

(1928) 08 BOM CK 0002
In the Bombay High Court
Case No : First Appeal No. 434 of 1925

Kondi Ravji Fadtare

APPELLANT

Vs

Chunilal Rupchand Marwadi

RESPONDENT

Date of Decision : 02-08-1928

Acts Referred:

Evidence Act, 1872 — Section 44

Citation : (1928) 30 BOMLR 1539 : (1929) ILR (Bom) 75 : 113 Ind. Cas. 229

Hon'ble Judges : Murphy, J; Charles Fawcett, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Fawcett Ag. C.J.

1. In this case the plaintiff sued to obtain a declaration that the decree obtained on an award filed in the Court of the First Class Subordinate Judge of Poona was unauthorized, null and void.
2. The main ground on which he asked for this relief was that there never was a reference to arbitration with his knowledge or consent, that he knew nothing about the alleged arbitration, and that the award was, in fact, a forged document, and, therefore, null and void. He admitted that he made his thumb impressions on some papers, so that there might be those thumb-impressions on documents connected with this alleged arbitration and what purports to be his application to file the award; but he says that he is an illiterate agriculturist and really made such thumb-impressions on papers delivered to his pleader in connection with a suit that he had brought in the Court of the Subordinate Judge of Saswad.
3. The defendant contended that all these allegations about the fraudulent nature of the award were false, and that the decree on the basis of the award was passed in the presence of the plaintiff himself in Court and with his knowledge and consent.

4. The case is one of some peculiarity, because the application to file the award was one made on behalf of the plaintiff by a pleader in whose favour the plaintiff admittedly had passed a vakalatnama, which bears the plaintiff's thumb-impression, and also the Saswad suit was withdrawn, shortly before the award decree was passed, upon an application made by one Mr. Gokhale, a pleader admittedly employed by the plaintiff in that suit, and saying that the suit need not be proceeded with as an arbitrator's award has been passed in the matter.

5. The case of the plaintiff involves gross dishonesty and even forgery on the part of his pleader, Mr. Gokhale, who had died at the time this suit was brought; and it may at once be said that no satisfactory explanation has been given as to why Mr. Gokhale should be guilty of such conduct. All that we are told is that the plaintiff has no knowledge on the subject. The Subordinate Judge, after recording evidence, held that the plaintiff had not proved that the reference to arbitration and the award were not genuine transactions made without the knowledge and consent of the plaintiff, and he dismissed the plaintiff's suit.

6. The first question in this appeal is whether the plaintiff has or has not established his case of a false and fraudulent award. The main circumstances under which this question arises are as follows:—

7. The plaintiff admittedly had mortgaged certain lands to defendant No. 1, who is his sawcar, and on April 7, 1921, he executed a deed in defendant's favour, which on the face of it was a deed of sale. The plaintiff, however, contended that the document was not a sale but a mortgage transaction. The defendant filed a suit in the Court of the First Class Subordinate Judge to get possession of the lands under his sale deed, and the Court decided that suit in favour of the sawcar to this extent that it awarded him possession of the lands but gave the present plaintiff leave to file a suit for accounts under the Dekkhan Agriculturists' Relief Act within four months. The plaintiff accordingly filed such a suit, claiming an account of the alleged mortgage transaction. That was suit No. 425 of 1922 in the Court of the Second Class Subordinate Judge of Saswad, and it was instituted on October 14, 1922. As I have already said, Mr. Gokhale was the plaintiff's pleader in that suit. On February 24, 1923, the alleged reference to arbitration and award are said to have taken place. There is, in fact, an award document signed by the arbitrator, one Mr. Shedge, on a stamp paper of Rs. 20; and it has been proved that two stamp papers, one of Rs. 20 and the other of annas 8, were sold to the plaintiff on that day. There is the evidence of the stamp vendor to that effect, which is supported by entries in his register bearing the thumb-impressions of the plaintiff; and in Exhibit 85 he admitted that the clerk of Mr. Gokhale had taken him to the stamp vendor and that he had put his thumb-impression on his book, as well as on the stamp papers. The stamp paper of Rs. 20 does bear such a thumb-impression, as well as the corresponding entry in the register kept by the stamp vendor. But the plaintiff says that he does not know what these stamp papers were meant for. The defendant, on the other hand, says that the eight annas stamp paper was bought for the purpose of a reference

to arbitration and the Rs. 20 stamp paper was used for the award. That is certainly a reasonable suggestion. But, of course, it does not settle the controversy.

8. Then, on March 8, 1923, there was an application made purporting to be on behalf of the plaintiff and admittedly bearing his thumb impression in two places, reciting the alleged award of the arbitrator and asking the Court to pass an order filing that award. On March 23, 1923, notice was ordered to issue to the defendant to show cause why the award should not be filed, and the notice was sent to the Saswad Court for service upon the defendant. On April 17, 1923, there was an application made by Mr. Gokhale, purporting to be on behalf of the plaintiff, in the Subordinate Judge's Court at Saswad that the Suit No. 425 of 1922 should not be further proceeded with, as an arbitrator's award had been passed about the deed in suit (Exhibit 52); and thereupon the suit was dismissed with costs. On April 20, 1923, the First Class Subordinate Judge recorded that the defendant had consented to the application as per his written statement, Exhibit 6 in that case, and he directed that the award be filed and a decree be drawn up in terms of the award.

9. The present suit was brought on June 11, 1924, and it was alleged that the plaintiff only came to know of the fraud in April 1924. The main evidence upon which reliance is placed for the plaintiff is that of the arbitrator, G.N. Shedge, Exhibit 40. He testified that he really effected no award whatever between the parties, but that Mr. Gokhale, the pleader, called him and asked him to sign a paper, saying it was an award in respect of a matter of the defendant Chunilal. He says that he hesitated to sign it, but that Mr. Gokhale assured him that there was no harm in doing so, and relying upon him, as he was his usual pleader, he signed the award Exhibit 41. He further says that he signed it even without reading it, and that the defendant Chunilal was not present when he did so. He also testifies that one Shivrarn Dhamdhare, a clerk of Mr. Gokhale was not then present, but that one Sadashiv B. Joshi had called him, saying that Mr. Gokhale wanted him. This certainly is evidence which can be relied upon in support of plaintiff's case that, in fact, there was no real reference to arbitration or award. But the Subordinate Judge has held that Shedge is a liar of the worst class, and he does not believe his testimony. Against this testimony there is the evidence of the defendant, who says that the plaintiff had filed a plaint before Shedge, and that he (defendant) filed his sale deed and written statement as well as account extracts, that Shedge heard them both, and that Mr. Gokhale and another were helping the plaintiff. He further says that Mr. Shedge was looking into the matter for two or four hours, and that Sadashiv Joshi, to whom I have already referred, wrote the award. Sadashiv Joshi has also given evidence in support of the defendant's story. He says that he wrote the award at Mr. Shedge's request, and at his dictation, and that both the plaintiff and defendant were present and consented to the award. He also says that the plaintiff made his thumb impression upon the award. There is, however, no such thumb impression upon the award except the one made against the endorsement about the sale of the

stamp paper to the plaintiff that I have already mentioned. He further says that the arbitrator had before him the plaint and the defendant's written Eitatement, that both the parties put their cases to the arbitrator, and that the defendant had brought certain account books, although in his cross-examination he contradicted this by saying that he did not see any account books there. He says that there was also a reference to arbitration, which bore the thumb-imprestrion of the plaintiff and the signature of the defendant, and was written on a stamp paper of eight annas on the same day, viz., March 24, 1923. This document has not been produced and the Subordinate Judge surmises that it has been suppressed by Mr. Shedge, to help the plaintiff. The arbitrator, however, does not appear to have been put any questions on the subject. The Subordinate Judge has accepted the testimony of the defendant and Sadashiv in preference to that of Shedge. At any rate, he says that he is inclined to believe the positive evidence on the defendant's side and that the evidence on the plaintiff's side is entirely negative and consists of denials and improbabilities bordering on falsehoods. He further comments upon the fact that the plaintiff failed to examine either Shivram Dhamdhere, Mr. Gokhale's clerk, who is still alive, or the other pleader who was engaged for the plaintiff in the First Class Subordinate Judge's Court, viz. Mr. Shanker Laxinan Joshi, Some explanation has been given by Mr. Thakor as to why this was not done, and it does appear that both the parties at one time were thinking of examining Mr. Joshi, but eventually he was not called, I do not, however, attach very much importance to this omission for reasons I am now going to give,

10. I do not think that the case of either party is really the whole truth, The Court cannot presume fraud and dishonesty. There must be something to justify a Court going to that length, and here the plaintiff's case involves the conclusion that his pleader was guilty of doing important things without the authority and knowledge of his client and that he baa practically forged documents by getting thumb-impressions from the plaintiff on the representation that they were wanted for a certain purpose and using them for another, viz,, in order that they may purport to show the authority of his client for things which he knew were unauthorized, Surely, a Court of law must hesitate before it cornea to a conclusion of that kind. There is nothing in the evidence to suggest any satisfactory reason why Mr. Gokhale should have been guilty of such conduct. On the other hand, there is a suggestion which, during the course of the arguments, I put to the learned Counsel, and which, to my mind, is consistent with the admitted facts of the case.

11. There was this dispute as to whether the sale deed was an actual sale or merely a mortgage transaction. It seems to me that there is an obvious explanation of these documents being in existence, viz., an actual award about the dispute on a stamp paper which admittedly bears the plaintiff's thumb-impression, the application made by two pleaders for filing the award under vakalatnatnas bearing the plaintiff's admitted thumb-impression in two places, and the application that in view of this award the Saswad suit was withdrawn by

the plaintiff. This is that the parties had, in fact, come to an agreement on the matters in dispute. They had settled terms which are recorded in this so-called award, and they adopted this procedure of having a fictitious award deliberately. A reasonable explanation is forthcoming for it, viz., that the agreement involved the payment by the plaintiff to the defendant of a sum of over Rs. 5,000, so that the Second Class Subordinate Judge could not pass a decree in terms of a compromise for payment of that amount, which was beyond the pecuniary limits of his jurisdiction. I will not say that there would necessarily be illegality, see *Ambadas HariRao v. Vishnu Govind* I.L.R (1926) Bom. 839: 28 Bom. L.R. 1461; but, at any rate, there would have been a possibility of complications and difficulties if a simple compromise had been recorded in the Saswad suit. It seems to me that Mr. Gokhale, the plaintiff's pleader, might well have advised his client that the safer course to take would be to go through the form of having a reference to arbitration and an award, and then to make a separate application in a Court having jurisdiction with regard to the pecuniary amount involved, viz., in the First Class Subordinate Judge's Court, Poona, to file the award and have a decree passed in its terms. The other party's pleader might equally consent to this course. It was not an essentially dishonest arrangement, for it was one upon which the parties had in fact agreed and there is nothing to suggest that it was an unfair arrangement. It is a device that can of course be abused, as it has often been in order to defeat the provisions of the Dekkhan Agriculturists' Relief Act. This is referred to in para. 2 of Chapter VI of the Manual of the High Court Circulars at p. 191; but the present is not a case of that kind. This theory explains the withdrawal of the Saswad suit and also is consistent with the evidence of the defendant that he did, in fact, receive a payment of Rs. 614 from the plaintiff after the award had been passed, which is corroborated by the admission of the plaintiff that he had paid him Rs. 1,000 or less in 1924. It also explains the arbitrator's evidence. As to his reliability, I differ entirely from the Subordinate Judge. I think that this gentleman, who is a Vani, having no connection with either of the parties, and is described by the Subordinate Judge as one of the well-to-do merchants of Saswad and Kopergaon, should not lightly be assumed to be a person who would falsely side with the plaintiff in a dispute of this kind and perjure himself. On the contrary I believe he has frankly told the truth, and that both the defendant and the clerk, Sadashiv, in trying to make out that there was a genuine reference to arbitration, a genuine hearing by the arbitrator and a genuine passing of an award, are telling lies. Therefore, I agree with the view taken by the lower Court that the plaintiff has not proved that this award transaction and the subsequent applications in the First Class Subordinate Judge's Court and in the Saswad Court, were all without his knowledge or authority. I do not believe that allegation, and I think it is a case merely of the plaintiff, after he had consented to these arrangements, going back upon his word. Accordingly, on the facts I see no sufficient reason to differ from the conclusion of the lower Court that the plaintiff had not made out his case of fraud on which he asks the Court to interfere with the award decree. But, of course, my reasons for that view are very different from those of the lower Court.

12. Mr. Thakor urges that, even if that view is adopted, yet the plaintiff has a right to have the decree set aside. So far as this is based on the contention that the decree was passed without jurisdiction, it is a point with which I shall deal later. So far as it is based on any suggestion that on the facts that I hold to be probably true, there was a fraud that would justify the setting aside of the award decree, I entirely differ. There are various grounds on which that conclusion can be based. There is, first of all, the rule that a party alleging one kind of fraud, on failure to prove it, cannot set up another kind of fraud and try and get a decree on that basis : see, for instance, *Abdul Hossein Zanail Abadi v. Charles Agnew Turner* I.L.R (1887) Bom. 620. Then, there are, of course, the familiar rulings that a participator in a fraud, when that fraud is effected, cannot impeach the transaction on the ground of such fraud: see *Ahmedbhoy Hubibhoy v. Vulleebhoy Oaasumbhoy* I.L.R (1882) Bom. 703 and *Chenvirappa v. Puttappa* I.L.R (1887) Bom. 708. In any case, there could not be said to be a fraud here, except in the sense that both parties colluded to keep the Court at Poona in ignorance of the fact that a suit between them was pending in the Saswad Court. But, that, in itself, would not be sufficient ground for setting aside the judgment of the Court below, Even supposing that the case could not be said to fall within the rulings I have referred to about fraud, the plaintiff is not entitled to set aside the collusive decree, because, as held in *Ghenvirappa V. Puttappa*, a party to a collusive decree is bound by it, except possibly when some other interest is concerned that can be made good only through his. That is not a case which arises here.; But, in truth, this conspiracy of silence cannot, I think, be described as "collusion" in the sense, in which the word is used in connection with judicial proceedings, viz., a secret agreement between two persons that the one should institute a a set against the other in order to obtain the decision of a judicial tribunal for some sinister purpose, or even in the wider sense of a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose (See *Ameer Ali's Law of Evidence*, 8th Edition, p. 417). In the present case though there was a conspiracy I deceive the Court, I do not think that there was a sinister or improper purpose within the meaning of those definitions,

13. Mr. Thakor has, also, fallen back upon the point of law which is indicated in ground No. 15 of the memorandum of appeal, although he has rather altered it in his argument. That ground snys:?

The alleged reference and award having been admittedly alleged to have boen made during the pendency of a suit in Court should have been held to be illegal and the decree baaed on such an award should have been set aside.

This contention, at any rate, is supported to this extent that in the Full Bench case of *Chanhasappa v. Basalingayya* I.L.R (1927) Bom. 908: 29 Bom. L.R. 1254 it was held by all the three Judges that paragraph 20 of Schedule 2 of the Civil Procedure Code, under which the award and subsequent application could only be justified, does not apply to arbitration in pending suits, but contemplates only

a reference to arbitration where there is no pending suit covering the matters in dispute referred to arbitration. That also was the view that was held : by Macleod C.J. and myself in *Manilal Motilal v. Golcaldas Rowji* I.L.R (1920) Bom. 245: Bom. L.R. 1048. Therefore it may be said that there was no proper reference or award upon which the First Class Subordinate Judge had jurisdiction to pass a decree in terms of the award. 11 It was contended further that the decree is absolutely illegal and being without jurisdiction should be set aside, although that is not a ground upon which the plaintiff asked the lower Court to do this On the other hand, Mr. Coyajee, among other arguments, has contended that this objection does not really make the award or decree an illegality, but only constitutes an irregularity; and he has drawn our attention to what has been laid down in *Visku Sikharam Najarkar v. Kriahnarao Malhar* I.L.R (1886) Bom. 153 viz, that where jurisdiction in the subject-matter exists, requiring only to be invoked in the right way, the party who has or allowed the Court to exercise it in a wrong way, cannot afterwards challenge the legality of the proceedings due to his own invitation or negligence. This argument is supported, at any rate, to this extent that on the face of them, the papers, viz, the application to file the award and to have a decree passed in terms of it, and the further exhibits such as the defendant's written statement, contained nothing to show that the First Class Subordinate Judge had not jurisdiction to pass the decree he did. The reference to arbitration and the award had taken place within the jurisdiction of the Court, the parties resided within its jurisdiction, and the pecuniary value of the decretal order was also within jurisdiction. The only thing which can be said to have deprived the Court of jurisdiction is the suit in the Saswad Court, which was a matter which both the parties deliberately did not bring to the notice of the Subordinate Judge. On the other hand, that suit was not actually pending at the date of the decree, because it had been withdrawn on April 17, 1923, whereas the decree was passed three days later. But, in my opinion, it is not necessary for the purposes of this case to decide whether the passing of the decree was entirely illegal or was merely an irregularity. The plaintiff comes to us and asks for certain relief. We have to consider whether that relief should be granted, and in deciding such a question we are not confined merely to the point whether in strict law the decree was passed without jurisdiction. We are a Court of Equity as well as a Court of Law, and we are not bound to give relief to the plaintiff. It is not a case where he comes to us as a Court of Appeal or Revision in regard to the award-decree of the First Class Subordinate Judge. In that case, of course, if the decree were shown to be without jurisdiction he would be entitled to consequential relief. But. in the present case, he asks us to interfere in separate legal proceedings on a ground, which Buffers not only from the weakness of not having been placed before the lower Court, but also from the weakness that the plaintiff is basing his claim upon a ground of objection which he himself deliberately kept from the Court that passed the decree in question, In fact he himself made the application to the Court to file the award, and pass a decree accordingly. The case is one which falls within the principle in *pari delicto potior est con-ditio posidentis* which was applied, for instance, by Sir Lawrence Jenkins

in *Sidlingappa v. Hiras* I.L.R (1907) Bom. 405: Bom. L.R. 542. This is also a case falling under a similar maxim *allegans contraria non est audiendus*. Plaintiff represented to the Court of the First Class Subordinate Judge, Poona, that it had jurisdiction. He obtained a decree upon that representation and now he wants to go back upon it and urges the contrary, viz., that the Court had no jurisdiction. Therefore, upon general grounds of equity, I think this is clearly a case in which we should not interfere with the lower Court's decree.

14. I may add that the contention seems to me to raise other questions of *res judicata* and *estoppel*, which might also be found to bar the claim. Thus it is alleged that the plaintiff in fact acted upon the award and got the defendant to give him possession of the land in suit; in that case he is probably estopped from raising this particular plea, see, for instance, *Brij Mohan Lai v. Bhiam Singh* I.L.R (1901) All. 164 and *Gauri Shanlear v. Ganga Ram* (1919) P.R 1919 referred to in *Ameer Ali's Law of Evidence*, 8th Edition, at page 855. The latter was a case where one of two plaintiffs joined with the defendant in an application to the Court for the case to be referred to arbitration. On the next day the other plaintiff (one G.R.) made an oral application before the Court to the effect that he accepted the arbitration. The arbitration lasted for over a year and G.R. conducted the proceedings throughout on behalf of the plaintiff. An award was duly filed but G.R. objected to it on the ground that he had not signed the original application to the Court for an order of reference. It was held that G.R. was estopped by his own action from raising any objection as to the legality of the arbitration proceedings on account of the want of his writing. This question would involve the taking of further evidence, because there is a dispute whether or not the plaintiff got possession under the award. If necessary, there would have to be a remand to have evidence taken on that point, But, in view of the general considerations I have relied upon, I think it is unnecessary to go into this point of *estoppel*. 1 Then, as to the question of *res judicata* no doubt the judgment and decree of the First Class Subordinate Judge may be said to be entirely without jurisdiction, and that would ordinarily prevent any plea of *res judicata* arising from them, as was for; instance laid down by the Privy Council in *Toronto Railway v. Toronto Corporation* [1904] A.C. 809. But, on the other hand, there is a possibility that the case might fall under the general principle illustrated by *Joint Committee of River Ribble v. Croston Urban District Council* [1897] 1 Q.B. 215 which is summarized in *Halsbury's Laws of England*, Vol. XIII, Article 491, at pp. 353-354, as follows :?

The absence of a condition necessary to found the jurisdiction to make an order, or give a decision, deprives the order or decision of any conclusive effect; but it is otherwise where the order is good on its face and the court adjudicating has jurisdiction to determine the existence or not of the condition, and the v" party denying its existence has neglected his opportunity of raising the objection at the hearing.

15. In the present case the defect of jurisdiction only arises out of the pendency

of the Saswad suit at the time of the arbitration proceedings. Plaintiff had an opportunity of drawing the Court's attention to that and getting it to determine whether it had jurisdiction or not. But, leaving this aside, the general principles of equity that I have stated are clearly applicable to the present case and justify a refusal to interfere with the decree of the Court below. For these reasons I would dismiss the appeal with costs.

Murphy, J.

16. There is a decree of the First Class Court, Poona, in suit No. 248 of 1923, based on an award made by an arbitrator on February 24, 1923, by which the plaintiff in the case is directed to pay Rs. 6,000, in yearly instalments of Rs. 2,000 and to take possession of some land in dispute. By the present suit No. 540 of 1924 the plaintiff sought a declaration that this decree made on the award under para. 20 of the second schedule of the CPC is null and void.

17. The facts underlying the first suit were, that plaintiff had executed a sale deed on April 7, 1921, conveying some of his land to defendant for Rs. 5,500. His contention has been all along that this sale deed really represented a mortgage transaction. The defendant first filed a suit, No. 450 of 1921, against the plaintiff for possession of the land. By the decree in that suit possession was ordered to be given, but plaintiff was allowed four months in which to file an account suit in the Saswad Court. He accordingly did so, this suit being No. 425 of 1922. While this second suit was pending, according to the defendant, there was a reference of the matters of difference in it to the arbitration of Mr. Shedge, the reference probably being made on February 24, 1923. The original reference is not forthcoming, but Mr. Shedge, in accordance with it, made an award in the terms already mentioned, at the beginning of this judgment.

18. On March 8, 1923, an application was made purporting to be by the plaintiff, in the First Class Court of Poona, to file the award and to have a decree passed in its terms. Proceedings went on in the First Class Court and a decree was passed in terms of the award on April 20, 1923. Meanwhile, an application was made to the Saswad Court, and the pending account suit there was withdrawn.

19. Plaintiff's case, as developed in the original Court, was that he had never really been a party to any reference, or to an award, or to the application to file the award in Court and to have a decree passed in its terms, and that all these proceedings were a fraud upon him. The pleader who was employed in the reference, Mr. Gokhale, has since died, and though his clerk was available as a witness, he was not examined. The pleader employed in the First Class Court by plaintiff, Mr. S.L. Joshi, has also not been examined.

20. The arbitrator Mr. Shedge has been called as a witness. He has largely supported the plaintiff, in his allegations that the award was a sham. On the other hand, the writer of the award gave evidence to the effect that it was a genuine one, as did the defendant. Mr. Shedge has been disbelieved, and so has the Murphy J, plaintiff, and the suit has been dismissed. On the facts, the

plaintiff's case cannot, in my opinion, stand. It is not possible to believe that the late Mr. Gokhale, a pleader against whom nothing is alleged, lent himself to a fraud for no particular reason. Plaintiff's explanation that Mr. Gokhale got him to thumb-impress blank sheets of paper, and that these were used for the subsequent fabrications, is incredible, and he has not dared to cite Mr. Joshi, his own pleader, in the Poona Court as a witness. There is also evidence to show that he bought a stamp paper of the value of Rs. 20; and one of annas eight, about the date of the reference and award, and that he later obtained a copy of the award which he subsequently annexed to his plaint in this suit.

21. Looking at the probabilities of the case as a whole, on the testimony given and the admitted facts, I believe that plaintiff has not made out the facts he has pleaded. It is impossible to believe that all these proceedings, including the buying of the stamps, the application in the First Class Court and the withdrawal of the pending suit in the Saswad Court, were carried out by his pleaders without his knowledge and consent. There is no reason for imputing dishonesty to these pleaders, or for thinking that they or their clerks were all involved in a conspiracy to swindle the plaintiff. Whether there was an actual award, or not, was also disputed; but I think, on the probabilities, that though the award may have had something in it of the nature of a compromise, it really granted the kind of relief likely to be sought by each of the parties. If, as plaintiff has all along claimed, the sale deed of 1911 was really in the nature of a mortgage, what plaintiff wanted was possession of his three fields, and what the defendant needed was profit on his money, and the award actually gives such relief in each case, with the advantage of instalments. On the facts, I believe that plaintiff was a party to the arbitrator's proceedings, though these were perhaps more in the nature of formalities to give an already agreed to arrangement the legal form of an award, rather than a contest on the questions at issue, and it is likely that this is the explanation of Mr. Shedge's evidence, in which the informalities have been exaggerated. In any case I cannot accept the plaintiff's allegation that there was no reference and no award of which he was aware, and that he had no cognizance of the proceedings. Neither can I believe that he did not engage Mr. Joshi of Poona to put through the proceedings which ended in the passing of the decree on the award.

22. I agree with the learned Subordinate Judge in finding that no ground for granting the declaration sought has been made out in so far as this question was discussed in the original Court.

23. But the appeal has also turned to a great extent on another question raised in the fifteenth of the grounds of objection in the memorandum of appeal. It is:?

15. The alleged reference and award having been admittedly alleged to have been made during the pendency of a suit in Court, should have been held "to be illegal and the decree based on such an award should have been set aside.

24. Now, it has been held by a Full Bench of this Court in Chanbasappa

Gurushantappa Hiremath Vs. Baslingayya Gokurnaya Hiremath, that where in a suit parties have referred their differences to arbitration without an order of the Court, and an award is made, a decree in terms of such an award can be drawn up under Order XXIII, Rule 3, but not otherwise, and it has been held in the course of the judgments in that case, that para. 20 of the second schedule would not apply to such an award. The facts here were, that the arbitration proceedings went on while the suit in the Saswad Court was pending, and that the suit was not withdrawn until April 17, 1923, that is, three days before the decree was passed on the award. It has, in consequence, been argued that this decree was made without jurisdiction. The question was raised for the first time in this Court, which makes it from some points of view difficult to decide, since it is possible that evidence might be available on several of the points involved.

25. Primarily, I think, that the reference and award in themselves involve no illegality. There is nothing to prevent the parties to a suit settling it out of Court, either by compromise or by means of an award, and a Full Bench case already quoted holds that such an award may form the basis of a decree under Order XXIII, Rule 3. But that ruling decides by implication that if such a settlement is arrived at the machinery of para. 20 of the second schedule, is not available to the parties to such an award, and here it was this machinery which was used. But does it follow that after resorting to the use of this procedure, plaintiff can be allowed to challenge the result?the award decree?a decree which, on the facts, he himself invited the Court to make, and which it is now urged he has acted on, having admittedly paid Rs. 614 of the first instalment due under it; and it is alleged?though of this there is no proof taken possession of the fields in accordance with its terms. I think that for several reasons, he cannot be allowed to do this. For one thing, if fraud there was, in the form of inducing the First Class Court to pasa an irregular decree, plaintiff himself was responsible for it, for in his application to file the award, the fact that a suit including the subject-matter of this dispute was pending in the Saswad Court, was suppressed. He cannot, I think, now come and plead it as a ground for relieving him of the result of his own disingenuous action in misleading the Court.

26. Mr. Coyajee's argument on this point was, mainly, that there was no rule of law or of equity which allows a Court to set aside a decree obtained in the circumstances of this particular one that in, that a decree can be vacated on the ground that it is irregular, and has referred us to Halsbury's Laws of England, Vol, XVIII p. 216, and the principle referred to in the same author's Vol. XIII, at p. 491, He has also referred us to the cases reported in Nanda Kumar Howladar v. Earn Jiban Howla-dar Timrnana v. Putabhata (1899) 2 Bom. L.R. 90 and Mahomed Golab v. Mahomed Sulliman I.L.R (1894) Cal. 612 and to Section 44 of the Indian Evidence Act, by which a decree can be avoided on certain grounds but cannot be set aside.

27. After giving all these cases my most earnest consideration I agree with the learned Chief Justice in thinking that it is not necessary for us to decide whether

the First Class Court's decree really was made without jurisdiction or not, and that it is sufficient to base our refusal to interfere with the lower Court's decree, on the equitable ground that where the plaintiff has himself, by a suppression of facts, caused an irregularity in the exercise of the Court's jurisdiction, it is not proper to allow him afterwards to come and to challenge the decree so obtained by him on that very ground because it would now suit him to get rid of this decree, since he has obtained all or some of its benefits. I agree that the lower Court's decree should be confirmed and that the appeal should be dismissed with costs.