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No. 11 of 1951.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR WESTERN AFRICA.

BETWEEN

1. OPANIN ASONG KWASI
2. ODAME KWASI
3. OBESE KWASI (Defendants) . . . . *Appellants*

AND

JOSEPH RICHARD OBUADABANG LARBI
(Plaintiff) . . . . . *Respondent.*

CASE ON BEHALF OF THE APPELLANTS

RECORD.

1. This is an Appeal from a judgment of the Court of Appeal for Western Africa, dated the 1st day of June, 1950, allowing an appeal by the Respondent and one Kwasi Prince from a judgment of the Supreme Court of the Gold Coast, Eastern Judicial Division, Land Court, dated the 10th day of June, 1949, and restoring a judgment of the Native Court "B," of Adonten, Akyem Abuakwa, Gold Coast Colony, dated the 10th day of August, 1948. The said judgment of the Supreme Court of the Gold Coast had varied a judgment of the Native Appeal Court, Kibi, dated the 23rd September, 1948, which had allowed an appeal from the said judgment of the Native Court "B" Adonten, Akyem Abuakwa. p. 20. p. 17. p. 8. p. 13.

2. The subject-matter of this Appeal is a certain parcel of land situate at Mfrano near Anum Apapam in the Akim Abuakwa District.

The suit giving rise to this Appeal was brought in the said Native Court "B" of Adonten, Akyem Abuakwa, by the Respondent and also nominally one Kwasi Prince (as to whose active participation in the suit it now seems there is considerable doubt) as joint successors to Kwaku Asagye, late of Larteh Ahenease (Deceased), against the Appellants for a declaration of title to the said land. p. 1. pp. 28–9.

Before the judgment of the Native Court "B" of Adonten, Akyem Abuakwa, was given, there was a reference of the dispute to the arbitration of a panel of Elders of Apapam who made an award in favour of the Plaintiffs, and the Order made by the Court was that the award of that arbitration should be accepted as judgment of the Court. pp. 2–6. p. 8.

CASE FOR THE APPELLANTS

3. The principal issues raised by this Appeal are as follows :—

(A) Whether the said Native Court had any jurisdiction to entertain the said suit.

(B) Whether the said Court had any power to refer the matters in dispute to arbitration.

(C) If it had any such power, whether it was open to the Court to refer the same to arbitration and then, after an award was made, to resume its own hearing of the case.

(D) Whether in any event the said Court had any power to enter judgment in accordance with the award.

(E) Whether the award was binding on the Appellants who objected to the arbitration before the same was concluded.

(F) Whether the Supreme Court of the Gold Coast and the Native Appeal Court, Kibi, were not right in ordering that the case should be re-tried.

4. On the 9th October, 1947, the Respondent and the said Kwasi Prince commenced

p. 1. THE PRESENT SUIT

in the Native Court " B " of Adonten, Akyem Abuakwa, Gold Coast Colony. The case came before the said Court for hearing on the p. 8, l. 23. 27th October, 1947, when a representative of the Odikro of Apapam and his Elders appeared and suggested that the action might be withdrawn with a view to arriving at a settlement. The hearing was then adjourned with the consent of the parties and the matter referred to a panel of Elders of Apapam.

5. The panel of Elders of Apapam accordingly began to investigate pp. 2–6. the matter. The panel is in the Record referred to as an arbitration court or panel and the proceedings before them as an arbitration. Before the p. 5, ll. 32, 40. proceedings were terminated the Appellants objected thereto and they p. 8. were concluded in their absence. The Arbitration Panel gave its decision p. 5, l. 37— on the 18th December, 1947, awarding the land to the Plaintiffs. p. 6, l. 20.

6. The suit was further heard in the Native Court " B " of Adonten pp. 6–8. on the 9th and 10th August, 1948, when, upon the application of the p. 8, ll. 40–41. Respondent, the Court ruled in the following terms " that the award of that arbitration should be accepted as judgment of this Court with costs to be taxed."

7. The Appellants appealed to the Native Appeal Court at Akyem p. 13. Abuakwa, Kibi. The appeal was heard on the 23rd day of September, 1948, pp. 13–14. when judgment was given allowing the appeal. The learned President, delivering the judgment of the Court, said—

p. 14, l. 21. " We find that there were many irregularities in the lower Court in the procedure of the above case. Instead of to strike out

the case for an arbitration, the Court rather adjourned it under Section 24 of the Native Courts (Procedure) Regulations No. 10 of 1945.

In the above circumstances, we find out that the Defendants-Appellants did not accept the award of the arbitration. In order to avoid misunderstanding and multiplicity of actions, the case should be sent to the lower Court for re-trial.

The appeal is allowed with no order as to costs, and the decision of the lower Court is set aside."

8. The Respondent and the said Kwasi Prince appealed to the Supreme Court of the Gold Coast, Eastern Judicial Division, Land Court.

The Appeal was heard on the 10th June, 1949, upon which day Quashie-Idun, J., delivering the judgment of the Court, affirmed the correctness of the Native Appeal Court's decision to set aside the judgment of the Native Court " B " of Adonten, Akyem Abuakwa, and accordingly dismissed the appeal, but varied the order of the Court below by ordering that the re-trial should be by the Native Appeal Court of Akyem Abuakwa. p. 17. p. 17.

9. The Respondent and the said Kwasi Prince thereupon appealed to the West African Court of Appeal. The appeal was heard on the 1st June, 1950, when the Court delivered judgment allowing the appeal and restoring the judgment of the Native Court " B " of Adonten, Akyem Abuakwa. The judgments delivered appear to have proceeded on the basis that despite irregularities in the hearing before the Native Court " B " of Adonten, Akyem Abuakwa, there was a valid arbitration award binding upon the parties. It was said by Blackall, P.— p. 19. pp. 20-23.

" It appears from the record that during the proceedings in the Native Court ' B ' the case was adjourned, and the parties attended before what is described as arbitration panel of elders. The first question for this Court to decide is whether those proceedings amounted to an arbitration and whether the parties were bound by the award. As to this, a perusal of the proceedings satisfies me that this was not a mere negotiation for a settlement; it was a formal arbitration. p. 20, l. 32— p. 21, l. 44.

It was contended, however, by Mr. Akufo Addo for the Respondents that the award was not binding under native customary law because at a certain stage, i.e., when the arbitrators went to inspect the land, the Defendants refused to point out their boundaries and withdrew from the proceedings.

Now the general principle governing arbitrations is well known, and it is set out *inter alia*, in the case of *Omanhene Kobina Foli* v. *Ohene Obeng Akese* (1 W.A.C.A.). In that case Deane, C.J., said—

' . . . in submissions to arbitration the general rule is that as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot when the award is good on its face, object to his decision, either upon the law or the facts.'

I might also refer to the case of *Ekua Ayafie* v. *Kwamina Banyea* (Sarbah's Fanti Law Reports, 2nd Edition, at p. 38) where it was held that where matters in difference between two parties are investigated at a meeting, and in accordance with customary law and general usage a decision is given, it is binding on the parties, and the Supreme Court will enforce such decision. In that case Bailey, C.J., said :—

> ' . . . after the arbitration was concluded, Defendant objected to the award, because it was against him. The Plaintiff no doubt, would have objected had the award been but this way.'

But notwithstanding that objection the Court held the award was a good one. Mr. Akufo Addo suggests that this case is distinguishable from the present one, because the Fanti law does not exactly agree in detail with Akan law. That is no doubt true, but the general principles of native customary law are based on reason and good sense and it would take a lot to convince me that Akan customary law is so repugnant to good sense as to allow the losing party to reject the decision of arbitrators to whom he had previously agreed.

Let us see then whether there is any cogent evidence in support of Mr. Akufo Addo's submission. I first look at the decision of Native Court ' B.' That Court had the arbitration award before it and was aware of the fact that the Defendants did not agree to it. But the Court nevertheless gave effect to the arbitration award. I infer from this that that Court did not hold the view that Akan law differs from Fanti law in this respect. Mr. Akufo Addo, however, argues that we must look at the judgment of the Native Court of Appeal, which he submits is in his favour.

Now the *ratio decidendi* of that judgment seems to have been that they found there were many irregularities in the procedure of the lower Court, for although they did say that ' in the above circumstances we find out that the Defendant-Appellants did not accept the award ' they proceeded, ' in order to avoid misunderstanding and multiplicity of actions, the case should be sent to the lower Court for re-trial.' That judgment in my opinion should not be construed as meaning that the Native Court of Appeal differed from the Native Court on the question of the binding validity of an arbitration award. In the result it seems to me that as there was a proper and valid arbitration both the learned Judge and the Native Appeal Court were wrong in ordering a re-trial and the award of the arbitrators should stand."

The question whether the trial court was justified in giving judgment in accordance with the award, or whether (if in fact there was a proper reference to arbitration) the court was any longer seised of the matter, does not appear to have been dealt with at all in the judgment of the learned President. It is however referred to by Smith, Acting C.J., in these terms :—

p. 22, l. 22. " . . . I understand their [i.e. the Native Court's] judgment to mean that because the case in the trial Court was adjourned and

not struck out when the matter was referred to the panel of Elders, the Appeal Court inferred from this that the reference was made in order that the Elders should negotiate a settlement and not that they should conduct an arbitration and make a binding award."

The point is thus dealt with by Lewey, J.A. :—

". . . The judgment of the Native Appeal Court contains a reference to irregularities in the proceedings in the Native Court 'B' in matters of procedure and goes on to say 'instead of to strike out the case for an arbitration the Court rather adjourned it under Section 24 of the Native Courts (Procedure) Regulations No. 10 of 1945.' This is a little obscure but it seems to me that the Appeal Court in fact accepted the validity of the proceedings, and confirmed that they were in the nature of an arbitration. They were, however, criticising the Native Court for merely adjourning the case instead of making an end of it in view of the arbitration proceedings." p. 22, l. 30.

10. Final leave to appeal to the Privy Council from the said judgment of the West African Court of Appeal was given on the 9th October, 1950. p. 29, l. 15.

11. The statutory provisions set out in the Annexure hereto are relevant to the matters arising in this Appeal.

12. Section 14 (1) of the Native Courts (Colony) Ordinance (No. 22 of 1944) provides that :—

"All land causes shall be tried and determined by a Native Court having jurisdiction over the area in which the land which is the subject matter of the dispute is situated."

The Native Court of Adonten, Akyem Abuakwa, is not a court having jurisdiction over the area of Apapam in which the land the subject matter of this dispute is situated. (Native Courts (Colony) (Constitution of Native Courts) (No. 2) Order 1945).

The Appellants accordingly submit that the said Native Court of Adonten, Akyem Abuakwa, had no jurisdiction to entertain this suit.

13. It is further submitted that the procedure adopted by the Native Court "B" of Adonten, Akyem Abuakwa, was wholly irregular and wrong. The Native Courts (Colony) Procedure Regulations, 1945, contain no provisions for the reference or submission to arbitration of any suit. The duty of the Court under the said Regulations is to consider and decide the matters brought before it, and, it is submitted, the Court could only be relieved of such duty by the conclusion or withdrawal of the case. Here the Court adjourned the proceedings, and the matters in issue were submitted to the decision of the panel of Elders of Apapam. The Court then delivered judgment in accordance with the said decision without ever having itself considered or decided any of the matters in issue.

14. The Native Courts (Colony) Procedure Regulations, 1945, contain no such provision for arbitration as appears in O. 51 of the Rules of the Supreme Court. However, if the procedure applicable to the native courts were similar to that laid down by O. 51 there would still be no

power to refer or submit the matters in issue to arbitration, but it would be the duty of the arbitrators fully to investigate such matters and then to make a final award which would itself be enforced as a judgment. Such a procedure was not followed in the present case.

15. The Appellants respectfully submit that their appeal should be allowed and the judgment of the Court of Appeal for Western Africa set aside for the following amongst other

REASONS

~~(1) Because the Native Court "B" of Adonten, Akyem Abuakwa, had no jurisdiction to entertain the suit.~~

(2) Because the said Native Court had no power to adjourn the hearing for the matters in suit to be submitted to arbitration.

(3) Because the matters in issue in the suit were not properly submitted to arbitration.

(4) Because the Native Court was not entitled to enter judgment in favour of the Plaintiffs without hearing the suit.

(5) Because the decision of the arbitrators was not binding on the Appellants.

(6) Because the Native Court was not entitled to enter judgment in accordance with the said decision of the Arbitrators.

(7) Because there were irregularities in the proceedings before the said Native Court.

(8) Because the judgments of the Native Appeal Court and of the Supreme Court correctly directed a re-trial on the matters in issue between the parties.

(9) Because, as was held by the Native Appeal Court, Kibi, which is the highest native court of Akyem Abuakwa, the decision of the arbitrators was not binding on the Appellants according to native customary law.

(10) Because the Appellants had been in possession of the land in question for thirty years.

(11) Because the judgment of the Court of Appeal for Western Africa was wrong.

PHINEAS QUASS.

ANNEXURE.

THE NATIVE COURTS (COLONY) ORDINANCE, 1944.

(No. 22 of 1944.)

3. 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.

14. (1) All land causes shall be tried and determined by a Native Court having jurisdiction over the area in which the land which is the subject-matter of the dispute is situated.

70. (1) The Governor may make regulations for carrying this Ordinance into effect.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may prescribe—

(*a*) the practice and procedure of Native Courts in their original jurisdiction ;

(*b*) the procedure relating to the swearing of witnesses ;

(*c*) the procedure relating to the remand of accused persons ;

(*d*) the procedure and practice relating to the institution, prosecution and hearing of appeals from Native Courts and Native Appeal Courts ;

(*e*) the procedure relating to civil causes ;

THE COURTS ORDINANCE.

(No. 7 of 1935.)

106. The provisions contained in the Second and Third Schedules shall in respect of the matters to which they extend regulate the proceedings in the Supreme Court and so far as is practicable and local circumstances permit in Courts other than the Supreme Court, but such provisions may be amended, altered, added to, or revoked by the same authority by which new Rules of Court may be made (as provided in section 107), and in the same manner.

THIRD SCHEDULE.

ORDER 51.

Reference to Arbitration.

Rule 1. If the parties to a suit are desirous that the matters in difference between them in the suit or any of such matters should be referred to the final decision of one or more arbitrator or arbitrators, they may apply to the Court at any time before final judgment for an order of reference ; and the Court may, on such application, make an order of reference accordingly.

Rule 14. If no application shall have been made to set aside the award, or to remit the same, or any of the matters referred, for reconsideration, or if the Court shall have refused any such application, either party may file the award in Court, and the award shall thereupon have the same force and effect for all purposes as a judgment.

THE NATIVE COURTS (COLONY) PROCEDURE REGULATIONS, 1945.

(No. 10 of 1945.)

Reg. 13. The hearing shall only be adjourned if the Native Court considers that there are good grounds for granting an adjournment, in which case the grounds shall be recorded.

Reg. 20. When the defendant or accused does not admit the liability or offence, the plaintiff or complainant as the case may be, shall open his case and produce his evidence.

Reg. 24. At any stage of any proceedings, the Native Court may of its own motion adjourn the hearing until such time as may be convenient. Any request by a party to a cause that an adjournment be granted shall be considered by the Native Court and refused unless there shall be payable by the party applying for the adjournment the fee prescribed for such adjournment.

THE NATIVE COURTS (COLONY) (CONSTITUTION OF NATIVE COURTS) ORDER, 1945.

(No. 20 of 1945.)

Section 2. (*a*) The Native Courts named in the first column of the Schedule to this Order are hereby constituted as Native Courts to exercise jurisdiction in the respective areas specified in the second column of the Schedule.

SCHEDULE.

NAME OF NATIVE COURT	AREA OF JURISDICTION	GRADE
Akyem Abuakwa Adonten	The Adonten Division of Akyem Abuakwa ..	B
Akyem Abuakwa Kibi ..	Kyebi Town and the lands attached to the Stools of Apapam, Afwenease, Adadientem, Afiesa, Tetteh, Pano, Potroase, Odumase and Wirenkyiren, all within the Akyem Abuakwa State.	D

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In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL FOR WESTERN AFRICA.

BETWEEN

1. OPANIN ASONG KWASI
2. ODAME KWASI
2. OBESE KWASI (Defendants)
Appellants

AND

JOSEPH RICHARD OBUADABANG LARBI (Plaintiff) *Respondent*

CASE ON BEHALF OF THE APPELLANTS

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