator has stated his reasons and his conclusions. But, in the present case, we need not go so far as the Court did in Johnston v. Cheape. There is no suggestion here that the arbitrator rejected any evidence that was tendered to him. On the contrary, the pleaders did not even wish to make summing up speeches. Their speeches were sufficiently put in the cross-examinations of the witnesses that were tendered to the arbitrator. It might have been more satisfactory if there was definite evidence on the arbitrator''s notes that the arbitrator had told the parties what hia personal knowledge of the history of the family was, and had expressly offered either side an opportunity of adducing evidence, if they wished, to vary or alter his views of the history. But, unfortunately, the arbitrator''s notes have been destroyed, and, therefore, we have to deal with the case as best as we can.

15. On the whole, the conclusion we have come to is that the arbitrator gave a fair hearing to all contentions that were brought before him by the parties and that he had a right to use his own expert knowledge as to the history of his own family, which, indeed, was one of the very reasons why he had been appointed sole arbitrator. For all practical purposes, therefore, he was in much the same position as the business experts such as the surveyor or the cloth merchant in the cases I have already referred to. That being so, it follows that the appeal must be allowed, and that the plaintiffs'' suit must be dismissed.

16. But, before parting with it, I should mention the other point that was urged before us by the defendant. It amounted to this, that although Mr. Desai had expressly refused the plaintiffs'' proposed amendment to raise expressly the alternative plea of a grant for maintenance, and although the issues were framed on the original pleadings and contained no issue as to a grant for maintenance, yet the trial Court and also the lower appellate Court decided the case against the defendant on this very alternative point of a grant for maintenance, although both Courts admitted that, on a strict interpretation of the pleadings before the Court and of the original issues before the Court, the plaintiffs'' case must fail. The ground for the Courts'' decisions appears to have been that the word ''partition'', which had been used in the plaintiffs'' pleadings, might be given a wide meaning and held to include an alternative plea of a grant for maintenance. If it became necessary to decide the point, we think that the defendant''s contention before us was correct, and that the case ought not to have been decided against him on an alternative plea which involved separate evidence, and which had never been properly pleaded nor raised by any express issue. On the other hand, we think it would have been necessary, in that event, to remand the case for a new trial, and to allow the plaintiffs'' original proposed amendment, which Mr, Desai refused. Similarly, we should have given some express directions as to the framing of certain issues, and, in particular, issues Nos. 2 and 5 which were subsequently amended by the trial Judge, Mr, Mehta. But, having regard to our decision on the arbitration point, it is not necessary, in our opinion, to deal more precisely with contingencies that would only arise, if that decision had been a different one.

Madgavkar, J.

17. I agree on the ground that no legal misconduct within the meaning of para, 15 of the Second Schedule of the CPC on the part of the arbitrator has been proved, sufficient to entitle the plaintiffs-respondents to have their award set aside.

18. A comparison of arbitrator and Judge is, in my opinion, fallacious. A Judge, with any knowledge of the facts, considers himself disqualified to act as such; an arbitrator, on the other hand, is often chosen, because of his knowledge. In the present instance, the finding on the second issue of the arbitrator is clear that the respondents were not members of the family of the appellant and could not, therefore, have obtained the lands by partition. Incidentally I might observe that this finding was equally fatal to the ease they sought to set up in their application (Exhibit 65) to amend, which was disallowed by the first Judge. It follows, therefore, that, even if the award of the umpire on the other issues were disregarded, his finding on the second issue would be fatal to the respondents'' claim. But, as a matter of fact, it was not, in my opinion, misconduct for the arbitrator, being himself a Raul of age and experience, acquainted with other Raul families, their manners and customs, to consider that in the absence of any evidence of the power of partition in the case of the Raul family of the appellant, the general absence of such

power was proved.

19. This suffices to dispose of the appeal and to entitle the appellant to have his appeal allowed and the claim dismissed.

20. On the other points, it appears to me that the appellant attempted, in the first instance, to obtain an unfair advantage by appeal to the Mamlatdar in Ms possessory suit, secondly, that, although the respondents'' application, Exhibit 65, was made late in the day, it would have been perhaps in the circumstances better to allow that application on payment of costs or otherwise and to permit the respondents to set up their third case of grant by way of maintenance with its limitations, if any, to which it was subject, if it ever existed.

21. I agree that the appeal must be allowed with costs throughout.

22. Per Curiam Appeal allowed. Hold arbitrator''s award valid. Decree in terms of the award dismissing plaintiffs'' suit and directing each party to bear his own costs up to the date of the award. All costs of the suit after the date of the arbitrator''s award in all three Courts including the costs of this appeal to be paid by the plaintiffs.