

APPELLATE CIVIL.

Before Jai Lal and Bhide JJ.

1930
Jan. 30.

ASA NAND AND OTHERS (PLAINTIFFS) Appellants
versus
GANESHA RAM (DEFENDANT) Respondent.

Civil Appeal No. 920 of 1927.

Punjab Land Revenue Act, XVII of 1887, section 158 (2) (xvii)—Jurisdiction of Civil Court—to file agreement for arbitration—where both title to and partition of agricultural land is in dispute—Res judicata—decision of District Judge on point of jurisdiction—whether can be reversed by his successor—Consent of respondent—whether binding.

The parties having entered into an agreement to submit to arbitration the division of their joint properties, both moveable and immovable, (the latter including some agricultural land) appellants applied to have the agreement filed in Court to which the respondent expressly agreed. Subsequently however the latter applied to have the order of reference cancelled on the ground that the property included agricultural land which was excluded from the jurisdiction of the Civil Court. The District Judge decided that he had jurisdiction as a question of title was involved, and on the award being filed raised issues on the respondent's objections. The Judge was then transferred and his successor, differing on the point of jurisdiction, dismissed the application to file the agreement to refer.

Held, that on the principle of *res judicata* it was not open to the successor of the District Judge to go behind his predecessor's order on the question of jurisdiction.

Held also, that the respondent, having expressly agreed in Court to the filing of the agreement to refer, should not have been permitted to go back on his consent.

Held further, that the Civil Court had jurisdiction to make the reference to the arbitrator as the dispute between the parties was concerned, not only with regard to the mode of partition of the agricultural land, but also as to the title thereto of the parties respectively.

Section 158 (2) (*xvii*) of the Punjab Land Revenue Act, 1887, referred to.

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Ram Jawaya Mal v. Devi Ditta Mal (1), relied upon.

Partab Singh v. Devi Singh (2), and *Fazl Din v. Shah Nawaz* (3), distinguished.

Sardar Gurdarshan Singh v. Sardar Lal Singh, Miscellaneous Civil Appeal No. 1879 of 1925 (unpublished), *Amir Begam v. Badr-ud-Din Hussain* (4), *Shaikh Muhammad Khalil v. Shaikh Abdul Rahim* (5), *Buta v. Municipal Committee of Lahore* (6), and *Mangha Ram v. Johar Das*, Civil Appeal No. 2069 of 1928 (unpublished), referred to.

First appeal from the decree of Khan Bahadur Sheikh Din Mohammad, District Judge, Dera Ghazi Khan, declining to enforce the award.

D. C. RALLI and JAGAN NATH AGGARWAL, for Appellants.

S. L. PURI and M. L. PURI, for Respondent.

JAI LAL J.—The parties to this litigation being joint owners of property both movable and immovable, the latter description of it also including agricultural land, entered into an agreement to refer the question of the division of the property to arbitrators by a written agreement dated the 3rd of February, 1925. The appellants Asa Nand and others, on the 1st of June 1925, presented an application to the Court of the District Judge of Dera Ghazi Khan under clause 17 of the 2nd Schedule of the Civil Procedure Code praying that the agreement be filed in Court and the learned Judge issued a notice to the other party who is the respondent in this appeal, to show cause why the agreement for reference to

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(1) 70 P. L. R. 1917.

(4) (1914) I. L. R. 36 All. 336 (P.C.).

(2) 5 P. R. 1883.

(5) (1925) I. L. R. 4 Pat. 760.

(3) 46 P. L. R. 1914.

(6) 87 P. R. 1902 (P.C.).

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arbitration should not be filed in Court. In pursuance of this notice the respondent appeared in Court and expressly stated in the written statement filed by him that he had "no objection of any sort to the application being granted." The application was consequently granted and the arbitrators were directed to file their award within a time fixed by the Court. In the meantime, one of the arbitrators having resigned, another arbitrator was appointed by the District Judge in his place and this matter is not the subject of any controversy before us on this appeal.

It seems that on the 5th of February 1926, the arbitrators submitted what is described by the District Judge as an interlocutory report and asked for an extension of time to make their award. This was granted. It also appears that the respondent, having discovered during the arbitration proceedings that the award was not likely to be favourable to him, presented an application on the 23rd of April 1926 to the District Judge, purporting to be under section 151 of the Civil Procedure Code, praying that "the order for filing the agreement for reference to the arbitration as well as the order for making the reference be cancelled," on the ground that, as the reference embodied a question of division of agricultural land and such a question being expressly excluded from the jurisdiction of the Civil Courts, the Court had no jurisdiction to pass the order making the reference to arbitration. This application was disposed of by the District Judge on the 2nd of June 1926, and it was held that as a question of title was distinctly involved the Civil Court had jurisdiction in the matter. This order is a detailed order and was passed after consideration of all the judicial authorities cited by both parties.

On the day when this order was passed the final award of the arbitrators which bears the date of the 28th of May 1926, had been made and submitted to the Court. After disallowing the respondent's objection as to jurisdiction the learned Judge proceeded to frame issues on the objections raised by the respondent against the award and the first issue was :

“ Is the reference to arbitration not valid ? ”

Evidence was then recorded and finally the case came up for hearing before Mr. Din Mohammad, District Judge, the learned Judge who had passed the order of the 2nd June 1926 having in the meantime been transferred. Mr. Din Mohammad differed from the view of his predecessor in office on the point of jurisdiction of the Court to order the filing of the agreement to refer to arbitration the dispute, and dismissed the application. It is to be noted that with regard to all other objections to the award raised by the respondent he found against him, that is the respondent.

This is an appeal by Asa Nand and others who had made the application for an order that the agreement to refer be filed in Court, and it is contended on their behalf that the learned District Judge who finally decided this case had no jurisdiction to go behind the order of his predecessor in office and, secondly, that the Civil Courts had jurisdiction to order the filing of the agreement to refer to arbitration the dispute in the present case.

With regard to the first ground of attack I have already stated above that *Lala Prabhu Dayal* who passed the order of the 2nd of June 1926, disallowing the respondent's objection, had considered it on the merits in the light of the authorities cited in support

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thereof. In my opinion, on the principle of *res judicata*, it was not open to his successor in office to go behind his order and to dismiss the application on the ground which had previously been decided against the objector. Moreover, in the present case the respondent had expressly agreed in Court to the filing of the agreement to refer and he should not have been permitted to go back on his consent. It is no doubt true that the same Judge who had refused the respondent's application on the 2nd of June had framed an issue after that order "whether the reference to arbitration was not valid" but this was due to other objections which were raised by the respondent to the validity of the reference; moreover this issue was followed by another issue whether the point could be raised at that stage. I must under the circumstances assume that the issue was framed with reference to the other objections to the validity of the reference which were raised by the respondent and did not cover the objection on the score of want of jurisdiction which had already been disposed of by the learned Judge.

I am also of opinion that in this case no valid objection existed to the jurisdiction of the Court to make a reference. A perusal of the agreement to refer shows that there was a dispute between the parties not only with regard to the mode of partition of land-revenue-paying land but also as to the title thereto of the parties respectively, that is, the extent of their respective shares, and this was the view of the learned Judge who passed the order of the 2nd June, 1926. It is conceded that the Civil Courts have jurisdiction to try the questions of disputes as to title in such land and the Court was consequently competent to refer such a question to the arbitrators. It

is further to be noted that the arbitrators in their award did not deal with the question of the mode of division of the agricultural land but merely declared the shares of the parties therein. This also shows that there was a dispute between the parties as to title. I am unable to see that under the circumstances any valid objection could be raised to the jurisdiction of the Court to make a reference to the arbitrators or to the power of the arbitrators to make the award that they have given in this case.

The respondent's counsel, however, takes his stand on the words "having jurisdiction in the matter" used in clause 17 of the 2nd Schedule of the Civil Procedure Code and contends that as the agreement related to the division by metes and bounds of revenue-paying land and as such a matter is expressly excluded by section 158 of the Punjab Land Revenue Act from the cognisance of the Civil Courts, the lower Court had no jurisdiction in the matter. But section 158 of the Land Revenue Act expressly provides that the jurisdiction of the Civil Courts to decide questions of title is not affected by it. It is, therefore, obvious that assuming that the word 'matter' in clause 17 is used in the sense contended by the respondent, *i.e.*, the subject matter and nature of the dispute, in the present case, there being a dispute between the parties as to title to the lands concerned, the matter to which the agreement related, was within the jurisdiction of the Civil Courts to that extent.

The learned counsel places reliance in support of his contention on *Partab Singh v. Devi Singh* (1). In that case the parties had referred to the arbitrators the question of (1) partition of ancestral land

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(1) 5 P. R. 1893.

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by whole villages and (2) the allotment of the office of *lambardar*. So far as No. 1 was concerned it was conceded that the arbitrators and the Civil Courts could deal with the matter, but it was contended that the question of allotment of the office of *lambardar* was wholly outside the jurisdiction of the Civil Courts and maintaining this last objection the Chief Court of the Punjab held that "the Civil Courts were not competent to make a reference and further that it was not permissible to strike out that portion of the agreement which was in excess of the Court's jurisdiction simply in order to give itself jurisdiction, unless the parties agreed to this being done with the view of the Court proceeding with the reference." In my opinion this case does not help the respondent. The question of allotment of the office of *lambardar* was wholly outside the jurisdiction of the Civil Courts. In the present case though the question of the mode of the partition of revenue-paying land was outside the jurisdiction of the Civil Courts, the question of determination of the shares of the parties therein was not so. *Partab Singh v. Devi Singh* (1) was followed in *Fazl Din v. Shah Nawaz* (2) which was decided by a single Judge of the Chief Court of the Punjab. In that case, it is to be observed, there was no dispute between the parties as to their respective shares in the agricultural land and the express object of the parties was to secure partition which had not yet been carried out.

The two cases cited above, therefore, do not really help the respondent in the present case and it is not consequently necessary for me to consider whether the law laid down therein with regard to the jurisdiction

of the Civil Courts to refer to arbitration disputes relating to matters which are partially cognisable by the Civil Courts is or is not sound. In (Miscellaneous Civil Appeal 1879 of 1925) *Sardar Gurdarshan Singh v. Sardar Lal Singh* decided by me on the 7th April, 1927, I ventured to doubt the soundness of the view taken in *Partab Singh v. Devi Singh* (1) and *Fazl Din v. Shah Nawaz* (2), and expressed the opinion that, in view of the law laid down in *Amir Begam v. Badr-ud-Din Hussain* (3), *Shaikh Muhammad Khalil v. Sheikh Abdul Rahim* (4), and *Buta v. Municipal Committee of Lahore* (5) and other cases cited, that in the case of an award of the arbitrators on a reference made by the parties without the intervention of the Court it is open to the Court to order the filing of the award so far as it relates to matters which are covered by the reference, after excluding matters decided by the arbitrators which are not so covered, I did not see any distinction between the case of filing an agreement to refer to arbitrators a dispute about matters which are partially outside the jurisdiction of the Civil Courts and an award made in respect of such matters by the arbitrators on a private reference without the intervention of the Court, though it must be conceded that in all the cases cited the objection was that the arbitrator had exceeded the authority conferred on him by the agreement and no question of the jurisdiction of the Court was involved. I also observe that in *Mangha Ram v. Johar Das, etc.* (Civil Appeal No. 2069 of 1928) decided by Dalip Singh J. on the 16th of January, 1930, that learned Judge also questioned the correctness of the view taken in the

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(1) 5 P. R. 1883. (3) (1914) I. L. R. 36 All. 336 (P.C.).

(2) 46 P. L. R. 1914. (4) (1925) I. L. R. 4 Pat. 670.

(5) 87 P. R. 1902 (P.C.).

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two cases mentioned above. In *Ram Jowaya Mal v. Devi Ditta Mal* (1), a Division Bench of the Chief Court, Punjab, presided over by Sir Donald Johnstone, Chief Judge, and Mr. Justice Shadi Lal, made the following remarks :—

“ Mr. Moti Sagar, for respondents, contends that the Civil Courts have no jurisdiction to partition agricultural land, and therefore, this claim should never have been entertained by the District Judge. The answer is easy. In the first place, the award does not divide up holdings by metes and bounds, but merely by shares, and really only settles ‘ title ’ leaving, if the award had been enforced, the Revenue Courts to do the actual division of fields. And secondly we are inclined to doubt whether the exclusion of civil jurisdiction provided in section 158, Land Revenue Act, as regards partition, was intended to apply where the partition is done by what might be called private agency.”

In that case also an application had been made to file an agreement to refer to arbitration and the usual proceedings were taken thereupon and the award made by the arbitrators on a reference made by the Court was ordered to be filed.

Another way of looking at this question is this :—

Supposing a suit is filed in a Civil Court for partition of joint property including agricultural land and there is a dispute between the parties as to their respective shares in such land but the prayer includes the partition of such land also, is not in such a suit the Court entitled to effect actual partition of the other joint property and merely to give a

declaration with regard to the agricultural land leaving the question of actual partition to the revenue courts. There can be no manner of doubt that the answer to this question must be in the affirmative. Speaking for myself, I am unable to see why under such circumstances when an agreement to refer authorizes the arbitrators to decide the question of title and also to make a partition of agricultural land along with other joint property the Court cannot allow the agreement to be filed and make a reference to the arbitrators. It may be that on receipt of the award of the arbitrators if the Court decides to pronounce judgment in accordance with the same after disposing of any objections on the score of misconduct of the arbitrators, etc., the Court can pass a decree only with regard to non-agricultural property excluding the agricultural land and can grant only a declaration of title as determined by the award in the latter description of land, leaving it to the parties to enforce partition in accordance with the award in the Revenue Courts; though again it is possible to argue that there should be no valid objection to the Civil Court filing the award and pronouncing judgment in accordance therewith even with regard to the partition of land, because in such a case the court merely files the award of the arbitrators, which is practically tantamount to an agreement between the parties, and does not make any adjudication on the merits of the dispute between the parties on the matter referred to arbitrators. Suppose in a suit for partition of joint property including land the parties enter into a compromise with regard to the division of the land as well, is it not open to the Civil Court to record such a compromise and to pass a decree accordingly? The question, however, is not really necessary for the deci-

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sion of the present case in view of my decision that in this case the parties were precluded by their conduct from questioning the validity of the reference on the ground of jurisdiction and that there being a dispute as to title and the arbitrators having decided only that question so far as the land in concerned, no valid objection could be raised either to the reference or to the award. I do not, therefore, pursue the matter any further.

I would, therefore, accept this appeal and setting aside the order of the learned District Judge remand the case to him, directing him to order that the award be filed and then to pronounce judgment in accordance therewith. The appellants will get their costs against the respondent throughout.

BHIDE J.

BHIDE J.—I agree that this appeal must be accepted and the case remanded as above. I also agree as regards the order as to costs.

A. N. C.

Appeal accepted.