SUPREME COURT OF INDIA

Arati Paul

Vs

The Registrar, Original Side, High Court, Calcutta and Others

Civil Appeal No. 745 of 1966

(J. M. Shelat, V. Bhargava JJ)

10.03.1969

JUDGMENT

BHARGAVA, J. –

1. The appeal, by special leave, is directed against a judgment of the Appellate Bench of the High Court of Calcutta, dated 18th February, 1965, dismissed an appeal against an order of a single Judge by which he dismissed a petition under Article 226 of the Constitution on 26th August, 1964. The facts leading up to this litigation are that one Shrish Chandra Paul died in the year 1930, leaving behind his widow Pramila Sundari, his daughter Arati and 4 sons Balai, Kanai, Netai and Gour. In the year 1945, Netai died leaving his mother Pramila Sundari as his sole heiress. On 27th September, 1946, a deed of gift in respect of two premises Nos. 60/11 and 60/12 in Gouri Beria Lane was executed by Pramila Sundari in favour of her three sons Balai, Kanai and Gour. On 18th March, 1952, there was an agreement for partition between Pramila Sundari and her three sons Balai, Kanai and Gour, by which the joint estate left by Shrish Chandra Paul was partitioned into four lots and a small portion of the property was left joint. On 13th June, 1957, Pramila Sundari instituted Suit No. 1045 of 1957, against Balai, Kanai and Gour for a declaration that the deed of gift and the agreement of partition were void and inoperative, and for a fresh declaration of the shares of the parties and partition of the joint properties. In this suit, Arati was also impleaded as a defendant. On 26th August, 1957, Pramila Sundari executed a will bequeathing her entire estate absolutely to Arati Paul and Gour in equal shares. On 13th January, 1958, Pramila Sundari died, and consequently, on 12th December, 1958, an order was made in Suit No. 1045 of 1957 transposing Arati Paul as the plaintiff. On 3rd February, 1960, Arati Paul applied in the Calcutta High Court for grant of Letters of Administration, with a copy of the will of Pramila Sundari annexed. This testamentary proceeding was contested and was marked in the year 1962 as Testamentary Suit No. 12 of 1962. On 17th December, 1962, the Testamentary Suit No. 12/1962 and the Partition Suit No. 1045/1957 appeared in the peremptory list of Mallick, J., and the Testamentary Suit was partly heard. On 2nd and 3rd January, 1963, there was further hearing in the testamentary suit. On 4th January, 1963, an agreement was put forward before Mallick, J., referring the dispute in both the suits to the sole arbitration of Mallick, J., extra cursume curiae. Since this reference is of importance, we may quote it in full :

> "It is recorded that all the parties consent of this Testamentary Suit as well as the partition suit being Suit No. 1045 of 1957 and all the disputes involved in these two matters be settled and referred to the sole arbitration of the Hon'ble Mr. Justice P. C. Mallick and the parties agree to abide by any decision that will be given and no

> evidence need be taken except or to what his Lordship might desire and the evidence need not be recorded in any formal manner. Parties agree that his Lordship would have all the summary powers including the power to divide and partition the properties and to make such decrees as his Lordship thinks fit and proper and for the purpose of partition if necessary to engage or appoint Surveyors and Commissioners as his Lordship thinks best.
>
> It is recorded that all the parties have referred this matter to the Learned Judge in what is known as *extra cursum curiae* jurisdiction of this Court.
>
> It is further recorded that all parties agree that they will not prefer any appeal from or against the decree or order that may be passed by his Lordship the Hon'ble Mr. Justice Mallick."

When this note was recorded, all the parties to the two proceedings were represented through their counsel. In pursuance of this agreement, Mallick, J., passed an order in Suit No. 1045/1957 on 1st April, 1963. It may be mentioned that the main dispute in the present case is whether this order of Mallick, J., in this partition suit amounts to an award or a judgment in a suit. On the same day, by a separate order, he also granted Letters of Administration in the Testamentary Suit. On 5th April, 1963, Arati Paul filed an objection to the recording of this order as a judgment. On 4th May, 1963, drafts of decrees drawn up in terms of that order were issued. On 13th May, 1963, Arati Paul applied for change of her Attorney in the partition Suit No. 1045/1957. On 17th May, 1963, the order of Mallick, J., dated 1st April, 1963, was filed on the record of Suit No. 1045/1957 as a judgment. On 24th July, 1963, the application of Arati Paul for change of Attorney was allowed. Thereafter, on 20th August, 1963, Arati Paul presented a Letter of Demand to the Registrar of the Original Side of the High Court to recall, cancel and withdraw the filing of the order of Mallick, J., dated 1st April, 1963, from the record of the suit and to take it off the file of that suit.

2. Failing to get any response, Arati Paul, on 4th September, 1963, presented a petition under Article 226 of the Constitution praying for issue of a writ in the nature of mandamus directing the Registrar of the High Court on the Original Side to forthwith recall, cancel and withdraw the filing of the said pretended Award (that is how the order of Mallick, J., was described in this petition), dated 1st April, 1963, as a judgment in the said Suit No. 1045/1957 as part of the records of the said suit, and another writ of mandamus directing the Registrar of the High Court to forthwith take off the said pretended Award, dated 1st April, 1963, from the file and/or records of the said Suit No. 1045/1957. In this petition, apart from the Registrar of the High Court on the Original side, Balai, Kanai and Gour were also impleaded as opposite parties. This petition under Article 226 of the Constitution was numbered as Matter No. 366 of 1963 and was summarily rejected by Banerjee, J., on 5th September, 1963. On 16th September, 1963, Appeal No. 228 of 1963 was entertained against this judgment under the Letters Patent, but an application presented for an interim injunction restraining the Registrar from taking any steps pursuant to the judgment of Mallick, J., dated 1st April, 1963, pending disposal of the appeal was rejected. On 27th November, 1963, Arati Paul obtained special leave to appeal from this Court against the refusal of the interim injunction by the interlocutory order, dated 16th September, 1963. While this appeal was still pending in this Court, the Appellate Bench of the High Court, on 28th April, 1964, allowed Appeal No. 228 of 1963, directed issue of a Rule in Matter No. 366 of 1963, and ordered stay of all proceedings pursuant to the order of Mallick, J., dated 1st April, 1963, till the final disposal of the Rule. Since the appeal in this Court had become infructuous, it was not prosecuted and was dismissed for non-prosecution on 29th April, 1964. On 10th June, 1964, two of the parties Kanai and Balai took out a notice of

motion for revocation of Letters of Administration which had been granted to Arati Paul by the order of Mallick, J., dated 1st April, 1963, in the Testamentary Suit. This notice was returnable on 15th June, 1964. Matter No. 366 of 1963, having been remanded by the Appellate Bench, appeared for final hearing before Sinha, J., on 15th July, 1964, but it was directed to go out of the list as an objection was taken on behalf of Kanai and Balai to the matter being taken up by him on the ground that he was a member of the Appellate Bench which had directed issue of the Rule in that Matter. On 16th July, 1964, this Matter No. 366/1963, was mentioned before the Chief Justice for being assigned to some other Judge, when a direction was made by the Chief Justice that a letter should be written by the party concerned to his Secretary. On 27th July, 1964, the Notice of Motion taken out by Kanai and Balai for revocation of Letters of Administration was partly heard by Mallick, J., who recorded the following minutes :

> "Part Head. The Rule issued by the Appeal Court in Matter No. 366/63 in the matter of Arati Paul v. Registrar, Orders IX, appears to be intimately connected with the application that is now pending before me. I direct that this matter with the said Matter No. 366 be placed before the Hon'ble C.J. for proper determination. Let this matter along with the matters appear day after tomorrow when I shall give directions. Interim Order to continue except that Arati Paul will collect rent."

It appears that, simultaneously with these proceedings, an application for taking proceedings for Contempt of Court were also pending before him in this connection. Hearing in Matter No. 366/1963 was concluded on 12th august, 1964, and then an order was made that this Matter as well as the proceedings relating to Notice of Motion for revocation of the Letters of Administration and the application for taking proceedings for contempt should appear in the list for judgment one after the order. On 26th August, 1964, Mallick, J., passed an order discharging the Rule in Matter No. 366/1963 as well as dismissing the other two applications. Subsequently, on 1st September, 1964, the preliminary decree drawn upon the basis of the order of Mallick, J., dated 1st April, 1963, in Partition Suit No. 1045/1957 was signed by him, and on 3rd September, 1964, the decree was filed. On 21st September, 1964, Arati Paul filed Appeal No. 226 of 1964 challenging the order, dated 26th August, 1964, passed by Mallick, J., dismissing Matter No. 366 of 1963. The appeal was dismissed by the Appellate Bench of the High Court on 18th February, 1965 and the order of the High Court in the appeal was filed on 16th March, 1965. Arati Paul then applied for a certificate under Article 133(1) of the Constitution for leave to appeal to this Court. That having been refused, she obtained special leave from this Court and has now come up in this appeal challenging the confirmation by the Appellate Bench of the order of dismissal of Matter No. 366 of 1963.

3. The prayer in the writ petition (Matter No. 366/1963) has been pressed before us by Mr. Chagla on behalf of the appellant on the sole ground that the order of Mallick, J., dated 1st April, 1963, was in the nature of an award made by an arbitrator and not a judgment in the partition suit, so that the appellant was entitled to obtain a writ for its recall, cancellation and withdrawal and for taking it off the record of the suit. Being a mere award of an arbitrator, it could not be treated as a judgment in the suit, nor could a decree be drawn up on its basis. On behalf of the respondents, other than the Registrar of the High Court on the Original Side, Mr. Goswami has argued that, even though, under the agreement, dated 4th January, 1963, Mallick, J., was requested to act *extra cursum curiae* and the suit was left to his arbitration, he, in fact, when passing the order, dated 1st April, 1963, acted as a Court and passed a preliminary decree. According to him, a preliminary decree in a suit for partition can only be passed by a Court and not by an arbitrator when giving an award in the dispute referred to him. He has, therefore, urged that the Registrar was right in filing that order on the record of Suit No. 1045 of 1957 as a judgment, and no writ of mandamus can be issued to him to

recall, cancel or withdraw it or take it off the record. Learned counsel for the Registrar also urged that all that the Registrar did was to file the order of Mallick, J., in accordance with the Rules of Court, because it was a judgment passing a preliminary decree in the suit, so that the appellant was not entitled to the writ of mandamus sought in Matter No. 366 of 1963.

4. Mr. Chagla, in support of his argument, relied primarily on two decisions of Courts in England and on the principle enunciated by Russell in his book on "The Law of Arbitration", 17th Edn. In this book at p. 117, Russell has enunciated the principle as follows :-

> "The subject-matter of an action may be referred to a judge as arbitrator. The Judge in such a case will, if such is the intention of the parties, be merely an arbitrator and have no special powers by virtue of the fact that he is a judge, and his award will not be subject to appeal."

After laying down this principle, Russell goes on to elaborate it in the subsequent notes with reference to some decisions, and one of these principles enunciated is :

> "When, with the consent of both parties, a judge deviates from the regular course of procedure of the Court, he ceases to act judicially and becomes an arbitrator, whose decision is subject to no appeal."

In support of this last proposition, Russell has quoted the decisions in Bickett v. Morris ((1866) LR 1 HLSc 47) and White v. Buccleuch (Duke). ((1866) LR 1 HLSc 70). We examined the decisions in these two cases, but could not find any specific statement in them that the decision given by a Judge on deviation from the regular course of procedure of the Court has to be held to be an award, though it was held in both cases that it would not be subject to an appeal.

5. The principal case on which reliance is placed on behalf of the appellant is the decision of the House of Lords in Robert Murray Burgess v. Andrew Morton. (1896 AC (HL) 136). In that case, a suit was first brought for recovery of a certain amount and the cause was set down for trial before the Lord Chief Justice, when, there being no likelihood of its being reached, the parties, with the consent of the learned judge, agreed to withdraw it from trial, and to state a special case for the decision of the Court. It was held by the House of Lords that the special case so stated did not raise directly any question of law and its decision only depended on questions of fact, so that the statement of the special case did not confer jurisdiction on the Court to deal with it as such. The learned Judges of the Divisional Court seized of the special case pointed out the incompetency and inexpediency of trying such a question by means of a special case, but expressed their willingness to do the best they could to decide it, if the parties desired them to do so; and on that footing, they heard the case and gave judgment. On appeal, the Court of Appeal reversed that judgment. This judgment of the Court of Appeal was brought up before the House of Lords which has to consider the nature of the judgment given by the Divisional Court. Lord Watson in his speech held :-

> "There are several decisions of this House, in cases coming from Scotland, which appear to me to affirm that the judgment of a court below, pronounced *extra cursum curiae*, is in the nature of an arbiter's award, and that, as a general rule at least, no appeal from it will lie. An appeal was held, on that ground, to be incompetent in Craig v. Duffus (6 Bell's Ap 308); Dudgeon v. Thomson (1 Macq 714) and Magistrates of Renfrew v. Hoby. (2 Macq 478).

Lord Shand also expressed a similar view, taking note of the fact that, as soon as it became apparent to the learned Judges of the Divisional Court that the special case raised only a question of fact for their determination, they would have been warranted in declining to give judgment on it. It was apparent that the learned judges yielded to the entreaties of both parties in entertaining and disposing of the case; and, on this basis, expressed his opinion as follows :-

> "I agree in thinking that the proceeding was extra cursum curiae, and that the decision of the dispute between the parties was of the nature of an award by arbiters, as, indeed, the learned Judges of the Divisional Court seem themselves to have thought, as appears not only from the terms of Wills, J.'s judgment, but from the observations of both judges when the defendant proposed to appeal."

6. Reliance was also placed on the decision of Goddard, J., in Wyndham v. Jackson. ((1937) 3 AER 677). The facts of that case were that the plaintiff issued a writ in the Chancery Division claiming an account and payment of all sums due to her under a contract entered into by plaintiff with the defendant. An order was made in the action by consent directing an account and the master, who dealt with that order, extended the ambit of his enquiry beyond the terms of the order at the invitation of both parties, gave a decision on a matter which was not covered by the Judge's order for an account, and issued a certificate to the effect that a certain sum was due from the defendant to the plaintiff. The question that was raised before Goddard, J., by the plaintiff was that she was entitled to recover the amount certified by the master, on the ground that the certificate was equivalent to an award having been made pursuant to an oral submission by counsel, who asked him to deal with all matters in dispute, though not technically covered by the order directing an account. It was also submitted on her behalf that the minute in the master's book, indicating an order that he was prepared to make on the plaintiff's application for an order for payment, was also an award entitling her, not only to the amount mentioned, but also to the costs of the Chancery proceedings. After considering the views expressed in a number of cases, Goddard, J., held :-

> "I must take it that it has been finally decided, in a matter between the parties, that the certificate was given extra cursum curiae. Then, as I find it was the result of a hearing which both parties requested, and to which they assented, I think it falls within the line of cases on which the plaintiff relies, and can be enforced as an award."

This case went up in appeal before the Court of Appeal whose decision is reported in Wyndham v. Jackson. ((1938) 2 AER 109). That Court differed from Goddard, J. on the nature of the order made by the master and held that the determination by the master was not a final determination and was never intended to be treated as a final arrangement between the parties. That matter was still to go before the Judge who had made the order for account and the master's certificate could not be binding until it had been confirmed by the Judge. The position of the master was held to be exactly analogous to the position of an arbitrator to whom the Court may have referred a matter to make a report to the Court in order that the Court may give a final decision between the parties. On this view, the Appeal Court did not go into the question whether the decision given by the master amounted to a decision given extra cursum curiae and whether it was enforceable as an award. The award of the master, being treated as provisional and subject to confirmation by the Judge, could obviously not be enforced as such. Thus, the view expressed by Goddard, J., that the decision of the master could be enforced as an award, if it had been final, was neither affirmed nor set aside.

7. The cases in India relied upon are two decisions of the Bombay and Calcutta High Courts. In

Sayad Zain v. Kalabhai Lallubhai (ILR 23 Bom. 752), before the case came to a regular hearing before the Court of the First Class Subordinate Judge, Surat, the parties as well as their pleaders signed an application which ran as follows :-

> "We have decided that the Court should make a settlement of the dispute between us according to Chapter XXXVIII of the Civil Procedure Code and we will abide by whatever decision the Court may give."
>
> "We have specially decided that the Court should have full authority to obtain information from the parties in whatever way the Court may think proper, but the parties are not to produce any evidence except documentary records."

The Subordinate Judge, in pursuance of this agreement, proceeded to deal with the case and ordered defendant to pay plaintiff a certain sum, having dispensed with the requirement of going through the formal procedure of rejecting the suit and registering their application as a fresh suit, because the parties referred him to the decision in Raoji Trimbak Nagarkar v. Govind Vinayak Nagarkar. ((1897) PJ 413). An appeal against this decision was taken to the High Court of Bombay which noted the fact that the Subordinate Judge had referred to the case mentioned above and held :

> "The very mention of that case shows that the parties must have intended that the decision of the Subordinate Judge as arbitrator should be final. In that case, as in this, the parties solemnly agreed by themselves and by their pleaders to abide by the decision of the Court to be made in a particular way. They cannot, therefore, appeal from it."

The Court further expressed the opinion that :-

> "The fact that the express provisions of Chapter XXXVIII of the Civil Procedure Code were knowingly disregarded, shows that the proceedings were extra cursum curiae, and thus the judgment of the subordinate Judge was in the nature of an arbitrator's award, against which an appeal cannot be entertained if the competency of the Appellate Court is objected to by the party holding the judgment. The fact that the subordinate Judge gave his award in the form of a decree will not make it a decree from which a regular appeal can lie."

In Baikanta Nath Goswami v. Sita Nath Gaswami, (ILR 38 Cal 421) after the hearing of a suit in a Munsif Court had commenced and some evidence had been recorded, the parties agreed to leave the question in dispute between them to the determination of the Munsif after he had inspected the locality, and also agreed not to raise any objection to the decision so arrived at by the Munsif and to hold themselves bound by the decision of the Munsif. It was specifically stated in the agreement that neither of the parties shall be competent to raise any objection to the decision or to prefer an appeal. Acting on this submission, the Munsif made a local inspection and passed an order with which the plaintiffs were not content, so that they applied to the Munsif under Section 623 of the Civil Procedure Code, 1882, for a review. The Munsif granted the review and passed a second order in modification of his first order, and again embodied the order in what purported to be a decree in the suit. Against this decree, an appeal was filed by the defendants before the District Judge who entertained the appeal and made an order of remand. On second appeal, the High Court of Calcutta held that the first judgment of the Munsif was in the nature of an award and that it did not lose that character because he embodied the operative part of that judgment in what purported to be a decree

in the suit. He was in fact an arbitrator by the submission of the parties and his decision was an award. It was not open to him to alter that award when made or to review his decision. It was further held that no appeal, consequently, lay to the District Judge against that decision. It is on the basis of these cases that it was argued that, in the present case also, the order made by Mallick, J., should be held by us to be in the nature of an award made by an arbitrator, so that it cannot be treated as a decree and filed as such in the partition suit which was pending before him.

8. As against these cases cited on behalf of the appellant, our attention has been drawn on behalf of the respondents to the views in Halsbury's Laws of England, and to certain decisions of Courts in India. In Halsbury's Laws of England, Third Edn., Vol. 2, at p. 8 in para 15, it is stated :-

> "An arbitration agreement must be an agreement to refer disputes to some person or persons other than a Court of competent jurisdiction. In principle, a judge sitting extra cursum curiae may sit as arbitrator under an arbitration agreement and a reference to a foreign Court has been treated as an arbitration agreement for the purpose of exercising the jurisdiction to grant a stay of proceedings arising out of the same subject-matter. An agreement that the decision of a judge sitting in Court should be unappealable is however, despite the language of some of the decisions cited, not an arbitration agreement; the decision, when given, is a judgment, not an award, and the judge is not placed in the position of an arbitrator."

Reliance is placed particularly on the last sentence of the above extract from Halsbury's Laws of England.

9. In Nidamarthi Mukkanti v. Thammana Ramayya, (ILR 26 Mad 76) parties in a suit pending before the District Munsif presented a petition undertaking that both parties would abide by the decision of the Court that may be passed, as it thinks just, after perusing the documents filed by both parties and all the records in the said suit, and after measuring the sites and inspecting the marks, etc., which are thereon. The District Munsif ordered accordingly, inspected the site, and found in favour of the plaintiff and pronounced judgment giving him the order claimed, and granted the injunction. It was held by the Madras High Court on appeal that the District Munsif acted as arbitrator by consent of parties and that, consequently, no appeal lay from his decision which must be looked on as an award. It was, however, added that, as no attempt had been made to attack that award on any of the grounds specified in Section 521 of the Civil Procedure Code, the Court must look on the decree of the District Munsif as one passed in accordance with the award and uphold it as such.

10. In Chinna Venkatasami Naicken v. Venkatasami Naicken and Another, (ILR 42 Mad 625) in a suit for money due upon a mortgage bond, after the examination of some witnesses, parties agreed to refer the questions of law and fact arising in the case to the decision of three persons, viz., the Subordinate Judge and two friends of the parties. An award was made by the majority. Thereupon, an application was presented by the defendants to set aside the award on various grounds. The Subordinate Judge overruled the objections and passed a decree in accordance with the award. In the Revision before the Madras High Court, the main ground taken was that the reference to the Subordinate Judge as one of the arbitrators was illegal and that the whole award was vitiated thereby. Seshagiri Ayyar, J., in confirming the decree of the Subordinate Judge, held :-

> "In my opinion, therefore, although the procedure adopted by the Subordinate Judge in dealing with the matter as if it was a reference under the second schedule and as if

> the provisions of the Code applied were wrong, inasmuch as a decree was passed in terms of the award, the defendant as a party to the reference is not entitled to contest its finality and to request that the case should be heard again."

Wallis, C.J., said :-

> "I think a reference of the suit to the presiding judge must be held to be altogether *extra cursum curiae* and not the less so when two others are joined with him, and that the decree passed in accordance with their decision must be regarded as a consent decree, and as not subject to the provisions of the second schedule."

In Neti Venkata Tomayajulu Garu v. Adusumilli Venkanna, (ILR 58 Mad 31) in a suit claiming an easement of necessity in respect of certain lands, the District Munsif, at the request of the defendant, made a local inspection of the site, where after the plaintiff was examined-in-chief and some documents were filed. Thereafter, the parties requested the Court to give a decision on the evidence already on the record and intimated that they proposed to adduce no further evidence. The Munsif gave his decision partly in favour of the plaintiff and partly against him. The plaintiff appealed to the Subordinate Judge who dismissed the appeal, holding it to be barred by reason of the joint statement given by the parties before the Munsif. On further appeal, the High Court of Madras held that, although the proceeding was not extra cursum curiae, the right of appeal was nevertheless barred by reason of the special agreement.

11. In K. P. Dalal v. R. S. Jamadar, (AIR 1945 Bom 478) in an application registered as a suit for ejectment from a premises, the Judge trying the suit, at the first hearing of the suit, after pleading of parties had been put in, enquired of the advocates of the parties as to whether they wanted a formal trial or whether they were prepared to leave the matter to him to be summarily decided as an arbitrator after hearing the respective advocates and inspecting the premises. Both the advocates agreed to the learned Judge hearing the facts from them and after inspection of the premises by the Court to submit to his decision as suggested. Thereafter, the judge inspected the premises and ultimately, on a further agreement by both parties that the matters in dispute should be decided by the Judge as an arbitrator, he gave his decision. When the case came up in revision before the Bombay High Court, the learned Judge of that Court referred to the quotations from Halsbury's Laws of England and Russell on Arbitration which we have noticed earlier, and expressed his opinion that he did not think that those observations necessarily meant that the Judge ceased to be a Judge and became a pure arbitrator in the sense that he could refer the dispute to himself and also remit the award to himself. The order of the trial Judge dismissing the application and making no order as to costs was upheld on the view that the trial Judge had not lost his capacity as a Judge and had not become a pure arbitrator governed by the Arbitration Act and, therefore, the provisions of that Act would not apply to him, so that the order passed by the trial Judge was correct.

12. In Baijnath v. Dhani Ram, (ILR 51 All 903) a suit for declaration, removal of certain encroachments and a perpetual injunction came for trial before the Munsif where the parties agreed that the Munsif should decide the case on inspection of the documents filed by the parties and on inspection of the locality. They further agreed to accept the decision of the Munsif. The Munsif wrote a judgment and decreed the suit in part. There was an appeal to the District Judge which was dismissed and the second appeal came before the High Court of Allahabad which was also dismissed. While the appeal before the District Judge was pending, an application for review of judgment was also presented before the Munsif. In disposing of this application, the Munsif held that he was an arbitrator and that his decision was binding on the parties, so that an application for

review did not lie as there was no sufficient cause for review. This order was again taken up in revision before the High Court, and the question arose whether the Munsif could not entertain the application for review because he was an arbitrator. The Court held :-

> "The Munsif, in accepting the position of an arbitrator, had a twofold capacity. He was an arbitrator, but he was also the Court. If the arbitrator left anything undecided, the parties would be entitled to go to the Court and to ask the Court to remit the award to the arbitrator. The fact that the two capacities were constituted in the same person should not deprive a party of his right of having matters set right."

On this view, the Court was of the opinion that an application for review lay against the judgment of the Munsif, allowed the revision and directed the Munsif to take up the application for review afresh and consider it on the merits.

13. In Edapalli Kotamma v. Nallapaneni, Mangamma and Others, (AIR 1957 AP 700) in a suit for mandatory injunction directing the defendants to remove certain constructions and for a permanent injunction restraining them from obstructing the flow of surplus water from plaintiff's land, the parties, after a Commissioner appointed to inspect the locality had prepared certain plants and submitted his reports, signed and filed a memorandum before the District Munsif in the following terms :-

> "Both parties agreed to abide by the decision of the Hon'ble Court after personal inspection. The parties are not adducing oral evidence. Documentary evidence can be received."

The District Munsif inspected the locality, placed on record a detailed note of the physical features of the locality, etc. and, on the basis of the Commissioner's plans and reports and his own personal inspection, gave a judgment for the plaintiffs. A decree was also drawn up in the usual course. The first defendant preferred an appeal which was rejected by the first Appellate Court on the ground that it was incompetent. In second appeal before the Andhra Pradesh High Court, the question arose whether the first Appellate Court was right in holding that no appeal lay to it from the decree of the Trial Court. A learned single Judge of the Andhra Pradesh High Court differed from the view expressed in Nidamarthi Mukkanti's case (supra) and held that there could not be a reference to arbitration by the Judge to himself. He expressed the view by saying :

> "It would be fantastic to say that in a case like the present, the Court made a reference to itself, fixed the time for the making of the award, stayed its hand till the expiry of the time fixed for the submission of the award, received the award, gave time for objections to the award, heard the objections and, finding no grounds for setting aside the award, pronounced judgment in accordance therewith."

He went on to hold :

> "The Arbitration Act of 1940 makes it clear that a reference to arbitration could be made only in accordance with the Act and the procedure prescribed by the Act should have been followed before Sections 17 and 39 of the Act barring appeals from decrees on awards, could be invoked. Consequently, the decision of the Trial Court could not be treated as the award of an arbitrator and the decree that followed, could not be held to be a decree on an award and therefore not open to appeal."

He then proceeded to examine the question whether, there being no statutory provisions barring a right of appeal in that case, there was any principle of law which deprived the parties of the right of appeal. He noted the fact that, in that case, there was no express agreement not to appeal; but the controversy turned on the question whether, by their conduct, the parties should be deemed to have given up their right of appeal and whether the waiver of the right of appeal should be implied from the terms of the agreement between the parties. The learned Judge held that there had been no waiver of the right of appeal, so that the appeal before the first Appellate Court was competent. The order dismissing that appeal was set aside and the case was remanded for a decision of the appeal on merits.

14. Reference may also be made to a decision of the Privy Council in Pisani v. Attorney-General of Gibraltar. ((1874) 5 P C 516 (E)). In that case, the Crown claimed certain lands as escheated for want of heirs of the deceased owner. The defendants to the action were a purchaser from that owner, a person who claimed that the purchaser was only a trustee for him, and certain legatees and beneficiaries under a will of the deceased. During the course of trial, it became evident that the title of the Crown by escheat was unsustainable, but, instead of dismissing the suit, the Court, with the consent of the parties, allowed an amendment of the pleadings by the addition of a prayer that the rights of the several defendants might be ascertained and declared by the decree of the Court. The Court then enquired into the rival claims of the defendants, and declared their respective rights. One of the defendants preferred an appeal from the judgment to the Privy Council and a preliminary objection was taken to the competency of the appeal. The Judicial Committee of the Privy Council held that, though the amendment of the pleadings in the Court below could not have been made except by consent of parties and though the Court below had been invited by the rival claiments to adjudicate upon their rights inter se, there was no stipulation that the right to appeal should be given up. The parties did not contemplate that the Judge was to hear the cause otherwise than as a Judge or that the litigation was not to go on subject to all the incidents of a cause regularly heard in Court, including an appeal to the Judicial Committee. There was nothing in the proceedings suggesting that the parties waived their right of appeal. It was in this context that the Judicial Committee made the following observations :

> "It is true that there was a deviation from the cursum curiae, but the Court had jurisdiction over the subject and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the Court jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal."

The Privy Council added that it was wrong to regard the decision of the Court as an award of an arbitrator or to attribute an intention to the parties that the decision should not be open to appeal.

15. A review of all these decisions shows that the question as to the nature of an order made in circumstances similar to those with which we are concerned has been considered both in England and in India primarily for the purpose of deciding whether such an order is subject to an appeal like an ordinary judgment of a Court from which an appeal lies. In some cases, the right of appeal was negatived on the ground that such a decision was in the nature of an arbitrator's award. In other cases, it has been treated as a judgment amounting to a decision by consent of parties. In the cases before us, the position is different. No appeal was ever sought to be filed against the order of

Mallick, J., dated 1st April, 1963. Further, the language of the agreement of the parties, on the basis of which Mallick, J., proceeded to make that order, was different from that considered in these various decisions. At the first stage, the parties got it recorded that the matters were to be settled and referred to the sole arbitration of Mallick, J. The parties agreed to abide by any decision that might be given by him and that no evidence need be taken except or to whatever extent Mallick, J., might desire. The evidence need not be recorded in any formal manner. Mallick, J., was to have all the summary powers including the power to divide and partition the properties. The conferment of these powers on Mallick, J., who was already seized of the partition suit, was clearly intended to enable him to function as an arbitrator so as not to be bound by the rules of procedure applicable to him as a Court. At the same time, the parties added that Mallick, J., was to make such decrees as he thought fit and proper and for the purpose of partition, if necessary, he could engage or appoint surveyors and Commissioners as he thought best. On the face of it, an arbitrator could not pass any decree. The decree could only be passed by Mallick, J., in his capacity of Court seized of the suit. Even if it be held that the first part of the agreement had the effect of bringing about a reference to him in his capacity as arbitrator, he did not cease to be seized of the partition suit as a Court. Even under the Arbitration Act, if a reference is made to an arbitrator in a suit pending in a Court, the Court does not cease to have jurisdiction over the suit. All that is required by the provisions of the Arbitration Act is that no further proceedings are to be taken by the Court, except in accordance with the other provisions of that Act. The suit continues to remain pending before the Court. In a case like the present, where the arbitration agreement envisages that the Presiding Officer of the Court should himself act as an arbitrator, he, in such circumstances, will obviously occupy a dual capacity. He will be both an arbitrator to decide the matters referred to him by the agreement of the parties, and a Court before which the suit continues to remain pending having jurisdiction to deal with the suit in accordance with the provisions of the Arbitration Act. It is a question whether a reference to arbitration by a Presiding Judge, before whom a suit is pending, can be competently made under the Arbitration Act; but that is a point on which we need express no opinion, because, if it be held that there was no reference to arbitration in the present case, the order passed by Mallick, J., must be held to be a preliminary decree passed by him as a Court seized of the partition suit. On the other hand, even if it be held that there was a competent reference, it is clear that, after deciding the matters left to his decision as an arbitrator by the parties, Mallick, J., proceeded further to deal with the suit himself as a Court and to pass a preliminary decree in it which course being adopted by him was envisaged by the parties themselves when they stated that he could make such decrees in the suit as he thought fit. The actual order passed by Mallick, J., also makes it clear that, in passing that order, he purported to act as the Court deciding the suit and not as the arbitrator to whom some matters in dispute were referred by the parties. At the beginning of the order, Mallick, J., described himself as "the Court". When making the operative order, he used the following language:-

> "In the result, for the present, I will pass a preliminary decree as under :-
>
> On the face of it, when he passed this order, he acted as a Judge seized of the suit who alone was competent to pass the preliminary decree in the suit. Consequently, we cannot accept the submission made by Mr. Chagla that the order made by Mallick, J., should be held to be an award of an arbitrator pure and simple and not a decree by a Court.

16. We are not concerned in this appeal with the question whether it was appropriate for Mallick, J., to have dealt with the suit in this manner, nor whether the actual order made by him passing the preliminary decree was correct or was liable to be set aside on the ground of the incorrect procedure adopted by him. As we have mentioned earlier, the sole relief claimed before the High Court was

the issue of a writ of mandamus directing the Registrar on the Original Side to recall, cancel and withdraw this order and to take it off the record, on the ground that it was an award and not a judgment of the Court. Since we have held that it was a judgment of the Court, the Registrar on the Original Side, under the Rules of the Calcutta High Court, was bound to file it on the record and retain it there. The appellant could have sought appropriate remedy for having that judgment vacated and, if such remedy had been sought against that judgment directly, the question whether it was a good judgment and should be retained on the record or not could have been appropriately decided. The remedy sought by the appellant of seeking a writ to restrain the Registrar on the Original Side from keeping the judgment on the record of the suit could not possibly be allowed, while the judgment stood and was not vacated.

17. In the result, we have to hold that the order of the High Court dismissing the petition filed by the appellant was correct and justified. The appeal is dismissed, but, in view of the special circumstances of this case, we direct parties to bear their own costs.

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