Robindra Deb Manna Vs. Jogendra Deb Manna

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Court : Kolkata

Decided On : Jun-22-1920

Reported in : 80Ind.Cas.459

Judge : Rankin, J.

Appellant : Robindra Deb Manna

Respondent : Jogendra Deb Manna

Judgement :

Rankin, J.

1. This suit was brought in 1915 on the 24th of March. It is an administration and partition suit between brothers as regards the family estate descending to them from their grandfather and under their father's Will. Jogendra, the first defendant, may be said to be the main defendant as his intromissions with the joint estate are apparently the main object of attack. Nogendra, defendant No. 2, appears to side with him: the other brothers support the plaintiff. A Receiver of the estate has been appointed by the Court at an early stage of the suit.

2. By order, dated 27th July 1917 and made on the plaintiff's application, the matters in difference in the suit were referred to two arbitrators under the second schedule to the Code. The order provided that the arbitrators should make their award in writing within six months from the date on which an office-copy of this order of reference be served on them or within such further time as they may allow themselves by endorsement on the said office-copy order. In case of difference of opinion between the arbitrators, they were to nominate an umpire who was to make his award within three months of the date of reference to him.

3. The joint remuneration of the arbitrators was agreed upon at Rs. 160 per sitting for the first ten sittings and thereafter Rs. 100 per sitting. Two clerks were appointed at Rs. 32 per sitting. The arbitrators appear to have held the sittings in the evening and for about two hours at a time. They began on the 20th December 1917 and on the 13th September 1919 they held the 122nd sitting. By this time they had not finished the plaintiff's case: indeed they had heard two witnesses only, viz., the plaintiff and one Jugal Kishore Pyne. The cross-examination of the third witness had only lasted for nine sittings and had not been completed. The manner in which the time has been expended can be found in the affidavits whose contradictions on detail leave the general result an undoubted scandal. The plaintiff was examined-in-chief for some 15 sittings and cross-examined for 33. Many sittings seem to have been expended in other ways than in taking evidence, e.g., 10 days on discussions as to amending pleadings. The arbitrators' fees had amounted to about Rs. 16,700-0-0. The total law costs of the parties are put by the plaintiff at a further sum of Rs. 30,000. Robust optimism on the part of the main defendant puts it at Rs. 6,000 only. The plaintiff says he has six more witnesses to call (making nine in all) though the main defendant undertakes to deny this. In any case, four years after action brought, two years after the order of reference, 122 sittings having been held, the arbitrators in September 1919 were not yet in sight of the defendants' case.

4. Since then nothing has been done. So far as the arbitrators are concerned, the reasons are as follows. Applications in connection with the Receivership and certain other matters came before me in January and again in May 1919, and I appear to have commented upon the unfortunate position. Moreover, in the absence of any decision about the estate or the parties' rights, and with costs apparently running mountains high, I could not see my way to order the Receiver to make distribution among the parties. These comments appear to have been carried to the arbitrators who, on the next day, 28th May 1919, enlarged their time for making their award till the end of the year and passed the following order:

The plaintiff does not produce the witness Babu Benode Behari Banerjee, nor is there any application on his behalf although he verbally states that the witness is ill. It seems that the proceeding before us cannot go on in this way; the fees of the arbitrators and of their clerks have not been paid for a considerable period, and it does not appear that some of the parties are at all willing to pay them. Under the circumstances we adjourn the further sittings sine die.

5. Shortly afterwards this spirit of hopelessness took for a passing moment the form of a spirit of compromise and the good offices of the arbitrators seem to have been employed in assisting a settlement. At a sitting on the 9th July the parties present--not all were present--were thought to have come to terms. The arbitrators recorded in their minute: 'The parties discussed and settled the terms of settlement. It is proposed that a petition should be made before the arbitrators embodying the terms of settlement herein. Next meeting on Friday 18th instant.' The terms--many and complicated, as they necessarily were--were not at the time reduced to writing by the arbitrators or, as far as I can find, by anybody else. Only the plaintiff and defendants Nos. 1 and 5 were present. Each side, accordingly, drew up 'without prejudice' a statement of terms of settlement, and these were widely discrepant. The plaintiff maintained that there was a settlement, and pointed to the arbitrators' minutes and demanded that the arbitrators find out what it was. The main defendant (and defendant No. 2 who sides with him and who was not even present at the sitting) denied that any final settlement had been completed. The arbitrators in the end found--very rightly, as I think--that no settlement had been concluded. The plaintiff on this and on other matters desired to apply to the Court and objected to the arbitration going on: then the mother of this contending family died. This made no real difference to the case--none that could not have been adjusted in a few minutes--but the plaintiff took six months to reconstitute the suit, and his application to the Court is filed on the 12th April 1920. From June 1919 to April 1920 the time has been wholly lost, and 1 give judgment now in June 1920 after the sheer waste of a year.

6. The plaintiff applies to me in the first place to record, under Order XXIII, Rule 3, his version of the terms of settlement, or some other to be found upon the evidence. I think it clear that there was no concluded settlement and no proof even of authority to settle as regards defendant No. 2.

7. But the plaintiff further applies that the reference should be re-called or superseded, first by reason of misconduct of one of the arbitrators in giving private interviews to the first defendant, and secondly by reason of the scandal, mishandling, expense, and delay of the arbitrators' proceedings. The charge of misconduct relates to visits to the arbitrators house by the first defendant on five occasions in August and September 1918, and on one occasion on 22nd July 1919. The allegations as to 1918 are utterly belated and their only possible effect is to discount the case upon the later incident. On the affidavits it is very difficult to decide a question upon which the reputation of a professional gentleman would depend. I am of opinion, that under the 2nd Schedule the only time for entertaining charges of misconduct against an arbitrator is when the award has been filed, and I think, it would be wrong of me to pass any judgment whatsoever at this stage upon the point.

8. The main question is, whether in view of the hopeless waste of time, money and effort, I have any power to suporsede the arbitration. The Advocate-General has pressed me strongly to do so and although I see no reason to think that the plaintiff is not equally to blame with the other parties whose contentiousness and loquacity have utterly overcome the arbitrators, I think so little of the chance of any reasonable termination of

the proceedings that I should have no hesitation in so doing if it is within my power. The arbitrators have failed to cope with their task. It was a difficult task, but they have made no adequate effort in the matter. Long ago they should either have retired or insisted on sitting de die in diem, and making some headway with the case. It is obvious that with sittings for two hours only at a time, half the time is lost. In (say) another year the case will have become so stale and overloaded that neither they nor anybody else will have much chance of arriving at a right decision.

9. Sir Benode Mitter for the main Defendant contends that there is no power to interfere at this stage. He points to Clause 3 of the 2nd Schedule and contends that the doctrine of an inherent power in the Court to interfere at any stage with the arbitrators is without warrant in the Schedule and contrary to its intention. His client is apparently willing to promise to be more reasonable and expeditious: but he objects to the costs already incurred before the arbitrators being thrown away, and he suggests that the plaintiff desires to get rid of the arbitration merely because he is getting the worst of the battle.

10. Upon considering the 2nd Schedule it strikes one at once that the Court is in a position in which the Statute intended that no Court should ever be. The scheme of the Schedule is simple and effective. When an order of reference is made, the Court is to fix a reasonable time for the making of the award. When that time elapses, either there is an award or there is not. If there is, the award can be sot aside for certain well-defined reasons. If not set aside, it can be confirmed, if, on the other hand, the time originally fixed by the Court as reasonable has elapsed and there is no award, the matter comes back be the Court and thus is founded the right of the Court either to enlarge or not to enlarge the time. If in its discretion it refuses any further time, the reference is at an end and the suit must be re-instated for trial. There is no need whatever in this scheme for any power of interference during the period limited to the arbitrators, and it is very much better that no interference should take place. The arbitrators are to be given their chance to make their own award. There are not to be two different authorities in operation at this stage doubling the litigation and expense; the Court cheeking the arbitrators though out or riding them on the curb. The Court will stay its hand altogether until the time limited has expired; it can part with control temporarily because the time limit will bring the matter back to the Court after no more than a reasonable time either to deal with the award or to consider whether more time should be given, or whether the reference should be superseded. The pivot of the whole scheme is the limit of time, and I can see no reason to suppose that any better scheme could be devised. That limit is the condition or the form of the Court's control over the arbitrators. The Court is not authorised either to abandon control or to substitute any other form of control.

11. In the present case after about three years of ill-directed labour and expense, the Court is said to be without control. There is no provision in the 2nd Schedule under which I can interfere, now, or for that matter in another two years' time, why? Because the order of reference imposed no limit of time by which the arbitrators (collectively) are bound. They were given unlimited power to extend the time at their own hand. This they have exercised and, as the main defendant contends, can go on exercising till they see fit to stop. Pressed by the plaintiff with the argument that the Court in such a case must have inherent power on some terms and at some time to end a scandal, and by the main defendant with the argument that the right to interfere is not merely absent from the 2nd Schedule and incapable of inference therefrom, but is negatived by the terms of Clause 3, I suggested at the argument that there was a third view, possibly more correct than either, viz' that this reference as ordered flouted a cardinal principle of the 2nd schedule from the outset. This view was adopted for the plaintiff and was fully argued. It was resisted for the main defendant whose Counsel laid stress on the fact that many orders of reference have been made in the same terms; and argued that even if such an order be wrong, there is no defect of jurisdiction. A strict compliance with Clause 1 is matter of jurisdiction, but on this view a strict compliance with Clause 3 is not. There is also a fourth view possible, viz., that in fixing six months from the date of service of the order, the Court fixed the time which it thought reasonable and that the order is only bad in so far as it purports to delegate to the arbitrators the Court's own duty to decide as to the enlargement of the time. On this view the Court could not enlarge the time, or supersede the reference under Clause 8.

12. There seems to be no doubt that in this Court a great many orders have been made in the present form. The reason is not far to seek. Apart from express limit contained in the submission, an arbitrator had at common law his whole life in which to make his award. But at common law all submissions were revocable at will. By the Arbitration Act of 1889 a submission is not revocable without leave, and unless the submission provides otherwise the award must be made within three months or within such further time as the arbitrators may in writing allow themselves from time to time. The Indian Arbitration Act follows this in principle. But in oases under these Statutes there is always power in the Court to give leave to revoke the submission, and this is the proper remedy where excessive delay or other injustice can be shewn, If, however, this well-known form as to time-limit be incorporated into the 2nd Schedule and if the last part of Clause 3 and the general scheme of the Schedule deprive the Court of any inherent power of revoking the reference, it is obvious that what was right and reasonable in the one class of cases is altogether out of the question in the other. If the main defendant's contention be right, the Court has not in this case that control over a reference in this suit which it would have had in similar circumstances had the arbitration been an ordinary private arbitration. The present difficulty would seem to be the result of a false analogy.

13. By the first part of third clause of the 2nd schedule two matters are dealt with uno flatu. First, that when Section 1 has boon complied with, the Court must make the order of reference. Secondly, that the Court by its order must fix such time as it thinks reasonable for the making of the award. The same clause by its second part forbids the interference of the Court save in the manner and to the extent provided in the schedule. Here there are three things which go together; the Court must part with its jurisdiction to decide; it must part with it for a specified time and no more; during that time it must stand aside. If a Court should wrongly refuse an order of reference and insist upon deciding the suit, I apprehend that its decree would be bad apart from any question of the merits. If after an order of reference a Court wrongly proceeded to try the suit, it would contravene an express prohibition. If by the order of reference no time is fixed at all, the error is of the same class: no time-limit means no control; and the Court is not authorised to abandon control save to the extent and upon the terms laid down. In Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar 13 A. 300 at p. 308 : 18 I.A. 55 : 6 Sar. P.C.J. 14 : 15 Ind. Jur. 283 : 7 Ind. Dec. (N.S.) 189, the Privy Council dealt with this matter upon the terms of Section 508 of the Code of 1882. They reversed the decision of the High Court at Allahabad that the words of that section were directory only, that is, that they amounted 'to no more than the imposition of a public duty on the presiding officer of a Court of Justice,' and that 'the neglect of it could not affect the substantiality of the proceedings of the arbitrators,' Har Narain Singh v. Bhagwant Kuar 10 A. 137 at p. 140 : A.W.N. (1888) 28 : 6 Ind. Dec. (N.S.) 92. The judgment delivered by Lord Morris, after pointing out that the case must be decided entirely upon the construction of the sections, says: 'Their Lordships are of opinion that Section 508 is not merely directory but that it is mandatory and imperative. Section 521 declares that no award shall be valid unless made within the period allowed by the Court, and it appears to Their Lordships that this section would be rendered inoperative if Section 508 is to be treated as merely directory.' On the facts of that case this ruling was nob applied: the actual decision was that after an award had been made the Court could not enlarge the time under Section 514, and that, as the time had run out before the making of the award, it was invalid under Section 521 and no Court could make a decree upon it. This latter question was undoubtedly put upon a new footing in some respects by the Code of 1908. Clause 15 of the 2nd Schedule altered Section 521: an award made out of time, or otherwise invalid, is no longer a nullity: it is liable to be set aside by the Court, but, if not set aside, a decree made for its enforcement is not without jurisdiction. [Shib Kist Daw v. Satish Chunder Dutt 18 Ind. Cas. 69 : 39 C. 822]. But the wording of Section 508 is retained in Clause 3 of the 2nd Schedule with two differences, upon which nothing turns for the present purpose. The question is whether what the Privy Council said of the same words is now inapplicable because Section 521 has been altered. It seems to be very difficult indeed so to hold. It is still true that a part of Clause 15 would be rendered inoperative if Clause 3 is to be treated as merely directory, and on a broad view of the schedule the provision for a limit of time is a main pillar of the scheme. Without it the character of the reference is entirely changed: the power of the Court to see justice done is materially diminished: indeed, it is out oft at the very point at which the Statute intended it to be applied.

14. If the words of the 3rd clause have the same meaning as before, it would seem that consent of the parties will not alter the position. ' We should have been disposed,' said the Court in Lachmandas v. Abparkash 30 A. 169 : 5 A.L.J. 144 : A.W.N. (1908) 59, 'to regard that as an irregularity which would be cured by the acquiescence of the parties... were it not for the clear and explicit language of their Lordships of the Privy Council'

15. If then the provision in the third clause is mandatory, what is it that is thus imperatively required--'The Court shall fix such time as it thinks reasonable for the making of the award.' Is it a compliance with that provision for the Court to say to the arbitrators?--'You can have any time you like. So long as you are both agreed, the time is left wholly to you. Endorse the order yourselves, and at your own hand the time will be enlarged indefinitely and as often as you like.' With all respect for the opinions of other people, I am very clear that this is no compliance at all. It is not a defective compliance or an absence of strictness in compliance. It is exactly as if the order should recite 'whereas by the third clause of the 2nd schedule this Court is required to fix such time as the said Court thinks reasonable for the making of the award, now, therefore, this Court does not think fit to do so accordingly. It may be that it is open to the Court to define the time by reference to a condition; to give the arbitrators a certain length of time after the happening of a future event, e.g., the service upon them of the order. This latter form of order appears to be fairly common: in my experience it has proved an undesirable form of order, but I do not say that it is not a compliance with Clause 3. Nor where the clause has been obeyed in substance need undue stress be placed upon a mere defect of form--e.g., in the case cited Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar 13 A. 300 at p. 303 : 18 I.A. 55 : 6 Sar. P.C.J. 14 : 15 Ind. Jur. 283 : 7 Ind. Dec. (N.S.) 189, a date was fixed by the Court for the hearing of the case and this date was taken as the limit of time given to the arbitrators. But what is necessary is that the Court should impose its own limit upon the arbitrators. In the present case, it seems to me that the Court has either not applied its own mind as to what is a reasonable limit or in any case it has refused to fix or specify it and has flatly declined to impose it upon anybody. There would seem to be one thing which cannot serve as a condition by reference to the Court to fix the time, and that is the will of the arbitrators. To leave the arbitrators (collectively) with a free hand as to time, subject to no limit imposed by the Court, is exactly what the Statute is taking measures to avoid.

16. I cannot assent to the view assumed in the case of Co-operative Hindusthan Bank v. Bhola Nath Borooah 31 Ind. Cas. 597 : 19 C.W.N. 165 that upon this form of order the Court must be taken to have fixed six months as the time which it thought reasonable. It gave 'six months or such further time, etc.' If it had really decided that six months was reasonable it had no right to give any more. It was bound by the Statute to limit the arbitrators in accordance (5) 31 Ind. Oas. 597; 19 0. W. N. 165 with that opinion. But in any case it seems impossible to say that it either fixed or specified in the order six months as the time for making the award. The words of Clause 3, 'shall fix such time as it thinks reasonable for the making of the award'--mean 'shall fix such time for the making of the award as it thinks reasonable in that behalf.' They are not complied with by mentioning a time and in the same breath letting some one else impose a different time as that within which the award may be made. This is clear, if only from Clause 15, where the time is referred to as 'the period allowed by the Court.'

17. If the intention of this form of order is to simply comply with Clause 3, but to throw away Clause 8, I think the attempt is impossible. In my view no time is 'fixed' or 'specified' within the meaning of Clause 3, unless it be so fixed and specified for the making of the award, that on the expiry of a period laid down by the Court, because the Court itself thinks it sufficient, the Court will have power under Clause 8 to supersede the arbitration.

18. If the words now in Clause 3 are not merely directory, it can make no difference whether the order is said to have failed entirely to comply with an imperative requirement or to have contravened an express prohibition. The same thing has a positive and a negative aspect. The Court must preserve a certain form of control; it does not do so. The Court has no authority to abandon control: it professes to do so.

19. I desire, however, to put the matter on a broader footing than a mere construction of Clause 3. The question then arises in the form whether it is competent by consent to delegate to the arbitrators the Court's function of control as to time. Upon this there is a dictum of Chitty, J., sitting at first instance in this Court, [Co-operative Hindusthan Bank v. Bhola Nath Borooah 31 Ind. Cas. 597 : 19 C.W.N. 165. In that case the arbitrator under the present form of order had purported to enlarge his own time after it had expired. The decision was that he could only do so beforehand. Having expressed this opinion the learned Judge makes the following observation obiter: 'It was suggested that the order of this Court was ultra vires in so far as it permitted the arbitrator to enlarge the time for making his award. I do not think that is so. The Court proceeded by consent of the parties and there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired.' I gather that the learned Judge was not put by the circumstances of that case or by the argument in sight of any objection at all to the course which he describes. He deals with none: as he was proceeding on another ground they mattered little at the time. The circumstances of the present case put me in a very different position, and I cannot take shelter under this dictum. I find what I think to be a scandal proceeding under the authority of this Court and in connection with a suit which this Court has yet to decree and I am told that I cannot interfere because the pivot of the 2nd schedule has been removed. 'The functions of the Court with regard to the enlargement of time' are the functions of the Court with regard to superseding the arbitration (Clause 8). To delegate a function of control to the party to be controlled is not in general a process to which objection is far to seek. If the argument be that because the Court has power to enlarge the time which it has fixed, it must, therefore, have power by consent and at the outset to let the arbitrators enlarge it without a limit: this is merely to argue that because the Court has a duty to control the arbitrators, it has, therefore, power to throw the control away. The parties to a particular suit are not the only persons interested in the question whether a statutory duty shall be abandoned by the Court. If all parties desire be have a suit dismissed by consent and then to go to arbitration, no doubt there are ways in which this can be done. But under the 2nd schedule the suit is still a suit, the arbitration is under the Court and the award will be binding, if at all, by virtue of an order of the Court. In any suit and particularly when as here a Receiver has been found necessary, interminable delay in the arbitration may mean a large number of quite unnecessary applications to the Court. For these reasons it cannot be assumed that it is no part of the intention of the Statute to limit the power of the Court as to what it may do by consent of parties. On the contrary, the general object is be lay down the terms upon which a reference may be ordered when all parties do consent, and the language of Section 89 as well as that of the schedule leaves little room for doubting that the statutory scheme is, in all its main features, compulsory. If so, the Court cannot by consent abandon control while retaining the suit; this would be to abandon the general principle which governs the character of the reference which is authorised by the Code. I cannot agree with Sir Benode Mitter that the only thing in the 2nd Schedule which cannot be changed by consent is the first clause.

20. I do not think that such a case as Official Trustee of Bengal v. Kumudini Dasi 6 Ind. Cas. 973 : 37 C. 387 is really in point here. That the Probate Court does not act without jurisdiction in the sense of Section 50 of the Probate and Administration Act or in the general sense when it gives a grant to a person who is not entitled to it or who is an improper person to take it, is no doubt a clear and correct decision. But I do not understand this case to lay down, as applicable to all subject-matters, that jurisdiction to entertain an application involves jurisdiction to do anything whatever by order made upon such application, statutory prohibitions notwithstanding. It is a mistake to suppose that a matter does not go to jurisdiction because it affects the limits, and not the mere existence, of jurisdiction. To delegate the functions of the Court, or, as I should prefer in this case to say, to declare in advance that a certain function of control shall not be exercised at all, is to do an act of a class altogether different from those which a Court authorised to hear an application for a reference is empowered to do. Jurisdiction is involved because the order professes to abrogate jurisdiction. A forum competent to entertain an application to refer a suit is not clothed with jurisdiction to throw the suit 'out at window.' It is not in the least necessary, so far as general principles are concerned, to hold that the whole order of reference is bad. But the professed abandonment of control is nugatory. Further, I am far from saying that because Clause 3 has not been complied with or because the abandonment of control as to

time was wholly without jurisdiction, that an award in this case if made and not set aside under Clause 15 would not give rise to a decree valid and unappealable under Clause 16. Under the Code of 1882 that may have been the position, but steps have been taken to alter this. Now, where there is an award, Clause 16 where it applies, cures invalidity in the interest of finality. However invalid the award, the decree can be valid because on applications under Clause 15 the Court has jurisdiction to determine whether the award is invalid in consequence of non-compliance with Clause 3, or for any other reason.

21. I have proceeded upon the footing that there is no inherent power on the part of the Court to supersede this reference. On this point I desire to adopt what was said by Piggot, J., in Chaturbhuj v. Raghubar Dayal 23 Ind. Cas. 758 : 36 A. 354 at p. 360 : 12 A.L.J. 529. 'In an arbitration conducted under the orders of the Court, the Court has very large powers of control. Against interminable delays at any rate it can provide at once by its order specifying the period within which the award is to be returned. It seems to me unsound on general principles to invoke the inherent jurisdiction of the Court in a matter for which provision appears to be made in the Code itself.' If this inherent power does exist I should in this case recall the arbitration. If, as I think, it does not exist, then the Court's control as against interminable delays is entirely dependent upon the limit of time, and the minimum result of the considerations which I have canvassed is that the unlimited authority to extend the time is bad and of no effect, if it is to be read as given to the arbitrators irrevocably, and without reservation to the Court of any shred of its original control. If it should so be read, as the original six months have long ago elapsed, I can supersede the arbitration now. If, however, the reservation can be implied, the same result follows, as the office-copy order served on the arbitrators is indorsed with extensions of time which run out on the 30th June 1920, and the award cannot be completed within the next few days (cf. Clause 8).

22. According to a recent Patna case [Patto Kumari v. Upendra Nath Ghose 50 Ind. Cas. 52 : 4 P.L.J.], where an application is made under Clause 15 to set aside an award as having been made out of time, questions of estoppel may arise, and the Court is not then obliged to set the award aside. Assuming that this doctrine founded on the cases under the Common Law Procedure Act is correct and that it also applies in all cases where the award is 'otherwise invalid,' I would point out that the position here is very different. The whole of the present difficulty arises because there is no award and no more than a distant prospect of any. By consenting to the order of 27th July 1917 and by his conduct under it till last September, the plaintiff is not estopped from objecting to the continuance of the proceedings ad infinitum, or after they have proved themselves incorrigible. Nothing that he can do will entitle any one else to insist as against the Court upon the continuance of discreditable and inept proceedings under the Court's authority, and in a suit which is still before the Court. 23. The order will be that all proceedings under the order of reference, dated 27th July 1917 be discontinued and that the suit be restored to its proper prospective list for trial. Liberty to apply for any incidental directions or for a speedy trial or otherwise as the parties may be advised. Each party to bear his own costs of this application: there wiil be no order as to the costs thrown away in connection with the reference.