Privy Council Appeal No. 11 *of* 1951

Opanin Asong Kwasi and others - - - - - - *Appellants*

v.

Joseph Richard Obuadabang Larbi - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH NOVEMBER, 1952

Present at the Hearing:

LORD NORMAND

LORD MACDERMOTT

LORD COHEN

[*Delivered by* LORD NORMAND]

This is an appeal from a judgment of the West African Court of Appeal, allowing an appeal by the respondent from a judgment of the Supreme Court of the Gold Coast, Eastern Judicial Division, Land Court, which had affirmed, with a minor variation, a judgment of the Native Appeal Court of Akyem Abuakwa, allowing an appeal from the Native Court "B" Adonten, Akyem Abuakwa. The effect of the judgment appealed against is to restore the judgment of the Native Court "B".

The subject matter of the suit is the title to a parcel of land at Mfrano near Anum Apapam in the Akim Abuakwa District. But the appeal is only indirectly concerned with the merits of the dispute. There are two issues presented for decision: first, the nature and effect of proceedings, described as an arbitration in the Record, which took place while the suit was pending in Native Court "B"; and second, the question whether the Native Appeal Court, Kibi, was a court regularly and properly constituted. This latter issue was raised by the respondent's counsel, who was allowed to address argument upon it to their Lordships, as it goes to jurisdiction, though it is not properly raised in his Case. He maintained that the Native Appeal Court was not lawfully constituted and therefore that all the proceedings subsequent to the judgment of the Native Court "B" were null.

This is a preliminary issue which must be decided before entering upon the first issue, the nature and effect of the so called arbitration proceedings. It can fortunately be disposed of without considering the circumstances of the particular suit in which it has arisen. It depends upon the construction of section 3 of the Native Courts (Colony) Ordinance 1944, which reads as follows:—

> "The Governor in Council may by order provide for the constitution of Native Courts which shall exercise jurisdiction in accordance with this Ordinance within such area as may be defined in the order and may by the same or a subsequent order authorise a Native Court to sit as a Native Appeal Court: and any such order shall assign to any Native Court thereby constituted such name as the Governor may think fit."

The term " Native Court " is defined by section 2 and it includes a Native Appeal Court unless the context otherwise requires. The Native Appeal Court in question was instituted by Order No. 17 of 1945 as a Native Appeal Court without jurisdiction as a court of first instance. The respondent's contention is that it was incompetent for the Governor-in-Council to proceed in this manner, and that the only competent mode of creating a Native Appeal Court was to create a Native Court of first instance, and then to confer appellate jurisdiction upon it either by the same or by a subsequent order. This point was taken for the first time in the West African Court of Appeal. The learned President in his judgment says that he was inclined to think that there was substance in the respondent's submission, but that it was unnecessary for him to decide it.

In their Lordships' view the respondent's reading of section 3 is too narrow. The section is not artistically drawn, but it contains nothing which requires that the words " Native Courts " should not include Native Appeal Courts. If so, it is competent by order to constitute a Native Court having only appellate jurisdiction, though it is also competent to constitute a Native Court of first instance and confer appellate jurisdiction upon it by the same or a subsequent order. By subsequent provisions of the Ordinance (section 13) Native Courts having jurisdiction as courts of first instance must be graded as A, B, C or D courts, but this has no application to a Native Court having only appellate jurisdiction. The respondent's submission on this head accordingly fails.

Their Lordships therefore turn to the first issue, the nature and effect of the so called arbitration proceedings.

The suit was brought in the Native Court " B " of Adonten, Akyem Abuakwa by the respondent and by one Kwasi Prince. Kwasi Prince, however, is now said to have died before the action was begun and the present respondent was in fact the sole plaintiff. He claimed against the present appellants a declaration of title to certain land and an injunction. The case came before the Court for hearing on the 27th October, 1947. What then took place is narrated in the " Findings of Special Arbitration " which subsequently came before Native Court " B ". The facts stated in the findings, it should be noted, were not challenged by the appellants. The document bears that at the hearing a representation of the Odikro of Apapam and his Elders appeared and offered " to withdraw the said action from the Native Court " B " of Kukurantumi for arbitration ". It was then " mutually agreed upon by both parties to submit the dispute to arbitration by a panel of Elders of Apapam ". The arbitration court comprised eleven persons of whom four were Stool Holders. The sum of five shillings was paid by Opanin Adu, one of the Stool Holders, as an adjournment fee and the sum of sixteen shillings was paid by each of the parties to signify their consent to refer the matter to the arbitrators. The court then adjourned the case.

The arbitration proceedings also are fully described in the " Findings of Special Arbitration " which is subscribed by " Opanyin Kwami Ayim President, Arbitration Panel of Apapam Elders ". It is a formal document setting out the proceedings with great clearness and considerable detail. It appears from it that the case was duly called for hearing on the 5th November, 1947, when both parties were present. Every effort was made by the arbitrators to give each side the fullest opportunity to state its case thoroughly and to call witnesses. There are findings which summarise the evidence with comments upon the value of some of the testimony offered. The document then states that after hearing all the relevant statements on both sides and their witnesses and thoroughly satisfying themselves through cross-examinations the arbitrators decided to send messengers to view the land under dispute. Both parties were asked to pay an advance of £12, which they paid. The messengers were appointed and a date for viewing the land was fixed and both parties were asked to meet the messengers on the spot and agreed to do so. The viewing party met both parties on the land but the appellants refused to show their boundaries. The respondent

on the other hand took the party to the land and pointed out the boundaries. After viewing the land the messengers instructed both parties to appear before the arbitrators at Apapam on the 18th November, 1947. At this sitting of the arbitrators the respondent was present but the appellants absented themselves and sent a letter intimating their decision to dissociate themselves from the arbitration and demanding a refund of the £12 advanced by them. It is not clear whether this sum was in fact refunded but their Lordships do not consider that this is a material point.

The arbitrators considered the questions before them. After a long discussion they decided " to break the last minute deadlock created by the defendants [the appellants] to brush aside their objections and to proceed with the case." They then gave their decision in favour of the respondent.

The case again came before the Native Court " B " on the 9th and 10th August, 1948. The respondent moved the court to enforce the arbitration award, but the appellants objected, partly on the technical ground that no record of the arbitration proceedings had been taken, and partly on the ground that they had withdrawn from the arbitration. The court ruled that the award should be accepted as the judgment of the court. It prefaced its ruling by narrating that the Opanin Yaw Adu on behalf of the Odikro of Apapam and his Elders had at the first hearing " submitted to withdraw the case for settlement " that the parties had agreed and the case was adjourned with their consent, and that the Elders of Apapam had held an arbitration.

The appellants' submission to their Lordships is that the court had erred and the submission was supported on alternative grounds: (*a*) that the so called arbitration was not an arbitration as understood in British jurisprudence but merely an attempt to arrive at a settlement agreed by the parties with the aid and active intervention of the Elders ; (*b*) that even if the proceedings were of the nature of arbitration and not of negotiations yet either party was entitled to resile at least till the date when the award was made. These matters are, it is agreed, questions of native customary law. It is therefore embarrassing to find that while Native Court " B " decided in favour of the respondent this decision was reversed by the Native Appeal Court. Had the two courts agreed their Lordships would have been disposed to accept their ruling as an authoritative application of native customary law, which ought not to be overruled except for clear and convincing reasons. As it is, their Lordships must decide the disputed issues upon the material available in the case before them, without laying down general propositions as to native customary law, which might not consist with the results of a fuller enquiry than the scanty material in this case allows.

In the Native Appeal Court the president, having stated that the appellants objected to the award on the ground that they had not consented to it, observed somewhat ambiguously, as it appears to their Lordships, " so far as the defendants-appellants have consented to the award of the arbitration, they cannot extricate themselves from the arbitration award ". He then brushed aside a purely technical objection based on an error of date, and proceeded ' We find that there were many irregularities in the lower court in the procedure " ; but he specified only one irregularity, the adjournment of the case instead of striking it out for the arbitration. Finally he says that in the circumstances the appellants did not accept the award, and in order to avoid misunderstanding and multiplicity of actions there should be a retrial by Native Court " B ".

An appeal was taken by the respondent to the Land Court. The judgment of the learned judge in that court was that the Native Appeal Court was right in setting aside the judgment of the Native Court " B ", but he thought that the case should be retried by the Native Appeal Court with a different panel from that which heard the appeal.

In the respondent's appeal to the West African Court of Appeal, the learned President said that the first question to decide was whether the proceedings before the Elders amounted to an arbitration and whether the parties were bound by the award and that a perusal of the proceedings

had satisfied him that this was not a mere negotiation for a settlement but that it was a formal arbitration. He also noted the contention that the award was not under native customary law binding on the appellants since they withdrew from the proceedings at the time of the inspection of the land. He dismissed the contention, but unfortunately he based his decision mainly on precedents which dealt with the enforcement of awards in proceedings from which neither party had resiled before the award was made. Smith, Acting C.J., agreed with the President. He observed that he construed the judgment of the Native Appeal Court as meaning that since the case was not struck out but only adjourned it must be inferred that the proceedings in question had been merely a negotiation for a settlement. Lewey, J.A., also agreed with the President. He said that the Native Appeal Court seemed to him to have regarded the proceedings as of the nature of an arbitration, but had criticized the adjournment as an irregularity.

Their Lordships agree with the finding of the Court of Appeal that the proceedings before the Elders were of the nature of an arbitration and not merely of a negotiation for a settlement. The reasons can be briefly stated. The suggestion that the case should be brought before the Elders came, not from the parties themselves, but from the representatives of the Odikro, and the parties gave their consent. In native customary law the Elders have a recognized judicial function and are in fact a tribunal before which natives can bring their disputes for judicial decision. (Danquah. Akan Laws and Customs pp. 83 ff.) It seems to their Lordships improbable that the intervention of the Odikro and the Elders was for the purpose of aiding a settlement by negotiation rather than for the purpose of discharging a judicial function in the form of an arbitration. Secondly the proceedings before the Elders, as narrated in their findings, have no resemblance to negotiations for a settlement but have all the marks of a well conducted formal arbitration. Thirdly the Native Court " B " when the case again came before it treated the award as an award in an arbitration and acted upon it by giving judgment in accordance with it. They knew how and with what intention the proceedings had originated and they could not honestly have acted as they did if the proceedings had been for the purpose of facilitating a settlement. The fact that the case was adjourned is not in their Lordships' opinion inconsistent with this view of the proceedings ; it was indeed appropriate to adjourn rather than to strike out the action if only because the arbitration proceedings might for one reason or another have aborted. No authority was cited to support the appellants' contention that it is incompetent for the Native Court to adjourn with the consent of parties in order to allow the dispute to be determined by arbitration, and it would be unfortunate if so convenient a procedure were prohibited. Other criticisms of the procedure of the court were submitted by Counsel for the appellants. It was said that if the proceedings were of the nature of an arbitration the court ought not to have given judgment conform to the award, but ought at that stage at latest to have struck out the action leaving to the respondent the right to raise another action to enforce the award. Their Lordships are of opinion that there is no substance in this argument. The Native Court had authority under Regulation 40 of the Procedure Regulations of Native Courts made under section 70 of the Native Courts (Colony) Ordinance 1944 to make in its discretion any order within its powers and jurisdiction which it considered necessary for doing justice. The order made in the present case was an order within the court's powers and jurisdiction in an action for enforcement and under regulation 40 the court could competently pronounce the order in the pending case since that would at once do justice and avoid multiplicity of actions. It was further said that the court had refused to hear witnesses before giving judgment and that such a refusal might have resulted in shutting out objections to the award, as *ultra fines compromissi* or as being vitiated by the improper conduct of the arbitration, which could have been stated and heard in an independent action to enforce the award. The answer to this is that there never has been and there is not now any suggestion

that the arbitrators either exceeded the powers committed to them or acted otherwise than with exemplary probity. If objections of that sort had been stated it would of course have been the duty of the court to entertain them and to receive evidence in support of them, and there is no reason to suppose that they would have refused to do so. They did in fact hear a technical objection to the award, that no record had been made of the arbitration proceedings. This objection failed because evidence was immediately given that the minutes had in fact been recorded. Had other and more fundamental objections been put forward they would no doubt have been heard. But it was not the duty of the court to hear evidence which had been or which ought to have been led before the arbitrators.

All this is, of course, on the assumption that there was no right to resile from the arbitration before the award was made. If there is such a right it is clear that the appellants intended to exercise it and intimated their withdrawal from the arbitration proceedings to their opponent and to the arbitrators. The question is whether the native customary law recognises such a right. It is established that there is no such right after the award is made (*Ekua Ayafie and Kwamina Banyea* 1884 Fanti L.R. 38; *Ku'urka Yardom and Kurankyi Minta III* Gold Coast L.R. Full Court 1926-29 p. 76), but there is no authority on the question of the right to resile before the award. There is in the judgment of this Board in *Abotche Kponugio and Adja Kodadja* (2 West African C.A. Judgments 24 at p. 27) a single sentence which, divorced from its context, appears to support the appellants' proposition. But in that case, as appears from the judgment of the Supreme Court, there had been no binding arbitration, and no more than an attempt to arrive at a settlement. Moreover there was evidence that the alleged arbitrators had so conducted themselves that the party who claimed to have resiled would have had a plain right to do so even in an arbitration. Further the proceedings, such as they were, had in the end proved abortive. Considered in the light of these circumstances the observation founded on by the appellants affords no support to their contention. No positive assistance is to be found in any of the judgments in the present case but it is difficult to believe that if the right to resile exists it should not have been mentioned by any of the judges in any of the courts. Since it is established that the parties gave their consent to the submission of the dispute to the Elders without any express reservation of a right to resile, and since there is certainly no right to resile after the award is made, it is for the appellants to satisfy the Board that a right so contrary to the basic conception of arbitration is recognised by native customary law. In this they have failed.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. As the argument on section 3 of the Native Courts (Colony) Ordinance 1944 took only an insignificant part of the time occupied by the hearing, the appellants must bear the costs of the appeal.

(17419) Wt. 8076—1 100 12/52 D.L./P1/3

In the Privy Council

OPANIN ASONG KWASI AND OTHERS

v.

JOSEPH RICHARD OBUADABANG LARBI

DELIVERED BY LORD NORMAND

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1952