

(1951) 12 MAD CK 0035

In the Madras High Court

Case No : Appeal No"s. 115, 199 and 499 of 1944, A.A.O. No"s. 210 and 661 of 1946 and 49 of 1947, C.M.P. No"s. 3273 and 3274 of 1946, 1122 and 7076 of 1947 and 5329 and 5330 of 1948 and Civil Revision Petition No. 1247 of 1946

CT. A. CT. Chidambaram Chettiar

APPELLANT

Vs

CT. A. CT. Subramanian Chettiar and Others

RESPONDENT

Date of Decision : 14-12-1951

Acts Referred:

Arbitration Act, 1940 — Article 21, 23, 30, 31, 17

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 23 Rule 3, Order 32 Rule 7, Order 41 Rule 5, Order 6 Rule 7

Citation : AIR 1953 Mad 492 : (1952) 65 LW 980 : (1952) 2 MLJ 524

Hon'ble Judges : Rajamannar, C.J;Venkatarama Aiyar, J

Bench : Division Bench

Advocate : K. Rajah Aiyar, for the Appellant; K. Bhashyam Aiyangar, for the Respondent

Judgement

Venkatarama Aiyar, J.—"C. M. A. No. 210 of 1946:-- "This is an appeal by the plaintiff against the judgment and order in I. A. No. 18 of 1945 in O. S. No. 91 of 1941 on the file of the Court of the Subordinate Judge of Devakottah, setting aside an award. O. S. No. 91 of 1941 is a suit for partition instituted by the appellant against his brother defendant 1 and his sons, defendants 2 to 5. The parties belong to Nattukottai Chettiar community and the family is an affluent one having extensive money lending business in Burma. Chidambaram Chettiar the father of the plaintiff and defendant 1 died on 20-8-1926 and at that time the plaintiff was an infant aged about six years, he having been born on 26-9-1920. The 1st defendant who was already associated with his father in the conduct of the business became the manager of the joint family and was in charge of its affairs. On 6-9-1941, the plaintiff sent a notice to defendant 1 calling upon him to effect a division and to render accounts. The demand not having been complied with, the plaintiff instituted the present suit for partition on 24-9-1941.

2. According to the plaint the assets of the family consisted of immovable properties in British India and Pudukottai being items 1 to 12 and item No. 13 respectively in schedule A to the plaint; of jewels and moveables described in schedule B and two money lending firms at Minla and Sitkwin in Burma mentioned in schedules D and E. It was further alleged in the plaint that Chidambaram Chettiar the father of the plaintiff and defendant I had entered large amounts belonging to the joint family in the names of the members of the family male and female in what are called the "Thanathu maral accounts", that these amounts were invested in various firms or with individuals and that those investments would come to about 15 lakhs. This was the subject of schedule C to the plaint, and the plaintiff claimed a half share therein. It may be noted that the assets mentioned in schedules C, D and E included also Immovable properties in Burma. The family had endowed various properties for performing charities and these are mentioned in schedule F. The plaintiff prayed that in the scheme of partition provision should be made for the management of the charities by all the parties according to their rights. The plaintiff also charged that defendant 1 had in the course of his management manipulated accounts and misappropriated large amounts and secreted them and it was prayed that he should be called upon to account for them.

3. The 1st defendant filed a written statement on 10-11-1941 on behalf of himself and as guardian of his minor sons, defendants 3 to 5. He admitted the relationship of the plaintiff and the share to which he was entitled and raised various contentions only with reference to the properties available for division. With reference to Immovable properties mentioned in schedule A he pleaded that items 10 and 11 were dedicated to charity and were, therefore, not divisible and that item No. 3 was being used as a school. He also mentioned some more properties as available for partition in schedule 1-A to the written statement. As regards the jewels and moveables mentioned in schedule B the defendants contended that it contained several items not belonging to the family and not in existence and a list of the articles which were available for division was set out in Schedule (2). There was a further plea that some of the jewels mentioned in the plaint belonged to the several defendants, to the wife of defendant 1 and to his daughters Nachammai and Sivakami as their own and that they were, therefore, not liable for partition. They are separately set out in schedule 2-B to the written statement. With reference to the "Thanathu maral" accounts, the defendants set out in some detail the history of the amounts and their investments, in para 6 of the written statement. In paras. 8 and 9 it was admitted that these amounts belonged to the family in whosoever's name the investments might stand and it was added that the true value of these assets would not be 15 lakhs as mentioned in the plaint but only 9 lakhs including lands purchased in Burma and of the value of 2 1/4 lakhs. Defendants denied that there was any manipulation of accounts or misappropriation of amounts and contended that accounts should be taken only of the assets as they stood on the date of the partition. They also pleaded that the court had no jurisdiction to divide the Immovable properties

situate in Burma. Two other pleas put forward by the defendants may also be mentioned. One is

"that according to the usual practice obtaining among the families of Nattukottai Chettiar community the 1st defendant is entitled to a decent remuneration for the management of the joint family business and properties."

and the other is that provision should be made for future "seer murais" for the sisters and that the remaining assets alone should be divided between the parties. The 2nd defendant who was a major filed a written statement putting the plaintiff to strict proof of the allegations in the plaint and otherwise adopting the written statement of defendant 1.

4. The plaintiff then filed a reply statement in answer to the contentions put forward by the defendants. Of the several matters mentioned therein, it is sufficient to refer to one plea which alone is material to the present appeals. The plaintiff pleaded that there was a custom in the Nattukottai Chettiar community for a member of the joint family "setting up separate family" after marriage, that monies drawn by him thereafter would be entered in a separate account called "Pathuvazhi", that at the time of the partition the amounts appearing in the "Pathuvazhi" account would be debited against the member and that in accordance with this custom the amounts shown in the "Pathuvazhi" account of defendant 1 should be debited against his share. On those pleadings issues were framed on 13-12-1941 and the suit was posted for trial on 6-2-1942. It underwent several adjournments and on 2-4-1943 the trial actually commenced. It was then referred to arbitration on 6-4-1943 but that proved abortive and the suit was posted peremptorily for trial on 10-12-1943 and the hearing actually commenced on 11-12-1943. Meantime defendant 2 filed on 6-12-1943 an application under Order 8, Rule 9, C. P. C., for leave to file additional written statement. That was numbered as I. A. No. 988 of 1943. Therein defendant 2 alleged "that the deceased Chidambaram Chettiar the father of the plaintiff and defendant 1 herein set apart on 25-3-1925 two sums Of money of Rs. 2,10,251-4-0 each separately in the name of the plaintiff and defendant 1 so as to vest the same in them forthwith" and that these amounts and their accretions were not "the property of the family liable to division in this suit." This application was opposed by the plaintiff on the ground that these allegations were inconsistent with the admissions in the written statement that all monies standing in the "Thanathumara" accounts were joint family properties available for division, that the petition was belated and not bona fide and that the real object of the defendants was merely to drag on the proceedings.

5. On 14-12-1943 the Subordinate Judge dismissed this application on the ground that it sought to raise a new and inconsistent plea and that it was really inspired by defendant 1.

6. Meantime the trial of the suit went on from day to day and was concluded on 15-12-1943 and judgment was delivered on 29-12-1943. The Subordinate Judge

held that the claim of defendant 1 for remuneration for management based upon the practice of the community was not well founded; that the custom pleaded by the plaintiff that amounts drawn by members of the joint family and entered in "Pathuvazhi" accounts should be debited against them was also not established; that, on the question of the jewels available for partition, the commissioner should determine whether the gifts in favour of the several members pleaded by the defendants were true and were reasonable; that the payment of "seer murais" was not legal but a moral obligation and that no provision need be made therefore at the division; that items 3, 30 and 11 had not been dedicated to charity and were available for division and that defendant 1 was liable to account only for the assets existing on the date of the division but that accounts should be taken on the principles applicable to accounting by managers of joint Hindu families and that provision should also be made for a proper scheme for the management of the family charities. It was also held on issue No. 13 that the Court had no jurisdiction to direct a division of Immovable properties not situated in British India. With these findings the suit was referred to the Commissioner for ascertainment of the properties available for division and for taking of accounts. Against this judgment appeals were preferred to this Court by all the parties, A. S. No. 115 of 1944 by defendant 2. A. S. No. 199 of 1944 by defendants 1, 3 and 5 and A. S. No. 499 of 1944 by the plaintiff. In A. S. No. 115 of 1944 defendant 2 applied in C. M. P. No. 1402 of 1944 for stay of further proceedings in O. S. No. 91 of 1941 pending disposal of the appeal. On this petition an order was passed on 12-4-1944 that there was no need to stay all proceedings in O. S. No. 91 of 1944 and that it was sufficient if the passing of the final decree alone was stayed. Interim stay which had been granted "ex parte" was also vacated. The result then was that the stage had been set for an enquiry being proceeded with before the Commissioner and for defendant 1 rendering accounts before him. In fact the Commissioner commenced the enquiry and there were preliminary skirmishes before him, resulting in an order Ex. P. 22 dated 9-6-1944 and the filing of a memo by the defendants on 24-6-1944, Ex. P. 23.

7. On 5-7-1944 the plaintiff filed I. A. No. 356 of 1944 for the appointment of a Commissioner for seizing certain account books which were stated to have been secreted by defendant 1 at his residence. It was ordered on the same day in the presence of the Advocate for defendant 1 and the Commissioner actually went to the place for executing the warrant. At this stage the parties entered into an agreement that the disputes in the suit should be settled by arbitration and that a sum of Rs. 2 lakhs should be paid to the plaintiff on account. That amount was actually paid on 12-7-1944, Ex. P. 9 and a joint application for referring matters in dispute to arbitration was made to the Court on 18-7-1944, I. A. No. 427 of 1944. That application was signed by the plaintiff, defendant 2 and defendant 1 for himself and as guardian of minor defendants 3 to 5. There was also a petition under Order 32, Rule 7, C. P. C., that the Court might grant leave to refer the matters to arbitration on behalf of the minor defendants 3 to 5 as it was beneficial to them. On 21-7-1944 the Court passed an order "that all matters in

dispute in this suit and all matters and proceedings connected therewith" be referred to the arbitration of Ramanathan Chettiar of Kandanur and Chellappa Chettiar of Kothamangalam.

The arbitrators entered on their duties and passed an interim award on 1-8-1944. It is stated therein that all the parties have agreed to the award and signed it in token of their acceptance. In fact the award is signed not only by the arbitrators but also by the plaintiff, defendant 2 and defendant 1 for himself and as guardian of defendants 3 to 5. The final award which is an amplification of the interim award was made on 6-12-1944 & filed into Court on that date. The defendants being dissatisfied with the award filed I. A. No. 18 of 1945 to set it aside under Sections 30 and 31, Arbitration Act. They complained that the agreement dated 18-7-1944 to refer to arbitration was brought about by coercion and undue influence, that there was no proper enquiry, that the arbitrators were partial and biased and that the award was unjust. The validity of the award was also attacked on two grounds which requires special mention. One was based on the fact that the joint family owned Immovable properties in Burma; and on the principle of private international law that Courts in one country would have no jurisdiction to adjudicate on title to Immovable property situated in a foreign country or to direct their division. It was urged that as the reference to arbitration comprised all the matters in dispute in the suit and as division of the Immovable properties in Burma was prayed for in the plaint the reference comprehended a subject over which the Court had no jurisdiction and that, therefore, it was illegal and that in consequence the award was void. Secondly it was contended that the reference to arbitration was opposed to the orders of the High Court in C. M. P. No. 1402 of 1944. The argument was that stay of passing of the final decree was ordered in A. S. No. 115 of 1944 because defendant 2 had raised a dispute about the partibility of a sum of Rs. 2,10,251-4-0 separately entered in the name of the 1st defendant and that the High Court intended that this controversy should be settled before the final decree was passed and it was contended that as the reference and the award included this item also it was in contravention of the order in C. M. P. No. 1402 of 1944.

The plaintiff opposed this application. He pleaded that there was proper enquiry and that the charges of misconduct were unfounded. He also contended that the reference to arbitration was not open to any objection, that the interim award was consented to by the defendants and that the final award was not liable to be set aside. He accordingly prayed that a decree might be passed in terms of the award. At the hearing of this petition no oral evidence was tendered by the defendants. They were content to rest their case on the documentary evidence and on their legal contentions. The Subordinate Judge held that there was no basis for the charges of misconduct levelled against the arbitrators, that there was due and proper enquiry and that the award was not open to objection on the merits but he agreed with the defendants that the reference to matters in dispute in the suit comprised also questions relating to Immovable properties in

Burma and that it was without jurisdiction and that it also included the dispute relating to the sums of Rs. 2,10,251-4-0 entered in the "Thanathumal" account of defendant 1 and the plaintiff, and that that was in contravention of the order of the High Court in C. M. P. No. 1402 of 1944 and that therefore the reference was illegal and the award following thereon was void. It is against this order that the plaintiff has preferred C. M. A. No. 210 of 1946. (8) In this Court apart from supporting the judgment of the Court below on the two grounds aforesaid, Mr. K. Bhashyam Aiyangar the learned counsel for the respondents raised a further contention that u/s 21, Arbitration Act, the power of the Court to refer matters in a suit to arbitration could be exercised only so long as judgment has not been delivered and that where judgment has been pronounced, as it was in this case on 29-12-1943, that power comes to an end and there is no jurisdiction in the Court thereafter to refer the dispute to arbitration and that, therefore, the reference dated 21-7-1944 is without jurisdiction. It was also argued that, even if this contention is to be held to be too wide, the reference to arbitration should at any rate be limited to matters still remaining to be decided and could not include what had been already decided by the Court and as the reference on 21-7-1944 was not so limited it was illegal and so was the award passed thereon. As a branch of the same argument it was contended that the High Court before which the appeals against the preliminary decree were pending has seisin of the cause, that that Court alone had power to refer to arbitration and that the reference by the Subordinate Judge was without jurisdiction. The judgment of the lower Court was also sought to be supported on the ground that the agreement to refer to arbitration was obtained by coercion, that there was no proper enquiry by the arbitrators and that the award was liable to be set aside on the merits.

9. On these contentions four questions arise for determination:

1. Is the reference bad on the ground that it involved the determination of title to immovable properties situated in foreign jurisdiction?
2. Is the reference bad as being in contravention of the order of the High Court in C. M. P. No. 1402 of 1944?
3. Is the reference bad on the ground that the Subordinate Judge had lost the power to refer matters in dispute to arbitration by reason of judgment having been delivered on 29-12-1943 or on the ground that the reference comprehended matters which had been decided by the preliminary judgment or that the Court had no jurisdiction by reason of the appeals against the preliminary judgment having been pending in the High Court, and,
4. Is the award vitiated by any misconduct or irregularity?

We shall deal with the above questions in the order mentioned above.

10. On the first question the contentions of the respondent will be found on analysis to resolve themselves into three propositions of law. The first proposition

is that the Courts have no jurisdiction to determine questions of title to Immovable properties in foreign countries or to effect a division thereof. This rule has long been well established and is not open to question. In -- M.Y.A.A. Nachiappa Chettiar Vs. M.Y.A.A. Muthu Karuppan Chettiar and Others, , this Court had occasion to consider this question elaborately and the substance of the decision is correctly set out in the headnote which runs as follows:

"Neither u/s 16(b), C. P. C., nor under the rules of private international law has a British Indian Court jurisdiction to entertain a suit for partition of Immovable properties situate outside British India (for instance in Ceylon) especially where the partible nature of such properties is disputed. It has no jurisdiction even to declare that the said properties are partible joint family properties. Nor has it power to take such properties into its calculation in adjusting the equities between the parties."

This rule is thus stated in Dicey's Conflict of Laws, (6th Edn., page 141). Rule 20: "Subject to the exceptions hereinafter mentioned, the Court has no jurisdiction to entertain an action for

- (1) the determination of the title to, or the right to the possession of any Immovable property situate out of England (foreign land); or
- (2) the recovery of damages for trespass to such immovable."

There are three exceptions to this rule: Where there is a contract or an equity between the parties with reference to Immovable property; where the action is one for the administration of an estate or trust and, where the action is for enforcing a maritime lien on a ship, or for damage done to an Immovable property situate out of England.

11. The learned advocate for the appellants does not contend that the Court of the Subordinate Judge of Ramnad would have jurisdiction either to decide the question of disputed title with reference to foreign Immovable property or to direct division thereof.

12. The second proposition is that a Court which has no jurisdiction to determine any matter in controversy in a suit has no jurisdiction to refer it for determination by arbitrators. This stands to reason because the award becomes effective only when a decree is passed thereon and as the Court is bound to pass a decree in terms of the award when it is not open to any objection, to recognise a power to refer the dispute relating to foreign immovables to arbitration would be to assume jurisdiction to pass a decree with reference to such properties. It will be illogical to hold that what a Court cannot do directly it can do indirectly through the machinery of arbitration. In -- V.N. Krishna Aiyar Vs. V.N. Subbarama Aiyar and Another, the point for determination was whether an award dealing with the Immovable properties both in British India and in Travancore could be filed in a British Indian Court u/s 20 of Schedule 2, Civil P. C., which provides that where any matter has been referred to arbitration without the

intervention of the Court and award has been made thereon any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award and that the award be filed into Court. It was held that the subject matter of the award must be wholly within the jurisdiction of the Court where it is sought to be filed and as a portion thereof was in Travancore, the sub-Court at Palghat had no jurisdiction to entertain the application. That no doubt was a case of an award pronounced in an arbitration without the intervention of the Court whereas in the present case the reference is by Court in a pending action but on principle this cannot make a difference because the award in either case would become valid only when a decree of the Court is passed thereon.

The following observations of Ananthakrishna Aiyar J. would be equally applicable to the present case:

"When an application is made under para. 20, notice is given to the other parties to the arbitration; and under para. 21, when a Court is satisfied of certain particulars mentioned therein, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Upon judgment so pronounced, a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award. Thus the judgment should be in accordance with the award; and the decree that should follow should be in accordance with the judgment. Therefore the decree should be in accordance with the award. The award deals with Immovable property outside British India. The decree also, therefore, should deal with Immovable property outside British India. Has the Court in British India jurisdiction to pass such a decree? "Prima facie", not."

In -- "Ladharam v. Rallaram", AIR 1928 Lah 730 (C) it was held:

"If a Court is not initially competent to entertain a suit in respect of the dispute which is the subject matter of reference to arbitration, it cannot pass a decree on an award made as a result of such reference by the parties whether before the suit was instituted or during its pendency. In the latter case the

Court is incompetent to refer the matter to arbitration."

The appellant did not seriously contest the soundness of this position.

13. The third proposition of law is that where the reference is invalid in part it is invalid "in toto" and the award based on such a reference cannot be split up into two parts and upheld in so far as it relates to what could be validly referred, and rejected only as regards what could not be. The decision in-- Cherukuri Lakshminarasu and Others Vs. Cherukuri Nagamma and Others, is relied on in support of this position. In that case the reference to arbitration comprised matters in dispute in suit as well as matters outside the suit. It was held that the reference was illegal and that, therefore, the entire award must be rejected, and the decision reported in -- Peddapalayam Bodachari alias Venkatraya Chari Vs.

Peddappalayam Muniyachari, wherein it was held that "an award under an invalid reference being itself invalid gives no rights either as an award or as a compromise" was followed. The reason for this rule is not quite obvious. It may be that it will be difficult to disentangle the valid portions from the invalid portions in an award in a partition action or partnership suit. In such a case the award must fail in its entirety. That was the case in -- Ram Protap Chamaria v. Durga Prasad Chamaria, AIR 1925 PC 293 which was a partnership action and the reference comprised matters in dispute in suit and other matters. The award was found to be inseparable and was, therefore, rejected. After quoting the observations of Rankin J. as he then was, that the arbitration cannot at the same time relate to matters within the jurisdiction of the Court and matters without jurisdiction, Lord Blanesburgh observed as follows:

"Their Lordships desire to reserve their opinion upon the question whether there may not be exceptions to that comprehensive statement."

It does not appear why if the reference and the award consist of distinct and severable parts the valid portions should not be upheld. It is unnecessary to deal with this aspect of the matter further because the learned advocate for the appellant is prepared to argue his case on the footing that if the reference includes matters beyond the jurisdiction of the Court it should be rejected "in toto". His contention is that all these propositions of law have no application to the facts of the present case because there was no dispute about title to Immovable properties in Burma and there was no claim for their partition at the date of reference to arbitration. It has already been mentioned that the title of the plaintiff to a half share in the Burma assets including Immovable properties was unequivocally admitted by the defendants in their written statement and, therefore, there was no question of title in dispute to be adjudicated by the Courts. As for division of the Immovable properties in Burma, it is true that the plaintiff prayed generally for partition of the joint family properties but the defendants contended that the Court had no jurisdiction to divide the properties in Burma and on that contention issue 13 was raised. It runs as follows:

"Whether this Court has jurisdiction to divide Immovable properties of the joint family in Burma?"

The Court held by its judgment dated 29-12-43 that it had no jurisdiction. Against the preliminary decree, the plaintiff filed A. S. No. 499 of 1944 but in the appeal he did not challenge the correctness of the finding on issue 13. The decision on this issue had thus become final. The plaintiff had accepted the decision of the trial Court and was content to leave it at that. Thus the position at the date of the reference was that the title to Immovable properties had been admitted and the question of actual division had been finally ruled out. Therefore the reference to arbitration of all the matters in dispute did not comprehend any matter which the Court could not have determined. It involved no adjudication of title to foreign Immovable properties; nor was there any subsisting prayer for division thereof. We are, therefore, of opinion that the reference cannot be held

to be illegal on the grounds urged by the respondent.

14. It is next contended that apart from the reference the award settled questions of title to immovable properties in Burma and that it was, therefore, void. Paragraphs 1 and 2 of the award relate to properties in Burma including immovables while para. 3 of the award relates to the Immovable properties in Pudukottah. Paragraph 1 runs as follows:

"After communications are restored to Burma, the plaintiff and the defendants have to divide the firms in Burma at the places Minhla and Sitquin belonging to them and the lands, godowns, homes, gardens and other properties, items, bank deposits, jewels, moveables, all assets, etc., and the subsequent income attached thereto into two halves and the plaintiff has to take one half and the defendants the other half."

The award, it will be seen, does not purport to divide the Immovable properties in Burma. It expressly reserves the division for a future and a convenient date. It merely records that the plaintiff has to take one half share and the defendants the other half. In para. 2 are set out the various adjustments to be made in the final settlement of accounts with reference to the Burma assets but they do not as such relate to any Immovable properties. It is merely provided that the assets are to be taken equally by the plaintiff and by defendants 1 to 5. Paragraph 3 deals with the Immovable properties in Pudukottah and the award expressly states,

"since the aforesaid property is situated in Pudukottah state, it has not been divided having regard to the good and bad qualities of the soil. If necessary the plaintiff and the defendants shall have it divided in equal halves later on when required."

It also provides that the plaintiff and the defendants shall enjoy them in equal halves. It is argued on behalf of the respondents that the award purports to give a half share each to the plaintiff and to the defendants in all the Burma assets including the amounts entered in the Thanathumaral" account of the plaintiff and defendant 1 and their accretions; that these assets included also Immovable properties; that I. A. No. 988 of 1943 raised the question of the divisibility of these assets and though it was rejected on 14-12-1943 by the Subordinate Judge it was pending decision in A. S. No. 115 of 1943 in the High Court and that, therefore, the question of title to the Immovable property in Burma was in dispute at the date of the reference.

That would be correct if the question of the divisibility of the assets raised in I.A. No. 988 of 1942 could be regarded as a matter in dispute in the suit but I. A. No. 988 of 1943 had been dismissed and so long as that order stood the question sought to be raised therein was not a matter in controversy in the suit. The pleadings in the suit contain an admission of the plaintiff's title to these assets and unless and until the additional written statement of defendant 2 is ordered to be received there was no dispute in the suit with reference to foreign

immovables. The fact that the order in I. A. No. 988 of 1943 was challenged in appeal has not the effect of altering or enlarging the scope of the suit so as to comprehend a dispute in respect of title to foreign immovables. The question in appeal was not whether those properties are divisible but whether defendant 2 should be permitted to raise that question. There is, therefore, no force in this objection.

15. It is further contended that under the terms of the award the title of the plaintiff as well as that of the defendants to a half share in the foreign assets including immovables has been recognised and declared; that such a decision has a force and operation independent of the admissions of the parties on which it is based; that, unlike admissions, the effect of the declaration is to conclude the rights of the parties and that, therefore, it is hit by the rule of private international law, that there is no jurisdiction to declare title to foreign Immovable properties. But it is only a declaration following upon adjudication by the Court, of disputed title to foreign immovables, that is beyond its jurisdiction and where there is no adjudication, there is no declaration such as is prohibited by the principles of private international law. It is not incompetent either to the arbitrator or to the Court to record an admission of title to foreign properties by the parties and to incorporate it in the award or in the decree. In this connection it will be, useful to refer to decisions u/s 17(b), Registration Act, which provides that non-testamentary instruments which purport to declare title to Immovable properties should be registered. The precise meaning of the word "declare" in that section has frequently come up for judicial consideration. In -- "Sakharam Krishnaji v. Madan Krishnaji", 5 Bom 232 (G) the question arose whether a deed which acknowledged that there had been a partition required registration u/s 17(b), Registration Act, on the ground that it declared the rights of the parties. Holding that it did not come within Section 17(b) West J. observed as follows:

"It implies a declaration of will not a mere statement of fact and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place does not "declare" a right within the meaning of the section. It does in one sense declare a right; that is, the existence of the right is directly or indirectly stated by the writing, but it is not the expression or declaration of will by which the right is constituted."

This passage was cited with approval by the Judicial Committee in -- AIR 1932 55 (Privy Council) . After observing that the decision in -- 5 Bom 232 (G) had been followed in -- "Jiwan Ali Beg v. Basamal", 9 All 103 (I) and -- M. Ranganayaki Ammal Vs. M. Virupakshee Rao Naidu, minor by guardian M. Rukmani Ammal and Another, , Viscount Dunedin observed as follows:

"Their Lordships have no doubt that this track of decisions is right. Though the word "declare" might be given a wider meaning, they are satisfied that the view originally taken by West J. is right. The distinction is between a mere recital of

fact and something which in itself creates a title."

16. In -- "Lahore Central Co-operative Bank Ltd. v. Quadir Baksh", AIR 1947 P C 117 (K) there was an award in respect of a claim of a Co-operative Society under a mortgage deed and it provided that in default of payment of the amount due the amount might be realised through civil Court by the sale of all the properties. This award was made a rule of Court and a decree was passed in terms thereof. The decree was not registered and the question was raised in execution that as it declared rights to Immovable property it was not admissible u/s 17(b), Registration Act. The Judicial Committee held that the provision in question in the award merely declared the legal consequences and did not by itself create any right in the Immovable property and that, therefore, it did not require to be registered under the Act. In -- "Krishnamurthi Naidu v. Ramakrishna Naidu", AIR 1943 Mad 811 (L) the parties to the suit entered into a compromise on the basis of the rights under a will and a decree was passed in terms of the compromise. It was held by Satyanarayana Rao J. that the decree did not declare any right within the meaning of Section 17(b), Registration Act and that it was admissible without registration. We are of opinion that on the same principle it should be held that the award in question did not declare any rights to immovable properties in Burma. Mr. K. Rajah Aiyar argued that even if there was in the award an affirmation of title to foreign Immovable properties that was only incidental and that such incidental declarations are not opposed to any principle of private international law. He is supported in this contention by the following passage from Halsbury's Laws of England, Vol. VI, page 220, para 269. The passage runs as follows:

"Where, however, it is only necessary to determine the question of title incidentally an action relating to rights in respect of a foreign Immovable will lie in England."

We are satisfied that the award in this case does not adjudicate upon any disputed title to foreign immovables and that its validity cannot be impugned on this account.

17. We may add that it was also suggested that the reference comprised not merely matters in difference in the suit but also "all matters and proceedings connected therewith" and that that went beyond the scope of the suit. This is clearly untenable as the other "matters and proceedings" are merely in relation to the matter in dispute in the suit, and is in the nature of the final prayer for general relief in the plaint.

18. We shall now deal with the second question whether the reference to arbitration contravenes the order in C.M.P. No. 1402 of 1944. It is not easy to discover the basis for this contention. The order of the High Court stayed only the passing of the final decree in the action. The reference to arbitration is in no sense the passing of the final decree or even the making of the award. The utmost that could be said is that before passing a decree in terms of the award

the order in C. M. P. No. 1402 of 1944 might have to be withdrawn. That, however, does not bar the jurisdiction of the Court to refer the matters to arbitration or the jurisdiction of the arbitrators to make an award. It is, therefore, not liable to be set aside as in contravention of the order in C.M.P. No. 1402 of 1944. That order far from staying all proceedings in the Court below directed that they should go on and the interim stay was also vacated for that purpose. There is nothing to prevent the parties themselves settling the matters by compromise notwithstanding this order, and likewise there is nothing to prevent them from agreeing to have their disputes settled by arbitration. As for inclusion of "Thanathumara" accounts of defendant 1 find the plaintiff within the scope of the arbitration that would be in accordance with the pleadings in the suit &, therefore, within the jurisdiction of the arbitrators. The filing of A. S. No. 115 of 1944 did not as already stated affect the scope of the suit or of the reference to arbitration. Moreover the order in C. M. P. No. 1402 of 1944 such as it was, was for the benefit of defendant 2 and possibly of the other defendants. That could be waived by them and they having expressly agreed to the reference on 18-7-1944 and again to the interim award on 1-8-1944 it is not open to them to raise any objection on this score. For all the above reasons this objection must be overruled.

19. The third objection which is the one that has been most strenuously pressed on us is based on the language of Section 21, Arbitration Act. which is in these terms: "Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

20. The argument for the respondents is that the Courts possess no inherent jurisdiction to refer disputes in pending actions to arbitration, that it is a power which must be expressly conferred by statute, that Section 21, Arbitration Act, is the enactment which confers such a power on the Courts; that under the terms of that section the power to refer to arbitration can be exercised only "at any time before judgment is pronounced"; that it cannot be exercised thereafter; that in this case on the pronouncement of the judgment on 29-12-1943 the power of the Subordinate Judge to make a reference came to an end. This position is sought to be reinforced by a reference to Section 23(2), Arbitration Act, which enacts that the Courts shall not deal with matters which have been referred to arbitration except in the manner and to the extent provided in the Act and this, it is argued, indicates that the matter is still capable of adjudication by the Court and would be inappropriate at a stage when there has been a decision by the Court.

21. It may be conceded that the power to refer to arbitration must be expressly conferred by statute. In -- Abani Bhusan Chakravarty and Others Vs. Hem Chandra Chakravarty and Others, where the point for determination was whether an appellate Court had the power to refer disputes to arbitration, there is the

following observation in the judgment of Mukherjea J.:

"Whatever the proper view might be, we are bound to apply the law as it stands and as the power of referring a case to arbitration is not one that is inherent in a Court, we must hold that in the absence of any express provision the appellate Court is not competent to exercise it."

The question, therefore, is whether on the terms of Section 21 the reference dated 21-7-1944 is "intra vires", of the powers of the Court and that has to be decided on a construction of the language of Section 21 in the light of well established principles.

22. That section provides that where "in a suit" all the parties agree that matters in difference "in the suit" shall be referred to arbitration that might be done at any time before judgment is pronounced. What is the meaning of the word judgment in this context? Judgment is defined in Section 2(9), C. P. C. as the statement given by the Judge of the grounds of a decree or order; and that is wide enough to cover judgments on applications for injunction, appointment of a receiver and so forth; and also judgments in the suit on such questions as court-fees payable on the plaint. It is not contended before us that these are judgments within the meaning of Section 21, Arbitration Act. It is, therefore, clear that judgment in Section 21 does not bear the same sense which it has in the Civil Procedure Code. To ascertain its true import we must turn to the language of the section itself. Section 21 contemplates that "any matter" in dispute in the suit can be referred to arbitration; and therefore a judgment which bars the jurisdiction of the Court to refer "any matter" to arbitration must be a judgment which does not leave "any matter" undecided. In this context, therefore, it can only mean a judgment which finally decides all matters in controversy in the suit; it does not mean an interlocutory judgment which still leaves any of the matters in dispute undecided. Findings on issues, though called judgments are not judgments in this sense; nor are preliminary judgments, even though they decide some of the matters finally, because there are still matters to be decided in the suit. For the purpose of Section 21, Arbitration Act, nothing is a judgment which does not put an end to the suit and so long as an action is pending there can be reference under that section.

23. It is well settled that a preliminary decree does not put an end to the action. The suit continues until the final decree is passed, the preliminary decree being only a step in the process of the passing of the final decree. This is clearly enacted in the explanation to the definition of decree in Section 2, C. P. C., which runs as follows:

"A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of.

It is final when such adjudication completely disposes of the suit."

It has been repeatedly held that the provisions of the CPC applicable to pending

suits apply to suits in which there has been a preliminary but not a final decree. In -- AIR 1940 11 (Privy Council) the Judicial Committee had to deal with a partition suit in which a party applied to be impleaded after the preliminary decree and to have his rights adjusted in the final decree. In holding that the application was maintainable, the Judicial Committee observed as follows:

"Their Lordships fully agree with the observation made by the learned Subordinate Judge who passed the final decree in his order of 8th May 1934 whereby he allowed the objections of the appellants to the Commissioner's report on the ground that a partition suit in which a preliminary decree has been passed is still a pending suit and the rights of parties who are added after the preliminary decree have to be adjusted at the time of final decree."

The appellant also relied on the following observations occurring in -- "Dwarakanath Misser v. Barindanath Misser", 22 Cal 425 (O),

"In the present case what the parties applied for was a partition by metes and bounds of the property which was the subject-matter of the suit. The partition has not yet been made and until the partition has been made and the final decree pronounced it could not be said that any decree in terms of the last paragraph of Section 396 has been passed in the case. The order that is made and which was made in this case under the first paragraph of Section 396 has no doubt the force of a decree but the question that we have to consider is whether the proceedings that are taken subsequent to such order being passed for the purpose of effecting a partition are proceedings in the suit itself, or proceedings in execution of the decree. We think that they are proceedings in the suit itself, & not proceedings in execution of the decree."

The question has frequently come up as to whether Order 23, Rule 3 is applicable to adjustments made after the preliminary and before a final where a suit has been adjusted the Court shall decree in a suit. Order 23, Rule 3 provides that order such adjustment to be recorded and, for this provision to apply, there must be a suit pending. In -- AIR 1945 152 (Privy Council) , the question was raised whether an adjustment made after the preliminary decree in a mortgage suit came within Order 21, Rule 2 which provides that the adjustment of the decree should be certified and if not certified within time it could not be taken into account. The Judicial Committee held that the case was governed by Order 23, Rule 3 which applies to pending suits and not by Order 21, Rule 2 which applies to execution of decrees. Lord Porter observed:

"Their Lordships see no qualification to the wide terms of the Order (Order 23, Rule 3) nor any grounds for limiting its application. Admittedly the suit continues until the final decree is passed and there is no time for recording the agreement arrived at as there is under Order 21. Rule 2."

In -- "Harihar Prasad Narain Sing v. Gopal Saran Narain Sing", AIR 1935 Pat 385 (Q) which was also a case of an adjustment after the preliminary decree in a mortgage suit had been passed the following observations occur;

"As I have already said, it was conceded by Mr. Das that, if Order 21, Rule 2 has no application the application is within the jurisdiction of the Subordinate Judge under Order 23, Rule 3 and in my opinion he was right in making that concession. The word "suit" in that rule is not used in any narrow sense but having regard to the division of the subject matter in the various orders and rules the word "suit" is applied to the proceedings from the beginning of the plaint up to the time when an executable decree has been obtained."

Inayat Khan Vs. Harbans Lal, is also a case of adjustment in a mortgage suit after the preliminary decree was passed. In applying Order 23, Rule 3 the Court observed as follows:

"This is a necessary corollary of the view taken by this Court that a preliminary decree does not terminate the suit, which continues till a final decree is passed. Once a suit is finally disposed of, Order 23, Rule 3 cannot have any application; but so long as the suit is pending it is open to the parties to enter into a compromise or otherwise adjust their differences."

24. The position being well established that the action is pending until a final decree is passed, it follows, that there is jurisdiction in the Court to refer the matters in dispute to arbitration until the final judgment is pronounced.

25. Mr. K. Bhashyam Aiyangar contended that there were reasons of policy why the Court should not have the power to refer matters in dispute to arbitration after a preliminary judgment is pronounced. He argued that it would be inconsistent with the dignity of a Court that its decision should be reviewed by a tribunal of laymen. He relies on certain observations occurring in -- "Juggeswur Das v. Kritartha Moyee Dossee", 12 Beng L R 266 (S). There the question was whether under the Civil Procedure Code, Act 8 of 1859, the appellate Court had the power to refer disputes to arbitration. u/s 312 of that Act the parties may apply to a Court "at any time before the final judgment for an order of reference." A Full Bench of the Calcutta High Court held that the appellate Court had no power under this section to refer disputes to arbitration. The decision as such is not material to this case but the following observations occurring in the judgment of Kemp J. are relied on for the respondents:

"As pointed out by the Chief Justice, if parties are allowed to refer matters to arbitration after a case has been finally disposed of by a Court of justice such a proceeding might tend to bring the lower Courts into contempt."

It may be noted that Couch C. J. observed at page 271 that the word final judgment was used in antithesis to the preliminary judgment in the suit, which means that there could be a reference to arbitration after a preliminary judgment.

In this Court it was held in -- "Sankaralingam Pillai", 3 Mad 78 (T) that the appellate Court could refer the matter to arbitration with the consent of the parties. That no doubt was a decision under Act 10 of 1877 but the following observations occurring in that judgment are relevant for the purpose of this

question.

"Entertaining all respect for the opinions of the learned Judges of the High Court at Calcutta by whom the case in 12 Beng L R 266 (S)" was decided, we are not convinced by the reasons given by them for holding that an appellate Court might not, with consent of the parties, refer the matters in dispute in the appeal to arbitration."

The decision in 3 Mad 78 (T)" was followed in -- "Bhugwandas Marwari v. Nundlal Sein", 12 Cal 173 (U) and -- "Sureshchandra Banerjee v. Ambica Churn", 18 Cal 507 (V) and until the enactment of the Arbitration Act of 1940 the jurisdiction of the appellate Court to refer disputes to arbitration was not disputed. Thus it is impossible to discover any principle of public policy in negating the power to refer matters which had been decided by a Court, to arbitration. It is true that under the Arbitration Act, 1940, there is authority for holding that the appellate Court has no power to refer disputes to arbitration. Vide -- Abani Bhusan Chakravarty and Others Vs. Hem Chandra Chakravarty and Others, ". That, however, does not affect the point now for consideration.

26. On the other hand it has been the longstanding practice of the Courts to refer partition suits and partnership actions to arbitration even after the preliminary decree is passed. It would cause a revolution in the existing practice if it is to be held that there is no power in the Court to refer such matters to arbitration.

27. Mr. K. Rajah Aiyar the learned advocate for the appellant referred to a number of cases in which there was reference to arbitration after preliminary decree had been passed and he relied on them as supporting the position that the power to refer to arbitration could be exercised until the suit terminated by the passing of a final decree. In the case in 22 Cal 425 (O)" already referred to there, was a reference to arbitration in a partition suit after the preliminary decree and that was relied on as saving limitation. In -- Radhey Lal Vs. Kanhai Lal, the facts were that in a partition suit there was a preliminary decree and thereafter an award was made by certain arbitrators effecting a division of the properties. A decree was passed in terms of that award. The question that arose for determination was whether the appeal against that decree was competent. In holding that the appeal did not lie Fazl Ali J. observed as follows:

"It is next contended that the present case did not fall within the second schedule of the CPC at all because this schedule is intended to apply to those cases only where a decree is based wholly upon the award of the arbitrators, whereas in the present case the final decree is based partly upon a preliminary decree and partly upon the award of the arbitrators. This contention must be negated on the short ground that there is nothing in the Code to prevent the parties from referring the matter in difference between them to arbitration at any stage of the suit and that it is not quite correct to say that the final decree which has been passed in the suit is not wholly based upon the award of the

arbitrators. It is true that the parties agreed among themselves as to their respective shares and this agreement was incorporated in the preliminary decree but the division of the properties which is the subject of the final decree was wholly based upon the award of the arbitrators."

In -- Ram Lal Vs. Deo Raj, the facts were that a decree passed by the Subordinate Judge of Ajmer was taken up in appeal to the District Court and was there confirmed. Thereafter u/s 17, Ajmer Courts Regulation the case was referred to the High Court of Allahabad and it was there pending. At this stage the parties filed an application in the District Court asking for a reference of the disputes to arbitration. That was done and resulted in an award. The question was whether there was a valid reference to arbitration. The following observations occurring at page 94 are relied on by the learned counsel for the appellant as supporting his contention:

"In our view the best analogy is that of a preliminary decree and a final decree, and pending the final order of the Ajmer Court. On receiving the answers of the High Court to the reference, the suit was still, to adopt the language of the arbitration schedule in the CPC "pending judgment"..... In our opinion, in spite of the reference to the High Court and not in any way because of the reference to the High Court, or because of anything which the High Court said, this was an arbitration in a suit in which the parties agreed that the matters between them should be referred to arbitration. By para. 1 of Schedule II, Civil P. C., they were, at any time before judgment was pronounced, at liberty to apply to the Court which ordered the order of reference."

28. In -- AIR 1944 83 (Privy Council) which was cited on behalf of the appellant there was a reference to arbitration by the appellate Court and in upholding the validity of the award passed thereon the Judicial Committee observed as follows:

"Their Lordships are of opinion that the subject of the submission to arbitration clearly was the whole dispute and not merely the matter of the appeal, and the order of the Court referring the matter confirms this view. In their Lordships' opinion there is no ground for impugning the validity of this award."

That was not a case of a reference of a suit to arbitration after the passing of a preliminary decree and the observations quoted above are, therefore, not apposite to the present case.

29. The learned advocate for the appellant also called in aid the analogy of Order 23, Rule 3. C. P. C., under which it has been held that there can be a compromise of the matters in the suit after the passing of a preliminary decree. The decision in Inayat Khan Vs. Harbans Lal, " has already been referred to.

30. In -- "Lalta Prasad v. Kedarnath", AIR 1936 Oudh 320 (ZA) the facts were that there was a preliminary decree in a partition suit and against that there was an appeal pending. Then there was a compromise between the parties and the Court of first instance passed a decree in terms thereof under Order 23, Rule 3.

It was held that as the suit was pending in that Court until a final decree was passed it had jurisdiction to pass the decree under Order 23, Rule 3 C. P. C. There is no reason why the same principle should not apply to references to arbitration, It must, therefore, be held that the order of reference dated 21-7-1944 was within the jurisdiction of the Sub Court and that the award could not be impeached on the ground that it was without jurisdiction.

31. It is next argued that in any event the reference should have been limited to the matters still remaining to be decided and that as it included all the matters in the suit including those already decided it was illegal. It is contended on behalf of the appellant that the award is confined to the matters not decided by the preliminary decree that the decisions of the Court that foreign immovables could not be divided, that defendant 1 was not entitled to remuneration, that no contribution need be made for "Seer murais" had all been adopted in the award and that the objection of the respondents had no foundation on the facts of the case and that, therefore, the question did not arise for decision. But it is clear from the award that the arbitrators intended to & did decide all the matters in dispute in the suit. The interim award sets out the several proceedings pending between the parties including A. S. No. 115 of 1944. In para. 43 the award deals with the subject-matter of I. A. No. 988 of 1943 and A. S. No. 115 of 1944. Paragraph 54 provides that A. S. No. 115 of 1944, A. S. No. 119 of 1944 and A. S. No. 499 of 1944 should not be prosecuted and it also decides the question of costs in the appeals. It cannot, therefore, be said that only those matters which were not decided by the preliminary decree were dealt with by award. The reference is certainly general.

32. Even on the basis that the reference and the award were not limited to matters left undecided by the preliminary judgment, the question still remains whether they are for that reason illegal. No authority has been cited in favour of such a contention. Nor is there anything in the language of Section 21, Arbitration Act, to support it. Under that section all the matters in dispute in the suit could be referred to arbitration without any limit or qualification, provided the three conditions mentioned there-in are satisfied, namely, that the reference relates to matters in dispute in the suit, that all the parties interested agree to the reference and the suit has not been disposed of by judgment which, as already held by us, must mean that the suit is pending. There is no further limitation under the section that only those matters in dispute could be referred which have not been decided by the Court. Once the conditions laid down in the section are satisfied the jurisdiction of the Court to refer the entire subject-matter of the suit to arbitration is absolute and unqualified. The reference is accordingly not open to objection on this ground.

33. It is finally argued that as appeals against the preliminary decree were pending in the High Court it was only that Court that could refer the dispute to arbitration and that the Subordinate Judge had no jurisdiction "to make the reference. This contention again is not sought to be supported either by

reference to the language of Section 21, Arbitration Act, or by any authority. There is nothing in Section 21 to limit the power of the Court to refer matters to arbitration because of the pendency of an appeal; so long as the action is pending in that Court its jurisdiction to refer is complete. It is contended that it would be inconvenient for two Courts to have concurrent jurisdiction to refer the same matters to arbitration; that it will result in a conflict of jurisdiction, and that there might even be inconsistent awards. But if it is a question of deciding which of two Courts has the power to refer disputes to arbitration there is no reason why the choice should fall on the appellate Court and not on the trial Court. It is contended that in respect of matters decided by the preliminary judgment the jurisdiction vests only with the appellate Court and not with the Court of first instance but it can equally be contended that in respect of matters not covered by the preliminary judgment the jurisdiction is exclusively vested in the trial Court and not in the appellate Court. Mr. K. Bhashyam Aiyangar on behalf of the respondents relied on certain observations occurring in -- "Nandram. v. Fakirchand", 7 All 523 (ZB) as supporting his contention. There the suit had been finally disposed of by the Subordinate Judge and an appeal against that decision was pending in the District Court. The appellate Court made an order calling upon the Subordinate Judge to submit revised findings on certain issues and the hearing on those issues was pending in the sub-court. Then there was a reference to arbitration and the question was whether it was valid. Holding that it was invalid, Mahmood J. observed as follows: "I am of opinion that when a Court has disposed of a case and passed a decree upon it, the jurisdiction assigned to the Court ceases, so far as that case is concerned, and can be revived only in the manner and to the extent which the law prescribes." This observation could have no application when the suit itself has not been finally disposed of. If anything it supports the position of the appellant. Mr. K. Rajah Aiyar referred to the following passage in the judgment of Sundara Aiyar J. in -- "Atchayya v. Sri Seetharamachandra Rao", AIR 1915 Mad 1223 (ZC)

"When, therefore, a suit had been disposed of by the first Court and an appeal is preferred, the Court of appeal is seized of the cause and has the powers and duties of the first Court."

When once it is conceded that the action is pending until it is finally disposed of by a final decree, the Court where it is pending has the power u/s 21, Arbitration Act, to refer the matters in dispute to arbitration. This objection must also be overruled.

34. It now remains to deal with the last objection of the respondents that the award is bad on the merits on account of coercion on the part of the plaintiff and misconduct of the arbitrators.

35. The respondents put forward five charge under this heading:

1. It was argued that defendant 1 was not a free agent in consenting to the reference to the arbitration and that he signed Ex. P. 12 under coercion and

undue influence. The only basis for the charge is that defendant 1 had fixed the marriage of his daughter for 25-8-1944, that the plaintiff having obtained an order for the appointment of a Commissioner to take possession of papers in the possession of defendant 1 on 5-7-1944, defendant 1 consented to the arbitration with a view to avoid humiliation and disgrace. It is difficult to see how any charge of coercion or undue influence could be laid on these facts. The 1st defendant has not gone into the box. The interim award which was pronounced on 1-8-1944 was signed by all the defendants. There were also repeated extensions by the Court of the time for the filing of the award by the arbitrators. Vide Ex. D. 15 series. This charge must, therefore, be rejected as not made out.

2. The second charge relates to the decision in para. 50 of the award that defendants 1 and 2 should pay Rs. 1,75,000 to the plaintiff on account of charges of mismanagement by defendant 1. The contention of the respondents is that the judgment decided that the plaintiff was not entitled to call for general accounts and that, therefore, the decision of the arbitrators was opposed to the finding of the Court. But a reading of the preliminary judgment shows that though the Court held that defendant 1 was not liable to render an account generally nevertheless he would have to account for monies traced into his hands and not proved to have been spent for the joint family purpose in accordance with the principles laid down in -- *The Official Assignee of Madras Vs. N. Rajabadar Pillai and Others*, and -- *Vaikuntam Pillai and Another Vs. Avudiappa Pillai and Others*, . There is no basis for the contention that the plaintiff was not entitled to relief if misappropriation was established and the award of the arbitrators is, therefore, within their province and further this finding was embodied in para. 17-A of the interim award, Ex. P. 15, which recites that defendants 1 and 2 agreed to this and this award is signed by them. The final award only incorporates what had been decided in para. 17-A of the interim award, with the consent of the parties. There is no substance in this objection.

3. The next objection is that the decision of the arbitrators on the question of jewels was opposed to the judgment in the suit which had declared that the Commissioner should decide whether the gifts of the jewels in favour of the several members of the family pleaded by the defendants was true and was binding on the plaintiff. In para. 19 of the award the arbitrators state,

"We have determined that all the jewels comprised in Schedules 2, 2-a and 2-b belong to the family in common and no one has any separate right to them."

That is to say they have rejected the story of the gifts of the jewels to the several members of the family. This is within the directions given in the preliminary judgment. Moreover it is stated in the award that both the parties have accepted this decision. This statement of the arbitrators has not been controverted by any evidence on behalf of the defendants and must be taken to be correct. Vide -- *"In re: Narasimhulu Chetti"*, AIR 1924 Mad 274 (ZF). There were some complaints about the valuation of the jewels but that is not a ground for setting aside the award.

4. The next complaint is about the directions in para. 56 of the award. It is provided therein that in respect of taxes payable by the family in Burma and in India the accounts had been taken till that date; that if there is any refund of the taxes with reference to the prior period the plaintiff will be entitled to half share therein and if any further tax is payable for that period the defendants alone shall be liable to pay the same and that in respect of this obligation the defendants should execute an indemnity bond in favour of the plaintiff. It was contended that the arbitrators whose authority extended to only to effect a division exceeded the same by providing for indemnity bond being executed. The Subordinate Judge has rightly held that this is incidental to effecting a partition and that the arbitrators had not exceeded their authority. Vide para. 28, We agree with this finding. It may also be noted that it is recited in para. 56 that the defendants consented to it.

5. The last objection raised by the defendants is with reference to the award of interest on the amount payable to the plaintiff from 15-8-1944 to 5-12-1944. The arbitrators state that they have settled the accounts as on 15-8-1944 and the award of interest from that date is within their authority. This objection must, therefore, fail.

36. Mr. T.M. Krishnaswami Aiyar appearing on behalf of defendants 3 to 5 argued that the award was not binding on defendants 3 to 5 because defendant 1 who acted as their guardian "ad litem" in the suit did not protect their interests; that he was negligent in not raising the plea that the amounts entered in the "Thanathumal" account of defendant 1 belonged only to him and to his branch and that, therefore, the award was not binding on them. The interests of defendant 1 were not adverse to that of defendants 3 to 5 and there is no sound reason for holding that defendants 3 to 5 are not bound by the action of defendant 1.

37. Thus all the objections put forward by the defendants to the validity of the award fail and there should accordingly be a decree in terms of the award. The order of the lower Court is, therefore, set aside and this appeal is allowed and it is directed that a decree be passed in terms of the award. The appellant is entitled to his costs throughout. The memo of objection is dismissed without costs.

38. On our finding that the award is valid and that a decree be passed in terms thereof it would be really unnecessary to discuss the questions arising in A. S. No. 115 of 1944, A. S. No. 199 of 1944 and 499 of 1944 and C. M. P. Nos. 3273 and 3274 of 1944 and C. M. A. Nos. 661 and 49 of 1947, and C. R. P. No. 1247 of 1946. But as the matter is one which might be taken in appeal to the Supreme Court we have considered it desirable to hear all these appeals and record our findings thereon.

39. "A. S. No. 115 of 1944":-- This is an appeal preferred by defendant 2 in O. S. No. 91 of 1941 on the file of the Sub Court, Devakottah, against the-

preliminary judgment and decree dated 29-12-1943. The facts leading up to this" appeal have been set out in our judgment in C. M. A. No. 210 of 1946. The only point that arises for decision in this appeal apart from the contention in A. S. No. 199 of 1944 is about the correctness of the order in I. A. No. 988 of 1943 whereby the Subordinate Judge declined to receive the additional written statement sought to be filed by defendant 2. The plaintiff had alleged in paras. 6 and 8 of the plaint that his father Chidambaram Chettiar had invested joint family funds in the vilasams of the members of the family, male and female and claimed his half share in these amounts and in the accretions thereto. The 1st defendant who is the father of the appellant and manager of the joint family admitted this claim. The 2nd defendant filed a written statement adopting that of defendant 1. After the suit had been pending long and had been posted peremptorily for trial, defendant 2 filed I. A. No. 988 of 1943 seeking to raise a new and inconsistent plea. In the additional written statement which was proposed to be filed it was alleged that the two sums of money of Rs. 2,10,251-4-0 each were separately set apart in the name of the plaintiff and defendant 1 and that

"by reason of the said transactions the said two sums constituted the individual and separate monies of the respective branches of the plaintiff and the 1st defendant and that they are not the property of the family, liable to division in this suit."

This is inconsistent with the admission made by defendant 1 that those amounts with their accretions are divisible among all the members of the family and that the plaintiff is entitled to a half share therein. The plaintiff opposed this application on the ground that it was inconsistent with the previous statement, that it was belated and that it was defendant 1 who was behind this application. The Subordinate Judge accepted this contention and dismissed the application.

The only point for determination in this appeal is whether there is ground for permitting defendant 2 to put forward his present case. It may be mentioned that even the additional written statement does not disclose any legal plea. The parties belong to a family which has been carrying on hereditarily money lending business & all the assets in the hands of Chidambaram Chettiar would be joint family properties. That being the position, merely setting them apart in the "Thanathumal" accounts would not destroy their character as joint family funds. No partition is pleaded for the obvious reason that this formed only a small portion of the joint family assets and all the other properties continued to be joint. No gift is pleaded; of course gift of joint family properties would be void. In fact monies were set apart not merely in the names of the plaintiff and defendant 1 but also in the names of the female members of the family. The additional written statement is open to the objection that it contains really no substantial plea and that it is sought to be filed only with the object of delaying the hearing of the suit.

40. The 2nd defendant was a minor, a few years old in 1925, when the

"Thanathumal" accounts were opened. He could have had no personal knowledge about this matter. It is not stated how he came by any new materials throwing fresh light on the question. It is obvious that defendant 1 finding himself concluded by his own admissions has set up defendant 2 to put forward a plea which is as unsubstantial as it is belated. It may also be mentioned that defendant 2 has endorsed his consent to the interim award, Ex. P. 15, in which it is expressly stated that the parties agreed to divide all the "Thanathumal" amounts which were the subject-matter of I. A. No. 988 of 1943 and A. S. No. 115 of 1944. We are satisfied that there is no substance in the contentions sought to be raised in I. A. No. 988 of 1943 and that the Subordinate Judge has exercised a sound discretion in dismissing this application. There is no other point in this appeal and it is accordingly dismissed with costs.

41. "A. S. No. 199 of 1944":-- This is an appeal preferred by defendants 1 and 3 to 5 against the preliminary decree in O. S. No. 91" of 1941, Sub Court, Devakottai. Four contentions were urged in this appeal.

1. The 1st defendant pleaded in para 22 of the written statement that according to the usual practice obtaining in the Nattukottai Chetti community the manager is entitled to a decent remuneration for managing the joint family business and the properties. Issue No. 10 relates to this question. The witnesses examined on the side of the plaintiff deny the existence of any such custom. D. W. 1 and D. W. 2 are examined on the side of the appellants for proving the custom. D. W. 1 stated that he received some amount as remuneration for the management of a business under an agreement with his brother. He does not speak to any custom prevalent in the community. D. W. 2 merely stated that at a partition between him and his brothers the panchayatdars gave him three jewels towards his remuneration. The custom pleaded is a very unusual one and runs counter to the fundamental conceptions of joint family. The evidence in support of this is absolutely worthless and was rightly rejected by the lower Court. This point must be found against the appellants.

2. It is next contended that the plea of the appellants with reference to the jewels should have been accepted. The Subordinate Judge did not negative the claim of the appellants to the jewels but only directed the commissioner to enquire into the truth of the gifts and about their reasonableness if they were true. The learned advocate for the appellants has been unable to urge anything against the soundness of this finding. It will accordingly be confirmed.

3. The next contention of the appellants relates to item No. 3 in schedule A. There is a school which is being conducted at that place and the appellants want that this charity might be continued. This is opposed by the plaintiff. There is not even a plea in the written statement that this property had been dedicated to charity. This contention must accordingly be rejected.

4. Lastly it is contended that it is customary for members of the family to make presents to sisters and that joint family properties, sufficient for that purpose

might be set apart and the balance alone be divided. This is not a legal obligation and the parties might be left to make their own presents as and when occasion arise in accordance with their willingness and ability. The lower Court has rightly rejected this claim. In the result this appeal fails and is dismissed with costs.

(42) "App. No 499 of 1944": This is the appeal of the plaintiff against the preliminary decree in O. S. No. 91 of 1941 on the file of the Sub Court, Deyakottai. The contention raised in this appeal is again a question of custom. It is pleaded in para. 5 of the reply statement filed by the plaintiff in these terms:

"The plaintiff states that according to the usage and custom of the Nattukottai Chettiars the drawings made by or the expenses incurred on behalf of the individual members of the family after setting up separate family by such member are debited to his individual account so as to equalise the shares of the members of the family in the joint family properties and to be adjusted at the time of the partition."

The separate accounts in the names of the members are called "Pathuvazhis" and the point for determination is whether there is a custom that the amounts standing as debits in the "Pathuvazhi" accounts could be debited against the shares of the particular members at the time of the partition. The evidence in the case shows that there is a practice in the Nattukottai Chettiar community for a member of the family to live separately after marriage and whatever he draws from the joint family is thereafter entered in a separate account called "Pathuvazhi". The custom as pleaded by the plaintiff is that all the amounts drawn by him and entered in the "Pathuvazhi" account should be debited against him. The "Pathuvazhi" account includes amounts drawn by the members for their maintenance. If the custom pleaded by the plaintiff is to be accepted in its entirety it would mean that in a joint family members have no right of maintenance after marriage, a position which is inconsistent with the fundamental character of the joint family. The evidence adduced on behalf of the plaintiff does not, however, go so far.

43. In *Castes and Tribes of Southern India* by E. Thurston, (Vol. V page 253) there is the following extract from an article of late Sundara Aiyar J". bearing on this custom:

"The first and chiefest aim of a Nattukottai Chetti is to make as much money as possible. He does not regard usury as a sin.....As soon as he marries, his father gives him a separate home, or rather compels him to live separately, though often in the same house as his parents. This makes him self-reliant, and produces in him a desire to save as much money as possible. He is given a certain allowance out of the paternal estate, but if he spends more, he is debited with the excess amount."

The existence and scope of this custom came up for decision in "A. S. Nos. 212 and 214 of 1928" on the file of this Court. Pandalai J. held that the custom was not made out. With reference to the evidence adduced in support of this custom

he observed:

"This bold bid at revolutionising the law of partition among Nattukottai Chetties by giving a novel meaning to their thrifty method of upkeeping family accounts failed miserably."

He went on to hold that the monies spent for the maintenance, marriage and other legitimate joint family expenses could not be debited against the members though they were entered in the "pathuvashi" accounts. Curgenv J., however, differed. On this difference of opinion the matter came before Madhavan Nair J. who proceeded to decide the case on the footing that the custom had not been made out and granted a decree on the basis of an agreement of the parties.

44. The next document relied on is Ex. P. 4(a) which is an award of the panchayatdars in O. S. No. 3 of 1936 on the file of the Sub Court, Devakottah. There is a provision in the award that the "Thanathu" drawings off each party should be debited against them. P. W. 7 is examined in connection with this but he is unable to remember what amounts were drawn in the "Pathuvazhi" account. If amounts unrelated to joint family expenses had been entered they could be rightly debited against the members. The same criticism applies to Ex. P. 6 which is the report of the commissioner appointed in O. S. No. 73 of 1937. The evidence is not clear as to whether the amounts drawn on the "Pathuvazhi" account were legitimate joint family expenses or not. The report of the commissioner in O. S. No. 64 of 1935 Ex. P. 8 does not appear to be a case of "Pathuvazhi" at all and is of no help in determining the point now at issue. The real evidence in support of this custom is vague, indefinite and discrepant. P. W. 1 stated that certain amounts were adjusted by agreement. He also deposed that the eldest member of the family who manages the properties of the family is not entitled to any remuneration. P. W. 3 stated that when amounts are spent on individual needs they would be drawn on "Pathuvashi" account and debited to individuals; they would be in accordance with Hindu law. His evidence does not support the contention that even monies spent for maintenance could be debited against the member. P. W. 4 also stated that whenever monies were required by a member the purpose would be mentioned, that it is a joint family purpose it would be shown as expenses and if it is a personal expense it would be debited to personal account. This completely destroys the case of the plaintiff. P. W. 5 deposed to his having settled several disputes but he is unable to remember the nature of the disputes or other details.

45. It will be seen, therefore, that there is no definiteness or certainty about the custom pleaded. According to one version the manager will fix the amount payable to each member when he begins to live separately and it is only the balance that will be debited against him. According to another version the whole of it will be debited. Then again according to one version the joint family expenses would not be debited but only the personal expenses.

According to another version all of them will be debited. In this state of evidence

and having regard to the fact that the custom is one which is radically opposed to the fundamental conception of Hindu joint family it must be held that the plaintiff has not discharged the burden which lies heavily on him of establishing the custom. That is the conclusion of the Subordinate Judge and we agree with it. In the result this appeal also will be dismissed with costs.

46. "C. M. P. Nos. 3274 and 3273 of 1946": -- In A. S. No. 115 of 1944 the plaintiff has filed C. M. P. No. 3274 of 1946 under Order 23, Rule 3, C. P. C., for an order that the interim award, Ex. P. 15, dated 1-8-1944 be treated as a compromise and a decree passed in terms thereof. It was held in -- Penmetcha Subbaraju Vs. Penmetcha Venkatramaraju, by a Full Bench of this Court that an award in respect of which a decree could not be passed could be treated as a compromise and a compromise decree passed under Order 23, Rule 3, C. P. C. This was followed in a case arising out of the Arbitration Act of 1940--Vide -- V.S.A. Arumuga Mudaliar Vs. V.S.P. Balasubramania Mudaliar and Others, . In -- Indramoni Mohapatra Vs. Nilamoni Moharana, , the decision in -- V.S.A. Arumuga Mudaliar Vs. V.S.P. Balasubramania Mudaliar and Others, has been dissented from and it has been held that unless the award is assented to after it is pronounced it cannot be treated as a compromise under Order 23, Rule 3, C. P. C., but defendant 2 having consented to the interim award, the plaintiff argues that a decree may be passed as against him under Order 23, Rule 3, C. P. C. In our opinion he is entitled to such a decree.

47. "C. M. P. No. 3273 of 1946": This is for a similar decree in A. S. No. 199 of 1914. For the reasons already given the plaintiff is entitled to a decree against defendant 1. But as defendants 3 to 5 were minors at the time when the interim award was pronounced and as no sanction of the Court was obtained under Order 32, Rule 7, C. P. C., for sanctioning the compromise on their behalf, no decree could be passed as against them under Order 23, Rule 3, C. P. C. There can be an order in C. M. P. No. 3273 of 1946 only in these terms.

48. "C. M. A. No. 661 of 1948 and 49 of 1947": These two appeals are against application filed in O. S. No. 91 of 1941 for passing a decree under Order 23, Rule 3 on the ground that the defendants had consented to the interim award. For the reasons given in C. M. P. Nos. 3274 and 3273 of 1946 these appeals will have to be allowed and a compromise decree passed in terms of the award under Order 23, Rule 3 against defendants 1 and 2.

49. "C. R. P. No. 1247 of 1946":--The only order that need be passed on this revision is that defendant 1 do put into Court copies of the correspondence for inspection by the plaintiff. He is not bound to show them to the plaintiff before despatching them.

50. There will be no order for costs in C. M. P. No. 3274 of 1946; C. M. P. No. 3273 of 1946; C. M. A. No. 661 of 1946; C. M. A. No. 49 of 1947 and C. R. P. No. 1247 of 1946. No orders are necessary in C. M. P. No. 7076 of 1947 and C. M. P. No. 1122 of 1947. C. M. P. No. 5329 and 5330 of 1948 are ordered.