
(1956) 05 MAD CK 0005
In the Madras High Court
Case No : Appeal No. 243 of 1952

Bambrana Guddappa Rai and Others APPELLANT
Vs
Ramanna Banta and Others RESPONDENT

Date of Decision : 02-05-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 4, 96

Citation : AIR 1957 Mad 95 : (1956) 69 LW 763

Hon'ble Judges : Govinda Menon, J; Basheer Ahmed Sayeed, J

Bench : Division Bench

Advocate : T. Krishna Rao and S. Ramayya Nayak, for the Appellant; K. Srinivasa Rao, M.G. Kamath and G.K. Govinda Bhat, for the Respondent

Final Decision : Dismissed

Judgement

Govinda Menon, J.—The appellants in this appeal are defendants 1, 2, 4 and 5 in O. S. No. 200 of 1949 on the file of the Court of the

Subordinate Judge of South Kanara who may be compendiously known as the mortgagees, while the plaintiffs 1 to 7 and defendants 24 to 26

represent the family of the mortgagors. The other defendants are tenants who have been impleaded as necessary parties to the litigation. The action

in the court below was for the redemption of a mortgage executed by the family of the plaintiffs in favour of the defendants' family evidenced by

Ex. 1 dated 15-6-1909 for a sum of Rs. 1,899. The mortgage was usufructuary in character and the mortgagees were put in pos-session of the

properties. It is not necessary for the purpose of this appeal to detail at any length the terms and conditions of the mortgage especially since in the

court below the right of the plaintiffs to redeem Ex. A 1 was not questioned. The main contest was with regard to the value of Improvements

payable to the mortgagees in possession which according to their written statement amounted to Rs. 36290 and the main issues in the case related

to the quantum of compensation for ascertaining which a commissioner had been appointed by the trial court who submitted his report. The report

of the Commissioner dated 4-6-1950 is a lengthy one and it deals with various matters such as the number of trees in the different plots, their size

and age and the value to be paid for them. On the whole the commissioner found that the value of the improvements on redemption would amount

to Rs. 22063-14-0. Objections to this report were filed by defendants 1 to 5 as well as by the plaintiffs. Whereas the defendants claimed

enhanced value, the plaintiffs submitted that the commissioner's valuation of the improvements was very high. The memos of objection to the

commissioner's report by the parties had been forwarded to the commissioner for his remarks and for his further report which he submitted on 22-

7-1950. The various objections raised by the plaintiffs were adverted to and the commissioner submitted his remarks on them.

2. In this state of things on 30-9-1950 the advocates appearing on both sides submitted a joint memo to the court which is to the following effect :

The parties submit that they will abide by the decision of the court on the issues raised in the suit, after local inspection and perusal of the

documentary evidence in the case. They have no oral evidence to be adduced.

sd. G. K. Govinda Bhat, Advocate

for the plaintiffs.

sd. M. A. Kamath, Advocate for

6th defendant.

Sd..... advocate for defendants 24 to 26.

Mangalore

30-9-1950.

From this, it is seen that neither the plaintiffs nor the defendants affixed their signatures to this joint statement but that their advocates on their behalf

have signed and filed the Joint memo into the court. There was some dispute at the Bar as to whether the parties consented to the filing of this joint

statement and the counsel appearing before us on both sides did not dispute that fact that each of the advocates who had signed the joint statement

had the previous consent and approval of his client or clients for signing the joint memo and filing it into the court.

We, therefore, take it that with the tacit and express consent of the parties the joint statement was filed by which the court was asked to make a

local inspection and peruse the documentary evidence in the case before coming to a conclusion and the parties agreed to abide by that conclusion.

Accordingly, the learned Subordinate Judge proceeded to the locality and stayed there for three days, inspected the various Items of properties

thoroughly and made copious notes of his inspection. In the words of the learned Judge what happened was as follows :

Eventually both the parties agreed by joint memo dated 30-9-1950 that they would abide by the decision of the court on these issues after local

inspection and perusal of the documentary evidence in this case. This court thereupon inspected the properties for three days in the presence of the

parties and their learned advocates and also heard elaborate arguments addressed by the learned counsel. No oral evidence was adduced by

either party." The joint memorandum and the notes of local inspection made by the learned Subordinate Judge in the presence of the parties and

their advocates on 26th, 27th and 28th of January 1951 form part of the record and the notes of inspection deal in extenso with the Various details

of improvements. The learned Subordinate Judge thereafter heard the advocates on both sides in court at great length and scrutinised the

documentary evidence in the case in the light of his local inspection. As stated already no oral evidence was let in.

The learned Subordinate Judge thereafter delivered Judgment by which a preliminary decree was passed for redemption of the plaint A schedule

properties, and the plaintiffs were allowed one month's time to deposit into court the Bum of Rs. 18999 representing the amount under Ex. A 1

and Rs. 6558-2-0 being the amount fixed towards compensation for the improvements effected by the defendants. The result of this preliminary

decree is that the Commissioner's estimate of improvements, namely, Rs. 22068-14-0 was reduced to Rs. 5558-2-0 by the learned Subordinate

Judge.

3. Aggrieved by this decision, defendants 1, 2, 4 and 5 have preferred the present appeal, and here they have confined their claim only to Rs.

10,000, for which details have been furnished in the memorandum of appeal. Though details have been shown for Rs. 12466-10-0 the claim in the appeal is confined only to Rs. 10,000.

4. When the appeal came on for hearing a preliminary objection was taken by Mr. G. K. Govinda Bhat for the plaintiffs-respondents, that no

appeal lay for the reason that the order of the learned Subordinate Judge was passed as it were, on the consent of the parties and so u/s 96 C. P.

Code the appeal is barred. Learned counsel for the appellants contended that the court had not been appointed as an arbitrator but that what his

clients wanted was only to dispense with oral evidence in the case, leaving the court to decide the matter on a local inspection and after perusing

the documentary evidence in the case. It is not as if the subject matter of the suit was taken outside the purview of the ordinary jurisdiction of the

court by making the Judge an arbitrator but that only a portion of the procedure for an adjudication of the matter was dispensed with.

5. The question now is, what is the Interpretation to be put upon the joint memo. A further point was raised that since the joint memo was signed

only by the advocates, the parties cannot be bound by it. We cannot countenance this argument for this reason : the learned Subordinate Judge

himself states that during the three days of his local inspection in the interior of the district the parties were present and they co-operated with him

In his local inspection.

Since it is not disputed that the counsel signing the joint memo had instructions to do the same, we have to take it that the joint memo must be

deemed to have been signed as it were by the parties themselves though actually their signatures do not appear on the face of it. What is the

meaning to be given to the first sentence in the joint memo that "the parties submit that they will abide by the decision of the court on the issues

raised in the suit", after local inspection and perusal of the documentary evidence in the case? A correct Interpretation of this statement would

depend to a very large extent on the meaning to be put upon the word "abide,

6. In Ballentine's Law dictionary, 2nd Edn. the following meanings are given : "To abide" means to obey, to comply with, to perform, to execute,

to conform to, to abide the judgment or order of the court. In Ramanatha Aiyar's "The Law Lexicon of British India" the meanings given for the

word "to abide" are to await to acquiesce in, to conform to, to accept as valid, to take the consequence of as in the phrase to abide by an award

of an arbitrator, to perform, to execute, to conform to as in the phrase to abide by the judgment of a Court. In Halsbury's Laws of England, 2nd

Edn., Vol. 1, (Lord Hailsham) at page 624, there is the following statement:

When in proceedings pending before the Court the parties agree to accept the Judge's decision as final it is stated that they thereby constitute the

Judge a quasi-arbitrator. The effect of such an agreement is that the decision of the Judge is unappealable and cannot be questioned in any way but

the Judge is not thereby really placed in the position of an arbitrator and his decision is not and does not in any way resemble an award.

From these extracts it is clear that when the parties agreed to abide by the decision of the learned Subordinate Judge, their intention was to obey

or to comply with it without; questioning its correctness or validity. If that is so, it is not open to anyone of them later on to say that the decision is

not binding on him. The real position is as stated in Halsbury's Laws of England Vol. I, the Judge is made a quasi-arbitrator though not bound by

any of the inhibitions of the Indian Arbitration Act.

7. According to Mr. t. Krishna Rao, learned counsel for the appellants, what the learned Subordinate Judge was asked to do is what is strictly

within his jurisdiction and not anything beyond it and if the act of the Judge can be brought within the confines of his jurisdiction, then it should be

deemed to be that of a Court, in which case an appeal would lie from it; but if what he has done is beyond the jurisdiction of the Court, then the

Judge becomes an arbitrator and no appeal will lie against his decision. The power should, therefore, be specifically mentioned in the memo.

As stated in some of the cases on the subject, the expression used is whether the Court acted extra cursum curiae. In our view the learned

Subordinate Judge has been made a quasi-arbitrator and therefore his decision, which is not an award in the sense in which it is understood under

the Indian Arbitration Act, will be binding on the parties. We need not consider at any length the English cases on the point but may refer to the

decisions in *Pisani v. Attorney General for Gibraltar*, (1874) 5 PC 516 and *In Re Durham County Permanent Benefit Building society; Ex parte*

Wilson, (1871) 7 Ch A 45 . In *Nidamarthi Mulkanti y. Thammana Ramayya*, ILR

26 Mad 76 , a similar memo by which the parties agreed to abide by the decision of the Court was construed by a Bench of this Court as an arbitrator. The exact terms of the document are:

Both parties will abide by the decision of the Court that may be passed as it chooses after perusing the documents filed by both parties and all the records in the said suit and after measuring the sites and inspecting marks etc., which are thereon. Therefore both parties will abide by the decision which the Court may be pleased to pass as its final decision signed.....

8. We are of the opinion that there is great resemblance between the consent memo filed in ILR 26 Mad and the joint statement filed in the present case;

9. There has been a large body of case law interpreting such agreements sometimes as barring an appeal against the decision on such a consent memo and sometimes holding that an appeal lies against it. We may refer in this connection to the decisions in Chengalraya Chetty v. Raghava

Ramanuja Doss, 37 M LJ 100 : AIR 1919 Mad 150; Sankaranarayana Pillai Vs. Ramaswami Pillai and Others, ; Neti Venkata Somayajulu Garu

Vs. Adusumilli Venkanna, ; Mohammed Ishaq and Others Vs. Balmakund Lal and Another Raghubir Saran Das Vs. Ram Das . How such

agreements will have to be looked into and interpreted is laid down both in Sankaranarayana Pillai Vs. Ramaswami Pillai and Others, and Neti

Venkata Somayajulu Garu Vs. Adusumilli Venkanna, .

In the latter case the headnote runs as follows:

If a proceeding is extra cursum curiae the decision is in the nature of a consent order and generally the right of appeal against it is barred. If on the

other Hand, the proceeding is not extra cursum curiae unless there is a clear waiver of the right, the right of appeal will not be lost; in that case the

person who contends that no appeal will lie must clearly show that the right has either expressly or by necessary implication been given up.

Therefore what we have to decide is whether the parties intended to depart from the ordinary practice and constitute the Judge as a quasi-arbitrator.

10. It is not necessary to traverse at length the various cases referred to above but we shall consider the recent decision in Kunjammal and

Another Vs. P.S. Rajagopala Iyer, , where Rajamannar C. J. and Rajagopalan J. after considering the earlier cases have held as follows :

A mere agreement between the parties that the Court may dispense with certain rules of procedure, and evidence without giving up the right of

appeal does not deprive the parties of the right of appeal but it is a question of fact in each case whether the circumstances merely amounted to

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 and the intention can only be ascertained by the

events which happened in a particular case.

11. We are in entire agreement with the expression of opinion contained in this case. That being the case, the question is one of fact to be decided

from the circumstances and conduct of the parties. It is unusual to request a subordinate Judge to proceed to a place far away from the Court

house and make an inspection of large stretches of arecanut and other gardens for deciding the value of compensation payable and it is still more

unusual that in the ordinary circumstances any Judicial Officer would spend three days of his working time inspecting the properties for the purpose

of ascertaining the value of improvements.

Since the parties agreed to conform to or abide by the decision arrived at by the learned Subordinate Judge after inspecting the suit properties, we

have no doubt, whatever, that he was constituted something in the nature of a quasi-arbitrator. Ordinarily, it is not possible to fix the value of

arecanut, cocoanut and other fruit bearing trees without oral evidence which has been waived in this case. It seems to us, therefore, that by their

joint statement dated 30-9-1950. and their subsequent conduct the parties took the case outside the ordinary jurisdiction of the Sub-Court and

that being the case it is a case of extra cursum curiae. In these circumstances an appeal to this Court against the decision of the Subordinate Judge

is incompetent. The appeal fails and is dismissed.