

ANDHRA PRADESH HIGH COURT

M. Venkataratnam

Vs.

M. Chelamayya

Appeal No. 212 of 1962

(Basi Reddy, Gopalakrishnan Nair and Venkatesam, JJ.)

01.04.1966

JUDGMENT

Basi Reddy Gopalakrishnan Nair, J.

1. This appeal has been placed before us as a result of the view expressed by a Division Bench of this Court that it involves certain important questions of law which deserve consideration by a larger Bench. The question expressly mentioned in the order of reference to the Full Bench is :

"Whether a private award passed after the coming into force of the Arbitration Act, 1940 and which deals with immoveable property of a value of more than Rs. 100/- is compulsorily registrable under Section 17 (1) (b) of the Indian Registration Act, before it can be made a rule of Court under Section 17 of the Indian Arbitration Act 1940".

Although no other question has been formulated in the order of reference to the Full Bench certain other points also seem to arise for our consideration and we shall deal with them in due course.

2. The salient facts leading up to this appeal may now be stated succinctly. The two appellants and the two respondents before us constituted a Hindu joint family which owned considerable moveable and immoveable properties. Differences arose between them and they considered it necessary to effect a partition of the joint properties. Consequently, on 20-5-1950, they executed an arbitration agreement, Ex. A-1 appointing V. Krishnaiah, B. Chinna Venkatarayudu and M. Ayyanna alias Venkataraju as arbitrators for partitioning the entire moveable and immoveable properties belonging to the joint family into four shares. Under this document, they also agreed to accept as final and binding the decision of the arbitrators. At the time of Ex. A-1, the second appellant, Venkataswamy, was a minor and was represented by his paternal uncle, the first respondent (Chalamaiah) as guardian. By October, 1954, the second appellant became a major and therefore he along with the first appellant and the two respondents executed Ex. A-2 dated 10-10-54. This document expressly stated that the immoveable properties belonging to the joint family had been partitioned by the arbitrators during the minority of the second appellant and that

the second appellant accepted that partition.

On 28-8-1955, the four members of the family executed Ex. A-3 requesting the arbitrators "to pass an award taking into consideration the chitta balance pertaining to our joint family, the paddy account relating to Faslis 1347, 1348 and 1349, the statements given by us previously and also the records." On 10-11-1955, the arbitrators made an award dividing the moneys belonging to the joint family among the four sharers. They decided that the first respondent had taken from the joint family a sum of Rs. 14,051-7-3 and the second respondent a sum of Rs. 8,926-3-6 in excess of their shares and, therefore, directed them to pay to the first plaintiff a sum of Rs. 8,268-11-0 and to the second respondent a sum of Rs. 14,708-15-9. They also decided that these amounts payable to the appellants by the respondents should be a first charge on the immoveable property which fell to the shares of the respondents. The award took care to declare that the respondents were also personally liable to pay the aforesaid amounts to the appellants. The appellants thereafter took steps under section 14 of the Arbitration Act to cause the award to be filed in the Court below and prayed that a judgment be pronounced and a decree passed in accordance with the award. The respondents filed two separate applications, I. As. 597 and 598 of 1956, for setting aside the award.

3. The respondents raised a preliminary objection that the award being unregistered could not be received in evidence as it came under the ban of Section 49 of the Registration Act. According to them, the award which effected partition of extensive immoveable properties of the joint family and which further created a charge on the immoveable properties which were allotted to the share of the respondents was compulsorily registrable under Section 17 (1) (b) of the Registration Act. They also raised an objection that the award was not duly stamped. The learned Principal Subordinate Judge, Kakinada upheld these objections and rejected the appellants' claim for a decree in accordance with the award. This led to the present appeal being filed.

4. The main contention raised by Mr. Narasaraju on behalf of the appellants is that an award made without the intervention of Court after the coming into force of the Arbitration Act (Act X of 1940) does not at all require to be registered under any circumstance because such an award has no force or effect whatsoever until it is made a decree of Court under Section 17 of the Arbitration Act, hereinafter referred to as the Act. In support of this contention, he has relied upon Sections 31(2) and 32 of the Act. It is well to read these sections here : Section 31(2) :

"Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been or may be, filed, and by no other Court".

Section 32 :

"Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

These provisions preclude an independent suit being filed to enforce an award which is not filed under Section 14 and made a rule of the Court. The effect of these sections considered in the light of the general scheme and object of the Act also prevents a party from setting up an unfiled award as a bar to an action brought against him. Vide *Pamandass v. Manikyam Pillai*¹, Thus an award which has not passed into a decree under Section 17 of the Act cannot avail for founding an independent suit or for resisting an action. A decision upon the existence, effect or validity of an award cannot be obtained outside the provisions of the Act; nor can an award be sought to be set aside, amended, or modified or in any way affected otherwise than as provided by the Act. The Act is a self-contained code with regard to the law of arbitration. The position which obtained under the old Arbitration Act of 1899 and under the repealed second schedule of the Code of Civil Procedure has been radically altered by the Act (Arbitration Act X of 1940). Under the previous law, it was open to a party to file a substantive suit to enforce an award. It was also open to a person to institute an independent action to set aside an award. An award could also be set up in defiance as a bar to a suit. The effect of an award under the previous state of law was to merge the original cause of action in the award. So, suits to enforce awards were freely resorted to, and with equal freedom the validity of awards was challenged in defiance or by separate action. In *Sassoon and Co. v. Ramdutt Ramkissen Das*², it was held by the Judicial Committee that an application under the Arbitration Act, 1899 was not the only way for setting aside an award and that it would be open to the party affected to challenge the validity of the award in a suit filed for the purpose where the arbitrator had acted wholly without jurisdiction and that the mere fact that the award had been made a rule of Court and enforced by execution would not under Section 15 of the Arbitration Act, 1899 be a bar to a suit to have it declared void and for consequential relief. This decision illustrates the inconvenience which could result from the old law relating to arbitration in India. Many decisions leading to equally inconvenient results had been rendered under the provisions of the second schedule of the Code of Civil Procedure. It was to remedy this unsatisfactory state of law that the Act of 1940 was passed "to consolidate and amend the law relating to arbitration." The Act of 1940 prohibits agitating questions relating to arbitration in any manner other than provided by the Act. And the Act provides a simple procedure for obtaining speedy decisions on questions relating to awards and the arbitration agreements. If an award is not made a decree of Court under Section 17 of the Act, it cannot now be relied upon either by a plaintiff or by a defendant. It will be open to the parties to revert to the original cause of action, that is, to the position which prevailed prior to the making of the unfiled award and work out their rights. In other words, an award which is not made a rule of the Court cannot help or hinder any party in a litigation. All this does not however, seem to us to lead to the conclusion that an award which purports to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, to or in immoveable property of the value of Rs. 100/- and upwards does not require to be registered under Section 17(1)(b) of the Indian Registration Act. There is no provision in the Act (Arbitration Act, 1940) dispensing with registration of a document compulsorily registrable under Section 17(1)(b). Indeed, the amendment of Section

¹ AIR 1960 And Pra59 (FB)

² ILR 50 Cal 1 : AIR 1922 PC 374

17(2)(vi) of the Registration Act by Section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929 clearly shows that an award no longer enjoys exemption from registration which it previously enjoyed. After the amendment of 1929, which came into force on 1st April, 1930, an award is compulsorily registrable if it purports or operates to create, declare,

assign, limit or extinguish, whether in present or in future, any vested or contingent right, title or interest to or in the immoveable property of the value of Rs. 100/- and upwards. If the Arbitration Act of 1940 intended that an award did not require registration even if it effected immoveable property of the value specified in Section 17(1)(b), one would expect some provision to that effect in the Act itself, or a suitable amendment of the Registration Act for the purpose. One cannot reasonably attribute to the legislature any inadvertent omission in this regard. The absence of any provision to indicate that an award need not be registered after the coming into force of the Arbitration Act of 1940 seems to point to the conclusion that the legislature considered that an award should be registered, if it purported to affect immoveable property as contemplated by Section 17(1)(b) of the Registration Act. To say that an award to be enforceable will have to be rendered a rule of the Court under Section 17 of the Act is not tantamount to saying that no other requirement of law needs to be complied with for making an award valid. The registration of an award under Section 17(1)(b) is a requirement of law which if not complied with would render the award invalid. We are not able to see anything inconsistent between this requirement of the Registration Act and the requirement under the Arbitration Act, 1940 that an award could be rendered enforceable only if it is made a decree of Court under Section 17 of that Act. Both these requirements must, in our view, be fulfilled to render an award valid and enforceable. One requirement cannot be said to exclude the other or deemed to be redundant in view of the other.

5. The criterion for purposes of registration is what is expressed on the face of the document and not the weight or value or effect a Court may subsequently attach to it. Therefore, if an award purports to create, declare, or assign, whether in present or in future, any right, title or interest vested or contingent, to or in immovable property of the value of Rs. 100 and upwards, it becomes compulsorily registrable under Section 17(1)(b) of the Registration Act. Whether the creation or declaration of this right, title or interest to or in immovable property will be eventually upheld or enforced by a Court is not a relevant consideration for determining the necessity to register the document. Adverting - although in a somewhat different context - to the necessity to stamp and register an award made on a reference to arbitration out of Court, a Full Bench of the Madras High Court in *Mohamed Yusuf v. Mohd. Hussain*³, stated :

"The mere fact that an unfiled award might have to be registered or stamped cannot be decisive of its effectiveness as stamping and registration have to be done on account of statutory provision and not because that it has any force by itself."

6. The matter may perhaps be looked at from a slightly different aspect. Let us assume that the parties intended that the award should take effect only on its being made a rule of the Court under Section 17 of the Act. Even so it can well be said that the award purported to create in future a right, title and interest to or in immoveable property. If parties purported to create a particular right, title or interest to or in immoveable property contingent upon the award being made a decree of Court under Section 17 of the Act, it

³ AIR 1964 Mad 1 at page 6 (FB)

will still, in our opinion, fall within the purview of Section 17(1)(b) of the Registration Act. We consider this to be the effect of the word "purport" and of the expression "in present or in future" and "whether vested or contingent" occurring in Section 17(1)(b) of the Registration Act.

Section 3 of the Act says :

"An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference".

Paragraph 7 of the first schedule is as follows :-

"The award shall be final and binding on the parties and persons claiming under them respectively."

7. Therefore, an award is made in pursuance of an agreement that it shall be final and binding on the parties. If such an award deals with immovable property of a value of Rs. 100/- and upwards, it is difficult to say that it does not purport to create or declare or assign right, title or interest in the immovable property. It is not necessary for the applicability of Section 17(1)(b) of the Registration Act to say that the award actually operates to create, declare, etc. any right title or interest in immovable property. If it purports to create or declare any right, title or interest, it shall have to be registered for being valid. In the instant case, Ex. A-1, the arbitration agreement, has clearly stated that the award passed by the arbitrators shall be final and binding on the parties. This is precisely what the implied condition 7 of the first schedule to the Act also provides. An award made pursuant to such an arbitration agreement cannot be regarded as one not intended to affect immovable property as contemplated by Section 17(1)(b) of the Registration Act. Therefore, if the immovable property involved is of the requisite value, the award will perform have to be registered, if it is to be valid.

8. The learned counsel for the appellants has strongly relied on the decision of a Full Bench of the Patna High Court in *Seonarain Lal v. Prabhu Chand*⁴, It was held there that an award being of no effect before it is made a rule of Court, does not require to be registered even if the value of the property dealt with under it exceeds Rs. 100/-. The Full Bench of the Patna High Court also pointed out that once a decree is passed on the award under Section 17 of the Act, it will be exempt from registration in view of Section 17(2)(vi) of the Registration Act. Therefore, according to this decision, neither the award, nor the decree passed in accordance with it, would require registration, whatever be the value of the immovable property comprised therein.

9. Mr. Parthasarathy for the respondents has pointed out that a Division Bench of this High Court in *Srinivasa Rao v. V. Narasimha Rao*⁵, has expressly dissented from the view taken by the Full Bench of the Patna High Court and held that an award which embodies a transaction under Section 17 (1)(b) of the Registration Act will be invalid if not registered.

⁴ AIR 1958 Pat252

⁵ AIR 1963 And Pra 193

10. We are inclined to agree with the decision of the Division Bench of this Court. We find it difficult to adopt the decision of the Full Bench of the Patna High Court in AIR 1958 Patna 252. The Patna Full Bench appears to have proceeded on the footing that it is the decree passed under Section 17 of the Act that creates rights and liabilities between the parties and that the award has no force of its own. In our view, rights and liabilities of the parties are created by the award and not by the decree. The Court in passing a decree in accordance with the award under Section 17 of the Act only sets its seal of approval to the award. This is very different from saying that it is

the decree that creates rights and casts obligations on the parties. In *Hanskumar v. Union of India*⁶, the Supreme Court considered the nature of an award and the powers of the Court in dealing with it, and observed :

"Where an arbitration is held in pursuance of such an agreement and that results in a decision, that decision takes the place of an adjudication by the ordinary Courts and the rights of the parties are thereafter regulated by it. It is true that under the law the Courts have the authority to set aside the awards made by arbitrators on certain grounds such as that they are on matters not referred to arbitration or that the arbitrators had misconducted themselves or that there are errors apparent on the face of the award. But where the award is not open to any such objection, the Court has to pass a decree in terms of the award, and under Section 17 of the Arbitration Act, an appeal lies against such a decree only on the ground that it is in excess of or not otherwise in accordance with the award. In other words, it is the decision of the arbitrator where it is not set aside that operates as the real adjudication binding on the parties and it is with a view to its enforcement that the Court is authorized to pass a decree in terms thereof. There is thus a sharp distinction between a decision which is pronounced by a Court in a cause which it hears on merits and one which is given by it in a proceeding for filing of an award. The former is a judgment, decree or order rendered in the exercise of its normal jurisdiction as a Civil Court and that is appealable under the general law as for example under Sections 96, 100, 104, 109 and 110 of the C. P. C. The latter is an adjudication of a private tribunal with the imprimatur of the Court stamped on it, and to the extent that the award is within the terms of the reference, it is final and not appealable".

Section 17 of the Act enjoins that :

"where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow.

The powers of the Court to remit the award under Section 16 or to set aside the award under Section 30 are very limited. Subject to the provisions of Sections 16 and 30, the Court is bound to pronounce a judgment and pass a decree in accordance with the award. It has no discretion to refrain from doing so. It cannot change the award or revise it or

⁶ AIR 1958 SC 947

seek to substitute its opinion for that of the arbitrator. In other words, what Section 17 demands is that the Court should give effect to the award passed by the arbitrator, if it sees no reason to remit it under Section 16 or to set it aside under Section 30. No discretion is given to the Court in the matter. It does not therefore appear to be correct to think that it is the decree of the Court that confers rights and imposes obligations on the parties. In truth and substance, it is the award that does so. The requirement that the award shall be made a rule of the Court is only with a view to

its enforceability. This is far different from saying that the decree passed by the Court confers rights or imposes obligations apart from the award. A Court may uphold a sale deed or mortgage deed as valid and give effect to it by passing a decree on the foot of it. In such a case, the decree of Court is necessary to enforce the sale deed or the mortgage deed, as the case may be, against the party who refuses to accept it or act upon it. What the Court does there is to enforce the terms of the sale deed or the mortgage deed and not to create the terms of the contract of sale or mortgage between the parties. We do not think the position is different in this regard when a Court passes a decree under Section 17 of the Act in accordance with the award. We are not, therefore, satisfied that the contention that until an award is made a rule of the Court, the award is "a mere waste paper" or a nullity can be accepted as correct. The crucial document which creates the rights and liabilities between the parties is the award and the Court can found a decree upon it under Section 17 of the Act only if it is qualified under the provisions of the Registration Act for being received in evidence and acted upon by the Court. If it is not so qualified in the light of Sections 17 and 49 of the Registration Act, it cannot be made a rule of the Court under Section 17 of the Act. We think it is not in any way repugnant to logic to say that even as an award which is not made a rule of the Court cannot be enforced between the parties, an award which requires to be registered under Section 17(1)(b) of the Registration Act but is not registered cannot be made a rule of the Court. The requirements under the Registration Act and also the requirements under the Arbitration Act have both to be complied with before an award could become enforceable. The registration of the award is an earlier step and the passing of a decree on the award under Section 17 of the Act a later step in rendering the award enforceable. Section 49 of the Registration Act is mandatory and cannot be by-passed in proceedings under section 17 of the Act. It is only if an award is accepted in evidence that a judgment can be pronounced and a decree passed in accordance with it under Section 17 of the Act. But to enable an award falling under Section 17(1)(b) of the Registration Act to be received in evidence, it should be registered. Otherwise, the prohibition enacted in Section 49 of the Registration Act will come into play and the award cannot be received as evidence and acted upon by the Court. The following observations of the Supreme Court in *Champalal v. Mst. Samrath Bai*⁷, are relevant in this context :

"The second question that the award required registration and could not be filed by the arbitrators before it was registered is equally without substance. The filing of an unregistered award under Section 49 of the Registration Act is not prohibited; what is prohibited is that it cannot be taken into evidence so as to affect immoveable property falling under Section 17 of that Act. That the award required registration was rightly admitted by both parties".

In *Kashinathsa v. Narsingsa*⁸, the Supreme

⁷ AIR 1960 SC 629 at p. 631

⁸ AIR 1961 SC 1077 at p. 108

Court said :

"The records made by the Panchas about the division of the properties, it is true, were not stamped nor were they registered. It is, however, clear that if the record made by the Panchas in so far as it deals with immoveable properties, is regarded as non-testamentary instrument purporting or operating to create, declare, assign, limit or extinguish any right,

title or interest in immovable property, it was compulsorily registrable under Section 17 of the Registration Act, and would not in the absence of registration be admissible in evidence. But in our judgment, the true effect of what are called awards is not by their own force to create any interest in immovable property; they recorded divisions, already made and on the facts proved in this case, their validity depends upon the acceptance by the parties. The records made by the Panchas were documents which merely acknowledged partitions already made and were not by law required to be registered".

These observations indicate that if the records made by the Panchas were not documents which merely acknowledged partitions already made, they would have been compulsorily registrable. No doubt, the learned counsel for the appellants contended that such an indication cannot be read into the observations of the Supreme Court, but we are not able to agree. If the Supreme Court considered that awards could be received in evidence without their being registered under Section 17 of the Registration Act or that private awards did not at all require to be registered in any circumstance, we think their observations would have been couched quite differently.

11. The decision of a Division Bench of the Calcutta High Court in *Nani Bala v. Ram Gopal*⁹, and of the Madras High Court in *Yanadama v. Venkateswarlu*¹⁰, support the view that an award embodying a transaction under Section 17(1)(b) requires to be compulsorily registered. Chief Justice Subba Rao (as he then was) said as follows in *Raghavareddi v. Venkata Reddi*¹¹,

"A combined reading of Section 17 and Section 49, Registration Act clearly shows that an unregistered partition deed or an award cannot affect any immovable property comprised therein".

According to the learned Chief Justice, non-registration invalidates the transaction altogether and the document cannot be looked at in view of the provisions of Section 49 of the Registration Act. The same view was taken by the Allahabad High Court in *Jag Mohan Singh v. Bisheshar Singh*¹². and by the Punjab High Court in *Shambhu Nath v. Gokal Chand*¹³.

12. For the reasons stated above, we are unable to accede to the contention of Mr. Narasaraju for the appellants that in no event can an award made without the intervention of Court, after the coming into force of the Arbitration Act, 1940, be required to be registered under Section 17(1)(b) of the Registration Act. On the contrary, we hold that an award which embodies a transaction contemplated by Section 17(1)(b) of the Registration Act is compulsorily registrable, and that if it is not registered it cannot be received in

⁹ AIR 1945 Cal 19

¹¹ AIR 1955 Andh 22

¹³ AIR 1952 Pun146

¹⁰ AIR 1947 Mad 168

¹²(1950) 5 DLR (All) 250

evidence for the purpose of making the award a rule of the Court under Section 17 of the Arbitration Act, 1940. We answer the question accordingly.

13. We have now to consider whether the award in the present case requires to be registered under Section 17 (1)(b) of the Registration Act. This takes us to a consideration of the terms of the award. According to Mr. Parthasarathy, the learned counsel for the respondents, the award

embodies the partition of immoveable properties of considerable value inter se the appellants and the respondents and that, therefore, it is compulsorily registrable. But Mr. Narasaraju for the appellants urges that the award does not embody or evidence a partition of immoveable properties but that it merely refers to a partition which was made and accepted by the parties more than three years before the award in question. If a subsequent document merely acknowledges or recites an antecedent fact of an out and out partition, it will not fall within the scope of Section 17 (1) (b). On the other hand, if a document embodies the partition and can be considered to be the only repository and appropriate evidence of partition, it would be an instrument of partition. The award in question only makes mention of a partition which had already taken place and does not by itself purport to effect or evidence a partition. Therefore, it cannot be treated as document of partition. The accomplished fact of the anterior partition is not in any manner purported to be affected by the award in question. A pre-existing fact or state of affairs which was not brought about but only referred to in a document cannot be regarded in any true legal sense as created by that document or even connected with that document. In AIR 1961 Supreme Court 1077 their Lordships had to consider whether certain awards which merely acknowledged the partitions already made were required to be registered. They clearly held that the awards did not require registration because they only recorded divisions already made. In *Usmanali Khan v. Sagar Mal*¹⁴, the award stated as follows :-

"The documents relating to debts obtained on lands.....shall remain as before till the payments of the debts and they shall also remain as securities till then, and the Nawab Saheb shall have no right to transfer the land."

It was argued that this award because it recited that the lands shall remain as securities for the debts, required to be registered. This contention was repelled by the Supreme Court on the ground that the award did not create or of its own force declare any interest in any immoveable property and that it merely stated an existing fact.

14. In the instant case, all that the award dated 10-11-1955 has recited is that a partition of the immoveable properties was effected by the arbitrators between 27-5-1952 and 30-5-1952 and that each of the sharers had obtained individual and separate possession of the lands allotted to him and has been in enjoyment of the same without let or hindrance. Then the award proceeded to say that "the said properties should be enjoyed by you with rights of alienation, gift etc." Mr. Parthasarathy for the respondents has urged that this recital in the award conferred on the sharers a right to alienate the immoveable properties allotted to them and consequently the award fell within the purview of Section 17 (1) (b). We are not impressed by this argument. When a partition of immoveable properties by metes and bounds takes place among the members of a joint Hindu family and each of

¹⁴ AIR 1965 SC 1798

them reduces the properties allotted to him to his separate possession and enjoyment, it indubitably follows as a matter of law that each sharer is in possession and enjoyment of his separate share as absolute owner. Therefore, the statement in the award, after a period of over three years after the partition and separate possession of the properties that the sharers possess absolute powers of alienation over the properties allotted to them at the partition cannot be said to be anything but an unnecessary statement of the well-known legal effect of the completed prior partition which was accepted by the parties. Such a statement cannot, therefore, be said to create

or even to purport to create any right, title or interest in the immovable property which was allotted to each member of the family at the partition. We are not, therefore satisfied that the award must be regarded as an instrument of partition or as a document creating or declaring rights over the lands divided and registered as such.

15. Mr. Parthasarathy then argues that the award has directed the respondents to pay a sum of Rs. 8,268-11-0 and Rs. 14,708-15-9 to appellants 1 and 2 and also created a charge for these amounts on the immovable properties which were allotted to the share of the respondents at the prior partition. This contention appears to us to be well founded. The arbitrators declared in their award that the aforesaid amounts due to the appellants by the respondents shall be a charge on the immovable properties of the latter. No other meaning can be given to the relevant provisions in the award. The charge so purported to be created by the arbitrators falls within the scope of Section 100 of the Transfer of Property Act. This section read with Sections 59 and 4 of the Transfer of Property Act requires a document creating a charge to be registered, vide *T. Viswanadhan v. M. S. Menon*¹⁵, and *Shiva Rao v. Shanmugasundaraswami*¹⁶, What then is a result of the non-registration of the award in so far as it relates to the charge mentioned above. The answer is furnished by Section 49 of the Registration Act, which says that "no document required by section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall –

(a) affect any immoveable property comprised therein.or

(b) be received as evidence of any transaction affecting such property..... unless it has been registered." As the award which purports to create a charge is not registered, it cannot affect the properties sought to be charged or be received as evidence of a charge over the properties. In other words, the charge provision of the award cannot be looked at in view of the terms of Section 49 of the Registration Act. It is as if that provision does not at all appear in the award so far as the Court is concerned. As observed by Earl of Halsbury, L. C. in *Seaton v. Burnand*¹⁷, "of things that do not appear and things that do not exist the reckoning in a court of law is the same."

We must therefore proceed on the footing that a provision creating a charge on immoveable property does not at all exist in the award.

16. The question then arises as to whether the rest of the award which does not affect immoveable property can be received in evidence and acted upon by the Court. We think the answer would be in the affirmative. In *Mt. Amir Begam v. Syed Badr-Ud-Din*¹⁸, the

¹⁵1939-1 Mad LJ 185

¹⁷1900 AC 135 at pp. 139-140

¹⁶AIR 1940 Mad 140

¹⁸ILR 36 All 336

Judicial Committee had to consider a case where an arbitrator in clear excess of his powers made an award partitioning certain land. That part of the award was therefore invalid. The question was whether the rest of the award could be accepted. Lord Parmoor delivering the opinion of the Judicial Committee observed :

"The award further purported to assign specific land in the zamindari of Rasulabad by way of partition, a matter clearly outside the power of the arbitrator, and which would

render his award invalid, unless this portion of his award is separable from the rest. In the opinion of their Lordships there is no difficulty whatever in separating this portion of the award from the rest. It is well recognized law that when a separable portion of an award is bad, the remainder of the award, if good can be maintained."

These observations are general and cannot be understood as only confined to a case where a portion of the award falls outside the power of the arbitrator. The same principle would apply whether the invalidity of the award results from want of registration or from lack of power on the part of the arbitrator. If the invalid portion of the award is separable from the rest of the award, there can be no objection to the invalid portion being eschewed and the rest being accepted and acted upon. In *Perumal Ammal v. Perumal Naicker*¹⁹, certain mortgage debts, book debts and promissory notes were transferred by way of gift under an unregistered document. The gift of mortgage debts was held to be invalid for want of registration. The question then arose as to whether the portion of the document which dealt with book debts and promissory notes could be held to be valid and effective. A Division Bench of the Madras High Court consisting of Sir John Wallis C. J. and Mr. Justice Hughes held that "whether there is a gift of immovables and moveables, but the former fails owing to want of registration, the latter may nevertheless be held good the question to be considered being whether the latter was conditional on the validity of the former." The learned Judges relied upon *Godman v. Godman*²⁰, for this proposition. In the instant case, the award held that the appellants were to get certain specific amounts from the respondents. The respondents were directed to pay these amounts to the appellants. The award provided that these debts due by the respondents will be charged on the immovable properties of the respondents and proceeded to say that the respondents will also be personally liable. It admits of no doubt that the charge was created for the benefit of the appellants. Nothing compels them to take advantage of the charge. It is open to them to take advantage of the charge. It is open to them to give up the benefit of the charge. That would in no way prejudice the respondents. On the other hand, it can, if anything, be only to their advantage. It is impossible to say that liability of the respondents to pay the amounts to the appellants depended upon a charge being created in favor of the appellants on the lands of the respondents. Nor can it be said with any reason that the appellants' right to receive the amounts from the respondents depended upon their obtaining a charge on the immovable properties of the respondents.

17. Thus, the right of the appellants to get the amounts from the respondents or the liability of the respondents to pay the debts to the appellants did not depend upon the creation of the charge in favor of the appellants and indeed was in no way conditional on

¹⁹ ILR 44 Mad 196

²⁰ (1920) P 261

the validity of that charge. No doubt, the provision in the award that the respondents are liable to pay certain specified amounts to the appellants is clearly separable from the provision creating a charge in favour of the appellants for those amounts. It follows that although the portion of the award relating to the creation of a charge is invalid for want of registration, the rest of the award is good and valid. We do not therefore find any difficulty in taking into evidence and acting upon the rest of the award.

18. The only question that now survives relates to section 35 of the Stamp Act. Mr. Parthasarathy for the respondents contended that the award is not duly stamped, and is not therefore admissible

in evidence in view of Section 35 of the Stamp Act. No doubt the arbitrators engrossed a copy of the award on a stamp of Rs. 2865/- on 6-3-56. But the contention of Mr. Parthasarathy is that this stamped document is only a copy of the award and the original award was made and pronounced on 10-11-1955. His argument is that under Section 17 of the Stamp Act all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution. In the present case, the award was "signed by the arbitrators and pronounced and delivered on 10-11-1955." This appears from an endorsement made by the arbitrators themselves on the unstamped award dated 10-11-55. It is clear that this is the original award. A copy of the award was subsequently written on stamp on 6-3-56. The question is whether this stamped copy will satisfy the requirements of Section 35 of the Stamp Act. In *Rikhabdass v. Ballabhdas*²¹, the question arose whether the court of first instance was justified in passing an order remitting the award to the arbitrator for re-submitting it after engrossing it on a duly stamped paper and after getting it registered. The Supreme Court held that such an order did not fall within the provisions of Section 16 (1) (c) of the Act. In dealing with this aspect, Justice Sarkar (as he then was) speaking for the Court observed as follows :-

"Section 17 of the Stamp Act requires that stamping should be at the time of execution. Under Section 14 (1) of the Arbitration Act, it is only after the signing of the award that is, its execution, that the arbitrators are required to supply the information about the fees and charges. It is, of course, no part of the duty of the arbitrators under the Act or otherwise to find the costs of a stamp themselves. Therefore it is difficult to appreciate how the word 'charges' mentioned in this section includes stamp. But on this question it is not necessary for us to express any final opinion in this case."

In the next paragraph, the learned Judge proceeded to state that it is well known that after making the award the arbitrators are functus officio. The learned Judge added :

"In the present case, ex hypothesi, the award has already been made and the arbitrator has therefore become functus officio. It is that award which requires stamp. Section 151 of the Code cannot give the Court power to direct the arbitrator to make a fresh award; that would be against well-established principles of the law of arbitration. It would again be useless to have another copy of the award prepared and stamped for the copy would not be the award and no action in a Court can be taken on it."

²¹ AIR 1962 SC 551

This decision seems to preclude the argument that a stamped copy of an award can be received in evidence and acted upon by the Court under Section 17 of the Act. A Division Bench of this Court in AIR 1963 Andhra Pradesh 193 following the Supreme Court held that a stamped copy of an award cannot be made a rule of the Court under Section 17 of the Arbitration Act, 1940. This does not however mean that the original award cannot at all be received in evidence or acted upon. The proviso (a) to section 35 of the Stamp Act does come to the assistance of the appellants. This proviso reads :

Provided that -

"any such instrument not being an instrument chargeable with a duty not exceeding ten naya paise only or a bill of exchange or promissory note, shall subject to all just

exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."

In dealing with this proviso, it is important to note that the arbitrators filed the unstamped original award of 10-11-55 along with the stamped copy of the award as a single document. The intention obviously was that the stamped affixed to the copy of the award should be treated as stamp in respect of the original award itself. Although we cannot regard the original award to have been duly stamped, we do not find any serious objection in the circumstances of this case to treat the stamp on the copy of the award as intended to serve as payment of stamp duty and penalty under proviso (a) to Section 35 of the Stamp Act, so as to enable the original award to be admitted in evidence. The Court below thought that the award must be treated as a document of partition and must be stamped as such, but we have already held that it is not a document evidencing or embodying a partition of immovable properties. It only created a charge on immovable properties for specified amounts to which we have already adverted. The learned counsel on both sides agree that if stamp duty is calculated on the basis that the award does not evidence or purport to effect a partition of immovable properties, the stamp duty and penalty payable under proviso (a) to Section 35 will in no event exceed Rs. 2865. Consequently, we do not think any further stamp duty or penalty has to be collected under the first proviso of Section 35 of the Stamp Act.

19. In view of the foregoing, the judgment and decree of the court below are set aside and the court below is directed to receive the award in evidence and deal with it under the provisions of the Arbitration Act and in the light of the observations made in this judgment. In order to eliminate the possibility of future doubts or disputes, we may reiterate that if the court below is satisfied that a judgment and decree should be passed under section 17 of the Arbitration Act, 1940, it will do so on the basis that the award does not contain any provision creating a charge on immovable property and does not also evidence or embody a partition of any immovable property. A. As. 597 and 598 of 1956 filed by the respondents in the Court below under the Arbitration Act will be dealt with by the Court below on merits and according to law. As each side has won in part and lost in part in this appeal, we do not make any order as to costs but direct each side to bear its own costs. The memorandum of cross-objections which relates out to costs is also dismissed without costs.

Order accordingly.