1933

SRINATHJI v. PANNA KUNWAR

maintenance. She will also get interest in the manner which will be indicated in our order.

For the reasons given above we allow this appeal and modify the decree of the court below and grant the plaintiff a decree for Rs.6,000. On the amount which was due to the plaintiff on the 26th of August, 1927, she will get interest at the rate of 6 per cent. per annum from that date. She will further get interest on the subsequent instalments at the above-mentioned rate, as they fall due. The parties will pay and receive their costs in both the courts, in accordance with their success and failure.

## REVISIONAL CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh*

NARAIN GIR (DEFENDANT) *v.* RAM LAKHAN GIR (PLAINTIFF)*

1933 *December*, 11

*Arbitration—Agreement of reference nominating an arbitrator and, in case of his refusal, a second arbitrator—Court's power to appoint a third arbitrator on refusal by both—Civil Procedure Code, Schedule II, paragraph* 5(2)*—Revision—Civil Procedure Code, section* 115*—"Case decided"—Suit between rival mahants for possession of a* math*—Arbitration whether competent in such cases—Public trust of a charitable nature —Jurisdiction—Public policy.*

Where the parties to a suit agreed that the case should be decided by arbitration and nominated an arbitrator and, in case of his refusal to act, a second arbitrator, but they did not mention what was to happen in case of refusal by the second arbitrator as well, and there was no express provision that the suit was thereupon to be decided by the court, it was *held* that the power conferred upon the court under paragraph 5(2) of schedule II of the Civil Procedure Code to appoint an arbitrator existed, and the appointment of a third arbitrator by the court was valid.

Where the suit related to the rival claims of two persons to the mahantship of a *math*, and it appeared that the *math* was not a public trust of a charitable nature, and that both the parties

*Civil Revision No. 542 of 1932.

1933

NARAIN GIR v. RAM LAKHAN GIR

were litigating in their own personal rights and were not asking the court to appoint a trustee on the supposition that the office was vacant, it was *held* that a reference to arbitration of such a suit was not opposed to law or to any rule of public policy.

*Quaere*—Whether an order appointing an arbitrator, under paragraph 5(2) of schedule II of the Civil Procedure Code, amounts to a "case decided" within the meaning of section 115 of the Code and a revision lies.

Mr. *K. Verma,* for the applicant.

Mr. *Shiva Prasad Sinha,* for the opposite party.

SULAIMAN, C.J., and RACHHPAL SINGH, J.:—This is an application for revision from an order, dated the 6th of June, 1932, appointing a third arbitrator when the parties, after due notice, failed to agree to the appointment by the court of any particular person. A preliminary objection is taken to the hearing of this revision that it does not lie. Unfortunately there appears to be some apparent conflict of authority. There are several cases relied on by the learned counsel for the respondent, some of which are mentioned in *Risal Singh* v. *Faqira Singh* (1), which would go to suggest that such a matter cannot be treated as a case decided. On the other hand, the learned advocate for the applicant has strongly relied on the case of *Puran Lal* v. *Rup Chand* (2), which followed an earlier ruling in *Jagannath Sahu* v. *Chhedi Sahu* (3). These cases would suggest that a revision would lie from an order appointing an arbitrator.

Had it been necessary for us to decide this point we would have been compelled to refer this case to a larger Bench in order to set the conflict at rest; but we may point out that in the case of *Puran Lal* v. *Rup Chand* (2) although the application in revision was from an order appointing a new arbitrator, the award had actually been delivered by the time the revision came up for hearing, and it would obviously have involved a waste of time, labour and money if that particular

(1) (1931) I.L.R., 53 All., 1006. (2) (1931) I.L.R., 53 All., 778.
(3) (1928) I.L.R., 51 All., 501.

application had been dismissed and the applicant had been asked to file a fresh application in revision from an order passed in the subsequent proceeding. Under section 115 of the Civil Procedure Code the High Court can interfere of its own accord when the fact of material irregularity is brought to its notice. As remarked above, it is not necessary in this case to reconsider the decisions.

The learned advocate for the applicant contends that when the parties agreed that the case should be decided by a named arbitrator and, in the event of his refusing to act, by another named arbitrator, they necessarily implied that no other person should be appointed as arbitrator by the court. It is also argued that there was, in fact, no agreement to refer the matter to arbitration in general, but that there was a mere agreement to have the case decided by two specifically named arbitrators.

In our opinion, when the parties agreed that the matter should be decided by arbitration, and counsel for the parties made a statement before the court and signed it, there was an application made to the court for an order of reference. The names of the two arbitrators were given because it was intended that as the parties had agreed as regards them the court should appoint them in the first instance. The statement of the counsel was silent as to what was to happen in case the second arbitrator also refused to act. There was no express provision that the court would have no power to appoint a third arbitrator and that the suit must be decided on the original side. Accordingly the power conferred upon the court under paragraph 5(2) of the second schedule existed and was not contrary to any agreement between the parties. By leaving the question open, the parties obviously intended that the ordinary statutory power would be enforced in the case of a deadlock. We are unable to interpret the statement of the counsel to mean that there was, by necessary

1933

NARAIN GIR v. RAM LAKHAN GIR

implication, an agreement that the court would have no power to appoint a third arbitrator.

It is not contended before us that the formalities required by paragraph 5(2) of schedule II of the Code were not complied with. There has been no material irregularity in the appointment of the third arbitrator. If the court has misinterpreted the statements of the counsel for the parties it may, at the utmost, be an erroneous view on a point of law and not necessarily a material irregularity.

The last point urged is that the court had no jurisdiction to allow a reference to arbitration when the dispute related to the mahantship of the *math* in question. Strong reliance is placed on the case of *Muhammad Ibrahim Khan* v. *Ahmad Said Khan* (1). That was a somewhat peculiar case which had certain special features. The trust had expressly created a wakf of certain immovable property "to defray the expenses of the poor, the faqirs, the orphans, the needy and the indigent; and to defray the expenses of other good deeds." The Bench thought that the question before them was which of the descendants of the wakif was qualified to become the trustee. As they had not come to an agreement as to who should be the trustee, they had referred their dispute to a private arbitration and the award delivered by the arbitrator was sought to be filed in court; and the Bench thought that as regards the trust of the nature of a public charity there is a prerogative of the Crown to protect such charities and that it is the duty of the King and therefore of the court to see that it is properly administered. The learned Judges accordingly held that the office of the trustee to a public charity was not a right the disputes about which can be settled by arbitration and that if the right of succession to the trusteeship of a public charity was attempted to be settled by an award it should not be accepted by a court.

(1) (1910) I.L.R., 32 All., 503.

In the present case the plaintiff merely admitted that the *math* belonged to an order of Gir Sanyasis. There is nothing on the record to show the strength of this order and no indication whether the members of the order can be regarded as any large section of a community. Furthermore, there is nothing to suggest that the *math* was of the nature of a public charity and that the income was to be spent on public purposes and was neither a mere religious order nor confined for the benefit of a group of persons belonging to that order. Both the parties were litigating in their own rights and were claiming that each of them was of right entitled to the *math*. They did not ask the court to appoint a trustee on the supposition that the office was vacant. In these circumstances the court could not possibly have investigated the rights and interests of a third party outside the litigation and, even if satisfied that such a third party was the real trustee, could not have appointed him as trustee. The sole question was whether the plaintiff was entitled to possession of the property or whether it should remain in the possession of the defendant and the claim should be dismissed. The dispute, therefore, was clearly of a private nature and there is nothing on the face of it on the record which would suggest that a reference to arbitration of such a dispute was in any way illegal or forbidden by law or contrary to any well known rule of public policy. In these circumstances the case of *Muhammad Ibrahim Khan* v. *Ahmad Said Khan* (1) is at least distinguishable and it is not necessary for us to consider that decision. We may point out that the decision of the rights of the parties will be only *inter se* and will in no way prejudice any other person who may have a better right to be the trustee. The application is accordingly dismissed with costs.

(1) (1910) I.L.R., 32 All., 503.