Privy Council Appeal No. 68 of 1938
Patna Appeal No. 2 of 1937

Upendra Nath Bose - - - - - - - - - *Appellant*

v.

Lall and others - - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY, 1940

[*Present at the Hearing*]:
VISCOUNT MAUGHAM
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
SIR GEORGE RANKIN
MR. M. R. JAYAKAR
[*Delivered by* LORD RUSSELL OF KILLOWEN]

This is an appeal from a decree of the High Court of Judicature at Patna by which it was ordered that the award hereinafter mentioned should be filed and made a decree of the Court.

The relevant facts leading up to this litigation are as follows:—

The appellant, one Upendra Nath Bose, had in the year 1908 purchased in execution sale the proprietary right in the village Raitar in the Patna district subject to incumbrances. In the year 1912 his friend, Ishwari Prasad, advanced to him a sum of Rs.50,000 for the purpose of partially clearing off the incumbrances and upon the terms that he should have an option to acquire a half share in the village in lieu of the repayment of his loan. This option he exercised in or about the year 1914. No conveyance was executed; the matter continued to rest on contract, but thenceforward he enjoyed a half share of the profits of the village.

This state of affairs continued until the death of Ishwari which occurred in the year 1924. He left him surviving three sons, viz., the respondents Het Lall, Debi Prasad, and Shyam Lall, and a grandson the respondent Parbhakar Prakash.

On the 26th April, 1925, the appellant executed a document addressed to the respondents in which he set out the facts relating to Ishwari's loan, and his half interest in the village. The appellant also stated his willingness to account, and that he claimed no personal interest in more than half the estate. Clause 6 of this document ran thus:—

> "I also hereby agree that as soon as accounts are made up and settled I shall execute such proper instrument as you may unanimously wish, or in case of difference of opinion among you, as the person you refer may reasonably require."

Ultimately the parties referred to two arbitrators differences which had arisen, as stated in the agreement of reference, " regarding the accounts and transfer of Raitar property." In the course of the arbitration it was suggested and agreed between the parties that a sum should be fixed upon the payment of which the respondents should have no claim to share in the village. This course was adopted by the arbitrators, who made their award on the 1st August, 1930. By paragraph 1 thereof they dealt with the accounts between the parties, finding the amounts due and directing payment with interest. By paragraph 2 they dealt with " the transfer of Raitar property," in the following terms:—

> " (2) That Babu Upendra Nath Basu requested us that instead of transferring the above said Raitar property to the second party he may be allowed to pay any sum fixed by us in lieu thereof so as to save the property from being ruined and we were asked by the parties to fix the sum to be so paid by the first party to the second party. We accordingly direct that the said Babu Upendra Nath Basu do pay rupees fifteen thousand, three hundred and fifty to each of the four gentlemen of the second party, that is to say a total sum of rupees sixty-one thousand and four hundred as the equivalent of the share of the second party in the said property, with interest at six per cent. per annum accruing from the first of October 1930. If the said amount is not paid by the first of October 1931, the rate of interest thereafter shall be seven and a half per cent. per annum on whole or any balance left unpaid.
>
> " The ownership of the second party in one-half of Raitar property shall not cease till after the above sum of rupees sixty-one thousand and four hundred as well as the amounts mentioned in the statement exhibit B together with interest specified in respect of both be fully paid up."

The award was registered before the sub-registrar of Benares, and in Book 4. It is conceded that this registration was made before the official of the wrong district and entered in the wrong book, with the result (which is common ground) that the award has never been registered at all.

In January, 1931, the respondent Het Lall applied, under paragraph 20 of schedule II of the Code of Civil Procedure, to the Subordinate Judge of Benares that the award be filed in Court, making the appellant and the other respondents parties as defendants to that application. Under paragraph 20 the application must be made to " any Court having jurisdiction over the subject matter of the award." The Subordinate Judge made the order; but on appeal to the High Court at Allahabad this order was reversed, as being made " without jurisdiction " on the ground that proceedings for filing the award could be instituted only in a Court within the local limits of whose jurisdiction the Raitar village was situated.

The respondent Het Lall then, on the 10th March, 1933, initiated the present proceedings in the form of a plaint before the Second Subordinate Judge of Patna, to which the appellant and the other respondents were joined as defendants, and by which he asked that the award be made a rule of Court and a decree passed on the basis of the award.

The Subordinate Judge dismissed the application; but on an appeal by the respondent Het Lall to the High Court at Patna, the order of the Subordinate Judge was set aside, and the award was ordered to be filed and made a decree of Court.

The point at issue on the appeal by the appellant to His Majesty in Council can now be stated.

It was contended by the appellant that upon its true construction the award was, within the meaning of section 17 (1) (*b*) of the Indian Registration Act, 1908, a non-testamentary instrument which purported or operated to create, declare assign limit or extinguish a right title or interest of the value of 100 rupees or upwards to or in immoveable property; and that since it had not been registered, then by section 49 of the same Act it was incapable of affecting the immoveable property in question or of being received in evidence of any transaction affecting that property, with the consequence that the award was incapable of being filed in Court and of having judgment pronounced and decree passed according to it.

The point, it will be noted, is whether upon its true construction that part of the award which deals with the village Raitar falls within the description of non-testamentary instruments contained in section 17 (1) (*b*) of the Registration Act. Sections 17 (1) (*b*) and 49 of that Act are framed thus:—

> "17.—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—
>
> * * * * * *
>
> (*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property;
>
> 49. No document required by section 17 to be registered shall—
>
> (*a*) affect any immoveable property comprised therein, or
>
> (*b*) confer any power to adopt, or
>
> (*c*) be received as evidence of any transaction affecting such property or conferring such power,
>
> unless it has been registered."

The question resolves itself into this:—whether by the last sentence of paragraph 2 of the award the arbitrators purport to confer upon "the second party" a right title or interest to or in one-half of the village, which commences with the award and comes to an end when the sum of Rs.61,400 with interest has been paid, or whether they intend merely to provide that the *status quo* (i.e., the contractual interest which arose from the exercise of the option) should remain unaltered until the Rs.61,400 and interest had been paid.

In their Lordships' opinion the latter is the true view. The sentence is not framed as one which purports to create

or confer an interest. It is framed on the assumption that an interest is already in existence, and provides that that existence shall not cease until a specified event has happened. It is true that the interest is called "ownership", while the existing interest of the second party was merely contractual, but the arbitrators were not lawyers but laymen, to whom the rights in respect of the village which were being exchanged or released for cash, might well appear to be not inaccurately described as an ownership which was not to cease until the cash was paid. However that may be, the mere use of the word "ownership" cannot in their Lordships' opinion outweigh the consideration that the whole wording of the sentence points to the continuance of a *status quo,* and not to the creation of a new condition of affairs.

The award did not purport or operate to create, declare or assign any right title or interest in the village, and therefore did not require registration under the Act.

A further contention, however, was raised by the appellant, of this nature. Assuming, it was argued, that upon its true construction the award did not purport or operate to create, declare or assign a right title or interest in the village, nevertheless as between the appellant and respondents it must be taken that it did, because the matter of the true construction of the award was *res judicata* between them.

The foundation for this argument is the decision before referred to of the Allahabad High Court, that the Courts of that Province had no jurisdiction over the subject matter of the award within the meaning of paragraph 20 of schedule II of the Code of Civil Procedure. Undoubtedly in order to test whether the Benares Court had jurisdiction to order the filing of the award, the Judges applied the test whether it would have had jurisdiction to try a suit in which the relief claimed was the relief granted by the award. For the purpose of this test, they construed the award as an award which "did determine that the heirs of Ishwari Prasad had a legal title to half share in the Raitar property which they were entitled to retain until the receipt of specified sums of money"; and they held that just as the Benares Court would have had no jurisdiction to try a suit claiming that relief, since the village was outside the local limits of its jurisdiction, so it had no jurisdiction to order the filing of the award.

It must, however, be borne in mind that the construction of the award was not an issue in the proceedings; it was merely a ground upon which the Court based their decision upon the question which was the issue between the parties, viz., whether the Benares Court had jurisdiction to order that the award be filed and be made an order of Court.

No case for holding that the matter of the construction of the award is *res judicata* between the appellant and respondents can be based upon section 11 of the Code of

Civil Procedure. Indeed this was conceded by counsel for the appellant, who based his case in this regard upon what he termed the general principles of *res judicata*. But it is difficult to see how those general principles can be applicable to the facts of the present case. The *res judicata* here was the lack of jurisdiction of the Subordinate Judge of Benares and of the High Court at Allahabad on appeal therefrom—not the reason for that decision. A Court which declines jurisdiction cannot bind the parties by its reasons for declining jurisdiction: such reasons are not decisions, and are certainly not decisions by a Court of competent jurisdiction. It would indeed be strange if on a dispute as to the jurisdiction of a Court to try an issue, that Court by its reasons for holding that it had no jurisdiction, could, upon the principle of *res judicata*, decide and bind the parties upon the very issue which it was incompetent to try.

For the reasons indicated their Lordships are of opinion that this appeal fails and should be dismissed. They will humbly so advise His Majesty.

The appellant will pay the costs of the appeal.

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In the Privy Council

UPENDRA NATH BOSE

v.

LALL AND OTHERS

DELIVERED BY LORD RUSSELL OF KILLOWEN

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