

APPELLATE CIVIL.

Before Adami and Allanson, JJ.

JNANENDRA NATH BAGCHI

v.

SURES CHANDRA ROY.*

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Jan., 5, 6;

Feb., 11.

Arbitration without the intervention of the Court—Code of Civil Procedure, 1908 (Act V of 1908), Schedule II, paragraphs 20 and 21—some properties left undivided—implied condition in the submission that all matters shall be disposed of, whether can be waived by agreement—construction of will, whether can be referred to arbitration.

In the case of an arbitration without the intervention of a court, there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all matters referred; but this condition may be waived by the consent of the parties before the arbitrators.

Makund Ram Sukal v. Saliq Ram Sukal (1), followed.

Kunjilal v. Banwari Lal (2), referred to.

Where, therefore, the partition of a joint estate consisting of different properties had been submitted to arbitration out of court, and the parties agreed to a division by stages and asked that the properties remaining undivided should be the subject of a further award to be made by the same arbitrators, and the arbitrators followed the direction of the parties but were unable themselves to perform the work of partitioning the remaining properties in a separate award,

Held, that it was competent to the parties to agree before the arbitrators to the division being made by steps and that, therefore, the partition as to the property divided was final.

A party or an executor can refer pure questions of law or the construction of a will to the decision of an arbitrator.

Soundamani Ghosh v. Gopal Chandra Ghosh (3), referred to.

*Appeal from Original Order no. 247 of 1925, from an Order of Maulvi Nujabat Husain, Subordinate Judge of Bhagalpur, dated the 22nd May 1925.

(1) (1894) I. L. R. 21 Cal. 590, P. C. (2) (1919) 4 Pat. L. J. 394.

(3) (1914-15) 19 Cal. W. N. 948.

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Where, therefore, under the terms of the reference, the arbitrators were asked to construe a will, wherein there was a direction that a donee was not to enjoy a vested share in full until he attained a particular age, and the parties further agreed that the wishes of the testator with regard to the postponement of the bequest should not be observed, and the arbitrators, on the construction of the will, found that the donee had an absolute interest and, accordingly, made over possession of his share in the property,

Held, that the award was valid as it was within the competence of the arbitrators to find whether the interest was limited or absolute.

Appeal by the defendant.

This was an appeal against an order of the Subordinate Judge of Bhagalpur passed under paragraph 21 of Schedule 2 to the Code of Civil Procedure directing an award to be filed and a decree to be passed in accordance therewith.

Babu Upendra Nath Bagchi, a Vakil of Bhagalpur, died on the 4th September, 1911, leaving him surviving, besides his wife and daughters, six sons. By his will dated the 30th August, 1911, after making provision for his wife and daughters and his son Birendra Nath Bagchi, he directed that his estate should be divided in equal shares between his other five sons, Harendra Krishna, Narendra Nath, Jnanendra Nath, Manindra Nath and Dharendra Nath. With regard to Dharendra Nath he directed that until he reached the age of 35, the executors should pay to him only the income of his one-fifth share and that when he reached the age of 35 if his brothers agreed that he was of good behaviour he should take possession of the share. Harendra Krishna, Narendra Nath and one Suresh Chandra Ray were appointed executors. They took out probate in the High Court at Calcutta. In 1920, Jnanendra Nath filed a suit for partition in the High Court, Calcutta, and this caused an agreement between the brothers to settle their disputes as to the property by arbitration. On

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the 14th June, 1921, they executed a deed of agreement for reference to arbitration but the arbitrators they appointed failed to act and so, on the 1st April, 1922, another deed of agreement was drawn up, referring the disputes to arbitration. The points referred to arbitration by that agreement which were material in the present case were the following :—

Clause (7).—" That the arbitrators shall also have power to construe the testator's will."

Clause (8).—" That Dharendra Nath Bagchi is now of good conduct and behaviour and all the parties to this deed have no objection and will not object to Dharendra Nath Bagchi's share being made over to him, and with a view to carry out the division by metes and bounds, without however otherwise altering the shares defined in the said will or disturbing the other provisions thereof the arbitrators shall be competent to make over at once to him his share in the estate as well as the management thereof, all provisions in that behalf notwithstanding in the said will contained. And after the partition of his share he will not in future raise any objection to the award or partition made by the arbitrators or set up any claim owing to his share in the estate being contrary to the provisions in the will being given to him before completion of his 35th year or on any account whatsoever."

Clause (9).—" That the arbitrators shall also ascertain in the first instance what the estate of the said testator consisted of at the time of his death and what the same now consists of together with accumulations and accretions thereto and thereafter proceed to partition by metes and bounds all the movable and immovable properties according to the respective shares of the parties therein and shall allot such shares to each of them as they are entitled to."

Clause (12).—" That the parties agree, when effective meetings are held, to pay and to contribute in proportion to the respective shares that they are entitled to receive in the testator's estate, the daily sum of Rs. 16 to each of the arbitrators as his remuneration and in like manner to bear and pay all costs and expenses of and incidental to this reference to the arbitrators."

Clause (13).—" That all questions regarding the award of cost other than those herein before provided and the costs in connection with the said High Court suit incurred by the parties which shall be paid out of the estate in the first instance, shall be decided by the arbitrators as they think proper."

Clause (14).—" That there is a partition suit pending between some of the parties to this deed and Sachindra Nath Bagchi, minor son of Hemendra Nath Bagchi, deceased, in the Calcutta High Court regarding premises no. 25, Prasanna Kumar Tagore's Street, Calcutta, and it is hereby agreed that during the pendency of that suit the arbitrators hereby appointed will not give any decision with respect to that property and the property will be dealt with by the arbitrators according to the terms of this deed after the final disposal of the said suit by the Hon'ble High Court."

The arbitrators proceeded to ascertain the estate of the testator which consisted of the house in Calcutta, properties in north Bhagalpur and in south Bhagalpur, and also in Monghyr, and also residential properties in Bhagalpur as well as cash and other moveable properties. They decided that for the upkeep of the family idol and for the payment of annuities to Dharendra Nath and Pramala Bala Devi, the daughter, it would be necessary to keep joint the properties in south Bhagalpur known as Taluka Mahespur.

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On the 19th March, 1924, a letter was addressed by the five sons and the executor Suresh Chandra Roy to the arbitrators, asking that the partition of their house in Calcutta should be effected by the senior Assistant Valuer of the Calcutta Improvement Trust. The letter proceeded—

“ We also pray that award in connection with all other matters including partition of all other properties, except the said premises no. 25, Prasanna Kumar Tagore Street, Calcutta, and our north Bhagalpur zamindari property, Mahal Dhamseha, bearing tauzi no. 3990, be given at one time and a separate award partitioning the said two properties to wit (1) premises no. 25, Prasanna Kumar Tagore Street, Calcutta, (2) Mahal Dhama, bearing tauzi no. 3990, within the Bhagalpur Collectorate be given afterwards within six months or within such other extended times as would be necessary, not exceeding six months.”

On the strength of that letter, the arbitrators forbore to partition the properties mentioned in that letter. They partitioned the properties falling within Bhagalpur town and also the Monghyr properties; they drew up a map and marked out the blocks which each of the brothers was to receive; they also divided between the brothers all the moveable properties.

With regard to Dharendra Nath and paragraph 8 of the reference, they stated in the award that—

“ The case of Dharendra Nath was, it seems to us, troubling the testator, he did not in any way like to disinherit him he being the youngest son. The testator bore some suspicion as to his future conduct and behaviour from the past. Hence the testator did not like to allow possession with regard to 1/5th share of his properties to remain in the hands of Dharendra Nath till he completes his 85th year. We are of opinion that the said 1/5th share vested in Dharendra Nath on the death of the testator, but actual possession thereof was deferred till a

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certain period and the said possession was left in the hands of the executors for that period. The testator being the father and the well-wisher of his son always wished for the welfare of his son. With a view to maintain the property in his son the testator directed that Dharendra Nath will enjoy the usufruct of his share till that period but he can never wish that the other brothers would usurp that share on any pretext whatsoever. Having thus found that the said 1/5th share has vested in Dharendra Nath on the death of the testator we are of opinion that the last clause in paragraph of the will that is

If Sriman Dharendra Nath die before being vested with absolute rights in 1/5th share my four sons Harendra Krishna, Narendra Nath, Jnanendra Nath and Manindra Nath shall get the said 1/5th share of the property in equal shares

can only mean that in case the said Dharendra Nath die unmarried or without any legal heir his share would pass on to his brothers other than Barendra. The testator in the latter part of his will made provisions for the marriage of his said son Dharendra Nath and is it possible the testator intended that in case Dharendra Nath would die before he completes 35th year leaving behind his widow and children even then the brothers would get his share and not the widow and children of Dharendra Nath? Thus we have no hesitation in construing the will as we do in determining that each of the five brothers Harendra Krishna, Narendra Nath, Jnanendra Nath, Manindra Nath and Dharendra Nath to have equal one-fifth share of the properties left by the testator vested in him absolutely."

And later the award stated—

"We may say herein that Dharendra Nath is now aged 33 years and odd months and that under the term of the will the possession is to be deferred till his 35th year, when with the approval of his brothers, he is to get possession if his conduct be found satisfactory, but as the parties including the executors certify that he bears a good character and that as the parties want to make over possession of his one-fifth share we do not like to stand in the way and we fully approve the delivery of possession of the divided share over the properties which is left by us as not divided by metes and bounds between the parties."

With regard to the division of costs, the arbitrators stated—

"There was some discussion before us by the parties" regarding costs in connection with the High Court incurred by the parties. "Babu Jnanendra Nath claimed Rs. 1,300 as costs. He also showed his attorney's bill and a number of correspondence and a receipt showing payment of the dues of the attorney in part. Babu Harendra Krishna stated that the matter of attorney's bill was settled at Rs. 500 which was denied by Babu Jnanendra Nath. The account shows Rs. 700 as paid to the attorney, Mr. Birendra Nath Mitter, while Babu Harendra Krishna showed a letter from the said attorney wherein the attorney admitted the receipt of Rs. 500 and claimed Rs. 500 or so as his outstanding dues. Babu Harendra Krishna wanted us to decide this matter of cost but Babu Jnanendra Nath remonstrated by a letter, dated the 16th July 1924, stating that we would be going out of our way in case we would decide the same. We think the contention of Babu Jnanendra Nath is sound in view of the wordings in the reference. Hence we have refrained from deciding that point."

The arbitrators signed their award on the 24th August, 1924. In the concluding paragraph they stated, referring to the joint letter of the parties dated the 19th March, 1924, that they were unable to accede to the request of the parties that they should proceed separately to partition the house in Calcutta and the properties of Mahal Dhamseha. They recommended the parties to select arbitrators by a separate registered deed to carry out the formal work of partition of these remaining properties.

On the 10th September, 1924, Babu Suresh Chandra Roy, the executor, who had been a party to the reference, applied before the Subordinate Judge under paragraph 20 of Schedule 2 to the Code of Civil Procedure, asking that the award might be filed and a decree passed in accordance with its terms. The present appellant Babu Jnanendra Nath Bagchi then, on the 2nd December, 1924, filed a petition of objection against the filing of the award. Many grounds were put forward by him which were considered by the Subordinate Judge. The grounds which were material in this appeal and were urged before us are the following:—

First, that the award is void because the arbitrators did not decide the question of costs as agreed in clause 13 of the reference:

Secondly, that the award is void because the arbitrators had not decided all the matters referred to them:

Thirdly, that the award is void because it contravenes the provisions of the will: and

Fourthly, that the award is void because a suit was pending in the High Court and yet reference was made without the intervention of that Court.

S. M. Mullick, G. N. Mukherji, N. C. Ghosh, for the appellant.

C. C. Das (with him *S. C. Mazumdar*), for the respondents.

Cur. adv. vult.

ADAMI. J. (after stating the facts set out above, proceeded as follows): With regard to the last objection, Mr. Sushil Madhab Mullick, on behalf of

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the appellant, withdraws the objection admitting that the suit in the High Court had been dismissed previous to the filing of the award.

We have to consider the three other objections.

With regard to the first objection that the question of costs was not decided by the arbitrators, I have cited above both the clause in the reference and the decision of the arbitrators thereon. It appears that the appellant Jnanendra Nath wrote to the arbitrators asking them not to come to a decision upon the costs in his letter dated the 16th July, 1924. Babu Jnanendra Nath Bagchi on the 21st July, 1924, a short time before the award was signed, wrote to the arbitrators complaining that he had not yet been paid his costs in the High Court and demanding that the arbitrators should pay to him the sum of Rs. 1,300 with interest at 12 per cent. per annum from the date of the signing of the deed of reference. He threatened that, if he were not paid this amount within 24 hours, he would move the court for an injunction directing the arbitrators to refrain from giving their award. The arbitrators replied on the 9th August, that the question of costs was to be decided by them and that the costs would be paid out of the estate in the first instance. The arbitrators did consider a certain travelling allowance bill submitted for journeys by Janendra Nath to Calcutta and his claim for travelling allowance was allowed. It is clear that the arbitrators were considering the question of costs and decided that the costs were to be paid out of the estate. If no more definite decision was come to it is clear that it was due to the letter written by the appellant on the 10th July, 1924. Under the circumstances I do not think that Babu Jnanendra Nath had any cause for complaint; the arbitrators decided the question so far as they could.

The next objection is that the arbitrators failed to divide all the properties by metes and bounds, and, therefore, the award was not complete. Mr. Sushil

Madhab Mullick points out that in the case of an arbitration without the intervention of a court if the arbitrators leave undetermined any of the matters referred to arbitration or determined any matter not referred to arbitration, the court must refuse to file the award. He refers us to the wording of paragraph 21 of Schedule 2 and points out the difference between an award without the intervention of the court and an award made in a suit. Under clause (a) of paragraph 14 the court may remit the award for reconsideration where a matter has been undetermined or there is the determination of a matter not referred to arbitration. He relies on a decision of this court in *Kunjilal v. Banwari Lal* ⁽¹⁾ and contends that in the present case this Court is bound to find that the award could not be filed since matters had been left undetermined. The matter left undetermined is the partition by metes and bounds of the north Bhagalpur properties and the house in Calcutta. The arbitrators have given their reason for leaving this partition undetermined, the reason being that all the parties, including the appellant, by their letter dated the 19th March, 1924, to which I have referred above, requested the arbitrators to postpone the partition of those properties and to first pass an award as to the partition of the other properties. In *Makund Ram Sukal v. Salig Ram Sukal* ⁽²⁾ their Lordships of the Privy Council ruled that the ground for holding an award to be invalid on account of its not disposing of all the matter referred appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all; this condition may be waived by the consent of the parties before the arbitrators. Where the partition of a joint estate consisting of different properties had been submitted to arbitration and the parties agreed to a division being made by steps and that each division should be final without any condition that the award should not be final while a part remained undivided,

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(1) (1919) 4 Pat. L. J. 394.

(2) (1894) I. L. B. 21 Cal. 590, P. C.

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It is quite clear that in the present case the parties did agree to the partition by stages and asked that the properties remaining undivided should be the subject of a further award to be made by the same arbitrators. The arbitrators followed the direction of the parties but were unable themselves to perform the further work of partitioning the remaining properties in a separate award.

In the present case, I do not think that, under the circumstances, the arbitrators failed to carry out the duties imposed as agreed to by the parties in their letter of March, 1924.

The last objection seems to be a more serious one. Though the will is not before us, it appears that the testator directed that Dharendra Nath should not have possession of his share until he reached 35 and only then if the brothers consented that he was of good behaviour and conduct.

Under the terms of paragraph 8 of the reference, it is quite clear that the parties to the reference, including the appellant, agreed that the wishes of the testator with regard to the postponement of the bequest should not be observed. It is contended by Mr. Sushil Madhab Mullick that the reference was bad by reason of this opposition to the terms of the will and that the award must also be bad. He relies on the case of *Soudamani Ghosh v. Gopal Chandra Ghosh* (1). In that case it was found that the executors authorised the arbitrators to substitute for the provisions of the will which might seem to them indefinite or illegal other provisions agreeably to what might have been imagined to have been the intention of the testator: in other words the executors in their submission authorised the arbitrators to make a new will for the

(1) (1914-15) 19 Cal. W. N. 948.

testator. It was there laid down—" But it is equally plain that an executor cannot make a reference to arbitration with the avowed purpose that the terms of the will may be modified and arrangements made for the management and distribution of the estate contrary to the directions of the testator.....The arbitrators are no doubt asked to construe the will; and it need not be disputed that pure questions of law may be referred to the decision of an arbitrator [*Staff v. Andrews* (1), *Ching v. Ching* (2) *Young v. Walter* (3), *Mathew v. Davis* (4) and *Gulam Jilani v. Mohammed Ahmed Husan* (5)]. But the arbitrators are here authorised to do something more than a construction of the will which as their Lordships of the Judicial Committee said in *Venkata v. Parthasarathi* (6) does not mean an addition to the terms of the will; they are not empowered to alter the terms of the will. This plainly was not within the competence of the executors. "

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Now, under the reference, the arbitrators had power to construe the terms of the will. Where " there is a direction in the will that a donee is not to enjoy a vested gift in full until he attains a particular age, then unless there is in the will or some codicil to it a clear indication of intention not only that the donee is not to have the enjoyment of the gift until attaining that age but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the donee up to the time of attaining that age as to induce the court to hold that as to the previous income there is an intestacy, the court on the application of the donee, if he is entitled to give a discharge for the gift, or the person deriving title under him, will strike that direction out of the will " [Halsbury's Laws of England, Volume 28,

(1) (1816) 2 Madd. 6.

(2) (1801) 6 Ves. 281.

(3) (1804) 9 Ves. 364.

(4) (1842), 1 Dowl. N. S. 697.

(5) (1901) I. L. R. 29 C. 167; L. R. 29 I. A. 51.

(6) (1913-14) 18 Cal. W. N. 554.

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paragraph 1161]. The case of *Gosling v. Gosling* (1) is relied on.

Mr. Sushil Madhab Mullick does not deny that an interest vested in Dharendra Nath under the will, but he contends that he had not an absolute interest subject as it was to the condition that a certain age was reached and the brothers gave their consent.

Now the executors evidently knew the law and they examined the will to find out whether the interest granted was an absolute one or not. The arbitrators' finding on the matter shows that they held that it could not be conceived that the testator meant that if Dharendra Nath died before reaching the age of 35 his share was to vest in his brothers. They held that the testator meant that if Dharendra had a wife or children and died before the age of 35, the share would belong to his wife and children. They found definitely that the interest vested in Dharendra absolutely. The reference gave them power to find this construction. They found indeed practically that in spite of the terms of the will Dharendra could have claimed possession of his share at once. That being so, in my opinion, the award cannot be found to be invalid by reason of the arbitrators directing that Dharendra should get his share at once. It has to be remembered that the appellant himself was a party to the reference and that he consented that Dharendra's conduct fitted him to get the share. Further Dharendra is now over 35 years of age and the condition of his reaching that age has been fulfilled and it will be idle now to set aside the award on the ground that the property was given into his possession before he reached the age of 35.

I cannot find in any of the grounds put forward by Mr. Sushil Madhab Mullick any reason why the award should be set aside, and I would therefore dismiss the appeal with costs.

ALLANSON, J.—I agree.

Appeal dismissed.