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Court : Allahabad

Decided On : Feb-13-1929

Reported in : AIR1929All521; 117Ind.Cas.361

Appellant : Madan Mohan Singh

Respondent : Narain Singh

Judgement :

1. This is a defendant's appeal arising out of a suit for recovery of possession of immovable property by avoidance of a decree passed in terms of an award in 1922. The grounds on which the decree is sought to be avoided are set forth in para. 16 of the plaint, the first four being to the effect that the award itself was contrary to an earlier waqfnama and was invalid in law, and the last one that the decree was fraudulently obtained. The plaintiff and the defendant are both grandsons of Sukha Singh from his sons Bija Singh and Bhajja Singh respectively. It was the plaintiff's case that Sukha Singh had made a valid waqf in 1887 under which the management of the entire dedicated property would come to the plaintiff and the defendant was wrongfully in possession of half of that property. The defendant denied that Sukha Singh had any power to make a valid waqf and pleaded that the arbitration award and the decree were binding on the plaintiff and that no fraud had ever been practised.

2. The learned Subordinate Judge has come to the conclusion that the plaintiff has failed to establish any fraud or misrepresentation which would entitle him to avoid

the decree of 1922. But his finding is that the waqf of 1887 was really valid, and as it was a public waqf the arbitrators had no power to direct that the two branches should manage portions of the dedicated property separately. In his opinion the award was ultra vires and the decree passed upon it was a nullity. The learned Subordinate Judge has not gone on to hold that the effect of a subsequent litigation of 1925 which also resulted in an award was to create any bar of res judicata against the defendant. He has, however, relied on this subsequent pronouncement as being worthy of greater reliance on the question of fact whether there had been a valid dedication in 1887.

3. The facts are that on 11th July 1887 a registered tamliknama was executed by the grandfather of the parties, viz. Sukha Singh, under which shares in several villages were dedicated and set apart for the expenses of a temple in Sabalpur. Mutation of names as trustee was duly effected. After the death of Sukha, his eldest son Bija's name was entered and when Bija died, the name of his younger brother Bhajja was entered. At this time the present plaintiff was a baby in arms, being a few days old. In 1922 Bhajja applied for a partition of the property covered by the tamliknama in the revenue Court and objection was raised by Narain Singh, the present plaintiff. The revenue Court referred the objector to the civil Court. Accordingly Narain Singh instituted a suit in the civil Court against Bhajja Singh on 1st May 1922 (p. 59). He claimed a declaration that the plaintiff was a mutwalli of the endowed property and asked for possession, if necessary. Before the time for the filing of the written statement arrived, the parties agreed to refer their dispute to certain arbitrators, and an application dated 15th May 1922 was presented before the Court. The matter was referred to the arbitrators named, and the Court directed that the defendant do file his written statement before the arbitrators. Bhajja Singh filed an elaborate written statement on 10th June 1922 before the arbitrators. In this he challenged the validity of the tamliknama and denied the creation of any valid endowment or the right of the plaintiff to take possession of the entire estate as manager. It is not necessary to refer to the other numerous pleas taken by him. On 19th June 1922 the arbitrators framed no less than seven issues, the first one of which was whether the property in question formed part of the joint ancestral property of the family of Thakur Sukha Singh and his sons, and whether Thakur Sukha Singh had a right to make a waqf of it or not. The last issue

was whether Madan Mohan Singh (Bhajja's son) should necessarily be made a party to the suit or not.

4. On the 24th June 1922 the arbitrators delivered their award and the same along with an application filed by the parties was incorporated in the decree of the Court. In the award after setting forth the issues which had been framed the arbitrators proceeded to decide them seriatim. Under issue 1 they recorded the finding that it was proved that the property in dispute was a part of the ancestral and joint family property of Sukha Singh and his sons, and under the circumstances the transfer made by one member without the consent of the other members of the joint family was invalid according to law. They then proceeded to state that at that time the parties to the suit were agreed to fulfil the wishes of their ancestor so far as it might be possible, and with that object they with mutual consent prepared the necessary statement of the incomes and expenditures and rendered themselves separately liable for carrying out the object for which the tamliknama was executed. They then proceeded to state that it seemed proper to them also that the parties to the suit should act up to the conditions relating to the worship of the deities installed in the temple. In their finding they referred to the statement which had been prepared by the parties and which was appended to the award. In their finding on issue 7 they came to the conclusion that it did not seem necessary to make Madan Mohan Singh a party to the suit inasmuch as his guardian Thakur Bhajja Singh was a party and could very well protect his rights. They then passed a decree for possession over 4 biswas and odd in favour of the plaintiff as manager and mutwalli and as regards the rest as proprietor.

5. In the list appended to the award it was stated that the parties had given their consent to do their best to fulfil the wishes of their ancestor and to abide by the proper instructions which the arbitrators might issue in respect thereof and to act up to the same in future. Separate lists of expenses which were to be made by Thakur Bhajja Singh and his sons and representatives and those which were to be made by Thakur Narain Singh, his sons and representatives were shown, and in the final note it was further stated that in order to fulfil this object it had been decided by the arbitrators with the consent of the parties that the management of the 20 biswas zamindari should be entrusted to both the parties in equal shares,

each party having the duty cast upon it to feed Brahmans and perform other functions. The application of 24th June 1922, filed by the parties in which two clerical mistakes occurring in the award had been pointed out was also incorporated in this decree. In this application there was a prayer that a decree for possession of four biswas and odd should be passed in favour of the plaintiff as manager and mutwalli, and the remaining property in dispute should remain in the possession of Thakur Bhajja Singh as manager and mutwalli thereof according to the conditions laid down and the award made by the arbitrators.

7. The finding of the Court below that no fraud or misrepresentation has been established has not been challenged before us. The plaintiff is accordingly not entitled to avoid this decree on any such ground. The Court below instead of first proceeding to decide whether this decree operates as a bar of res judicata has thought fit to consider the question of the validity of the waqf made by Sukha Singh in the first instance. There was no direct evidence before the Court to show that the property dedicated by Sukha Singh was his self-acquired property. The learned Judge, however, thought that 'the arbitrators in a way had shirked to tackle with the issue and decided that the property was a part of the joint ancestral property. The learned Judge thought that they meant to say that although it was acquired by Sukha Singh it was thrown in with the joint family property and became a part and parcel of it. It is not easy to understand on what ground this inference is drawn. The arbitrators in their judgment had distinctly stated that after having enquired about the facts relating to the case and thought over the evidence produced by the parties they found it proved etc. The learned Judge had before him the pronouncement of those arbitrators and an expression of opinion in a subsequent litigation of 1925 to which we shall refer later, and thought that the latter being more recent was worthy of greater reliance. He admitted that the oral evidence on the point on either side was unconvincing, and particularly that the plaintiff and two of his witnesses who had sworn that the property was self-acquired were giving hear-say evidence and could have no direct knowledge of the matter. Relying, however, on a passage in the latter award he recorded a finding that the property was the self-acquired property of Sukha Singh. He then followed it up with the finding that the waqf created by him was valid and binding on the parties. Having this finding in view, he proceeded to consider the award of

1922. He conceded that the grounds of the invalidity of the said award ought to have been raised by way of objection after the award was filed in Court and before the decree was passed, and he expressed a doubt whether the plaintiff can raise that point now. He, however, held that the endowment was of a public character and there was accordingly no bar against the plaintiff from raising the question. He has referred to a few cases in his judgment, but none of the cases referred to by the learned Subordinate Judge is directly in point, and goes to the length of laying down that a trustee is not personally bound by a decree passed against him.

8. In our opinion the fallacy underlying the reasoning adopted by the Court below lies in the supposition that because according to the view taken by the Court below the waqf of 1887 was really valid, the arbitrators acted without jurisdiction in going contrary to its provisions. As observed by their Lordships of the Privy Council in the case of Ghulam Khan v. Muhammad Husain [1902] 29 Cal. 167, the arbitrators have power to decide the question of jurisdiction and they can do so. They may err in law, for arbitrators are judges of law as well as judges of fact, and their error in law does not vitiate their award. An award having been made and not having been corrected or modified, and no application having been made to set it aside or such an application having been made but refused, the Court had no option but to pronounce a decree in accordance with it. We have pointed out that on the pleadings before the arbitrators the question whether the waqf of 1887 had been validly made or not was a matter in issue. They recorded a clear finding that it could not have been validly made. It is wholly irrelevant now to consider whether their finding was right or wrong. We cannot sit in judgment over their expression of opinion. Having found that the waqf of 1887 was invalid, they certainly did not act without jurisdiction if they proceeded to incorporate the agreement of the parties in their award and directed how they should separately manage portions of the property in order to carry out the wishes of their ancestor.

9. Reading their finding on p. 85 and the way in which the parties had agreed to separately manage different portions of the properties and fulfil the objects mentioned in the waqf and tamliknama of 1887, we are convinced that the effect of the award was to hold that no valid waqf had been in reality created in 1887, but that the parties agreed that they should create a new waqf subject to the

conditions agreed upon which were all embodied in the award. It is noteworthy that in the application which was filed before the Court, no objection was taken to the division of the management, nor was any objection taken to the decree for possession of part of the property in favour of the plaintiff as manager and the retention by the defendant of the other part of the property in his capacity as manager and mutwalli thereof according to the conditions laid down in the award. We therefore fail to see in what way it can be said that the arbitrators were acting without jurisdiction and that their award was ultra vires. In our opinion the invalidity of the award ought to have been challenged before the Subordinate Judge under Sch. 2, Civil P.C. It is clear from the provisions of Rule 15, sub-Cl. 'c' that the award could have been set aside if it was in any way 'invalid': *Lutawan v. Lachya* [1914] 36 All. 69. No such objection having been raised and the decree having been passed, we are of opinion that the decree is binding on the parties thereto, and it cannot now be treated as a nullity because the arbitrators had wrongly decided a mixed question of fact and law which had arisen before them.

10. The learned advocate for the respondent has taken a new ground in support of the decree which has not been mentioned by the learned Subordinate Judge. His contention is that the effect of the subsequent litigation of 1925 was to create a new bar of res judicata against the defendant. On 1st August 1923, Bhajja Singh filed a suit for partition. In para. 3 of his plaint he clearly stated that the ancestor of the parties had made a waqf of a portion of the zamindari property which was the subject-matter of dispute in the suit of 1922, and the matter terminated in an award, and that at that time there was no dispute in respect thereof. The lists appended to the plaint as printed in pp. 127 and 128 show that the dedicated property was excluded from the plaint. In the written statement that was filed by Narain Singh, all the allegations contained in the plaint were not admitted but the last para. 12 shows that the defendant did not want to raise any controversy with regard to the plaintiff's allegations relating to this waqf property. He stated that the contesting defendant was taking other proceedings in respect thereof. The award which is printed on p. 141 does not show that the plaint was at all in controversy between the parties. It goes on to say that certain villages which are named are sought to be partitioned and then states:

the remaining property, viz., some villages were personally acquired by Thakur Sukha Singh, the ancestor of the parties, and he had full power to transfer them in every way. He had dedicated the said villages to Sri Thakurji and Mahadeoji installed in the temple in the village Sabalpur. The parties should think it their duty to serve Sri Thakurji and Mahadeoji and they should get the temple repaired as soon as possible and this will be a source of benefit to the soul of their ancestor.

11. The learned advocate for the respondent contends before us that this amounts to a fresh finding in favour of the validity of the waqf and therefore supersedes the previous decree. We are unable to accept this argument. The property was not in dispute in the suit, and the parties had not called upon the arbitrators to adjudicate upon their respective claims in respect of such property. The reference to the dedication which by the way neither names the villages specifically, nor mentions the date of the deed, was by way of expressing a pious wish that the parties should think it their duty to serve their family deities and repair the temple. Furthermore, if this passage were to be taken strictly literally, it reaffirmed the right of both the parties to serve their deities and repair the temple, whereas it is the plaintiff's case now that he alone has the exclusive right to do so. In our opinion this stray remark which was not incorporated in the operative portion of the award does not amount to a fresh adjudication which would supersede the previous decree.

12. The last point urged before us is that in view of the fact that Bhajja Singh is dead, his son Madan Mohan cannot take advantage of the arbitration award of 1922. We think that there is no force in this contention. The arbitrators did remark that Madan Mohan was represented by his guardian and father Bhajja Singh, who was there to protect his right. Madan Mohan is not trying to go behind the decree. Bhajja Singh, his father, certainly represented him. It seems to us that the present plaintiff Narain Singh who was himself a party to the previous decree cannot avoid it by saying that Madan Mohan might have repudiated the decree although he is prepared now to accept it. As regards the binding nature of the decree on the sons and representatives of the parties to the suit there are clear recitals in the award and the lists prepared by the parties which were incorporated in it. We are accordingly of opinion that the learned Judge was wrong in holding that the plaintiff

can treat the previous decree of 1922 as a nullity and recover possession of the property which was given to Madan Mohan's father Bhajja Singh in 1922. We accordingly allow this appeal and setting aside the decree of the Court below dismiss the plaintiff's suit with costs.

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