APPELLATE CIVIL

Before Mr. Justice Rachhpal Singh and Mr. Justice Ismail

KRISHNA GOPAL (JUDGMENT-DEBTOR) *v.* LAKSHMI BAI (DECREE-HOLDER)* 1938 January 17

Arbitration—Guardian and minor—Award appointing guardian—Jurisdiction—Arbitration Act (IX of 1899), section 15(1)—Court executing award as a decree—Execution court questioning validity and jurisdiction of the award.

A dispute between two persons *K* and *L* was referred to arbitration under the Arbitration Act, 1899, and the arbitrator gave an award directing that *L* should act as guardian of the three daughters of *K*, that *K* should pay a certain sum every month to *L* for the maintenance of the three daughters, and that *K* should pay to *L* a certain sum for the marriage of each daughter. The award was filed in court and no objections were taken to it by either party. *L* subsequently applied for execution of the award as a decree, under section 15(1) of the Arbitration Act, for the recovery of marriage expenses of one daughter and arrears of maintenance money as provided by the award; *K* raised the objection that the award was beyond the jurisdiction of the arbitrator inasmuch as it dealt with the appointment of guardian of minors and was therefore invalid:

Held that although it was true that the appointment of a guardian to a minor was not a matter which could be validly referred to arbitration and an arbitrator had no jurisdiction to decide it, yet that was a question which could be raised and decided only by a proper suit by the judgment-debtor and it was not open to him to raise the question in the execution department. If the decree-holder had asked the court that she should be appointed to act as guardian of the minors, it would be a question whether the judgment-debtor could not have resisted the execution by raising the plea that the award appointing the decree-holder to act as guardian was without jurisdiction and void; but the decree-holder was asking only for the recovery of certain sums due to her under the award. Except where the nullity of the decree appears on the face of it, the execution court is not justified in going into a variety of circumstances and deciding intricate questions in order to find out whether the decree was competent and valid or was one without jurisdiction.

*First Appeal No. 532 of 1935, from a decree of D. C. Hunter, District Judge of Cawnpore, dated the 20th of August, 1935.

1938

KRISHNA GOPAL v. LAKSHMI BAI

Messrs. *P. L. Banerji*, *B. Malik* and *B. S. Darbari*, for the appellant.

Dr. *N. P. Asthana* and Mr. *S. N. Katju*, for the respondent.

RACHHPAL SINGH and ISMAIL, JJ.:—These are three connected appeals arising out of the same matter and can conveniently be disposed of together.

For the purpose of disposing of these appeals, it is necessary to set forth here briefly the facts which have given rise to this litigation between the parties.

One Udai Ram died leaving considerable property. One of his sons was Radha Krishna by name who was married to Mst. Lakshmi Bai. Radha Krishna had a son Jai Narain, and Krishna Gopal is his son. Udai Ram before his death executed a will under which he divided his estate between Krishna Gopal and Mst. Lakshmi Bai. On the death of Udai Ram a dispute arose between Krishna Gopal on one side and Mst. Lakshmi Bai on the other. They executed an agreement under which they appointed Mr. Vikramajit Singh, an advocate practising at Cawnpore, as an arbitrator. The arbitrator came to the conclusion that there were twenty-five points in issue which had to be settled and he made an award. It is necessary to state here that the award is to be governed by the provisions of the Indian Arbitration Act (Act IX of 1899). On the 26th of November, 1933, the arbitrator declared his award to the parties and filed it in court on the 18th of December, 1933, notice of which was given to the parties in accordance with the provisions of the Indian Arbitration Act; but it appears that no objections were filed by either party. The arbitrator, among other points, gave his decision on the following points:

1. That Mst. Lakshmi Bai should act as guardian of the three daughters of Krishna Gopal. (It may be stated here that Krishna Gopal had married a second time and the daughters are by his first wife).

2. Krishna Gopal was made to pay a sum of Rs.15 a month on account of maintenance of each of the three daughters to Mst. Lakshmi Bai.

3. Krishna Gopal should pay to Mst. Lakshmi Bai a sum of Rs.5,000 for the marriage of each of the three daughters.

Execution First Appeal No. 35 of 1937 relates to an application for execution made by Mst. Lakshmi Bai in which she claimed a sum of Rs.5,000 on account of the marriage of one of the daughters, maintenance expenses due and certain other sundry expenses. A perusal of the application shows that two previous applications had been made and struck off and the last application was the third application. Execution First Appeal No. 532 of 1935 relates to a sum of Rs.1,125-4-0 claimed by Mst. Lakshmi Bai under the terms of the award on account of maintenance expenses, etc. First Appeal from order No. 135 of 1936 arises out of an application made by Krishna Gopal in the court below for setting aside the second award. The circumstances were as follows.

The first award had been made by Mr Vikramajit Singh and it appears that some trouble arose over the marriage of one of the girls and fresh arbitration proceedings were taken. The arbitrators decided that Krishna Gopal should have the girl married within a fixed period and if he failed to do so then Mst. Lakshmi Bai should get her married. Under the second award it had been decided that if the father failed to marry the girl within a fixed time, then he would pay marriage expenses to Mst. Lakshmi Bai which she might incur. No objections were taken to the second award, which was given on the 11th of April, 1935.

In all the three abovementioned cases the judgment-debtor Krishna Gopal has been unsuccessful His application to set aside the second award has failed. Similarly his objections in the other two appeals relating to execution have been dismissed and he has preferred these three appeals to this Court.

1938

KRISHNA GOPAL v. LAKSHMI BAI

The main contention raised by learned counsel for the appellant is that the award or, to be more correct, both the awards were wholly beyond the jurisdiction of the arbitrators and therefore invalid and incapable of execution. In connection with this matter we have to bear in mind the provisions of section 15 of the Indian Arbitration Act of 1899 which runs as follows: "(1) An award on a submission, on being filed in the court in accordance with the foregoing provisions, shall (unless the court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the court." It is, therefore, clear that for the purpose of the execution department the court has to treat the award as if it were a decree of the court and execute it as such. Learned counsel for the appellant relies on *Mahadeo Prasad* v. *Bindeshri Prasad* (1). In that case a Bench of this Court held that "the appointment of a guardian to a minor, not being a matter of private right as between parties, is not a question which can be settled by reference to arbitration." KARAMAT HUSAIN, J., in his judgment, made the following observations: "The State is theoretically the guardian of all its minor subjects. As an old Writer observes, 'the law protects their persons, their rights and estate, excuseth their laches and assists them in their pleadings; the Judges are their counsellors, the jury are their servants and the law is their guardian'." We may at once say that we entirely agree with the view expressed in the above ruling. In our opinion, however, the difficulty of the judgment-debtor appellant before us is not solved. We are not called upon to decide in the present case as to whether or not the appointment of guardian under the award by the arbitrator was legal and valid. The question before us is somewhat different and it is whether the agreement of the judgment-debtor who agreed to make certain payments to the respondent for the maintenance and for the marriage expenses of his

(1) (1908) I.L.R. 30 All. 137.

own daughters is binding upon the parties. It may be that in a proper suit the judgment-debtor may be able to establish that the order of the arbitrator directing Mst. Lakshmi Bai to act as guardian of the daughters of the judgment-debtor was not a valid one. In *Sassoon and Co.* v. *Ramdutt Ramkissen Das* (1) their Lordships of the Privy Council have laid down that a question of jurisdiction of arbitrators can be questioned in a suit brought for the purpose. At page 9 their Lordships observed as follows:

"On the argument before their Lordships, it was argued, as a preliminary point, that the suit would not lie, as the only remedy open to the plaintiffs was to move to set aside the awards under section 14 of the Arbitration Act, and this could not be done after the awards had been enforced by execution. In their Lordships' opinion there is no substance in this point. Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought, no doubt, to be taken by motion to set aside the award; but where (as here) it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. Nor is the fact that the award has been enforced by execution under section 15 a bar to a suit to have it declared void and for consequential relief. Section 15 does not enact that the award, when filed, is to be deemed to be a decree of the court, but only that it is to be enforceable as if it were a decree."

Thus it is open to the judgment-debtor appellant before us to raise the question of the jurisdiction of the arbitrator by instituting a regular suit. What we have to consider in the present case, however, is whether in the execution department it is open to the appellant to raise this question, and after a consideration of the matter we have come to the conclusion that he can not be permitted to do so. It is important to remember that the decree-holder in the present case is not asking the court that she should be appointed to act as guardian of the daughters of the judgment-debtor. Had she made a prayer of this kind, it is a question as to whether or

(1) (1922) I.L.R. 50 Cal. 1(9).

1938

KRISHNA GOPAL v. LAKSHMI BAI

not the judgment-debtor could have resisted the execution proceedings by pleading that the award of the arbitrator appointing Mst. Lakshmi Bai to act as guardian was wholly without jurisdiction. However, as we have already remarked, there is no such point before us. All that the decree-holder asks is that certain terms of the award incorporate that expenses of maintenance and marriages of some of the daughters should be paid by the judgment-debtor in accordance with the terms of the award. We do not think that it can be said that so far as this matter is concerned the award is open to any objection. It appears to us that it is always open to the parties to make any arrangement which they consider to be suitable for the bringing up of the daughters of the judgment-debtor. In any case the court executing the award, which in accordance with the provisions of the Arbitration Act has the force of a decree, can not go into any such question. In *Tahir Hasan* v. *Chandra Sen* (1) it was decided (page 112) that "Where a judgment is passed without jurisdiction, the judgment-debtor can show in the execution proceedings that it is wholly null and void. The condition precedent, however, is that the nullity should appear on the face of it." One of us was a party to that case. We think that the view taken in that case should be followed. There may be cases in which the want of jurisdiction in the court which passed the decree is apparent on the face of it and there certainly the execution court can be asked not to execute the decree on the ground that it is null and void. An ordinary instance of this is where a suit cognizable by a Subordinate Judge is disposed of by a Munsif who had no jurisdiction to entertain it. But the case will be altogether different where, in order to decide the question about the want of jurisdiction, the court has to go into a variety of circumstances to find out whether the decree was competent and in such a case the execution court will not be entitled to go into these questions.

(1) (1935) I.L.R. 58 All. 98.

The best thing is to leave the parties to have their remedy by a separate suit. The duty of the court executing the decree is clear and that is to execute the decree. It may be that in the present case the judgment-debtor, if he institutes a separate suit, may be successful in getting the whole award set aside. On the other hand, it is equally possible that he may fail. The execution court in the present case is not justified in deciding intricate questions in order to find out whether the arbitrator had an authority to make the award which he did. We may further point out that during the course of argument we were told that two of the daughters of the judgment-debtor have already been married and so there can be no question as regards their guardianship. They are now married and their husbands are their guardians. The decision of the arbitrator does not in any way touch the powers of the district court to appoint a suitable guardian for any of the daughters of the judgment-debtor, if it so desires; but so long as that power is not exercised, we see no reason for interfering with the award. It is quite possible that the district court, on making an inquiry, may come to the conclusion that having regard to the circumstances of the present case the grandmother of the girls is the most suitable and fittest person to act as guardian. If any of the married girls is a minor, then somebody has to look after her as her guardian and so long as the district court does not appoint anyone else to act as such, we would not be justified in cancelling the award and leaving the minor unprotected. For these reasons we are of opinion that in the present case the execution court can not go into a question as to the validity of the award made by the arbitrators, and if the judgment-debtor thinks that he has got any right to have the award set aside he has his remedy. He can institute a regular suit if he so desires or he can move the District Judge to appoint another person as guardian. So long as the award stands, the decree-holder, in the present case, can enforce it as if it

1938

KRISHNA GOPAL v. LAKSHMI BAI

were a decree of a court and can claim all the reliefs to which she is entitled under the terms of the award.

For these reasons we are of opinion that all the three appeals must be dismissed and we accordingly dismiss all the three appeals with costs throughout.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Yorke

And on a reference

Before Mr. Justice Bennet

And finally

Before Mr. Justice Iqbal Ahmad and Mr. Justice Verma

1937 *October* 6, 18, 25

MUBARAK HUSAIN (PLAINTIFF) *v.* SAGAR MAL AND OTHERS (DEFENDANTS)*

1938 *January*, 18

Landlord and Tenant—Grove-holder—Occupancy holding converted into grove—Right of transfer—Custom to contrary—Burden of proof—Agra Tenancy Act (Local Act III of 1926), sections 196, 197.

Held, by a majority, that grove-holders, whether they were tenants to whom the land had been let for the special purpose of planting a grove, or whether they were occupancy tenants who by planting trees on their holding have converted it into a grove, either with the express or implied permission of the landlord or without such permission where it was allowed by custom, have now, under the general law in this province, a transferable right in the trees, unless there be a custom to the contrary, and the burden of proof of such a custom lies on the landlord who denies the right of transfer to a grove-holder. Section 197(*b*) of the Agra Tenancy Act, 1926, has introduced a change in the law and clarified the position.

The course of development of the statute law as well as the case law in regard to grove-holders was traced.

Mr. *Panna Lal*, for the appellant.

Messrs. *P. L. Banerji* and *S. N. Gupta*, for the respondents.

IQBAL AHMAD, J.:—The question that arises for consideration in the present appeal is whether the defendants, who have certain groves in mahal Bakar Ali and mahal Gurdhan Das in village Pachenda Kalan, have a

*First Appeal No. 415 of 1933, from a decree of Shah Wali Alam, Additional Civil Judge of Muzaffarnagar, dated the 29th of May, 1933.