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Court : Privy Council

Decided On : Jan-21-1930

Judge : VISCOUNT DUNEDIN, SIR GEORGE LOWNDES & SIR BINOD MITTER

Appeal No. : Privy Council Appeal No. 17 of 1928 (From Calcutta: Bengal Appeal No. 61 of 1925)

Appellant : Kamini Kumar Basu and Others

Respondent : Birendra Nath Basu and Another

Advocate for Pet/Ap. : P.V. Subbarow, for Appellants. Birendra Nath Solicitors for Appellants, Francis and Harker.

Judgement :

Sir Binod Mitter:

The facts out of which this appeal arises are as follows: The Basu family referred to in the pleadings in the suit, owned Taltola Hat and Bazar, which was an old and established Hat of considerable repute. It was originally held on land owned by the Basu family on the bank of the river Dhaleswari. The site of the Hat had to be changed from time to time owing to the action of the river, and ultimately, in the year 1916, there was no land owned and possessed by the family on which the Hat could be held and it was removed to some lands belonging to a Mussalman family. There was a great scramble for the purchase of such lands from the different members of the Mussalman family, amongst the plaintiffs on the one hand and the principal defendants on the other. One Abdul Aziz purported to execute conveyances in favour both of the plaintiffs and the principal defendants in respect of the same land, and in the course of the proceedings taken by both parties to have their respective documents registered he sometimes admitted and sometimes denied the execution of such documents before the Sub-Registrar.

On 14th December 1916, one 'Rohini, a servant of the plaintiffs, and on their behalf, complained before the Sub-Divisional Officer of Munshigunj, against various persons, including some of the principal defendants namely: Paresh Chandra Basu, defendant 16, Gopal Chandra Basu, defendant 13, Benoy Chandra Basu, defendant 14, Krishna Kumar Basu, defendant 18, Kamini Kumar Basu, now defendant 2 (son of Ananta Kumar Basu, since deceased, who was originally defendant 2 the suit) charging them with having committed offences under Ss. 465, 467, 193 and 194, I. P. C., all of which offences were non-compoundable. The persons against whom the complaint was made are referred to for the purposes of the judgment as the accused in the criminal proceedings. The Magistrate did not issue any summons, but directed the complainant to prove his case of 8th January 1917.

The criminal proceedings served to bring matters to a head, and after its institution Ananta, whose son, Kamini, was accused 6, became exceedingly alarmed, and was very anxious to have all the disputes settled between the plaintiffs and the defendants, including the criminal proceedings. He desired that the disputes should be referred to the arbitration of A. C. Basu, a relation of the parties, and one of the pro forma

defendants in the suit.

The disputes as to the title concerned the plaintiffs and defendants 1 to 21. A.C. Basu in his deposition stated that at the time of the reference there were only present the plaintiff Birendra, Ananta and the accused Benoy, Paresh and Krishna. The reference was oral, and only two sittings were held, namely on 27th and 29th December. The only persons who attended both days were the plaintiff, Ananta, and the accused, Benoy, Paresh, Krishna and Kamini (son of Ananta). A.C. Basu further stated that no evidence, oral or documentary, on the question of title was produced before him, and on 29th December he delivered an oral award which was followed by a written memorandum, which is not forthcoming. A memorandum purporting to be a copy of the award, and dated 12th August 1917, signed by one A.C. Samanta, and the arbitrator, is on the record. The arbitrator further stated that it was provided by the award that all the interested persons, and not merely those who made the reference or who appeared before him, would execute an agreement embodying the result of his decision. According to him the award had declared that the plaintiff and the principal defendants 1 to 21 would get 3 annas 12 gandas and 12 annas 8 gandas shares respectively, of the proprietary interest of the Hat land. The award also purported to deal with certain pecuniary interests of the proforma defendants (22-72).

On 8th January 1917, the criminal proceedings came up before the Magistrate, but, at the instance of the parties, were adjourned to 24th January. On 23rd January 1917, after 9 o'clock in the evening, an ekrarnama was executed by Ananta, his son Kamini, his brother Jayanta, defendant 3, and defendants 5, 6 and 10, i. e., Debendra Kumar Basu, Surendra Kumar Basu and Sanat Kumar Basu. They were very near relations of Ananta. By this ekrarnama its executants admitted that the plaintiffs have title and possession to 3 annas 12 gandas share of the land in suit. The ekrarnama further provided that if the other cosharers of the land did not join with the executants in executing a solehnama or other appropriate deed within six weeks from the date thereof, then executants would execute a proper deed in favour of the plaintiffs, making up their aforesaid share of 3 annas 12 gandas out of their own share. None of the executants except Ananta had taken any part in the arbitration proceedings, and were in no way bound by them. On 24th January the complainant Rohini put in a petition before the Magistrate, alleging that his principal witnesses had been won over by the accused, and he further alleged that the dispute had already been settled. On this petition the Magistrate dismissed the case under S.203, Criminal PC, for non-production of evidence.

The learned Subordinate Judge held that the real object of the reference to arbitration was not to get a judicial decision on the question of the right and title of the plaintiffs in the lands in dispute, but to placate the plaintiff Birendra, and induce him to withdraw from the criminal proceedings. He further held that the ekrarnama was not a bona fide settlement of the dispute, but was executed with a view to securing the withdrawal of the criminal proceedings on charges of forgery and other non-compoundable offences, and that the consideration wholly or in part of this agreement, was unlawful and, therefore, the agreement was void.

The High Court disagreed with the learned Subordinate Judge, and held that the reference to arbitration was a bona fide one for the settlement of the disputes as to title. They further held that the persons against whom the complaint was made were never brought before the Magistrate as accused persons, and that as the Magistrate dismissed the complaint under S. 203, Criminal PC, the prosecution could not be said to have been dropped, implying thereby that the stage at which a prosecution could be said to have commenced had not been reached within the meaning of the Criminal Procedure Code. They further held that in the circumstances aforesaid there was no tampering with the administration of justice by the complainant or that he usurped the functions of the Judge. The High Court, on the basis of their findings that the award and ekrarnama were valid gave certain relief to the plaintiff against the persons who had taken part in the arbitration proceedings or who had signed the ekrarnama. From this judgment and decree of the High Court the defendants the representatives of Ananta, and defendants 3, 5, 6, 10, 14, 16 and 18 have appealed to this Board.

It may quite well be that a prosecution only commences after a summons is issued, and that before that stage

is reached a complainant cannot be said to have dropped a prosecution under the Code: see Golap Jan v. Bholanath (1). Their Lordships are not called, upon to express any opinion on this point, nor are they doing so. The real question involved in this appeal on this part of the case is whether any part of the consideration of the reference or the ekrarnama was unlawful, and not whether any prosecution within the meaning of the Criminal Procedure Code had been started or dropped. If it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama as the case may be, is unlawful: see Jones v. Merionethsire Permanent Benefit Building Society (2) and the award or the ekrarnama was invalid, quite irrespective of the fact whether any prosecution in law had been started.

With regard to the award there is a further question, namely, whether, assuming that there was a valid reference the award was capable of being enforced against any of the defendants. Their Lordships will first of all determine the validity of the ekrarnama,

In a case of this description it is unlikely that it would be expressly stated in the ekrarnama that a part of its consideration was an agreement to settle the criminal proceedings. It is enough for the defendants to give evidence from which the inference necessarily arises that part of the consideration is unlawful. There is, however, in this case, the evidence of Sasanka, who acted as a pleader for the plaintiffs, and was called by them in this suit. He stated before the learned Subordinate Judge as follows:

"The former case was withdrawn the day after the execution of the agreement, at the time of which there had been an understanding between the parties that the parties would withdraw from their respective criminal cases. I understand that the result of the agreement would be to settle all disputes including the criminal cases.

Amulya, another pleader also called by the plaintiffs, stated:

"I know that the object of the compromise was to bring about reconciliation including the dropping of the prosecution."

There is no doubt that the parties had agreed not to proceed with the complaint as the complainant in his petition dated 24th January stated to the Magistrate that the dispute had been settled.

The fact that the ekrarnama was executed only by Ananta and his very near relatives, none of whom was bound by the arbitration proceedings, is very significant. The only question is whether the agreement settling the criminal proceedings was arrived at before or after the execution of the ekrarnama. The ekrarnama, as has already been stated, was signed after 9 p. m., on 23rd January, and it is hardly credible that after its execution the plaintiffs for the first time decided not to proceed with the complaint. Their Lordships have no hesitation in holding that, prior to the execution of the ekrarnama, it was an implied though not an expressed term, that in consideration of the executants admitting the shares of the plaintiffs they would not proceed with the charges laid by them against the accused. It is also a significant fact that when after the execution of the ekrarnama and the dismissal of the criminal proceedings the executants of the ekrarnama did not carry out its terms, the plaintiffs took steps to revive the criminal proceedings, though without success. For these reasons the ekrarnama is not enforceable against its executants.

The next question that calls for determination is whether any part of the consideration for reference to the arbitration was unlawful. The only persons amongst the principal defendants who joined in the reference were Ananta, Benoy, Krishna and Paresh. The criminal proceedings were pending at the time of the reference against the last three mentioned persons and the son of Ananta. The dispute affected the other principal defendants, as also the proforma defendants, and no proper settlement could have been reached unless the other defendants joined in the reference.

The learned Subordinate Judge held that the arbitration proceedings were

"hastily and rapidly run through somehow to placate the plaintiff Birendra and to induce him to withdraw the criminal case."

Nothing was done to give effect to the award, and the proceedings were adjourned from 8th to 24th January, on which date, as has been stated, the ekrarnama was executed, which in effect took the place of the award. Their Lordships have set forth in the early part of the judgment the circumstances under which the reference was made and the manner in which the arbitration was conducted, and they are of opinion that the finding of the learned Subordinate Judge that the reference was not a bona fide reference for settlement of civil disputes only is amply borne out by the evidence in the case. Their Lordships are also of opinion that the award was incomplete and that the parties whose presence was absolutely necessary to make it valid were never before the arbitrator. For these two reasons their Lordships are of opinion that the award is not valid. The suit, therefore, so far as it is based on the ekrarnama and the award, should be dismissed.

The plaintiffs' suit was based upon their alleged title by purchase, and, alternatively, upon the award and the ekrarnama. The learned Subordinate Judge held that the plaintiff had succeeded in proving their title of purchase to the extent of 1-anna 4-pies share of plots 472, 473, 474 and 842. The High Court did not think it necessary, by reason of its findings on the award and the ekrarnama, to determine this question. Their Lordships think that this part of the case, not having been investigated by the High Court, should be remitted to them for further investigation. It does not appear that the plaintiffs ever gave up this part of their case. For the reasons stated above their Lordships think that the decree of the High Court should be set aside. The defences raised by the appellants were not commendable although they are compelled to give effect to them upon grounds of public policy indicated in their judgment. They will therefore not give any costs of the appeal before them or before the High Court. The learned Subordinate Judge did not give any costs to any of the parties and their Lordships think that his direction as to cost was right and they will not interfere with it. The costs of the further investigation of the title will abide the result. Their Lordships will humbly advise His Majesty accordingly.

Case remanded.