Ct. A. Ct. Nachiappa Chettiar and Others

Vs

Ct. A. Ct. Subramaniam Chettiar

Civil Appeals No. 112 to 116 of 55

(P. B. Gajendragadkar, K. Subha Rao, J. C. Shah JJ)

13.11.1959

JUDGEMENT

GAJENDRAGADKAR J. –

These five appeals arise from a pertition suit (O.S. No. 91 of 1941) field by the respondent Subramanian Chettiar against his brother Ct. A. Ct. Nachiyappa Chettiar and his four sons, applicant 1 to 5 respectively, in the court of the Subordinate Judge of Devakottai, and they have been brought to this Court with a certificate granted by the High Court of Madras under Art. 133 of the constitution. The principal appeal in this group is Civil Appeal No. 112 of 1955 and the questions which it raises for our decision relate to the validity of the award made by the arbitrators to whom the matters in dispute between the parties were referred pending the present-litigation. It would, however,be convenient at the outset to state broadly the material facts leading to the suit and indicated the genesis and nature of the five respective appeals.

The appellants and the respondent belong to the Nattukottai Chettiar community and their family which is affluent had extensive money-lending business in Burma. Chidambaram Chettiar, the father of Appellant 1 and the respondent, died on August 20, 1926. At the time of his death the respondent was an infant 6 years of age. Appellant I had already been associated with his father in the management of the business and on his father's death he became the manager of the family and took charge of its affairs and business. On September 6, 1941, the respondent gave notice to appellant 1 calling upon him to effect a partition and to render accounts of his management and the properties of the family. This demand was not complied with and so the respondent instituted the present suit on September 24, 1941.

According to the plaint the assets of the family consisted of immovable properties in india which was then described as British India and in Pudukottai, an Indian State. These consisted of Items Nos. 1 to 12 and Item No. 13 respectively in sch. 'A'. The jewels and moveables belonging to the family were set out in sch. 'B', Whereas two money-lending firms which the family owned and conducted at Minhla and Sitkwin in Burma were set out in schs. 'D' and 'E' respectively. The plaint further alleged that Chindambaram Chettiar had entered large amounts belonging to the family in the names of the members of the family in what are called Thanathu maral accounts and these amounts were invested in various firms or lent to several individuals. The total of these investments came to about Rs. 15,00,000 described in Sch. 'C'. The assets thus described in Schs. 'C', 'D' and 'E' included immproveable properties in Burma and the respondent claimed a half-share in all of them. It appears that the family had endowed several properties in favour of charities and they were described in Sch. 'F'. The respondent claimed that in effecting partition between the parties a scheme should be framed for the management of the said respective charities. According to the respondent

appellant 1 had in the course of his management manipulated accounts and had in fact misappropriated large amounts, and so he claimed an account from appellant 1. That in brief is the nature of the claim made by the respondent in his plaint.

At the date of the suit appellants 3 to 5 were minors and they were represented by appellant 1. It appears that a written was field by appellant 1 for himself and as guardian of his minor sons in which the relationship of the respondent and his half-share to the family properties were admitted. Several contentions were, however, raised with reference to the properties available for partition. It was alleged that Items Nos. 10 and 11 in Sch. 'A' were dedicated to charity and as such not devisible and that Item No. 3 was being used as a school. The written statement referred to some more properties which had not been included in the plaint though they were liable to partition. In regard to the jewels and moveables it was contended that several items not belonging to the family, and some not even in existence, had been shown in the said schedule. It was also alleged that some of the jewels shown in the said schedule belonging to the several appellants as their separate property. Then as regards the Thanathu maral accounts the appellants gave a detailed history of the amounts and their investments. It was admitted that the said amounts belonged to the family though the investments had been made in the names of the different members of the family. It was, however, urged that the total value of the assets enumerated in Sch. 'C' would be only Rs. 9,00,000 and not Rs. 15,00,000 as alleged by the respondent. The respondent's case that appellant 1 had manipulated accounts and misappropriated family funds was denied, and it was urged that for the purpose of partition the assets of the family as they stood on the date of the partition should be taken into accounts. The appellants also pleaded that the court had no jurisdiction to divide the immovable properties situated in Burma. According to them there was a special practice obtaining among the families of the Nattukottai Chettiar community according to which appellant 1 was entitled to a decent remuneration for the management of the joint family business and properties. According to another custom pleaded by the appellants it was alleged that provision had to be made for future Seermurais for the unmarried daughters of the family. Broadly stated these were the pleas raised by appellants 1 and 3 to 5. Appellant 2 who was a major field a separate written statement generally adopting the written statement field by appellant 1; nevertheless he put the respondent to the strict proof of the allegations made by him in the plaint in support of his claim.

In reply to the contentions thus raised by the appellants the respondent field a reply. In this statement he pleaded inter alia that there was a custom amongst the community for a member of the joint family to set up a separate family after marriage and that monies drawn by him thereafter would be entered in a separate account called Pathuvazhi and that at the time of the partition the amounts appearing in the said account would be debited to the said member. The respondent claimed that account should be made in accordance with this custom in effecting the partition of the family. On these pleadings the learned trial judge framed fifteen issues.

It appears that an attempt was made by the parties to have their disputes referred to arbitration, and in fact a reference was made on April 6, 1943, but this attempt proved abortive and the suit was set down for hearing before the court, and the hearing actually commenced on December 11, 1943. Meanwhile, on December 6, 1943, appellant 2 field an application under 0.8, r. 9, of the code of civil procedure for permission to file an additional written statement. This application was numbered as I.A. No. 988 of 1943. It would be relevent to refer to the plea which appellant 2 sought to raise by this application. He alleged that the deceased Chidambaram Chettiar had set apart on March 25,1925, two sums of money of Rs. 2,10,251-4-0 each separately in the name of the respondent and appellant 1 so as to vest the same in them forthwith, and he urged that these amounts and their accretions were not the properties of the family liable to partition in the suit. This

application was opposed by the respondent. On December 14, 1943, the trial judge dismissed the said application on the ground that it sought to raise a new and inconsistent plea and that had been really inspired by appellant 1. On December 29, 1943, the learned judge delivered his judgment in the suit and it was followed by a preliminary decree.

Against this decision three appeals were preferred before the High Court of Madras. A.S. No. 115 of 1944 was field by appellant 2 and No. 199 of 1944 by appellants 1, 3 to 5, whereas A.S. No. 499 of 1944 was field by the respondent. It appears that under his appeal No. 115 of 1944, appellants 2 made an application for stay of further proceedings before the commissioner (C.M.P. No. 1402 of 1944). On this petition the High Court ordered that there was no need to stay all proceedings before the commissioner and that it would be enough if the passing of the final decree alone was stayed. As a result of this order interim stay which had been granted ex parte was vacated. After the final order on this application was passed the commissioner commenced his enquiry, but before the enquiry could make any progress the parties decided to refer their disputes for arbitration.

Accordingly on july 18, 1944, a joint application was field by the parties before the trial judge requesting him to refer to the arbitration of Mr. VE. RM. AR. Ramanathan Chattiar of kandanoor and RM. AN. S. RM. Chellappa Chettiar of kothamangalam "all matters in dispute in the suit and all matters and proceedings connected therewith". An application under O.32, r.7, was also field since three of the parties to the dispute were minors. On July 21, 1944, the trial court allowed the said application and certified that the proposed reference was for the benefir of the minors and so referred "the matte rs in dispute in the suit and all matters and proceedings connected therewith "for determination by the two arbitrators named by the parties.

The arbitrators then began their proceedings and made an interim award on August 1, 1944. It was followed by their final award on December 6, 1944. This award field in the trial court.

On January 3, 1945, the appellants field a petition (I.A. No. 18 of 1945) under ss.30 and 31 of the Indian Arbitration Act (hereinafter called the Act). By this petition the appellants urged that the award should be set aside on the grounds enumerated by them in the petition. Their case was that the reference to arbitration had been brought about by corecion and undueinfluence, that the arbitrators had not held any proper enquiry and that they were partial and biased. Thus the award was sought to be set aside on the ground that the reference was bad and that the arbitrators were quilty of misconduct. The validity of the award was also challenged on the ground that both the reference and the award were invalid because they contravened the principle of private international law that courts in one country would have no jurisdiction to adjudicate on title to immoveable property situated in a foreign country or to direct its division; the reference and the award dealt with immoveable properties in Burma and so they were invalid. The appellants further contended that the reference to arbitration was opposed to the orders passed by the High Court in C.M.P. No. 1402 to 1944, and as such it was invalid.

This application was resisted by the respondent. He traversed all the allegations made by the appellants and claimed that a decree in terms of the award should be passed. At the hearing of this petition no oral evidence was led by the parties; they were content to base their case on the documents produced on the record and on points of law raised by them.

The trial judge rejected the appellant's case about the alleged misconduct of the arbitrators. He also found that there was no substance in the contention that the reference was the result of undue influence or coercion. He was satisfied that the arbitrators had made a proper enquiry and that the

award was not open to any objection on the merits. He, however, held that the reference to the arbitrators which included matters in dispute in the suit comprised questions of title in relation to immoveable properties in Burma, and so it was without jurisdiction and invalid. In his opinion the reference also included the dispute relating to the sums Rs. 2,10,251.4.0 which had been entered in the Thanathu maral accounts of appellant 1 and the respondent and that this part of the reference contravened the order passed by the High Court in C.M.P. No. 1402 of 1944. He thus unheld these two contentions raised by the appellants and set aside the reference and the award. It was against this order that the respondent preferred C.M.A. No. 210 of 1946.

The High Court has allowed the respondent's appeal. It has confirmed the findings of the trial court in respect of the pleas raised by the appellants as to the misconduct of the arbitrators and as to the invalidity of the reference on the ground that it was the result of coercion and undue influence. It has, however, reversed the conclusions of the trial court that the reference and the award were invalid inasmuch as they related to immoveable properties in Burma and contravened the stay order passed by the High Court. The High Court has construed the order by which reference was made to the arbitrators in the present proceedings as well as the award and has held that they are not open to be challenged on either of the two grounds urged by the appellants. It was also urged before the High Court that the order of reference was invalid because under s. 21 of the Act the trial court was not competent to make the reference; this contention has been negatived by the High Court. In the result the High Court has found that the reference and the award were valid and it has directed that a decree should be passed in terms of the award. It is against this decision that Civil Appeal No. 112 of 1955 arises; and, as we have already mentioned, the questions which it raises relate to the validity of the award on which the two courts have differed. Before we deal with the merits of these points, however, we may indicate how the other appeals arise.

In A.S. No. 115 of 1944 field by appellant 2 before the High Court the appellant presented Miscellaneous Application C.M.P. No. 2374 of 1946 under O. 23, r.3, for an order that the interim award (Ex.P. 15) passed by the arbitrators which had been signed by all the parties in token of their consent should be treated as a compromise and a decree passed in accordance with at under O. 23, r. 4. The High Court has observed that in view of its decision in C.M.A. No. 210 of 1946 it was really unnecessary to pass any order in this appeal; but it thought that since the matter was likely to go in appeal to this court it would be better to make a formal order and direct that a decree in terms of the interim award should be drawn under O. 23, r. 3. Against this decision the appellants have preferred Civil Appeal No. 116 of 1955 in this court.

The appellants had made a similar application in A.S. No. 199 of 1944 and it was numbered as C.M.P. No. 3273 of 1946. The High Court has allowed this application for similar reasons and its decision has given rise to Civil Appeal No. 115 of 1955.

In the trial court the appellants had field two similar applications under O. 23, r. 3; but they had been rejected by the trial court; these orders had given rise to two appeals in the High Court, C.M.A. No. 661 of 1946 and C.M.A. No. 49 of 1947. The High Court has allowed these appeals and has ordered that a decree in terms of compromise should be passed under O. 23, r. 3. Against the orders thus passed by the High Court in these two appeals, Civil Appeals Nos. 113 and 114 of 1955, have been field in this court. That is the genesis and nature of the four subsidiary appeals in the group. We will now revert to the points which arise for our decision in the principal Civil Appeal No. 112 of 1955.

The first ground on which the validity of the reference and the award is challenged is based on the

assumption that the reference involved the determination of the title to immoveable properties situated in Burma and/or that the award has actually determined the said question of title. The appellants contend that there can be no doubt that courts in this country have no jurisdiction to determine questions of title in respect if immoveable properties in foreign countries or to direct a division thereof. This position is not and cannot be deputed. The rule of law on this subject has been thus stated by Dicey : "The courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immoveable property not situate in such country." (Dicey's "Conflict of laws", 6th Ed., pp. 141 and 348) It is also urged that where a court has no jurisdiction to determine any matter in controversy such as the question of title in respect of the foreign immoveable property it has no jurisdiction to refer it for the determination of the arbitrators. This portion also is not and cannot be disputed. The appellants further argued that if the reference includes properties over which the court had jurisdiction as well as those over which it had no jurisdiction the whole of the reference becomes invalid and in such a case it is not permissible to separate the invalid part of the reference from that a which is valid . The correctness of this contention is disputed by the respondent; but, for the purpose of the present appeal the respondent is prepared to argue on the assumption that even this contention is well-founded. The respondent's case is that neither the reference nor the award purports to deal with any immoveable property in Burma; and so the challenge to the validity of the reference and the award on the legal points raised by the appellants cannot succeed. It is, therefore, necessary to examine the reference and the award and decide whether the factual assumption made by the appellants in urging their legal grounds against the validity of both the reference and the award is justified.

In dealing with this question it is necessary first to ascertain the scope of the request made by the parties when they applied to the trial court for reference of their dispute to arbitration. In their application (Ex.P. 12) the parties have briefly indicated the nature of the respondent's claim and have stated that the dispute between the parties was then pending before the High Court in the form of three appeals preferred by them. Then it is averred that appellants 3 to 5 are minors but it is added that the proposed reference was for their benefit and so another application had been separately made for the court's sanction to the said reference in respect of the said minors. "The parties desire and agree", said the application, "that all matters in dispute in this suit and all matters and proceedings connected therewith should be referred to the unanimous decision of the two named arbitrators". They had also agreed that they would abide by the unanimous decision of the arbitrators and that the arbitrators should be empowered to partition the properties of the family between the parties and if necessary also by payment of monies to equalise the shares and to take the necessary accounts and to decide all matters in dispute between including costs. The parties had further agreed to produce their own papers and copies before the arbitrators and that if the arbitrators needed any further papers, accounts or documents which had been field in court they should be authorised to require the Commissioner to send them to the arbitrators. It is on this application that the court made the order that "all matters in dispute in this suit and all matters and proceedings connected therewith "be referred for determination to the two named arbitrators. The question which arises for our decision is : What was the scope and extent of the matters thus referred to arbitration ? In other words, did this order of reference include the respondent's claim for a share in the immoveable properties in Burma ?

The appellants contend that the order of reference includes not only all matters in dispute in the suit but also all matters and proceedings connected therewith and their case is that these clauses are wide enough to include the respondent's claim for a share in the immoveable properties in Burma. There is no doubt that the latter clause refers to matters and proceedings connected with the suit; but the appellants' contention can be upheld only if it is shown that the respondent's claim for a share in the

properties in Burma was connected with the suit or was a part of the matters connected with it at the material time.

What then was the nature and extent of the dispute between the parties at the material time ? Let us examine the pleadings of the parties, the issues framed by the trial court, the decision of the trial court on them and ascertain the nature and extent of the subsisting dispute between them which was pending in the High Court in the three respective appeals. There is no doubt that in his plaint the respondent had claimed a share in the immoveable properties in Burma. In regard to this claim his allegation was that with the aid of the advances made by the family firms in Burma and of those in the accounts described as Thanathu maral accounts, lands and other properties had been purchased and they formed part of the assets of the firms and the Thanathu maral accounts. The written statement filed by appellant 1 admitted that there were Thanathu maral transactions during the lifetime of chidambaram Chettiar and that all sums taken from the family assets, though invested for the sake of convenience in the name of one or the other member of the family, belonged to the family and had been treated as family assets. According to the appellants, however, the extent of the Thanathu maral transactions had been exaggerated by the respondent. On the whole the written statement clearly admitted that the branches of appellants 1 to 5 on the one hand and of the respondent and his son on the other are entitled to a half-share each; but they pleaded that the said shares have to be allotted only after making some provisions out of the joint family funds for the payments of the future seermurai etc., due to the unmarried daughters in the family. They also contended that the court had no jurisdiction to divide the immoveable properties in Burma though it was admitted that the respondent was entitled to the relief in respect of the division of the family assets as set forth in the written statement. This written statement was adopted by appellant 2 though in a general way he denied the allegations in the plaint which had not been expressly admitted by him in his written statement. It would thus be seen that the respondent's share in the family properties was not in dispute nor was his share in the properties in Burma seriously challenged. The only plea raised in respect of the latter claim was that the court had no jurisdiction to deal with it. This state of the pleading in a sense truly reflected the nature of the dispute between the parties. It is common ground that the family is a trading family and there could be no doubt that the assets of the family were partible between the members of the family. It was on these pleadings that the trial judge framed fifteen issues and set down the case for hearing.

At this stage appellant 2 wanted to go back upon his written statement by making further and additional pleas. That is why he filed an application (Ex.P. 3(a)) for leave to file an additional written statement. As we have already mentioned this application was rejected by the trial court; but for present purpose it is relevant to consider the pleas which he wanted to raise by this additional statement. He wanted to contend that the amounts set apart in favour of appellant 1 and the respondent respectively by their father remained invested distinctly and separately during his lifetime and that in law they ought to be taken to be separate properties of their branches. In other words, the plea thus sought to be raised was that by reason of the investment of the amount in the names of appellant 1 and the respondent respectively the said amounts constituted the individual and separate monies of the respective persons and became the separate properties of their branches. Appellant 2 thus raised a contention about the character of the amounts invested by the deceased Chidambaram Chettiar in the two names of his sons respectively and in that sense the issue which he sought to raise was in regard to the character of the amounts themselves. It had no direct reference to any immoveable properties in Burma.

Since the trial court refused to allow appellant 2 to raise this additional plea he proceeded to try the issues already framed by him, and, as we have already indicted he held that he had no jurisdiction to

deal with immoveable properties in Burma, and appointed a Commissioner to make an enquiry in pursuance of the preliminary decree. The preliminary decree in terms excluded from its operation the immoveable properties in Burma as well as in the India State of Pudukottai. In the proceedings before the commissioner parties agreed that the properties in Burma and Pudukottai should be left out of account and so no dispute appears to have been raised before him that the accounts of the firms in Burma should be taken by him.

In the appeal filed by the respondent against this preliminary decree he did not challenge the decision of the trial court that he had no jurisdiction to deal with immoveable properties out of British India. His appeal raised some other points which it is unnecessary to mention. This fact is very significant. It shows that the respondent accepted the finding of the trial court and did not want the High Court to consider his claim for a share in the excluded properties. In the appeal preferred by appellant 2 he had urged inter alia that the trial court should have allowed him to raise the additional pleas and it appears that he had also raised a point that the trial court had no jurisdiction to direct a division of the movable properties of the firms in Burma. The grounds taken by appellant 2 in his memo leave no manner of doubt that none of the pleas which he sought to raise before the High Court had any reference to immoveable properties in Burma. It is, therefore, clear that in none of the three appeals pending before the High Court was it urged by any party that the immoveable properties in Burma should be brought within the scope of the partition suit.

The application made by the parties for arbitration to which we have already referred had deliberately set out the pendency of the three appeals in the High Court at the material time in order to furnish the background for determining the extent and nature of the dispute which was sought to be referred to arbitration. The respondent's claim for a share in the properties outside India had been negatived by the trial court and the decision of the trial court had become final because it was not challenged by the respondent and so there can be no doubt that the said claim was outside the purview of the dispute which was then pending between the parties in the High Court. It was not, and could not have been, intended to be a matter in dispute in the suit between the parties or any matter and proceedings connected therewith. Therefore we are satisfied that the High Court was right in coming to the conclusion that the reference did not include any claim with regard to the immoveable properties in Burma.

It is, however, urged that the reference did include the points raised by appellants 2 in his appeal before the High Court; and that no doubt is true. But what is the effect of the said grounds raised by appellant 2 ? As we have already pointed out the said grounds did not raise any question about immoveable properties in Burma. They marely raised a dispute about the character of amounts invested by the deceased Chidambaram Chettiar in the names of appellant 1 and the respondent respectively. It was a dispute in regard to monies or moveable and so appellant 2 was driven to contend that the trial court had no jurisdiction to deal with such moveable. This contention is obviously without substance and has not been raised either in the court below or before us. The only argument raised is that the reference included claims inregard to immoveable properties in Burma and this argument cannot be supported on the ground of the pendency of the appeal by appellant 2 before the High Court because, even if the said appeal was allowed, it could have no reference to any immoveable properties in Burma. Thus the attack against the reference on the ground that it included immoveable properties in Burma must fail.

Does the award deal with the said immoveable properties in Burma ? That is the next question which falls to be considered. If it does, it would be invalid not only because it purports to deal with foreign immoveable properties but also for the additional reason that it is in excess of the terms of

reference. At the hearing of the present appeals in this court Mr. Vishwanatha Sastri, for the appellants, attempted to critcise the decision of the arbitrators on several grounds; but we did not allow him to raise any contentions against the merits of the award because both the courts below have rejected the appellants' objections in that behalf,and in view of their concurrent findings it would not be open to the appellants to raise the same points over again. That is why we would confine ourselves to those portions of the award which, according to the appellants, show that the arbitrators divided the immoveable properties in Burma and Pudukottai.

In regard to the properties in Pudukottai this is what the award says in paragraph 3 : "The plaintiff and the defendants shall enjoy them in equal halves as under marukkal kuttu. In proportion to their respective shares, the plaintiff shall pay one-half of the taxes and the defendants 1 to 5 the other half. Since the aforesaid property has been situate in Pudukottai state it has not been divided on the good and bad qualities of the soil; if it is necessary, the plaintiff and the defendants shall have it divided in equal halves later on when required."

In regard to the properties in Burma, paragraph 1 of the award recites that "after communications are restored in Burma the plaintiff and the defendants have to divide the firms in Burma at the places Minhla and Sitkwin belonging to them and the lands, godowns, homes, gardens and the properties items, bank deposit jewels, moveables, all assets etc., and the subsequent income attached thereto into two halves; and the plaintiff has to take one half and the defendants the other half". Paragraph 2 adds that since both the parties have agreed to divide the movable properties attached to the said shop later on the arbitrators had not divided them. The award has also stated that the sale deeds at Alagapuri and relating to the lands attached to the said firms have been divided into two lots and for the purpose of safe custody two lists known as Schs. A and B have been prepared and both parties have signed the lists. Later on, at the time of division of the said lands, firms and assets, all the documents shall be collected together and the parties shall take the documents relating to their respective shares.

The arbitrators then dealt with the additional plea sought to be raised by appellant 2, and in substance they refused appellant 2 permission to raise that plea because they thought that having regard to the conduct of the parties it was futile to raise such a plea. That is why they directed that "that plaintiff's branch and the defendant's branch have shares in all the amounts and they added that their conduct fully justified the said conclusion and the parties agreed to it."

It is these portions of the award on which the appellants based their contention that immoveable properties in Pudukottai and Burma have been dealt with by the arbitrators. In our opinion this contention is not well-founded. What the arbitrators have done is to divide the properties which were then the subject-matter of the dispute between the parties; and having done so they have indicated what the legal position of the parties would be in respect of the properties outside the dispute. In appreciating the effect of the words used in the award we must bear in mind that the arbitrators were laymen not familiar with the technical significance of legal expressions, and so we must read the relevant clauses as a whole with a view to determine what in effect and substance they intended to decide. Now take the recitals in the award to the Pudukottai properties. The award expressly states that the properties had not been divided by them and that the plaintiff and the defendants shall have them divided when so required. All that the award says is that since the parties had separated and the properties in suit before the arbitrators had been actually divided by metes and bounds, the two branches shall enjoy the Pudukottai in equal halves. This clause in the award cannot be said to drive the said properties or even to determine their shares in them. The shares of the parties in the said properties were admitted and so the award merely says that as divided members

they will hold and enjoy the properties half and half.

Similarly in regard to the properties in Burma the award expressly states that the said properties had not been divided and it merely refers to the true legal position that they would be enjoyed by the two branches half and half. The arrangement proposed by the arbitrators in respect of the immoveable properties in Burma is very significant. They merely asked the parties to hold the documents of title half and half for safe custody and they have added that when the parties decide to decide the properties all the documents would have to be brought together and a partition made according to law. That again is an arrangement dictated by common-sense and cannot be said to amount to a decision in any way. It is not as if the award declares the shares of the parties in respect of the properties. What it does is no more than to state the true and admitted legal position of the parties' rights in respect of the said properties.

In this connection it would be useful to refer to the observations made by Viscount Dunedin in Bageshwari Charan Singh v. Jagarnath Kuari ((1932) I.L.R. 11 pat. 272; 53 I.A. 130). In that case the Privy Council was called upon to consider the question about the admissibility of a petition which was relied upon as an acknowledgment of liability under s. 19, sub-s. (1) of the Limitation Act; and it was urged that the said petition was inadmissible because it purported or operated to create or declare a right to immoveable property and as such was compulsorily registrable under s. 17(1)(b) of the registration Act, 1908. In urging the objection to the admissibility of the petition a large number of Indian decisions were cited before the Privy Council dealing with the word "declare" used in s. 17(1)(b) of the Registration Act, 1908; and it was apparent that there was a sharp comflict of views. In Sakha Ram Krishnaji v. Madan Krishnaji ((1881) I.L.R. 5 Bom. 232), West, J., had observed that the word "declare "in s. 17(1)(b) is placed along with 'create', 'assign' 'limit' or 'extinguish' a right, title or interest, and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to, and had added that he thought that is equally the case with the word "declare". On the other hand certain other decisions had construed the word "declare" liberally in a very wide sense and it was on those decisions that the objection against admissibility of the petition was founded. In repelling the objection Lord Dunedin observed that "though the word "declare" might be given a wider meaning they are satisfied that the view originally taken by West, J., is right. The distinction is between a mere recital of fact and something which in itself creates a title." These observation assist us in deciding the question as to whether the impugned portions of the award declare the parties' rights in immoveable properties in the sense of deciding them as points or matters referred to arbitration. In our opinion, the High Court was right in answering this question against the appellants. Therefore the award is not open to the attack that it, deals with immoveable properties out of the jurisdiction of the court.

That takes us to the next ground of attack against the validity of the award. It is urged that the award contravenes the order passed by the High Court on the stay petition filed before it by appellant 2. There is, however, no substance in this contention. All that the High Court directed was that pending the final decision of the appeals before it a final decree should not be drawn. In fact the High Court clearly observed that there was no reason for staying all the proceedings pending before the Commissioner. That is the usual order made in such cases, and it is difficult to appreciate how this order has been contravened by reference to arbitration or by the award that followed it. The award is not and does not purport to be a final decree in the proceedings and the proceedings before the arbitrators substantially correspond to the proceedings of the enquiry which the Commissioner would have held even under the order of the High Court. Therefore this contention must also fail.

We must now consider another objection against the validity of the reference which has been seriously pressed before us. It us urged that the reference and the award are invalid because the trial court was not competent to make the order of reference under s. 21 of the Act. Section 21 reads thus :

> "Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

Two conditions must be satisfied before an application in writing for reference is made. All the interested parties to the suit must agree to obtain a reference and the subject-matter of the reference must be any matter in difference between the parties in the suit. When these two conditions are satisfied the application for reference must be made at any time before the judgment is pronounced. Thus broadly stated the construction of the section presents no difficulty. But when we analyse the implications of the two conditions and seek to determine the denotation of the word "court" difficulties arise. What does the word "court" mean in this section ? According to the appellants "court" means the court as defined by s. 2(c)of the Act. S. 2(c) defines the "court" inter alia as "a civil court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit"; and this prima facie means the trial court. The argument is that an order of reference can be made only by the trial court and not by the appellate court, and so there can be no reference after the suit is decided and a decree has been drawn up in accordance with the judgment of the trial court. In the present case a judgment had been delivered by the trial court and a preliminary decree had been drawn in accordance with it, and so there was no scope for making any order of reference. That is the first part of the argument which must be carefully examined.

Does the "court" in the context mean the trial court ? This construction cannot be easily reconciled with one of the conditions prescribed by the section. After a decree is drawn up in the trial court and an appeal is presented against it, proceedings in appeal are a continuation of the suit; and speaking generally, as prescribed by s. 107 of the Code of Civil Procedure the appellate court has all the powers of the trial court and can perform as nearly as may be the same duties as are conferred and imposed on the trial court, If that be so, during the pendency of the appeal, can it not be said that matters in difference between the parties in suit continue to be matters in dispute in appeal ? The decision of the appeal can materially affect the nature and effect of the decree under appeal; and there is no doubt that all the points raised for the decision of the appellate court be and often are points in difference between them in the suit; and, in that sense, despite the decision of the trial court the same points of different in suit continue between the parties before the appellate court. If during the pendency of such an appeal parties interested agree that any matter in difference between them in the appeal should be referred to arbitration the first two conditions of the section are satisfied. When s. 21 was enacted did Legislature intended that during the pendency of the appeal no reference should be made even if the parties satisfied the first two conditions prescribed by the section ?

In considering this question it would be relevant and material to take notice of the fact that prior to the passing of the Act in 1940 the longstanding practice of india indian courts was to refer to arbitration disputes pending before the appellate court between the respective parties to the appeals. If the object of enacting s. 21 was to prohibit such reference at the appellate stage it would, as the High Court has observed, cause "a revolution in the existing practice". Was such a revolution really intended ? Having regards to the fact that the words used in s. 21 are substantially the same as those

used in sch. II, paragraph 1, of the earlier Code, it would be difficult to to sustain the plea that the enactment of s. 21 was intended to bring about such a violent departure from the existing practice. If that had been the intention of the Legislature it would have made appropriate changes in the words used in s. 21. Therefore, the word "court" cannot be interpreted to mean only the trial court as contended by the appellants. Similarly the word "suit" cannot be construed in the narrow sense of meaning only the suit and not an appeal. In our opinion, "court" in s. 21 includes the appellate court proceedings before which are generally rectinuation of the suit; and the word "suit" will include such appellate proceedings. We may add that whereas s. 41 of the Act is consistent with this view no other section militates against it.

The next question is : When can an application for reference be made ? The section prescribes that it can be made at any time before the judgment is pronounced. It has been fairly conceded before us that the word "judgment" cannot refer to the various interlocutory orders and judgments that may be passed during the hearing of the suit; and so the word "judgment" cannot be given the meaning assigned to it by s. 2(9) of the code. It cannot mean in the context the statement given by the judge of the grounds of a decree or order. It must mean a judgment which finally decides all matters in controversy in the suit. has it follows that it is open to the parties to apply for a reference at any time before the final judgment is pronounced in the suit. If that be so, can the parties apply for an order referring matters in difference between them even though such matters may have been covered by interlocutory judgments delivered in the meanwhile ? The appellants suggest that though reference to arbitration may be made at any time before the final judgment is pronounced the subject-matter of the reference must be such as is not covered by any decision of the court pronounced in the meanwhile. This argument reads the word "judgment" as judgment in regard to a matter in difference between the parties; if a difference between the parties has been covered by an interlocutory judgment it can no longer be referred to arbitration; that is the contention. We are not impressed by this contention. In our opinion the scheme of the section of the section doe not permit the addition of any words qualifying the word "judgment" used in it. The expression "at any time before the judgment is pronounced" is only intended to show the limit of time beyond which no reference can be made, and that limit is reached when a final judgment is pronounced. The provision that "any matter in difference between the parties in the suit can be referred to arbitration "cannot be subjected to the further limitation that the said matter can be referred to arbitration if it is not covered by the judgment of the court. The effect of the section appears to be that so long as the final judgment is not pronounced by the court any matter - i.e, some or all the matters-in difference between the parties can be referred to arbitration provided they are agreed about it. If a reference can be made even at the appellate stage when all matters in difference the parties are covered by the judgment of the trial court, it is difficult to understand why in allowing reference to be made during the pendency of the suit in the trial court any further conditions should be imposed that only such matters of difference can be referred to as are not covered by an interlovutory judgment of the court. We would accordingly hold that it is open to the trial court to refer to arbitration any matters of difference between the parties to the suit provided they agree and apply at any time before the court pronounces its final judgment in the suit.

But this construction still leaves one question to be considered. Had a final judgment been pronounced by the trial court in this case at the time when it passed the order if reference ? It had delivered a judgment and a preliminary decree had been drawn up. A judgment delivered by a court in a partition suit which is followed by a preliminary decree cannot be said to be a final judgment in the suit. Proceedings which parties may take pursuant to the preliminary decree are still a part of the suit, and it is only with the passing of the final decree that the suit comes to an end. As observed by the Privy Council in Jadu Nath Roy & Ors. v. Parameswar Mullick & Ors. ((1939-40) 67 I.A.11) a

partition suit in which a preliminary decree has been passed it still a pending suit with the result that the rights of parties who are added after the preliminary decree have to be adjusted at the time of the final decree. This position is not disputed. Therefore, the fact that a preliminary decree had been drawn up in the present case and it was based upon a judgment delivered by the court cannot exclude the application of s. 21. The judgment which had been delivered by the court is not a final judgment contemplated by s. 21. The trial court would, therefore, have jurisdiction to make the order of reference.

There is, however, another fact which introduces a complication; and that is the pendency of the three appeals before the High Court at the material time. As we have already observed the three appeals which were pending before the High Court raised before that court matters in difference between the parties in the suit, and to that extent the said matters of difference were really pending before the High Court and not before the trial court. In such a case, which is the court that has jurisdiction to make the order of reference ? There is no difficulty in holding that if the suit is pending in the trial court and a final judgment has not been pronounced by it, it is the trial court which is competent to make the order of reference. Similarly, if a suit has been decided, a final judgment has been delivered and a decree had been drawn up by the trial court and no appeal has been preferred against it, the matter is concluded and there is no scope for applying s. 21 at all. On the other hand, if a decree determining the suit has been drawn up by the trial court and it is taken to the appellate court, during the pendency of the appeal, it is the appellate court that is competent to act under s. 21. These three cases do not present any difficulty; but where a preliminary decree has been drawn up and an appeal has been filed against it the complication arises by reason of the fact that the disputes between the parties are legally pending before two courts. Proceedings which would have to be taken between the parties in pursuance of, and consequent upon, the preliminary decree are pending before the trial court; Whereas matters in difference between the parties which are covered by the preliminary judgment and decree are pending before the appellate court. In such a case it may perhaps be logically to take the view that the arbitration in respect of the dispute in relation to proceedings subsequent to the preliminary decree can be directed by the trial court, whereas arbitration in respect of all the matters concluded by the trial court's preliminary judgment which are pending before the appellate court can be made by the appellate court; but such a logical approach is not wholly consistent with s. 21; and rather than help to solve any difficulty it may in practice create unnecessary complications. In most cases matters in disputes before the trial court in final decree proceedings are so inextricably connected with the matters in dispute in appeal that effective arbitration can be ordered only by one reference and not by two. We are, therefore, inclined to hold that in a case of this kind where both the courts are possessed of the matters in dispute in part it would be open to either court to make an order of reference in respect of all the matters in dispute between the parties. It is argued that on such a construction conflict of decisions may arise if two sets of arbitrators may be appointed. We do not think that such a conflict is likely to occur. If the parties move the trial court and obtain an order of reference they would inevitably ask for appropriate orders of withdrawal or stay of the appellate proceedings; if, on the other hand, they obtain a similar order of reference from the appellate court they would for similar reasons apply for stay of the proceedings before the trial court. In the present case proceedings subsequent to the preliminary decree were pending before the trial court and so we must hold that the trial court was competent to act under s. 21. On the view the objection against the validity of the reference based on the provisions of s. 21 cannot succeed.

We may now briefly refer to some of the decisions to which our attention was invited. Before the Act was passed in 1940, the procedure for referring matters in dispute between the parties in pending suits was governed by the provisions of Sch. II to the code of Civil Procedure. There

appears to have been a consensus of judicial opinion in favour of the view that under Sch. II, Paragraph 1, the appellate court could make an order of reference in respect of matters in dispute between the parties in an appeal pending before it. A note of dissent had, however, been struck be a Full Bench of the Calcutta High Court in Jugessur Dey v. Kritartho Moyee Dossee (12 Beng. L.R. 266). In that case the question for decision arose under the provisions of the code of 1859 and the Full Bench held that an appellate court had no power even by consent of parties to refer a case for arbitration under the arbitration sections of Act VIII of 1859 which applied only to courts of original jurisdiction nor was such power conferred on an appellate court by s. 37 of Act XXIII of 1861. One of the reasons which weighed with couch, C.J., who delivered the principal judgment of the Full Bench was that according to him neither reason nor convenience required that the appellate court should refer a suit to arbitration after the matter had been decided by the trial court. Kemp, J., who concurred with the decision, apprehended that "if the parties are allowed to refer matters to arbitration after a case has been finally disposed of by a court of justice such a proceeding might tend to bring lower courts into contempt". In our opinion this apprehension is not well-founded. Besides it is well-known that when parties agree to refer the matters in dispute between them in suit to arbitration they desire that their disputes should be disposed of untrammeled by the rigid technicalities of the court procedure. A search for a short-cut by means of such arbitration sometimes takes the parties on a very long route of litigation but that is another matter.

The Calcutta view was dissented from by the Madras High Court in Sangaralingam Pillai ((1881) I.L.R. 3 Mad.78) in somewhat emphatic words. "Entertaining all respect for the opinions of the learned judges of the High Court of Calcutta by whom the case of Jugessur Dey (12 Beng. L.R. 266) was decided", observed the judgment," We are not convinced by the reason given in the judgment for holding that an appellate court might not, with consent of the parties, refer the matters in dispute in the appeal to arbitration." Having thus expressed their disapproval of the Calcutta view, the learned judges proceeded to add that in the case before them an order of reference was sought for under s. 582 of the code of 1877 and they held that under the said provision the appellate court is given the same powers and is required to perform the same functions as nearly as may be as the trial court. The view thus expressed by the Madras High Court was subsequently accepted and approved by the Calcutta High Court in Bhugwan Das Marwari & Anr. v. Nund Lall Sein & Anr. ((1886) I.L.R. 12 Cal. 173) and Suresh Chander Banerjee v. Ambica Churn Mookerjee ((1891) I.L.R. 18 Cal. 507). As we have already observed, prior to the enactment of the Act there has been a longstanding judicial practice under which orders of reference have been passed by appellate courts in respect of matters in dispute between the parties in appeals pending before them.

The construction of s. 21 has led to a divergence of judicial opinion. In Abani Bhusan Chakravarty & Ors. v. Hem Chandra Chakravarty & Ors. (A.I.R. 1947 Cal 93), the Calcutta High Court has taken the view that the court as defined in the Arbitration Act does not include an appellate court and consequently there is nothing in the Act which enables an appellate court to refer to arbitration matters in dispute between the parties. This decision proceeds on the erroneous view that the "court" in s. 21 means only the court as defined in s. 2(c) and that the considerations based on the powers of the appellate court prescribed by s. 107 are foreign to the Act. It also appears that the learned judges were disposed to think that if the matter in dispute between the parties as the appellate stage was referred to arbitration it might tend to bring the lower courts into contempt. There is no doubt that a court cannot claim an inherent right to refer a matter in dispute between be thus referred to arbitration it must be shown that the court in question has been statutorily clothed with the power to make such an order; and that would depend on the construction of s. 21 of the Act. The Calcutta High Court has construed the said section in substance consistently with the view taken by it in the case of Jugesseur Dey (12 Beng. L.R. 266).

On the other hand the Patna High Court has taken a contrary view in Thakur Prasad v. Baleshwar Ahir & Ors. (A.I.R. 1954 Pat. 106) Jamuar, J., who delivered the judgment of the court, has considered the decision of the Calcutta High Court in the case of Jugesseur Dey (12 Beng. L.R. 266) and has dissented from it. In the Allahabad High Court somewhat conflicting views had been expressed on different occasions; but, on the question as to whether the appellate court can refer a matter in dispute between the parties to arbitration or not, and whether the suit includes an appeal, the decision of the Full Bench of the Allhabad High Court in Moradhwaj v. Bhudar Das (A.I.R. 1955 All. 353) seems to be on the same lines as that of the Patna High Court. This Full Bench also considered the question about the applicability of s. 21 to execution proceedings but with that aspect of the matter we are not concerned in the present appeal. The Madras High Court has taken the same view in Subramannaya Bhatta v. Devadas Nayak & Ors. (A.I.R. 1955 Mad. 693). Howevera, none of these decisions had occasion to consider the question about the competence of both the trial court and the appellate court in cases where a preliminary decree has been passed and an appeal has been filed against the said decree. It would thus appear that the majority of the Indian High Courts have construed the words "suit" and "court" used in s. 21 liberally as including appellate proceedings and the appellate court respectively. In the result we hold that the trial court was competent to make the reference and its validity is not open to any objection.

That leaves only one point to be considered. It is urged by the appellants that the arbitrators acted illegally and without jurisdiction in directing the appellants to pay to the respondent Rs. 2,682-6-0 by way of interest on the amounts specified in the award up to December 5, 1994, and from that date at the rate of 5as. per cent. per mensem, thus imposing on the appellants a total liability of Rs. 2,36,782-11-9. The appellants have also been directed to pay future interest on the same amount at 8as. per cent. per mensem from the said date until the date of payment. This argument us based solely on the observations made by Bose, J., who delivered the judgment of this Court, in Seth Thawardas Pherumal v. The Union of India ((1955) 2 S.C.R. 48). It appears that in that case the claim awarded by the arbitrators was a claim for an unliquidated sum to which interest Act of 1839 applied as interest was otherwise not payable by law in that kind of case. Dealing with the contention that the arbitrators could not have awarded interest in such a case Bose, J., set out four conditions which must be satisfied before interest can be awarded under the interest Act, and observed that none of them was present in the case; and so he concluded that the arbitrator had no power to allow interest simply because he thought that the payment was reasonable. The alternative argument urged before this court that interest could be awarded under s. 34 of the Code Civil Procedure, 1908, was also repelled on the ground that the arbitrator is not a court within the meaning of the Code nor does the Code apply to arbitrators. Mr. Viswanatha Sastri relies upon these observations and contends that in no case can the arbitrators award interest. It is open to doubt whether the observations on which Mr. Viswanatha Sastri relies support or were intended to lay down such a broad and unqualified proposition. However, we do not propose to pursue this matter any further because the present contention was not urged before the High Court. It was no doubt taken as a ground of appeal but from the judgment it is clear that it was not urged at the time of hearing. Under these circumstances we do not think we would be justified in allowing this point to be raised before us.

The result is that the conclusion reached by the High Court is right and so its order that a decree should be drawn in terms of the award must be confirmed. Civil Appeal No. 112 of 1955 accordingly fails and is dismissed with costs. It is conceded that if the principal appeal fails it would be necessary to make any effective orders on the rest of the appeals in this group. The said appeals also fail and are dismissed; but there would be no order as to costs.

Appeals dismissed.

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