

MISCELLANEOUS CIVIL

Before Mr. Justice G. H. Thomas, Acting Chief Judge and
Mr. Justice Ziaul Hasan

BENI DATT AND OTHERS (DEFENDANTS-APPELLANTS) v. BAIJ-
NATH (PLAINTIFF-RESPONDENT)*

1938
Mercer, 2

Arbitrator—Award—Partnership business—Reference to arbitration of dispute relating to liability of various partners to the loss in business—Reference, whether stands revoked by subsequent death of one of the parties—Death of a party after all inquiry was over but before award—Sons of deceased party not brought on record—Award, whether valid—Failure of one of the arbitrators to sign award, whether invalidates award—One or other arbitrator absenting himself at arbitrators' sittings—Award, whether invalid for that reason.

The rule of English Common Law that a submission to arbitration stands revoked by the death of one of the parties is not applicable to this country. The test to be applied is, what is the true nature of the submission? Were the matters in difference personal questions in respect whereof it was not intended that the succession-in-interest of the parties should be affected by the decision of the arbitrators? If the intention of the parties was that not merely themselves but their representatives-in-interest should be bound by the decision of the arbitrators, the reference plainly does not stand revoked merely by the death of one of the parties. Where the partners to a business refer a dispute as to the proportion in which each was liable for the loss incurred in the partnership, to arbitration though there be no express provision in the agreement that the representatives-in-interest of the parties will be bound by the reference, it must be presumed that that was the intention of the parties, as the dispute referred to the arbitrators could not end with the life of any of the parties. *Manindra Nath Mandal v. Mohanunda Roy* (1), relied on.

Where after the arbitrator had finished the inquiry into the case one of the parties died, then as nothing remained for the arbitrators to do except to make the award, the award cannot be said to be invalid merely because it was given after the death of one of the parties, without his son being brought on the record. *Binayakdas Acharjee Chowdhury v. Sashi*

*Miscellaneous Appeal No. 46 of 1936, against the order of Mr. Krishna Nand Pandey, Civil Judge of Partabgarh, dated the 10th of February, 1936.

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Bhusan Chowdhury (1), and *Hara Krishna Mitra v. Ram Gopal Mitra* (2), relied on.

Where an award is arrived at by all the arbitrators and represents their decision, the failure of an arbitrator to sign does not render it invalid. *Manphool v. Sahi Ram* (3), and *Bhoj Nath v. Shiva Nandan* (4), followed. *Kali Charan Pande v. Gupt Nath Misra* (5), and *Nand Ram v. Fakir Chand* (6), referred to.

An award made on proper reference ought not to be set aside on the ground of an alleged defect in procedure not affecting the merits where substantial justice has been done. Therefore the mere fact that at every meeting of the arbitrators one or other of the arbitrators was always absent will not render the award invalid.

Messrs. *Radha Krishna* and *C. P. Lal*, for the appellants.

Mr. *Ali Zaheer*, for the respondent.

THOMAS, A. C. J. and ZIAUL HASAN, J.:—This is an appeal against an order of the learned Civil Judge of Partabgarh, filing an award and passing a decree thereon on the application of Baij Nath, respondent.

It appears that four persons, namely, Baij Nath respondent, Beni Dutt and Ram Sewak, appellants nos. 1 and 2, and Jamna Das, father of Paras Nath, appellant No. 3, entered into a partnership for carrying on some business. The business resulted in a loss and disputes arose as to the proportion in which the partners were liable to bear that loss. On the 7th of December, 1933, all the four persons entered into an agreement to refer the matter in dispute to the arbitration of Sirah Mal, Ganga Prasad, Ghanshiam Dass and Debi Dayal, arbitrators, and Babu Lal, umpire. The arbitrators gave their award on the 15th of June, 1935, and on the 30th of August, 1935, Baij Nath, respondent, applied to have the award filed in court. The present appellants raised various objections to the filing of the award, but the learned Civil Judge overruled their objections, and

(1) (1922) A.I.R., Cal., 226.

(3) (1917) 43 I.C., 154.

(5) (1918) 16 A.L.J., 307.

(2) (1910) 14 C.W.N., 759.

(4) (1930) 7 O.W.N., 541.

(6) (1885) I.L.R., 7 All., 523.

holding that the award was valid ordered the award to be filed and a decree to be passed in pursuance of it. It is against this order that this appeal has been brought by the defendants to the suit registered under rule 20(2) of the Second Schedule to the Code of Civil Procedure.

The learned counsel for the appellants has raised two points before us in this appeal. The first is that one of the parties to the reference, namely, Jamna Dass, died before the arbitrators delivered their award, and his son, Paras Nath, appellant No. 3, was not made a party to the proceeding by the arbitrators. The second is that all the arbitrators did not join in making the award.

On the first point the learned counsel for the appellants argues in the first place that the death of Jamna Dass had the effect of revoking the reference, as, he says, the agreement does not contain a provision that reference would bind the successors-in-interest of the parties also. In support of this argument he relies on D. C. Banerji's *Law of Arbitration in British India*, (1932 Edition), page 195, where it is said. "If the submission provides either in express terms or by necessary implication that it shall bind the legal personal representatives of the parties thereto, then they are bound, but if it contains no such provision, the ordinary rule of law that the death of a principal revokes the authority of his agent takes effect, and the legal personal representatives are not bound." This remark however, is based on an English Case; but in the case of *Manindra Nath Mandal and another v. Mohanunda Roy and others* (1), it was held by a Bench of the Calcutta High Court that the rule of the English Common Law that a submission to arbitration stands revoked by the death of one of the parties is not applicable to this country. The learned Judges say "The test to be applied is, what is the true nature of the submission?"

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Were the matters in difference personal questions in respect whereof it was not intended that the succession-in-interest of the parties should be affected by the decision of the arbitrators? If the intention of the parties was that not merely themselves but their representatives-in-interest should be bound by the decision of the arbitrators, the reference plainly does not stand revoked merely by the death of one of the parties." In the present case the matter in dispute among the parties to the reference was not a matter personal to the parties themselves, and though there is no express provision in the agreement that the representatives-in-interest of the parties will be bound by the reference, it must, in our opinion, be presumed that that was the intention of the parties, as the dispute referred to the arbitrators could not end with the life of any of the parties. There is thus no force in the contention that the reference in the present case came to an end on the death of Jamna Dass.

The second argument put forward on behalf of the appellants on this point is that as the award was delivered after Jamna Dass's death without his son, Paras Nath, being brought on the record, the award was invalid. This argument too does not appear to us to have any force. It is true that the order of Paras Nath being made a party is contained in the award itself, but as the arbitrators had finished the inquiry into the case in the lifetime of Jamna Dass, and as nothing remained for them to do except to make the award, we are of opinion that the award cannot be said to be invalid merely because it was given after the death of Jamna Dass. In the case of the Calcutta High Court referred to above the facts were similar and the learned Judges said "If the hearing had not been completed, it would have been necessary to bring the representatives of the deceased party on the record and to make them parties to the submission. Here, however, the hearing had

terminated and nothing remained for the arbitrators to do but to deliver their award. We are of opinion, that the award so delivered is binding upon the parties and their representatives-in-interest." In *Binayakdas Acharjee Chowdhury and others v. Sashi Bhusan Chowdhury and others* (1), a Bench of the Calcutta High Court held that where an agreement was made to refer a dispute about property to arbitration by some of the parties on their own behalf and on behalf of minors and the investigation had been finished and documents produced before the arbitrators while they were alive, there is no rule of procedure by which the arbitrators could substitute the representatives or appoint guardian *ad litem* of infants. Similarly in *Hara Krishna Mitra and another v. Ram Gopal Mitra* (2), it was held that where an agreement to refer having been filed in court, the court appointed an arbitrator who, after finishing his enquiries and hearing the arguments of the pleaders of the parties, reserved his report and award, and then one of the parties died, the death of the party did not make the award void, and that the doctrine of *nunc pro tunc* was applicable as in the case of a judgment of court. We are, therefore, of opinion that the award in the present case was not invalid because it was made after the death of Jamna Das.

The second point urged on behalf of the appellants is that the award is invalid, because at no sitting of the arbitrators, all of them were present. The agreement, (exhibit 2), provides that the award of the arbitrators should be either unanimous or of the majority, and it is contended that as at least Ganga Prasad arbitrator, whom the appellants examined in the court below, did not join any sitting of the arbitrators, the award cannot be said to be even that of the majority. In this connection the learned counsel for the appellants relies on the case of *Kali Charan Pande and other v. Gupta Nath Missra and others* (3), and *Nand Ram and another v.*

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Fakir Chand (1); but in both these cases one of the arbitrators refused to act and withdrew from the arbitration. In the present case none of the arbitrators did so. In fact according to the evidence of Babu Lal, umpire, which was believed by the learned court below, and which we also see no reason not to believe, the award was given "under the joint consultation" of all the arbitrators including Ganga Prasad. He further says that though Ganga Prasad did not sign the award, yet the award had his concurrence. It cannot, therefore, be said that the award in question was not an unanimous award. It has been held by the various courts in India that where an award is arrived at by all the arbitrators and represents their decision, the failure of an arbitrator to sign does not render it invalid, *vide Manphool v. Sahi Ram and others* (2) and *Bhoj Nath v. Shiva Nandan and others* (3).

The learned counsel for the appellants lays much stress on the statement of Babu Lal, umpire, that at every meeting of the arbitrators one or another of the arbitrators was always absent; but, in the first place, none of the defendants ever took any objection to the meetings of the arbitrators being held in the absence of one or other of them, and, in second, we are in perfect agreement, if we may respectfully say so, with what the learned Judges of the Calcutta High Court said in *Binayakdas Acharjee Chowdhury and others v. Sashi Bhusan Chowdhury and others* (4), namely, that an award made on proper reference ought not to be set aside on the ground of an alleged defect in procedure not affecting the merits where substantial justice has been done.

We agree with the learned Judge of the court below that none of the grounds mentioned in rule 14 and 15 of the Second Schedule of the Code of Civil Procedure has been made out, and therefore we dismiss this appeal with costs.

Appeal dismissed.

(1) (1885) I.L.R., 7 All., 523.

(2) (1917) 43 I.C., 134.

(3) 118 N.W.O. 2 (1861) (P)

(4) (1922) A.I.R., Cal., 226.