

Harakhbai Vs. Jamnabai

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Court : Mumbai

Decided On : Oct-27-1912

Reported in : (1913)15BOMLR340; 19Ind.Cas.786

Judge : Dinshaw D. Davar, J.

Appeal No. : O.C.J. Suit No. 17 of 1912

Appellant : Harakhbai

Respondent : Jamnabai

Judgement :

Davar, J.

1. This is a suit by the plaintiff against her daughter-in-law and others for the administration of the estate of her late husband Hirji Asoo and for various other consequential reliefs.

2. After several attempts to settle matters in dispute between them had failed, I was informed that the plaintiff and the first and the third defendants had referred matters to the arbitration of two friends of the family, and with the consent of the Advocate General, who is the second defendant in the suit, the matter stood over pending the decision of the arbitrators. The first defendant assured the Court that as soon as her differences with the plaintiff were adjusted, she would make

arrangements in respect of charities with the Advocate General which would be satisfactory to him.

3. On the 3rd of October 1912 when the suit was called on for hearing, I was informed that the arbitrators had made their award the day previous and Mr. Setalvad for the plaintiff asked me to allow the matter to stand over to enable him to consider the award published only the day previous. The hearing stood over accordingly and the case was called on again on the nth of October, when Mr. Desai for the first defendant asked me under Order XXIII, Rule 3, to record the award as an adjustment of all differences as between the plaintiff and the first and the third defendants and to pass a decree in terms thereof. I was further informed that the first defendant had arranged terms in respect of charity which were satisfactory to the Advocate General, and that the first and the second defendants were prepared to take a decree by consent so far as the charities were concerned.

4. Mr. Desai in support of his application relied on the case of *Pragdas v. Girdhardas* I.L.R. (1901) Bom. 76 : 3 Bom. L.R. 431. That case is a very clear authority, for holding that where a suit is referred by parties to arbitration and an award is made, the submission and the award may be recorded as an agreement adjusting or compromising the suit and a decree passed in terms of such award. This case was decided under Section 375 of the old Civil Procedure Code. That section is reproduced in the present Code in XXIII, Rule 3, but with the additional words 'where it is proved to the satisfaction of the Court'. The addition of these words would seem to make it quite clear that the Court has power to enquire into a disputed compromise and record it, if satisfied, that the compromise was properly arrived at. If the matter had stood there, I should have found no difficulty in acceding to Mr. Desai's application, but Mr. Setalvad who disputes the award points to Section 89 in the new Code and contends that the proper procedure to be adopted should be such as is laid down in the second Schedule to the Code. When I turn to the second Schedule, I am faced with the difficulty that the provisions of that Schedule do not contemplate a reference to arbitration by the parties to a pending suit without the intervention of the Court. The first sixteen sections of the second Schedule clearly contemplate a reference to arbitration in a pending suit through the intervention of the Court. The rest of the sections except

Section 18 in that Schedule contemplate an agreement to refer to arbitration and a reference to arbitration, when there is no suit pending between the parties. Section 18 provides for stay of a suit by a party to an agreement to refer to arbitration. The second Schedule to the Civil Procedure Code, therefore, does not apply to or contemplate a reference to arbitration by parties to a suit, which is pending, outside of the suit and without the intervention of the Court. What with the Arbitration Act of 1899, Section 89 of the Civil Procedure Code, the second Schedule to the Code, and the High Court Rules relating to arbitration, the subject of what is a correct procedure to follow in cases of reference to arbitration seems to me to be involved in some confusion. Here, however, there is no question, that all parties to the suit except the Advocate General referred all matters in dispute between them in the suit to arbitration and an award has been made. That award is now challenged and the question for me to decide is, what is the procedure to be followed in order to dispose of the question, whether the award is a valid and binding one and such as may be enforced between the parties by recording it and passing a decree thereon.

5. If I follow the procedure under the second Schedule to the Code, the award would have to be submitted in Chambers, the parties objecting would then have to file their objections and obtain either a Judge's summons or give a notice of motion to have the award set aside. Parties would have to make affidavits and it may be that in the end it might be necessary to take oral evidence on points in dispute between the parties. If on the other hand I regard this as an adjustment, I would still be bound to give the party objecting an opportunity of establishing that there are circumstances which would make it inequitable to enforce this adjustment against the party so objecting. Having regard to the fact that the second Schedule to the Civil Procedure Code does not contemplate a reference to arbitration in a pending suit without the intervention of the Court, it seems to me that the best method of dealing with this question would be to treat the words ' any other law for the time being in force ' in Section 89 of the Civil Procedure Code as applicable to Order XXIII, Rule 3, and to hold an investigation before me in Court, wherein the first defendant, who [wishes to enforce this award, should proceed to the satisfaction of the Court that the adjustment which she sets up was justly, legally and properly arrived at. In its consequences, the result will not be in any way

prejudicial to the interests of the plaintiff for in that investigation I will allow the plaintiff to urge all and every objection which she would be entitled to urge against the award, if the investigation was held under the provisions of the sections of the second Schedule to the Civil Procedure Code.

6. The suit will be set down for hearing on Tuesday, 22nd instant, when the 1st defendant will, in the first instance, proceed to satisfy the Court that the adjustment has been properly and justly obtained and the plaintiff will then be entitled to urge any ground that may be open to her to show that the award which is sought to-be enforced against her as an adjustment ought not to be recorded and a decree passed in terms thereof.

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