

Asim Krishna Deb Vs. Sailesh Chandra Ghosh and ors.

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Court : Kolkata

Decided On : Aug-15-1927

Reported in : AIR1928Cal174

Appellant : Asim Krishna Deb

Respondent : Sailesh Chandra Ghosh and ors.

Judgement :

Cuming, J.

1. The facts of the case out of which this rule has arisen are these:

The opposite party instituted a suit for partition in the Court of the Subordinate Judge at Alipur, sometime in 1921. A preliminary decree was made in August 1921, a commissioner was appointed and a final decree was passed on 20th February 1923. On an application for a review being made this decree was set aside and¹ a fresh partition was ordered. The parties then agreed to refer all the disputes in the suit to arbitration. Sir Provash Mitter and his brother Sir Benode undertook this duty. It was agreed that the arbitrators might make separate awards from time to time.

2. They made an award regarding the Calcutta properties. The parties as usual in these cases began to file various objections to the arbitrators' award. The arbitrators then refused to have anything more to do with them and the remaining

properties which also formed part of the subject of the partition suit have not been dealt with by the arbitrators. The Court held that the award being only a partial award it could pass no decree on it. The Court, therefore, set aside the award and ordered the parties to take the necessary steps. The petitioner then moved this Court and obtained this rule. His contention is that a decree can be made on a separate award and that hence, the Judge in refusing to make a decree on the separate award has refused to exercise a jurisdiction vested in him by law.

3. So far as the present matter is concerned it is no doubt an interlocutory order in the suit and the view I have always taken is this, that such an order cannot form subject of revision under Section 115, Civil P.C., It is not, however, necessary to discuss this question because whether or not an interlocutory order can form the subject of Section 115, Civil P.C., I am quite satisfied that the present matter, whether interlocutory or final order, cannot form the subject of an application under Section 115. The argument put forward is this that the Judge wrongly decided that he could not pass a decree on a partial award. Hence he refused to exercise a jurisdiction vested in him by law, and so the matter comes within the provision of Section 115. If this argument be accepted, as far as I can see, every error of law or fact can be converted or perverted into the subject of revision under Section 115.

4. I will give a few instances.

5. A Judge wrongly refused to admit a certain document in evidence holding that it was inadmissible in evidence. The document was admissible in evidence so the Court has jurisdiction to admit the document and as the result of wrongly deciding the document inadmissible he refused to exercise a jurisdiction vested in him by law. Or the Judge held wrongly that a suit was barred by the principle of res judicata and so would not take any further evidence and he dismissed the suit. Had he decided rightly that the suit was not barred by the principle of res judicata he would have taken evidence in it and, therefore, by wrongly deciding that the suit was barred by the principle of res judicata he refused to exercise a jurisdiction vested in him by law which was to take evidence and make a decree in favour of the plaintiff.

6. It is unnecessary to multiply instances. There would be no difficulty if once this principle were accepted in extending it to errors of fact. A Judge wrongly decides a question of fact and decrees a suit in favour of plaintiff. Had he decided it properly he would have given a decree in favour of defendant. Hence he did not exercise a jurisdiction vested in him by law which was to give a decree in favour of defendant on account of his error of fact. In other words, every error of law or fact would be a refusal to exercise a jurisdiction not vested in the Court. This seems to me to be merely a perversion of the word 'jurisdiction.' 'Jurisdiction means' 'the power of deciding.' In the present case admittedly the Judge had the power to deal with or decide the case before him which was a partition suit within his territorial and pecuniary jurisdiction. In exercising the power of decision he held that a decree could not be given on a partial award because he held the parties agreed to refer all matters to arbitration and did not agree to abide by the decision of the arbitrators if they decided only some and not all of the matters in dispute. He might be wrong and possibly he could have granted a decree on a partial award and he might have been mistaken as to what the agreement of the parties was in reference to arbitration. A number of rulings have been cited to show that he can. It is unnecessary for me to determine whether he can or cannot. It might be an error of law that he wrongly held he could not give a decree on a partial award or possibly an error of fact that the parties really agreed to have decision on some of the matters in dispute and did not require that all the matters should be decided by the arbitrators. But in the exercise of a Court's jurisdiction to decide a question of law or fact wrongly is not to refuse to exercise a jurisdiction or to exercise it with material irregularity. As the Privy Council has pointed out in *Amir Hassan Khan v. Sheo Bakhsh Singh* [1885] 11 Cal. 6 where a Court has jurisdiction to decide a case and does decide it whether it decides it rightly or wrongly it is immaterial. If it decided wrongly it did not exercise its jurisdiction illegally or with material irregularity. In that case the present contention was not put forward that such exercise really amounted to a refusal to exercise its jurisdiction. It was only argued in that case that the Judge had acted with material irregularity, The present contention amounts to this that the Court by exercising its jurisdiction or power of decision wrongly refused to exercise its jurisdiction or power of deciding. In other words that to exercise jurisdiction is not to exercise jurisdiction It is unnecessary to

further pursue the argument,

7. In the present case the Judge had jurisdiction and he exercised it and held that he could not pass a decree on a partial award. He might be wrong but that would not give this Court power to interfere under Section 115.

8. I may here refer to the case of Kali Charan v Sarat Chunder [1903] 30 Cal. 397 a case which in many respects is very nearly akin to the present case. Further if the Court had the power to interfere under Section 115 this is not a case in which the Court should interfere. The Judge has not finally decided the case. It is still open to the parties to ask for fresh arbitration if they so desire or to leave the case to be decided in the ordinary way. Further I may point out that when the case is finally decided it could still be made a ground of appeal that the Court should have accepted the award. I would therefore, discharge this rule. The rule is discharged with costs. Hearing-fee ten gold mohurs.

Roy, J.

9. I regret to say that I differ from my learned brother in this matter. As my opinion cannot make any difference in the result of the case I will only indicate my reasons very briefly:

There was a preliminary decree in this partition suit and the parties thereafter agreed to refer the matter to arbitration. The arbitrators were given powers to give their award separately from time to time and it was agreed that Calcutta properties should be divided first by the arbitrators. They divided the Calcutta properties and gave an award in respect of these properties. On account of certain circumstances the arbitrators refused to proceed any 'further with the partition. The learned Subordinate Judge has set aside this award in respect of the Calcutta properties and directed a commissioner to make a fresh partition. The contention of the petitioner is that the order of the Subordinate Judge is in so far as it deals with the properties not dealt with by the arbitrators is good and the order in respect of the properties dealt with by the arbitrators is bad and should be set aside and that a decree should be made on the basis of the arbitrators' award. A question has arisen whether we can interfere with the learned Subordinate Judge's order in

revision. The cases of Rudra Prasad v. Mathura Prasad : AIR1925 All566 and Chimanbhai Kalyanbhai v. Keshavlal Bulkhidas A.I.R. 1923 Bom. 402 amongst others were referred to where the learned Judges refused to interfere with the order setting aside the arbitration. These decisions appear to have proceeded from the point of view that the order of the lower Court was only an interlocutory order.

10. It has been pointed out, however, by the learned advocate for the petitioners that Piggot, J., who was a party in the Full Bench case of Buddhoo Lal v. Mewa Ram A.I.R. 1921 All. 1, interfered with an order wrongly superseding an arbitration in Husain Baksh v. Lachhman Das A.I.R. 1922 All. 69. On the other hand, the learned advocate for the opposite party has referred to a decision of Maclean, C.J., in Kali Charan Sirdar v. Sarat Chunder Chowdhry [1903] 30 Cal. 397, where the learned Judge refused to interfere with an order of the Small Cause Court in respect of an arbitration matter. It might be said that the last case was governed by the facts of that case. The Calcutta High Court seems to have taken ordinarily a view different from those of the High Courts of Bombay and Allahabad as to the meaning of the word 'case' in Section 115, Civil P.C., and has interfered in revision in many cases. Some of these cases have been collected or mentioned in the case of Salam Chand v. Bhagawan Das A.I.R. 1926 Cal. 1149. The ground taken in these cases seems to have been that where there is likely to be grave injustice or injury this Court should interfere even with interlocutory orders and other orders from which there is no appeal. Several of these cases are mentioned in Salam Chand v. Bhagawan Das A.I.R. 1926 Cal. 1149. In this particular case it is urged that the error in law of the Subordinate Judge has led him to assume a jurisdiction which he did not possess and the cases; of Lachmi Narayan v. Balmakund A.I.R. 1924 P.C. 198, Birj Mohun v. Rai Uma Nath [1893] 20 Cal. 8 and Timed Mai v. Chand Mal A.I.R. 1926 P.C. 142 have been referred to as examples where similar errors have been corrected. It is conceded by the learned advocate for the opposite party that the arbitrators had power to make partial award, but it is contended that the parties did not say that they would be bound by such partial award and the decision of the learned Subordinate Judge is a finding of fact with which we cannot interfere.

11. It seems to me that the case must be decided on the construction of the terms of the reference which was made in the case. If the parties agreed to abide by the decision of the arbitrators in respect of the whole of the dispute and if the arbitrators had power to make partial award from time to time the award which they actually made must be effective and cannot be set aside in that way and a decree should follow on the award already made. It would seem to me that great hardship would result to the parties if they are asked to wait until the whole suit which began in 1921 - and which may still be prolonged for a considerable time - is finally decided and then to raise any debateable question by way of appeal against the final decision. With all due respect to my learned brother I would say that this is a case in which we should interfere on the ground that the learned Subordinate Judge had no jurisdiction to deal with the properties in respect of which there had been effective award.