

Bholanath Biswas Vs. Rabindra Kumar Biswas and ors.

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Court : Kolkata

Decided On : Dec-16-1988

Reported in : (1989)1CALLT405(HC)

Judge : Monoranjan Mallick and ;Siba Prasad Rajkhowa, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 16(1), 27, 30 and 33

Appeal No. : Appeal from Appellate Decree No. 151 of 1968

Appellant : Bholanath Biswas

Respondent : Rabindra Kumar Biswas and ors.

Advocate for Def. : Kamal Krishna Chakraborty, Adv. for Respondent Nos. 2 to 6

Advocate for Pet/Ap. : Ranjit Kumar Banerjee and ;Sailendra Bhusan Bakshi, Adv.

Disposition : Appeal allowed

Judgement :

Monoranjan Mallick, J.

1. This appeal is against the appellate judgment and decree passed by Sri K. C. Mukherjee, Additional District Judge, Hooghly in Title Appeal No. 50 of 1966 by which the Learned Judge while dismissing the Appeal filed before him against the

judgment and decree passed by the Subordinate Judge, Hooghly, in Title Suit No. 34 of 1960, has confirmed the preliminary decree passed by the Learned Subordinate Judge subject to the modification that the portion in which the parties were directed to get the Suit properties amicably partitioned amongst them in respect of their respective shares in terms of the award within three months from the date of the Order should stand deleted and it should be substituted by the Order that the interim award be referred back to the Arbitrators for making the award final by partitioning the properties by metes and bounds in respect of the respective shares of the parties in terms of the interim award within four months from date.

2. The facts giving rise to this appeal may be briefly stated as follows :

A Suit for partition was filed by the plaintiff respondent No. 1 before the Learned Subordinate Judge, Hooghly on 18.5.60. Subsequently 'before the written statement was filed all parties to the Suit filed a petition for referring the matter to three Arbitrators, viz-, Sri Akshoy Kumar Ghosh, Sri Shiba Prosad Banerjee and Sri Kamakshya Charan Basu, as mentioned in paragraph 2 of their petition and in this petition they agreed to refer all matters in dispute between them in the; Suit to these Arbitrators. As prayed for by the parties in the petition, the Learned Subordinate Judge by his Order No. 15, dated 13.8.60 referred the Suit to the Arbitrators mentioned in the petition for making an award in respect of all the disputes arising out of the Suit. The writ of reference was issued upon the Arbitrators and they made an award on 24.6.63 and requested the Court to carry on the further proceedings. In making the award it was also mentioned by them as follows :

'The existence or otherwise of joint properties of the parties other than those mentioned in the plaint and the question of previous partition of Suit properties by metes and bounds between the parties, if any, are left open by the Arbitrators to be agitated by any of the parties to this Suit in future.'

3. On this award both parties filed petitions of objection before the Learned Subordinate Judge praying for setting aside the award under Section 30 of the Arbitration Act. However, the Learned Subordinate Judge deleted the portion

quoted above from the award and passed a preliminary decree in terms of the award and directed the parties to amicably partition the properties failing which a commissioner for partition would be appointed to partition the properties by metes and bounds.

4. Being aggrieved by the said judgment and decree passed by the Learned Subordinate Judge an appeal was preferred and the Learned Additional District Judge dismissed the said Appeal and modified the judgment and decree passed by the Learned Subordinate Judge to the extent indicated above. Being aggrieved the same appellant has preferred this Second Appeal.

5. It is contended that the Learned Additional District Judge was not at all justified in treating the award passed by the Arbitrators as an interim award under Section 27 of the Arbitration Act, that the award of the Arbitrators would clearly indicate that they declared certain shares of the parties and also declared certain properties to be not partible and left the question of previous partition as well as the plea of partial partition raised by the defendants open and submitted the report before the Learned Subordinate Judge that they were not in a position to undertake the partition by metes and bounds and requested the Court to take up the matter of partition in the property by metes and bounds. It is, therefore, submitted that the Learned Subordinate Judge should not have treated the award to be an interim award, that the Learned Subordinate Judge ought to have held that the Arbitrators committed a legal misconduct by not passing an award strictly in terms of reference and deciding only some of the disputed questions and leaving all other important questions referred to them undecided and that in the circumstances the Learned Additional District Judge ought to have set aside the award under Section 30 of the Arbitration Act and directed the Learned Trial Judge to dispose of the Suit on merits on taking evidence to be adduced by the parties.

6. Plaintiff respondent No. 1 has in the meantime died and has been substituted by legal representatives. Plaintiff respondent No. 1 was represented by a Learned Advocate but none has appeared on behalf of his heirs and legal representatives. The respondent Nos. 2 to 6 have appeared through a Learned Advocate. They are also defendants in the Original Suit and have virtually supported the case of the

appellant.

7. We have carefully considered the judgment passed by the Learned Additional District Judge, Hooghly. We have also perused the award passed by the three Arbitrators to whom all the disputes in the; Suit were referred for arbitration. When in a Suit for partition all the disputes between the parties were referred for arbitration, the Arbitrators ought to have decided all the disputes and partitioned the properties by metes and bounds. If any question was raised before them that the Suit was bad for previous partition and the Suit was bad because of the fact that some of the properties have not been brought in the hotch-potch and the Suit was bad for partial partition, it was within the jurisdiction of the Arbitrators to decide that dispute. Moreover, it was the duty of the Arbitrators to finally dispose of the Suit including passing of a final award allotting properties to each of the co-sharers but it is strange that they declared shares of the parties in the disputed properties and also declared some of the properties to be impartible and did not wish to go into the question of partition in the properties by metes and bounds on the ground that it would take more time which they could not devote and they also kept the question of previous partition as well as the question of partial partition to be adjudicated by the parties before the Learned Judge. Therefore, there is no doubt that the Arbitrators did not act in terms of the reference and without performing the duties entrusted to them by the parties to the Suit, they declared the shares of the parties only, did not decide the important questions nor did they partition the properties by metes and bounds. In such circumstances, we fail to understand as to how the Learned Additional District Judge considered such an award to be an interim award. The award does not show that it was an interim award. The Arbitrators wanted to wash their hands off the whole matter by passing some award and directing the parties to decide the remaining disputes by the Learned Judge. In the Privy Council decision of *Mukund Ram v. Salig Ram*, reported in ILR 21 Cal 590 and also followed in the case of *Indian Minerals Company v. Northern India Lime Marketing Association*, : AIR1958 All692 , it has been clearly held that when the parties agree to refer the matter to Arbitration there is an implied condition in the submission that the Arbitrator will dispose of all the matters. Therefore, if the award leaves some vital matters referred to arbitration undermined then it is a fit case either for remitting the award under

Section 16(1)(a) or setting it aside. It has been submitted at the Bar that one of the Arbitrators is now dead and so there is no point in remitting the matter to the Arbitrators under Section 16(1)(a) of the Act. Therefore, it is a fit case in which the award ought to have been set aside by the Learned Additional District Judge on the ground that the Arbitrators committed a legal misconduct by not deciding all the matters referred to them for arbitration.

8. We, therefore, set aside the award passed by the Arbitrators on the ground of their legal misconduct and also set aside the judgment and decree passed by the Learned Additional District Judge and that of the Learned Trial Judge and we direct that the Learned Subordinate Judge shall now decide the Suit on merits on taking evidence of both the parties. It is to be noted that the defendants have not yet put in the written statement but the Learned Trial Judge shall also take up the hearing of the case from that stage and direct the parties to file written statement and thereafter proceed with the Suit in accordance with law and decide the Suit on merits on taking evidence.

9. This Appeal is allowed but there will be no Order as to costs.

10. Preparation of formal decree in this Appeal is dispensed with.

Let a copy of this judgment along with the records be sent down to the Learned Trial Judge as expeditiously as possible.

Siba Prasad Rajkhowa, J.

I agree.

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