

Ram Bali Vs. Tulsi

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Court : Allahabad

Decided On : Apr-04-1963

Reported in : AIR1964All231

Judge : S.C. Manchanda, J.

Acts : [Arbitration Act, 1940](#) - Sections 8, 8(1), 8(2) and 30; [Evidence Act, 1872](#) - Sections 115; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115

Appeal No. : Civil Revn. No. 723 of 1962

Appellant : Ram Bali

Respondent : Tulsi

Advocate for Def. : R.B. Misra, Adv.

Advocate for Pet/Ap. : H.P. Dube and ;S.N. Misra, Adv.

Disposition : Application dismissed

Judgement :

ORDER

S.C. Manchanda, J.

1. This is a revision application against the order of the Civil Judge, Jaunpur dated, the 27th of February 1962, whereby the order of the Munsif holding that there was

legal misconduct by the arbitrators in making the award was set aside.

2. The facts giving rise to the application are these : Ram Babu plaintiff filed a suit for partition of share of the plots in list A filed with the plaint. Tulsi defendant No. 1 was the main contestant. The plaintiff alleged that he was the son of Jaganandan the uncle of defendant No. 1. Jagannath defendant No. 2 was alleged to be the owner of the remaining half share in the impugned plots. Both the plaintiff and defendant No. 1 conceded that Jagannath defendant No. 2 had a half share in the plots. Jagannath admitted the case of the plaintiff. Real contest therefore, was only between the plaintiff and defendant No. 1 Tulsi. During the pendency of the suit the contesting parties agreed to refer the matter to the Arbitration of Bansraj, the Pradhan of the Gaon Sabha and one Magan. An application having been made the matter was referred to the arbitration of the aforesaid two arbitrators. An award was filed in Court on the 18th March 1960.

Objections to the award were filed and these inter-alia were (1) that as no Umpire was appointed the award was invalid, (2) the award was given without taking evidence and (3) that the award was undated and no notice was given about the filing of the award. The trial Court rejected the first two contentions but accepted the third contention as it considered that no proper evidence was recorded by the arbitrators and notice of the hearing should have been given to the parties in writing. According to the learned Munsif this constituted legal misconduct and therefore the award was set aside.

On appeal to the Civil Judge by the opposite party, the evidence of the parties and their witnesses was considered and the lower appellate court preferred to believe the evidence of the arbitrator Rajbans. It also considered that the evidence of Raj Bans was worthy of credence as it was natural and normal, and that the statement of Rambali plaintiff was highly interested and could not be relied upon. Believing the evidence of Bansraj it was held that no secret enquiries were made by the arbitrators but that the enquiry was made in the presence of the plaintiff. It was also noticed that no such grievance was made in the objections filed against the award by the plaintiff. The non-appointment of an Umpire was considered to be only an irregularity which must be considered to have been waived in view of both

the parties having appeared before the arbitrators and produced their evidence. It was also considered that the trial court had misread Section 42 of the Arbitration Act which did not require a notice in writing to be given by the arbitrator.

3. Mr. Dube, the learned counsel for the applicant has contended that the failure to appoint an Umpire vitiated the whole award. He relied on *Jawala Prasad v. Amar Nath*, AIR 1951 All 474 for this purpose. This ruling no doubt lays down that failure to appoint an Umpire under the provisions of Para 2 of Schedule I of the Arbitration Act, hereinafter referred to as the Act, read with Section 21 renders the award invalid. In a later Division Bench case of this Court in *Shambhu Nath v. Hari Shanker Lal*, AIR 1954 All 673, Malik C. J. who delivered the judgment of the Division Bench pointed out that the learned Judges in the earlier case had advisedly confined the decision of that case to the facts of that particular case. That decision, therefore, must be confined to the facts of that particular case. In the *Shambhu Nath's* case, AIR 1954 All 673 it was laid down that failure to appoint an Umpire was not an illegality but a mere irregularity which could be waived by the parties. In the absence of the appointment of an Umpire it was the duty of the party who was making a grievance to exercise its right under Section 8(1)(c) of the Act by calling upon the arbitrators within the statutory time provided to appoint an Umpire. Upon such party's failure to enforce its rights for the appointment of an Umpire at the proper time would estop it from questioning that award later on, on that ground.

4. The learned counsel for the applicant has contended that Section 8(1)(c) will have no application to a reference in a pending suit as Section 8, falls in Chapter II which deals with arbitration proceedings, without intervention of court. The provisions of Section 25 of the Act which fall in Chapter IV and relate to arbitration in suits makes the other chapters, including Chapter II, so far as they can be made applicable also to cases falling under Chapter IV. In the proviso to Section 25 a specific reference has been made to Section 8, though in a different context and, therefore, there cannot be any doubt that provisions of Section 8 read with ct. (2) Para 2 of Schedule I to the Act would have no application to cases covered by Clause (c) of Section 8 for the reason that the notice which is required to be given is only in respect of Clause (c) i.e. a notice to concur in the appointment or

appointments in the vacancy and as there was no question of appointing an Umpire or of supplying the vacancy a notice under Sub-section (2) would not be required to be issued.

There is no force in this contention. No authority, has been cited for placing such a narrow construction on the provisions of Sub-section (2) of Section 8. The concurrence, obviously, is required in the first instance in the appointment or appointments of an Umpire. Therefore, what is required is a notice to the arbitrators that they should concur in the appointment of an Umpire and upon their failure to do so within the statutory time, the next step is for the appointment of an Umpire by the Court upon the application of the party. The provisions of Section 8(2) of the Act were, therefore, clearly applicable and it was the duty of the plaintiff to have taken the necessary steps, by moving an application to the Court, to call upon the arbitrators to appoint an Umpire and upon their failure to do so, ask the Court to appoint an Umpire itself. The plaintiff cannot wait till the decision of the arbitrators has gone against him before waking up to his obligations under Section 8(2) of the Act.

5. The next contention was that the failure to give a notice of the date of hearing violated the rules of natural justice. No such objection was taken in the objections filed and it is therefore too late in the day to raise any such contention at the stage of revision. In any event the lower appellate court has found as a fact that the arbitrators did take evidence in the presence of the parties. This statement has been believed by the lower appellate court and no question of failure to exercise jurisdiction can possibly arise.

6. The next contention is that that information was gathered from strangers and no opportunity for cross-examination was furnished. On this point the finding of fact given is that the evidence was taken in the presence of the parties. It was next argued that Bansraj defendant No. 4 was an interested witness and he should not have been appointed as one of the arbitrators. No such objection was taken hitherto and as such it cannot possibly be entertained at this late stage. Lastly, it was contended that defendant No. 2 Jagannath was not a party to the agreement to refer the matter to arbitration and therefore the reference was invalid. There is

no substance in this submission. The plaintiff nor defendant No. 1 had challenged Jagannath's half share to the land in dispute, as such Jagannath's right not being in dispute there was no point in his joining the reference. The only question that was in dispute was whether the plaintiff was the son of Jagannath as claimed by him or not. This was a dispute entirely between the plaintiff and defendant No. 1 with which Jagannath had no concern. In any event, no such objection was raised before the Courts below and it cannot be allowed to be raised at this late stage.

7. For the reasons given above, the application is without merit and it is accordingly dismissed with costs.

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