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(1919) 01 MAD CK 0011

In the Madras High Court

Chinna Venkatasami Naicken — APPELLANT

Vs

Venkatasami Naicken and Another — RESPONDENT

Date of Decision : 20-01-1919

Acts Referred:

Citation : (1919) ILR (Mad) 625 : 51 Ind. Cas. 827 : (1919) 36 MLJ 291

Hon'ble Judges : John Wallis, C.J;Seshagiri Aiyar, J

Bench : Full Bench

Judgement

Seshagiri Aiyar, J.—The suit was for money due upon a mortgage-bond. After the examination of some witnesses the parties agreed to refer

the questions of facts and of law arising in the case to the decision of three persons, namely the Subordinate Judge and two friends of the parties.

An award was made by the majority. Thereupon an application was presented by the defendant to set aside the award on various grounds. The

Subordinate Judge overruled the objections and passed a decree. On this a Civil Revision Petition was filed in the High Court, mainly on the

ground that the reference to the Subordinate Judge as one of the arbitrators was illegal and that the whole award was vitiated thereby. Mr. Justice

Ayling rejected this contention and dismissed the petition. This Letters Patent appeal is against the learned Judge''s judgment.

2. In my opinion the conclusion of the learned Judge is right. I may at the outset say that it is undesirable that a Judge before whom a case is

pending should associate himself with other persons as arbitrators in the case, The Subordinate Judge thought that the second schedule to the CPC

applied to the reference. If he was right in this view, when the award is submitted to the court, it would be open to the par-ties to impeach the

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character and conduct of the Subordinate Judge as an arbitrator. It is not desirable that a Judge should lay himself open to such a possible

impeachment. But I do not think that the second schedule has any application to the case. Mr. Ramachandra Aiyar for the petitioner referred to the

order of the reference, and contended that as the reference was in terms made under the second schedule the entire proceedings were void. The

form of the reference is not conclusive of the matter. It is the intention of the parties that has to be looked to. There can be no doubt that the parties

desired that the controversy between them should be put an end to by the decision of the three gentlemen to whom they referred the matter. In my

opinion, the whole frame of the second schedule shows that references like the present one are not within its purview. Applications may be made

for extension of time, for remitting the award, for correcting the award, and for impeaching the partiality of the arbitrators. If a Judge is one of the

arbitrators, he cannot in another capacity extend, the time, correct his own judgment, and scrutinise his own character. Section 17 of the Civil

Courts Act though not in terms applicable to the present case, indicates that what has been done by a Judge in one character or capacity should

not be revised by the same officer in another capacity. It may be as pointed out by Lord Halsbury in Burgea v. Morton (1896) A.C. 136, where a

reference is made to a presiding officer the proceedings may be taken to be extra cursum curiae. But it does not follow that the rules which govern

awards by private persons would be strictly applicable to decisions in which the Judge of the court takes part as a referee. The Lord Chancellor

said : ""My Lords, it has been held in this House that where with the acquiescence of both parties a Judge departs from the ordinary course of

procedure and, decides 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 heard in due course."" With slight modifications the same language may be applied to what has

been done in the present case. Where parties have chosen to entrust their case to a Judge and two others, they must be deemed to have agreed to

accept the decision of that body as final and as not being open to the attacks to which otherwise a judgment is liable. An argument was addressed-

to us based upon Section 89 of the Civil Procedure Code. Clause 1 lays down that all references to arbitration whether by an order in a suit or

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otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second schedule.

The proviso exempts reference under the Indian Arbitration Act and proceedings under ""any other law for the time being in force."" No doubt if

there is no law which would give validity to the decision of the fudge and of his two colleagues, the proceedings must be taken to have been under

the second schedule to the Code of Civil Procedure. In this case I am of opinion that by virtue of Order XXIII of the CPC the present reference

can be regarded as being outside the second schedule. The parties have chosen a particular tribunal consisting of the Judge and of two other

persons to deal with their contentions. They must be deemed to have agreed to accept their conclusions unreservedly. In other words, it must be

regarded that they agreed to adjust the suit by the result of the decision of the three persons. This adjustment must be taken to have been reported

to the court before which the suit was pending; and the court by virtue of its inherent powers to finally dispose of any matter which is pending

before it must be deemed to have passed a decree in terms of the decision reported to it by the three persons. This was practically the view taken

in Nanjappa Vs. Nanjappa Rao, , and Pragdas v. Girdhardas ILR (1901) B. 76. Giving such a finality to decisions is not unknown to the Civil

Procedure Code. For example Order XXXVI provides for cases in which a party may state a special case before a judge who hears the suit. In

such cases it has been held that there will be no appeal. Vide Nidamarthi Mukkanti v. Thammana Ramayya ILR (1902) M. 76. If the conclusions

come to by a judge before whom a special case is stated can be regarded as final, there is nothing incongruous in giving the same finality to the

conclusion come to by a judge who is assisted by two other persons. 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 was wrong, in as

much 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. On this ground, I am of opinion that the. decree of the Subordinate Judge was rightly passed, and that the petition

to this Court was rightly dismissed. The Letters Patent Appeal must be dismissed with costs.

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John Wallis, C.J.

3. I agree with the conclusion. I think a reference of a 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.

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