ANDHRA PRADESH HIGH COURT

Edapalli Kotamma

Vs.

Nallapaneni Mangamma

Second Appeal No. 324 of 1952, Guntur, in A.S. No. 68 of 1951

(Viswanatha Sastri, J.)

17.08.1955

JUDGMENT

Viswanatha Sastri, J.

1. This Second Appeal arises out of a suit filed in the Court of the District Munsif of Guntur for a mandatory injunction directing the defendants to remove certain bunds put up by them and for a permanent injunction restraining them from obstructing the flow of surplus water from plaintiff's land. The defendants resisted the suit on various grounds. A Commissioner was appointed to inspect the locality and he prepared certain plans and submitted his reports. Before the trial began, the parties signed and filed a memorandum in Court 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."

2. The District Munsif inspected the locality and placed on record a detailed note of the physical features of the locality, the height and length of the bunds and other relevant matters. On the basis of the Commissioner's plans and reports and his own personal inspection, the District Munsif gave judgment for the plaintiffs. A decree was also drawn up in the usual course. Against the decree, the first defendant preferred an appeal, but the appeal was rejected by the lower appellate Court on the ground that it was incompetent. The question in this Second Appeal is whether the lower appellate Court was right in holding that, in the circumstances of the case, no appeal lay to it, from the decree of the trial Court.

3. Learned counsel for the appellant and the respondent each cited a decision of the Madras High Court as supporting his contention. Before considering the decisions cited as well as others, I should like to refer to certain general principles and the relevant statutory provisions. Section 96, Civil Procedure Code, provides a right of appeal from the decree of a Court exercising original jurisdiction,

> "save where otherwise expressly provided in the body of this Code or by any other law for the time being in force."

Section 96 (3) provides that ho appeal shall lie from a decree passed with the consent of parties. In some of the decided cases, decisions of the kind now in question have been treated as consent decrees or orders. In my opinion, however, this is not a correct view to take. Order 23, Rule 3, Civil Procedure Code, provides the procedure to be followed in passing consent decrees. It has been ruled by the Judicial Committee that when a decree is passed by consent of parties it should always so appear on the face of the decree when drawn up. Vide *Zahir-ul-Said v. Lachmi Narayan*[1],. Where both parties to a suit ask the Court to pass a decree in accordance with a lawful compromise arrived at between them, the Court has no discretion but only a duty to record the compromise and pass a consent decree. Vide *Sorendranath v. Tarubala*[2], Since a consent decree merely embodies the terms of the contract between the parties and is a mere creature of the agreement on which it is founded, a right of appeal from this decree is not given. In the present case, the terms of the decree were not agreed to by the parties but were imposed upon them by the Court and the Court did not and could not have acted under Order 23, Rule 3, Civil Procedure Code, when passing the decree. Section 96 (3), Civil Procedure Code, does not therefore debar an appeal in this case.

4. The view has been taken in some cases that the decision of the Court in a case like the present is in the nature of an award of an arbitrator and is therefore not open to appeal. In *Nidamarthi Mukkanti v. Thammanna Ramayya*[3], where the facts were similar to the present case, the learned Judges held that the District Munsif acted as an arbitrator by consent of parties and consequently no appeal lay from his decision which must be treated as an award. The Court held that the decree passed in accordance with what they considered to be an award was not open to appeal by reason of Section 522, Civil Procedure Code, 1882, corresponding to Schedule II, para. 16 (2) of the Civil Procedure Code of 1908. Both Sections 521 and 522, Civil Procedure Code of 1882 and the corresponding provisions of Schedule II of the Civil Procedure Code of 1908 contemplated an arbitration by third persons and not by the Court itself. 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. I respectfully share the doubts expressed by Sadasiva Ayyar J., in In re, Peda Nagamma, 26 Ind Cas 355 , about the correctness of the decision in ILR 26 Mad 76.
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.

5. There being no statutory provisions barring a right of appeal in the present case, I have to consider whether there is any other principle of law which deprives the parties of the right of appeal. A right of appeal is an important right possessed by litigants

[1] 60 Mad LJ 648 [3] ILR 26 Mad 76
[2] ILR 57 Cal 1311

and such a right can only be given up by a clear agreement either in express terms or
by necessary implication. If there is an express agreement not to appeal, no further question arises. The controversy has 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 decided cases do not speak with one voice. There are two well-known English cases which lay down the principles applicable to cases of this kind. The first is *Pisani v. Attorney-General of Gibraltar*[4], In that case, the Crown sued to establish its right to certain lauds which originally belonged to a deceased lady but which were alleged to have been escheated for want of heirs. The defendants to the action were a purchaser from the lady, a person who claimed that the purchaser was only a trustee for him, and certain legatees and beneficiaries under a will of the deceased. The defendants put forward competing claims to the property. During the course of the 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 Judicial Committee and a preliminary objection taken by the respondents to the competency of the appeal, was overruled by the Judicial Committee. The Judicial Committee 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 claimants to adjudicate upon their rights inter se, there was no stipulation that the right of 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 following oft-quoted observations of the Judicial Committee were made :

> "It is true that there was a deviation from the cursus 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 everyday 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 held 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. In that case, there was no agreement between the parties that a decision of the Court should be final. Nor was there anything in the course of the proceedings suggesting that the decision was intended by the parties or the Court to be final and not appealable.

[4](1874) 5 PC 516

6. I may now refer to a case on the other side of the line, *Burgess v. Morton*[5], The English Rules of Procedure did not contemplate or permit the use of a special case except for the purpose of obtaining the decision of questions of law arising upon the facts admitted. The parties, however, did not agree on the facts and yet submitted a special case and invited the Divisional Court to try questions of fact in dispute between them and give a decision on their rights. The Court acceded to their request and gave a decision. The House of Lords held that the proceedings were not in ordinary course of law but extra cursum curiae and that the decision of the Divisional Court

should be regarded as being in the nature of an arbitrator's award from which no appeal lay. There was no agreement between the parties excluding a right of appeal, and the basis of the decision was that the proceedings were extra cursum curiae the decision of the Court was in the nature of an award and therefore the right of appeal was barred. Lord Halsbury, L. C., observed :

> "Where with the acquiescence of both parties a Judge departs from the ordinary course of procedure and has, as in this case decided upon a question of fact, it is incompetent for the parties afterwards to assume that they have an alternative mode of proceeding and to treat the matter as if it had been arrived in due course.

I am satisfied that if the parties had not agreed to take the decision of the Divisional Court upon the question of fact, that Court would have refused to hear the case. The parties having done so, I think they are now precluded from treating the matter as subject to appeal."

7. The decision of the Divisional Court was treated as being in the nature of an arbitrator's award and was therefore held to be unappealable. The right of appeal was held to be barred not by any express agreement of the parties but by necessary implication, by reason of their invitation to the Court to act extra cursum curiae.

8. The cases in India have sought to apply the principles enunciated in the two English decisions referred to above. Reference has already been made to ILR 26 Mad 76. In *Sayad Zain v. Kalabhai*[6], the facts were similar to the present case. A money claim in a pending suit was left for the decision of the presiding Judge on the basis of his own information and the documentary evidence produced by the parties. The parties agreed to abide by his decision. The Court held that the decision of the Judge, though followed by a decree, was in the nature of an arbitrator's award and therefore not open to appeal. The next case that calls for notice is *Chengalroya Chetty v. Raghava Ramanuja Doss*[7], where the terms of the agreement between the parties were :

> "We shall abide by any kind of decree made by a Court after a personal inspection of the place in dispute."

The learned Judges held that the parties who had given their consent to the Court itself acting as an arbitrator were debarred from afterwards questioning the decision

[5] 1896 AC 136 [7] 37 Mad LJ 100

[6] ILR 23 Bom 752

not by reason of the provisions relating to arbitration awards in Schedule II, Civil Procedure Code, 1908, but because they were bound by their agreement. Sadasiva Ayyar J., had observed in 26 Ind Cas 355 thus :

> "An agreement not to appeal is binding on the parties, the consideration being their mutual consent to refer the matter in dispute to the Court as an arbitrator."

9. In 37 Mad LJ 100 , the learned Judge further explained the ratio decidendi in these terms :

> "On general principles of jurisprudence, a party cannot go back on his consent to abide by

> the decision of an arbitrator after the award is given just as he cannot resile from the obligations arising from an executed contract."

I am in respectful agreement with the reasoning of Sadasiva Ayyar J.

10. A different view has been taken in *Sankaranarayana v. Ramaswami*[8], where Schwabe, C. J., expressed his dissent from the reasoning in ILR 26 Mad 76 and 37 Mad LJ 100 . The facts of that case were similar to those of the present case. The agreement between the parties was set out in an affidavit which ran as follows :

> "We agree to the matter being decided according to the opinion which the Court might entertain on local inspection without going into any further evidence."

11. The plaintiff endorsed on that affidavit an agreement to abide by any decision which the Court may arrive at after making local inspection of the land and perusing certain plans and other records. It was held that an appeal from the decision of the Court was maintainable and that there was no waiver of such right. Reference was made to the two English cases cited above and the previous decisions of the Madras High Court from some of which the learned Chief Justice expressed his dissent. The learned Chief Justice also made a distinction between questions of fact and questions of law as regards the maintainability of appeals in this type of cases, I find it difficult to draw a distinction between a decision on the facts and a decision on the law so far as the maintainability of the appeal is concerned. If the parties agree, expressly or impliedly, not to appeal from the decision of a Court, the agreement must cover the decision both on facts and law. If, however, the agreement does not debar an appeal, the appeal must be competent both on facts and law, though in view of the course the trial has taken with the consent to the parties the appellant cannot complain of the inadequacy of the evidence and materials to sustain the findings of fact or of the competency of the Judge to act on his personal observations unsupported by independent evidence. There is no reason to assume that the parties agree to the Court deciding questions of fact finally and to the best of its judgment but not questions of law, unless it is so stated in the agreement. The next case that has to be considered is *Venkatasomayajulu v. Venkanna*[9], a decision of Venkatasubbarao, J., the learned

[8] ILR 47 Mad 39

[9] ILR 58 Mad 31

Judge came to the conclusion that there was, in the circumstances of that case, a waiver of the right of appeal, not by express agreement but by necessary implication. In the agreement between the parties they prayed that the Court might be pleased to consider the evidence on record and the documents filed so far and give a final, decisive adjudication between the parties without there being any necessity for examining further witnesses. Both the parties further agreed "to be bound by the decision and to act according to it by giving full effect thereto." The learned Judge held that though the proceeding in that case was not extra cursum curiae, the right of appeal was nevertheless barred by reason of the agreement between the parties under which impliedly, but not in express terms, the parties waived their right of appeal. The agreement in the present case is not so emphatic or positive in its terms. The last case to be referred to is *Kunjammal v. Rajagopala Iyer*[10], where the facts were somewhat different. The appeal was one from a decree for maintenance in a suit by a wife against her husband who had denied liability in his written statement but agreed at the trial as a matter of compromise to give the wife such

maintenance as might be fixed by the Judge not on any evidence - in fact no evidence was adduced - but on statements of counsel from the bar. The appeal was dismissed on two grounds : (1) there were no material in the shape of evidence on the strength of which the appellate Court could safely come to a different conclusion from that of the trial Court, (2) the concession by the defendant of the plaintiff's right to maintenance was a matter of compromise and was bound up with the procedure agreed to by both sides which left the court free to pursue a course which was not in any sense, judicial. The Court observed that it was a question of fact in each case whether' the circumstances merely amounted to a deviation more or less from the ordinary procedure or whether the agreement between the parties was that the Court should give a decision more in the nature of an award than an adjudication on the evidence in the case complete or incomplete. The intention could only be ascertained by the events which happened in the particular case.

12. In the present case the Court had jurisdiction to entertain the suit which was filed there in the normal course. A commissioner was appointed who, after inspecting the locality submitted his plans and reports which are marked as Exhibits A-1 to A-5. The parties dispensed with oral evidence and invited the District Munsif to make a local inspection and he accordingly inspected the locality and placed on record an elaborate note with full details of what he observed at his inspection. The District Munsif was asked to give his decision after taking into consideration the commissioner's plans and reports, the facts observed by him during his local inspection and the documentary evidence adduced by the parties. Actually no other documents except Exhibits A-1 to A-5 were filed or exhibited. The District Munsif gave his decision on the basis of the commissioner's plans and reports and the notes of his personal inspection. A full and complete judgment recording his findings on the issues with reasons therefor was given and was followed by a decree. The proceedings were not in any sense extra cursum curiae. The suit was one triable by a District Munsif in the normal course. Just as in any other suit the parties had the right to dispense with oral evidence and they did so. The District Munsif had power to make a local inspection under Order 18, Rule 18, Civil Procedure Code. The only deviation from the normal procedure was that the observations of the District Munsif in the course of his local inspection were

[10]1948-2 Mad LJ 291

substituted for the oral evidence of witnesses, with the consent of the parties. By reason of the agreement the parties could not object to the findings of the District Munsif on the ground that he had put his views derived from his local inspection in the place of oral evidence and reached a decision. If on the basis of the notes of local inspection and the commissioner's plans and reports alone, without more, the decision of the District Munsif could be shown to be erroneous in fact or in law, the appellant is entitled to do so, unless he had agreed expressly or by necessary implication, to give up the right of appeal. The words "abide by the decision", without more, were held not to imply an abandonment or giving up of the right of appeal in ILR 47 Mad 39 . I therefore hold that the appeal to the lower appellate Court was competent.

13. The decree of the lower appellate Court is reversed and the appeal is directed to be restored to its file and heard on the merits. Costs of this second appeal will abide and follow the result. The court-fee paid on the memorandum of appeal is directed to be refunded.

Appeal allowed and case remanded.