

Sm. Balika Devi And Anr. vs Kedar Nath Puri on 10 November, 1955

Equivalent citations: AIR1956ALL377, AIR 1956 ALLAHABAD 377

JUDGMENT

H.S. Chaturvedi, J.

1. This is a revision by Srimati Balika Devi and her son Ramesh Chandra arising out of proceedings instituted by Kedar Nath Puri under Section 8, Arbitration Act.

2. Learned counsel for the opposite party has raised a preliminary objection that no revision lies under the provisions of Section 115, Civil P. C. His contention is that the Arbitration Act makes provision for appeals only under Section 39 of the Act, and there being no provision for a revision, it should be inferred that the Legislature intended to exclude the operation of Section 115 to orders passed under the Arbitration Act.

We think that this contention is concluded I against the opposite party by decisions of this Court which are binding on us: 'Mt. Mariam v. Mt. Amina', AIR 1937 All 65 (FB) (A); 'Charan Das v. Gur Saran Das Kapur', AIR 1945 All 146 (B).

3. The facts which culminated in the filing of this revision may now be briefly stated: --

4. One Badri Nath Kochar was carrying on contract business in Kanpur. It is no longer disputed that in 1943 Badri Nath Kochar and Kedar Nath Puri, a resident of Lucknow, became partners in the contract business in Kanpur, Both of them executed a partnership deed on 18-7-1943 (vide Ex. 1). Initially, this partnership was confined to the business of the supply of bricks to a firm known as Messrs. Shapurji Palanji & Co., but it was provided in Clause 6 of the partnership deed that if any other work was undertaken in partnership, the same terms would continue to bind the two partners.

Under this agreement the two partners had equal shares in the profits and loss of the business and both of them were to invest money in the business. The supervision of the contract work and the employment and discharge of servants were entrusted to Badri Nath Kochar. The main clause with which we are concerned is Clause 12 of the agreement. This clause provided for the settlement of disputes by arbitration.

It was agreed between the two partners that if any disputes were to arise concerning the partnership business they would be referred to an arbitrator whose decision will be binding on the two partners. It appears that the partnership business was carried on in Kanpur after the execution of the aforesaid partnership deed.

5. On 1-7-1950, Badri Nath Kochar died leaving behind him his wife and minor son, the two applicants before us. Shortly after, Kedar Nath Puri (opposite party) went to Kanpur on a condolence visit, as the late Badri Nath Kochar was his maternal uncle. During his stay in Kanpur, Kedar Nath Puri broached the question about settlement of his claims against Badri Nath Kochar.

Shrimati Balika Devi pleaded ignorance of the transactions between her husband and Kedar Nath Puri, but on the intervention of some relations she agreed to refer all the disputes relating to claims put forward by Kedar Nath Puri to the arbitration of one Sri Vaish of Kanpur; & for that purpose Kedar Nath Puri and Shrimati Balika Devi executed a deed a reference on 16-11-1950. Shrimati Balika Devi signed the deed both in her personal capacity and as the natural guardian of her minor son. The agreement specified the disputes between the parties.

One of the disputes related to the rendition of accounts in respect of four partnership contracts detailed in the agreement. The second dispute was in respect of two sums, viz. Rs. 14,000/- and Rs. 1,500/- which were alleged to have been advanced by Kedar Nath Puri to Badri Nath Kochar for investment in the partnership business. And the third item of dispute was the claim of Kedar Nath Puri to recover Rs. 4,000/- and Rs. 17,000/- paid by Kedar Nath Puri to certain persons under directions from Badri Nath Kochar in the year 1947.

6. Sri Vaish entered on the reference ' and proceedings before him continued for a long time. He was allowed extension from time to time by the Court but ultimately he refused to give an award. Thereupon Kedar Nath Puri gave a notice to Shrimati Balika Devi telling her that as Sri Vaish had refused to give an award it was desirable that parties should appoint another arbitrator to settle their disputes.

In that notice Kedar Nath Puri suggested the name of one D. P. Halwasiya of Lucknow. Shrimati Balika Devi refused to accede to the request of Kedar Nath Puri. Thereafter Kedar Nath Puri made an application under Section 8, Arbitration Act and requested the Court to appoint an arbitrator for the settlement of the disputes. This application was registered as Suit No. 17 of 1952. In this suit the plaintiff claimed the appointment of an arbitrator under the agreement executed on 16-11-1950 (Ex. 2), and, in the alternative, under the arbitration Clause 12 of the partnership deed.

7. The suit was contested by both the defendants and they filed separate written statements. Both of them challenged the validity of the agreement (Ex. 2) on the ground that it had been executed under undue influence. Ramesh Chandra, who was a minor at the time of the execution of this agreement, also contended that he was not bound by the agreement executed by his mother, as the agreement was not for his benefit.

Both of them questioned the maintainability of the application under Section 8, Arbitration Act on the ground that there were no subsisting disputes between the parties which could be referred to arbitration. It was also contended that the matter of appointment of an arbitrator under Section 8, Arbitration Act being discretionary this was a case in which the Court should not exercise Ha discretion in -favour of the plaintiff.

8. Ramesh Chandra also filed an application under Section 33, Arbitration Act alleging that the agreement dated 16-11-1950, executed by his mother was a document unenforceable at law and that he was not bound by it. This application was registered as Suit No. 70 of 1952, and in it Kedar Nath Puri was arrayed as defendant. He, however, maintained that the agreement dated 16-11-1950, (Ex. 2) was binding upon the minor.

9. Both the above suits were originally tried by Shri R. A. Qureshi, Civil Judge of Mohanlalganj, who decreed the suit of Kedar Nath Puri and appointed a local lawyer as arbitrator for the settlement of the disputes enumerated in Ex. 2. The other suit filed by Ramesh Chandra was dismissed and his objection that he was not bound by Ex. 2 was overruled. A revision was filed against that order, which came up for decision before a Bench of which one of us was a party. (Vide Section 115 Appln. No. 115 of 1953, 26-8-1953 (All) (C)).

The revision was allowed, as in the opinion of this Court the question of the benefit of the minor had not been properly considered by the trial Court. The result was that the orders of Sri Quraishi in the two suits were set aside and the case was sent back for disposal in accordance with law.

10. The two cases were heard afresh by the Civil Judge of Lucknow. His finding in both the cases is that the agreement executed by Shrimati Balika Devi on 16-11-1950, on behalf of the minor was not executed for the latter's benefit and that document cannot therefore be enforced.

The Court below has, however, relying upon the arbitration Clause 12 of Ex. 1, held that under 3. 8, Arbitration Act Kedar Nath Puri is entitled to claim the appointment of an arbitrator to settle the partnership disputes between the parties. According to his finding, the reference to arbitration was to be made in respect of two disputes only, i.e. (1) the dispute relating to accounting in respect of four contracts, and (2) the dispute relating to the claim of the plaintiff for the recovery of Rs. 14,000/- and Rs. 1,500/- which, according to the plaintiff, he had handed over to Badri Nath Kochar for the purpose of partnership business on 4-8-1946, and April 1947 respectively. ' The Court below has held that no reference could be made with regard to the claim .of the plaintiff in respect of the two sums of money, viz., Rs. 4,000/- and Rs. 17,000/-, as these sums had no concern with the partnership business.

11. The finding of the Court below that Ex, 2 does not operate as a valid deed of reference is no longer disputed. The other finding of the Court which is not challenged before us is that on the basis of the arbitration Clause 12 of Ex. 1 no reference can be made in respect of two sums, that is Rs. 4,000/- and Rs. 17,000/- which Kedar Nath Puri claims to have advanced to Badri Nath Kochar as these advances had nothing to do with partnership business.

12. The main question that falls for determination is whether the Court below has acted with material irregularity in appointing an arbitrator under Section 8, Arbitration Act, which runs thus:

"8. (1) In any of the following cases: --

(a) Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen concur in the appointment or appointments, or

(b) If any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties or the arbitrators, as the case may be, do not supply the vacancy, or

(c) Where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators as the case may be with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court, may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard appoint an arbitrator or arbitrators or umpire as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

13. Sub-clause (c) of Section 8(1) has no application as it contemplates a case in which an umpire has to be appointed by the parties but they have failed to do so, Sub-clause (b) provides for filling up a vacancy in the office of an arbitrator who, for any of the reasons enumerated in the-section, is not available to discharge the functions of an arbitrator.

Sri Vaish was no doubt appointed an arbitrator under Ex. 2 but no question of filling up his vacancy arises in view of the finding of the Court below that Ex. 2 does not operate as a valid deed of reference. Sub-clause (b) also does not, therefore, apply.

14. Clause (1) (a) will apply to a case where, according to the arbitration agreement, an arbitrator is to be appointed by the parties to the agreement, jointly but they are unable to agree between themselves to name a person. This sub-clause is applicable to the arbitration Clause 12 of the partnership deed if the various conditions mentioned therein are satisfied. We shall now proceed to consider the various points raised by learned counsel for the applicants in support of his contention that sub-Clause (a) to Clause (1) is not applicable to arbitration Clause 12 of Ex. 1.

15. It was urged that the arbitration Clause 12 of Ex. 1 was binding only on the signatories to Ex. 1, that is Badri Nath Kochar and Kedar Nath Puri, and that on the death of Badri Nath Kochar the arbitration clause could not be enforced against his legal representatives, that is the applicants. We do not find any substance in this-contention for reasons given below.

16. Section 2(a), Arbitration Act defines arbitration agreement thus: --

" 'Arbitration agreement' means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not."

In view of this provision of law it was open, to the two parties to the partnership agreement, Ex, 1, to agree to have their future differences settled - through a domestic tribunal and for that purpose Clause 12 was inserted in the partnership deed. This arbitration clause was no doubt binding upon the parties to Ex. 1, that is Badri Nath Kochar and Kedar Nath Puri.

The question is whether the death of Badri Nath Kochar make any difference. The argument is that the arbitration clause does not bind the legal representatives of Badri Nath Kochar, that is the applicants. This argument is met. by Section 6, Arbitration Act. It is as, follows: --

"6. (1) An arbitration agreement shall not be discharged by the death of any parties thereto, either as respects the deceased or any other 'party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by Whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person."

Section 6 has been enacted with the avowed object of keeping arbitration agreements alive even after the death of the signatories to the agreement. The death of one party will not operate as revocation of the agreement and it will be enforceable by or against the legal representatives of the deceased party, provided however that the right to sue or be sued survives.

We are, therefore, of opinion that the arbitration Clause 12 of the deed of partnership did not expire on the death of Badri Nath Kochar and that it can be validly enforced against Shrimati Balika Devi and Ramesh Chandra, who are the legal representatives of Badri Nath Kochar.

17. Learned counsel for the applicants relied upon the case of -- 'Dawoodbhai Abdulkader v. Abdulkader Ismailji', AIR 1931 Bom 164 (D), for the proposition that the existence of a difference or dispute is an essential condition for the arbitrator's jurisdiction. This proposition of law cannot be disputed, as Section 8, Arbitration Act will not be attracted unless there is some difference or dispute between the parties to the' reference.

In the case cited a chamber summons was taken out by the defendants for an order that all further proceedings in a suit pending in the lower Court may be stayed in order to enable the parties to refer the matter in dispute to arbitration under an agreement. It was noticed that even in the affidavit, which had been filed in support of the summons, the matter in dispute had not been set out nor explained. It was in those circumstances that the prayer for appointment of an arbitrator was refused. In our opinion, the facts of that case bear little resemblance to the facts of the case before us.

18. It is true that Section 8 will be attracted only if differences or disputes have arisen between the parties. 'Such differences should exist at the time when the Court makes the order under Section 8. The question before us is whether such differences or disputes did really exist or not. We have been referred to a letter from Badri Nath Kochar dated 1-8-1948, (Ex. 15) to Kedar Nath Puri.

In this letter Badri Nath Kochar expressed his anxiety about the settlement of his partnership accounts. He pointed out that the question of the payment of the dues of Kedar Nath Puri -after accounting was engaging his attention. He further pointed out various difficulties in his way in settling the accounts promptly. In the end, he expressed himself by saying that he had made some plans for payment of the dues of Kedar Nath Puri and he further assured the latter that whatever sum was found due after accounting shall be paid.

This letter does indicate that even in the lifetime of Badri Nath Kochar, Kedar Nath Puri was anxious for an early settlement of his accounts and for payment of the sums that were found due to him on accounting. It is not pretended that any accounts had been settled by Badri Nath Kochar before his death. It is, therefore, not unnatural that on the death of Badri Nath Kochar Kedar Nath Puri lost no time in demanding the settlement of those partnership accounts.

It was because of the existence of disputes that Shrimati Balika Devi executed the agreement, Ex. 2. The position in 1950 was that while Kedar Nath Puri was claiming the settlement of his partnership accounts, the legal representatives of Badri Nath Kochar were disputing the very existence of the partnership business. In these circumstances, it is idle to contend that there was no difference in existence.

19. It was next argued that the partnership accounts had been settled long ago, and consequently no dispute remained for settlement. Reliance was placed on an assessment order (Ex. A-2) in which the Income-tax Officer remarked that the firm did business till 31-12-1946 and was dissolved thereafter. The comment of the Court below -- with which we agree -- was that there was nothing to show from what source the Income-tax Officer derived that information and no Weight could be attached to this remark.

We have already referred to a letter of Badri Nath Kochar dated 1-8-1948 (Ex. 15), in which he had pointedly mentioned that the settlement of partnership accounts was yet to be done. The Court below further noticed that while the plaintiff in his evidence stated that the partnership business continued till the death of Badri Nath Kochar and that no accounts had been settled, Shrimati Balika Devi, defendant 1, on the other hand, did not rebut that part of the evidence.

There is another letter (Ex. 16) written by Badri Nath Kochar to the plaintiff on 25-8-1948, in which the former mentioned that he was making all efforts to acquire fresh contracts in connection with the partnership business. After considering the entire evidence the Court below came to the conclusion that the partnership business continued up to the time of the death of Badri Nath Kochar and that the disputes about the settlement of partnership accounts were never settled.

The question whether or not there was a bona fide dispute between the parties was a question of fact, and the Court below on being satisfied that there were real differences in existence between the parties has proceeded to take action under Section 8. The decision of the Court below on a question of fact cannot be challenged in revision. .

20. In view of what we have mentioned above, we are satisfied that substantial differences had arisen between the parties about the settlement of partnership accounts so as to attract the provisions of Section 8, Arbitration Act, All the conditions necessary to attract Clause 1 (a) of Section 8 are present. The arbitration agreement is contained in Clause 12 of the partnership deed which is binding on the opposite party.

The Court below has found that owing to the existence of disputes relating to the partnership" business it is necessary to give effect to the arbitration clause. It is also proved that a notice in terms of Clause (2) of Section 8 was served upon Balika Devi who failed to concur in the appointment of a common arbitrator. All conditions having been fulfilled, the Court below was justified in appointing an arbitrator under the provisions of Section 8.

21. The next argument of the learned counsel for the applicant namely that the opposite party never claimed the appointment of an arbitrator under Clause 12 of the partnership deed, has no force. Both in his application to Court and in the notice served on Balika Devi, Kedar Nath Puri had made pointed reference to the arbitration clause of the partnership deed.

It seems to us that Kedar Nath Puri wanted to enforce the agreement, Ex. 2, in the first instance, and in the alternative he was relying on the arbitration clause of Ex. 1. In view of the finding of the Court below that Ex. 2 was not enforceable as a deed of reference, it was open to Kedar Nath Puri to claim the appointment of an arbitrator under Clause 12 of Ex. 1, & the Court below was justified in enforcing this clause.

22. Learned counsel for the applicants has invoked the provision of Clause 3 of Section 6 to show that the claim of Kedar Nath Puri for appointment of an arbitrator lapsed with the death of Badri Nath Kochar. There is some confusion of thought in this argument. Clause (3) of Section 6 is founded upon the well known maxim *actio personalia moritur cum persona* : which means that a personal right of action dies with the person.

It is obvious that Clause (3) refers to actions in torts where the right claimed by a person against a tort-feasor does not survive after his death. The rights and liabilities to which Badri Nath Kochar was subject in respect of partnership business have survived to his legal representative and therefore Clause (3) of Section 6 does not come into play at all. The arguments based upon the two cases cited, i.e. -- '*Karri Venkayamma v. Goluguri Tirapayya*', (S) AIR 1955 Mad 32 (E), and -- '*Kumeda Charan Bala v. Ashutosh Chattopadhyaya*', 17 Cal WN 5 (F), that Kedar Nath Puri is not entitled to ask the legal representatives to render accounts of the partnership business has nothing to do with Clause (3) of Section 6, Arbitration Act. It will be a matter for the arbitrator to decide whether or not this part of Kedar Nath Puri's claim can be enforced.

We, would, however, point out that the arbitration Clause 12 of Ex. 1 covers all sorts of disputes relating to the partnership business. The fact that Kedar Nath Puri is not entitled to ask the applicants to render accounts does not mean that Kedar Nath Puri cannot claim the settlement of his partnership accounts and other allied differences concerning the partnership business. All these questions will have to be considered by the arbitrator and it will not be right to express any opinion at this stage.

23. The next argument of the learned counsel for the applicants was that the application of Kedar Nath Puri for appointment of an arbitrator under Section 8, Arbitration Act was misconceived and that the application should have been made under Section 20 of the Act. In making this submission the following passage from the Judgment of the Supreme Court in -- 'Thawardas Pherumal v. Union of India, (S) AIR 1955 SO 468 at p. 474 (H) was quoted:

"A reference requires the assent of 'both' sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court under Section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under Sub-section (4)."

In that case, a reference to arbitration had been made under the arbitration clause of the agreement between a contractor and the Government. Under the agreement all disputes between the contractor and the Government arising out of or relating to a contract were to be referred to the Superintending Engineer of the circle. The contract was for the supply of 21/2 crores of pucca bricks.

The Government had stipulated to remove pucca bricks as soon as they were fully baked, but this stipulation was not carried out with the result that a large number of kachcha bricks were destroyed by rain. The contractor claimed the price of the kachcha bricks which had been destroyed. The reference to the Superintending Engineer was made without the intervention of the Court. The arbitrator gave his award in favour of the contractor who then applied to Court for confirmation of the award.

The Central Government filed objections under Section 30, Arbitration Act. The arbitrator had, on a question of law, found that the Government was liable to make good the loss to the contractor because baked bricks had not been removed promptly from the kiln. The Union Government had relied upon Clause 6 of the agreement which provided that the department will not entertain any claim for idle labour or for damage to unburnt bricks 'due to any cause whatsoever'.

The question of law was whether the contractor could be tied down to Clause 6 of the agreement. The arbitrator had held that Clause 6 of the agreement did not prevent the contractor from claiming loss. This view of the arbitrator was found to be bad in law by the Supreme Court.

It was in this context that their Lordships of the Supreme Court pointed out that if the particular point of law that arose in the case had been referred to the arbitrator by the parties for his decision, the position might have been different. But as no recourse had been taken to Section 20, Arbitration

Act for that purpose, it was open to the Court to consider whether the award was vitiated by an error of law apparent on the face of it.

The above observation has no relevancy to the case before us. Under the scheme of the Arbitration Act, Section 8 occurs in Chap. II of which the heading is "Arbitration without intervention of a Court", while Section 20 falls in Chap. III of which the heading is "Arbitration with the intervention of the Court where there is no suit pending".

Since the applicants had refused to concur in the appointment of an arbitrator under Clause 12 of Ex. 1, Kedar Nath Puri had the option either to move the Court under Section 8, Arbitration Act or under Section 20 of the Act. There is nothing, in Section 20 to compel Kedar Nath Puri not to take recourse to Section 8 of the Act. It was Kedar Nath Puri's concern whether to apply under Section 8 or under Section 20 and his application under Section 8 cannot in our opinion be rejected merely on the ground that Section 20 was perhaps more appropriate.

If a relief can be given under Section 8, it will be available to him. We are, therefore, satisfied that Section 20, Arbitration Act does not stand in the way of Kedar Nath Puri maintaining an application under Section 8, Arbitration Act.

24. Learned counsel for the applicants has next argued that no reference to arbitration can be made on the basis of the arbitration Clause 12 of Ex. 1 because the agreement does not specify precisely the points in dispute.

In support of this argument reliance has been placed on the case of -- 'Kunwar Puran Singh v. Mt. Bahal Kunwar', AIR 1930 All 319 (2) (H) where it was remarked that an agreement for reference to arbitration should clearly set forth the points in difference between the parties on which the arbitrators are required to arbitrate and that such points should be set forth clearly in the form of issues.

These observations were made in a case which had been decided on merits, by the trial Judge and a reference to arbitration was made at the stage of appeal. The trial Court had given his findings on the issues that arose in the case and the parties knew what those issues were in the case when they agreed to make the reference.

Bennet, J. pointed out that the words of the agreement were extremely vague and 'were not at all in accordance with paragraph 1, Schedule II, Civil P. C. It is significant that although the reference was held to be 'vague', the award was not set aside in its entirety. Only that portion of the award which decided on matters between the defendants inter se was set aside on the ground that those matters were not the subject matter -of the suit.

The observation that points in difference should be specified in the form of issues should be confined to the facts of that particular case. In our opinion this case is distinguishable and does not apply to the facts before us.

25. We have mentioned above that the definition of 'arbitration agreement' as given in the Act makes it clear that future differences can form the basis of an agreement to refer those disputes, as and when they arise, to an arbitrator. Parties to such an arbitration clause cannot predict as to what the actual point of difference would arise between them at some later stage.

All that they can do is to prescribe the limits by mentioning the nature of disputes which will be referable to a domestic tribunal. What is necessary is that the subject-matter of reference should be clearly defined so that the arbitrator may be in a position to know that he has to decide only those disputes which appertain to the subject-matter of reference.

Judged by this test, the arbitration Clause 12 of Ex. 1 is quite specific. It lays down that all matters arising out of or incidental to partnership business of the two partners shall be referred to an arbitrator. The arbitrator will be in a position to know that he has to decide only those matters in dispute which relate to partnership business.

It will be for the arbitrator to ascertain the points in issue when he proceeds with the reference. And for that purpose the arbitrator can order the parties to define the matter in controversy by delivering to each other points of claim and defence. We are, therefore, satisfied that the arbitration Clause 12 of Ex. 1 affords a good basis for making a reference.

26. The last contention of learned counsel for the applicants was that the Court below was wrong in holding that the two items, namely Rs. 14,000 and Rs. 1,500, formed part of the partnership business. Kedar Nath Puri has claimed that he advanced these two sums to his partner Badri Nath Kochar for investment in the partnership business but the two sums were used by Badri Nath Kochar for his personal purposes.

The Court below has held that these two sums should be treated as sums advanced for partnership business. We are of opinion that this question should be left open for the arbitrator to decide. We think that in view of Clause 12 of the partnership deed, Ex. 1, the claim of Kedar Nath Puri in respect of these two items will be a proper matter for reference and it will be for the arbitrator to decide whether or not these sums could be taken into consideration in settling the partnership accounts. We might usefully refer to the following observation of Broadway, J., which we approve, in -- 'Agya Singh v. Sundar Singh', AIR 1928 Lah 137 (I).

"In order to arrive at a proper settlement of the partnership accounts it seems to me that it was necessary for the arbitrator to ascertain first what the assets and liabilities of the partnership actually were, and in order to discover this it was obviously necessary for him to decide any dispute that might arise during the course of his investigation into the partnership affairs as to whether or not any particular contract or property belonged to and formed part of the partnership assets."

27. For reasons given above we do not find any substance in the revision which is dismissed with costs.