
(1939) 08 MAD CK 0046
In the Madras High Court

Madipalli Venkatachellam

APPELLANT

Vs

Madipalli Suryanarayanamurthy and Others

RESPONDENT

Date of Decision : 16-08-1939

Acts Referred:

Citation : AIR 1941 Mad 129 : (1940) 52 LW 556 : (1940) 2 MLJ 520

Hon'ble Judges : Mockett, J;Krishnaswami Ayyangar, J;Krishnaswami Aiyangar, J

Bench : Full Bench

Judgement

Mockett, J.—Defendant 1 is the appellant. He is the son of one Chelamiah who died on 15th October 1925 at a great age. Defendant 2 is the brother of defendant 1 and the plaintiff is the third brother. The following facts were stated from the bar and were accepted. In April or October 1917 - at this stage it is not necessary to be more precise about the date - the family became divided in status. In 1920, defendant 2 filed, but subsequently withdrew, a suit for partition, but on 22nd May 1921 there was a muchilika entered into between the parties with a view to dividing the property. On that there was a reference to arbitration by the plaintiff and the defendants and it is on that reference that this matter comes before this Court, having been first of all decided by the District Judge of East Godavari. That is all that is necessary at present with regard to the facts, because what is now being dealt with may be called a preliminary point. It can be shortly stated. Mr. V.V. Srinivasa Iyengar for defendant 1 has raised a point which was referred to but not decided by the Judicial Committee of the Privy Council in Ramlal Hargopal v. Kishanchand ("24) 11 AIR 1924 . The point in question is dealt with by Lord Phillimore at p. 372. His Lordship said:

It was contended on behalf of the appellant that if an award relates to more than one subject-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court; in fact, that it can be filed in no Court, because no one Court would have jurisdiction over the whole subject-matter. Their Lordships deem it unnecessary to rest their judgment on any such general proposition.

2. Lord Phillimore went on to point out why it was unnecessary to decide that

point. His reason was this, namely, that it was evident to their Lordships that the property concerned in the case before them was property wholly outside British India and that in the words of their Lordships there was no dispute concerning the ownership and management of properties within the jurisdiction. It must, therefore, be emphasised in that case that what was before the lower Court was an application under para. 20, of Schedule 2, Civil P.C., relating to property wholly outside the jurisdiction of the Courts of British India. What is the procedure set out in Schedule 2? Clause 20 is headed "arbitration without the intervention of a Court" and it says:

Where any matter has been referred to arbitration without the intervention of a Court, and an 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 that the award be filed in Court.

3. And in the case to which I have just referred there was an application to the Court to file an award with regard to property wholly outside British India. In this case it is not necessary to say more than this, that admittedly this award dealt with property and part of it was immovable property within the jurisdiction of the District Judge of East Godavari and part of it outside his jurisdiction, as that term is ordinarily understood. Mr. Srinivasa Iyengar has argued before us exactly the point that was referred to by Lord Phillimore. His argument is that Clause 20 of Schedule 2 to the Code states that the person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award and that means "to a Court having jurisdiction over the whole of the subject-matter of the award" and that, as admittedly part of the subject-matter of this award is situated outside East Godavari judicial district, the District Judge had no jurisdiction. And Mr. Srinivasa Iyengar has also not recoiled from the position that no Judge had any jurisdiction to make an order under Clause 20 in regard to this matter, because once it is conceded that the subject-matter is in more than one jurisdiction, it must follow that no Judge in any one jurisdiction can have jurisdiction over it. That seems to me to be a startling proposition and. it is difficult to suppose that the Legislature can have contemplated the results it would produce in numerous cases - for, it naturally and frequently happens - especially on the borders of districts that family lands are partly in one district and partly in another. But authorities have been cited to us which, according to the learned Counsel for the appellant, are said to support the proposition. It is as well to state that no authority has been cited to us covering facts similar to the facts now under consideration.

4. There is no authority which has been brought to our notice in which it has been decided that, when an application under Clause 20 relates to property in two jurisdictions in British India, no Court has jurisdiction to hear the application. But there is clear authority that, when part of the subject-matter is in British India and part of the Subject-matter is in a foreign state which naturally in this country usually means "in a native state," the Court in British India cannot

exercise jurisdiction over the award. I respectfully agree that that must necessarily be so, because, once it is conceded, and especially in the case of immovable property, that the property in question is wholly outside the jurisdiction of the British Courts, it must follow that a British Court cannot deal with an award because the award could not be enforced in a foreign state and moreover very curious results must follow, if the award was divided. The following result would follow; that is to say A has awarded to him lands in British India and B lands in a foreign state. A partial enforcement of that award would mean that A, would get something and B would get nothing. It is obvious that, in order to make an award effective, the whole of it must be enforced except possibly in such cases in which it appears that the award may be equitably divisible and that is a topic on which I desire to express no opinion. This particular topic - severability - has been discussed in one or two cases but does not in this case require any decision from us.

5. Mr. Srinivasa Iyengar relies very strongly on a decision of this High Court which is reported in *Krishna Iyer v. Subbarama Iyer* ("32) AIR 1932 Mad. 462. The learned Judges in that case, Eeilly and Ananthakrishna Iyer JJ. held that the expression "the subject-matter of the award" in para. 20 of Schedule II, Civil P.C., means "the whole" and not "the whole or portion of the subject-matter of the award" and a Court within whose jurisdiction a portion of the immovable properties forming the subject-matter of an award is situated has therefore no jurisdiction to entertain an application to file the award made under that paragraph. That is a very general proposition and, if accepted by us, undoubtedly covers this case and is a clear authority in favour of Mr. Srinivasa Iyengar's argument. But it is most important to emphasise that in that case the properties over which the subordinate Judge of Palghat in this province purported to exercise jurisdiction were partly within the Madras Presidency and partly in Travancore, a state under the rule of His Highness the Maharaja of Travancore. There was some discussion with regard to certain property situate in Bangalore. It is not necessary to go into that as it is sufficient if part of the property concerned lay within Travancore. That judgment therefore deals with the position which I have previously indicated, namely, where it is obvious that the Court in British India can have no jurisdiction to make any order. It is to be emphasized that there were immovable properties in Travancore State. It does not seem that in that case any argument was addressed to the Court with regard to the position before us now, namely, where the whole of the properties are in British India. At p. 694 Ananthakrishna Iyer J. who gave the leading judgment of the Court says:

Prima facie the expression "over the subject-matter of the award" would seem to imply over the whole of the subject-matter of the award. The words "whole" or "in part" occur in para. 11 of Schedule 2, and in Section 17 of the Code, the words "any portion of the property" occur. If therefore the intention of the Legislature was that the words "subject-matter of the award" should mean the whole or a portion of the subject-matter of the award, then it is reasonable to expect that it would have said so expressly.

6. As to this, there seems to me to be little relation between para. 11 and para. 20 which deal with very different topics and with respect I am not able to agree that they can be usefully compared. The learned Judges relied on two decisions, both of this High Court. The first was a decision of Scotland C.J. and Collett J. reported in *Gangappa v. Kapinappa* ('70) 5 M.H.C.R. 128 and secondly reference is made to certain observations of Kumaraswami Sastri J. in *Rethamali Servai v. Ramaswami Servai* ('19) 6 AIR 1919 Mad. 22. Reference is also made to a decision in Rangoon reported in *S.A. Nathan v. S.R. Samson* ('31) 18 AIR 1931 Rang. 252. But in that latter case also the subject-matter was immovable properties within the jurisdiction of British Courts and immovable properties in the French territory of Pondicherry. In the case reported in the Madras High Court Reports, the Court observed as follows:

The application must be made to a Court having jurisdiction in the matter to which the award relates.... From this it appears quite clear that the Court applied to must be one having jurisdiction in respect of the whole matter.

7. We have had the advantage of seeing the original documents in that case. It was a reference by the Judge of the Small Cause Court, Chittoor, and it is clear from that reference that what the arbitrators had done was to adjudicate on debts payable between the parties, the aggregate thereof being beyond the jurisdiction of the Small Cause Court, but the amount of one of them within the jurisdiction. In other words, what was raised in that reference was, could a Court of Small Causes deal with an award which dealt with matters beyond its pecuniary jurisdiction? And the learned Judges took the view that the Court applied to must be one having jurisdiction in respect of the whole matter. That seems to me to mean "having jurisdiction in the sense that it is understood, the measure of pecuniary jurisdiction" and that, if the award dealt with a matter that was beyond that jurisdiction, it was a clear case when the award as a whole could not be enforced by that Court. The judgment of Kumaraswami Sastri J. does not seem to me to touch the question which we have to decide, because his observations are very general. What had happened in that case was that an arbitrator had joined in an award an order for dissolution of marriage and also for the payment of money. What Kumaraswami Sastri J. held was that the jurisdiction of the Court would depend upon the reliefs awarded, by the award and that it was not open to the parties to confer jurisdiction on the subordinate Judge to deal with matters over which he had no jurisdiction at all. It should in this appeal be remembered that the District Court of East Godavari has unlimited jurisdiction. It is well to mention that the decision to which We have just referred in 55 Mad 689, a has been considered by a Bench, Broomfield and Sen JJ. of the Bombay High Court in *Gangadhar v. Dattatraya* ('37) 24 AIR 1937 Bom. 211 and their Lordships at p. 212 express the view that,

if the decision in 55 Mad 6893 is correct, it would mean that in many cases private arbitrations could never be made effective in the manner contemplated by the Legislature, since there would be no Court to which the application could

be made. With all deference to the learned Judges who decided this case I am not satisfied that this is the law.

8. In my view the learned Judges in Bombay have not noticed what seems to me the key to the whole position, namely, that, however general the words in decision, the decision itself actually only deals with references in which property in British India and property in a foreign jurisdiction is concerned. If the decision of the Court was intended to go further than the actual facts before it, I personally should be disposed to share the doubt expressed by the Bombay High Court. But I take the view that that decision extends no further than the actual facts and that it is only due to the generality of the observations of the Court while dealing with those particular facts that it has been possible to attempt to extend the decision so as to bring about the deadlock which the appellant seeks to establish in this case in applications under Clause 20 of Schedule 2.

9. In my view there is a complete answer to the argument which has been put before us by Mr. Srinivasa Iyengar. It must be observed in Clause 20 that any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award. How is the Court to determine whether it has or has not jurisdiction? What procedure is laid down? In the case of an ordinary Court, in an ordinary suit, the Civil Procedure Code, Sections 15 to 25 give guidance to the Courts as to how they should decide whether they have jurisdiction or not and it seems to me that it is by reference to Section 16 that the appellant contends that the Court has no jurisdiction. But it is argued that these sections do not apply to proceedings under Clause 20. The nature of those proceedings is dealt with in Sub-clause (2). It is stated that the application should be in writing and shall be numbered and registered as a suit between the applicant as the plaintiff and the other parties as defendants. A reference to the record in this case shows that the pleadings are described as in an ordinary suit. It is numbered as such. There is the document headed a "plaint". There are three written statements and additional written statements and there were issues. From where is all that procedure derived? It has not been possible for me to understand how, if the CPC does not apply, it is possible for the Court to which application is made under Clause 20 to decide any matters at all.

10. Once again how can it decide whether it has jurisdiction? It seems to me that the curious position referred to by Lord Phillimore and argued before us today is met by the answer that the intention of Sub-clause (a) of Clause 20 is that these applications should be in every way treated as suits and that the procedure applying to suits should apply to them; and I am fortified in that view by the position which at the risk of repetition I will again state that, if it is not so, then apparently there is no procedure and no methods whatever provided by which the Court can deal with those matters. If that is so, Section 17 of the Code provides that where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose

jurisdiction any portion of the property is situate. If Section 17 applies, it is obviously open to the plaintiff as they are described in the pleadings in this case to file their plaint in East Godavari and the East Godavari Court would have jurisdiction to hear that case not only with regard to the property immediately within its jurisdiction but with regard to any other property, the subject of that suit; and the result would be that by the application of Section 17 the East Godavari Court would have jurisdiction over the whole of the subject-matter when the trial starts. If that is so, much of the argument in this case will have been unnecessary. I hold that for the reasons I have given, the District Judge had jurisdiction to deal with the whole of the subject-matter which is situate in the first place outside his jurisdiction, but by the filing of the suit included the other matters in the plaint over the whole of the subject-matter. The arguments which I just referred to were directed from another aspect of the case altogether.

11. It was contended by the learned Counsel for the respondent that it was not open to Mr. Srinivasa Iyengar to raise this objection at all. It had never been argued in the Court below that the Court had no jurisdiction and therefore says the learned Counsel for the respondents, Section 21, Civil P.C., is in the appellant's way. It has never been raised as a ground of appeal and therefore again says the respondent, Order 41, Rule 2, prevents the appellant from raising it. As the argument was originally put to us by Mr. Srinivasa Iyengar, I am inclined to the view that he was not prevented from raising the point for the same reason that the appellant was not prevented from raising the point in the case before the Judicial Committee to which I have referred, because what he was arguing was that this was a case of no jurisdiction whatever. But in view of what I have held above, I think technically this is a matter relating to the place of suing which should have been raised in the lower Court and that therefore both the provisions of the CPC stand in Mr. Srinivasa Iyengar's way and, speaking for myself, I should not be disposed to grant him any indulgence here to allow him to raise it. All this however is purely academic, because, in order to arrive at a decision with regard to the whole matter, it has been necessary for us to hear it argued in full and I therefore only record my above view for the sake of completeness. For the reasons I have given I consider that the objection by the appellant that the lower Court had no jurisdiction to hear this application under Clause 20, Schedule 2, Civil P.C., must fail.

Krishnaswami Ayyangar, J.

12. I agree. It is unnecessary for me to refer to the facts which have been sufficiently set out in the judgment of my learned brother just now delivered. In the memorandum of appeal before us the appellant has taken a number of points. We are not now dealing with any of those points but with a question of jurisdiction not raised in the Court below and not mentioned in the grounds of appeal before us. Order 41, Rule 2 leaves a discretion in the Court as to whether an appellant may be allowed to urge in support of his appeal a ground of objection not set forth in the memorandum of appeal. I may also mention that,

beyond giving the respondent notice that the objection was going to be taken, the appellant has not chosen to follow the procedure indicated by Rule 42, Appellate Side Rules, for obtaining leave to raise an additional ground of appeal. Ordinarily, speaking, we should not object to a new ground of appeal being raised and argued if the respondent is not likely to suffer any prejudice thereby. But it seems to me that the facts of this case render it extremely difficult for us to exercise our discretion in favour of the appellant. The application for filing the award was made in the Court below in September 1926 and it was heard and disposed of on 30th October 1935. The application therefore appears to have been pending for a period of nearly nine years in the Court below and the hearing itself before the learned Judge seems to have occupied a period of 12 days. The appeal to this Court was filed about three and half years back and, after all this long lapse of time and after all the expense which must have been incurred, one feels naturally reluctant to allow a point to be raised which had never been taken before. But, in view of the large stakes involved and the possibility of the case proceeding further, it is perhaps proper that we should deal with the merits of the objection.

13. The objection is that the Court below had no jurisdiction to entertain the application because the whole of the property which formed the subject-matter of the award did not lie within the local limits of its territorial jurisdiction. It is not disputed that except for a house in Innespet, Rajahmundry, and a share in a rice factory in the same place the rest of the large properties mostly immovable, dealt with by the award were outside the Court's jurisdiction. Mr. Srinivasa Iyengar, the learned Counsel for the appellant, has contended that the Court having jurisdiction over an application to file an award under para. 20, Schedule 2, Civil P.C., is the Court having jurisdiction over the whole of the subject-matter of the award and inasmuch as admittedly in this case a portion only of that subject-matter was within the jurisdiction of the Court below, it had no jurisdiction to entertain the application. In other words, a Court having territorial jurisdiction over a part only of the subject-matter is wholly incompetent to deal with an application filed under the paragraph. If the award should be sought to be enforced in a suit it is not disputed that the suit could be entertained by a Court having jurisdiction over part only of the subject-matter of the award. The contention however is that an application coming under para. 20 is not governed in matters of jurisdiction by the rules in the Code which determine the venue for the purpose of a suit. There are two objections to this contention. In the first place, though para. 20 speaks of a Court having jurisdiction over the subject-matter of the award, neither it nor Schedule 2 contains any rules for determining the Court invested with jurisdiction in matters within Schedule 2. We would be left entirely without any guidance on the point unless we can refer to the provisions of Sections 15 to 25 in the Code as providing the necessary machinery. Section 89 of the Code is not to be regarded as implying a prohibition to this course. That section provides that

save in so far as is otherwise provided by the Arbitration Act, 1899, or by any

other law for the time being in force, all reference to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Schedule 2.

14. There is nothing in the language of the section to warrant our holding that the sections of the Code or the rules in Schedule 1 do not apply to matters arising under Schedule 2. For instance, the question whether the procedure of Order 23, Rule 3 could be made applicable to matters arising under Schedule 2 was considered in *Subbaraju v. Venkataramanraju* ('28) 15 AIR 1928 Mad. 1025 and it was ruled that the Code was applicable to Schedule 2 which is really a part of it and that there was no justification to regard it as a self-contained chapter in itself. So it seems to me that it is not only permissible but obligatory upon the Court to take note of the provisions Sections 15 to 20 and with their aid to ascertain which Court is the proper Court to entertain an application under para. 20. Among those sections is Section 17 which furnishes a valuable guidance for the determination of the point raised. It enables a party to institute a suit relating to immovable property if a portion at least, though not the whole of the property is situate within the limits of the Court to which he resorts. Where the property is situate within the jurisdiction of different Courts, the plaintiff has the option of choosing any one of those Courts, and when he has once chosen it, he is entitled to bring before it not only so much of the dispute as relates to the property within its jurisdiction but the entire dispute covering that property, and other property in other jurisdictions as well. In other words, where, by reason of Section 17, a Court is given jurisdiction by reason of part alone of the property being within its local limits that jurisdiction extends over the entire subject-matter of the suit.

15. I am quite unable to accede to the argument that Section 17 does not govern the consideration of the question as to which Court is to be held for the purpose of para. 20 of Schedule 2 to have jurisdiction in a given case. If this construction is not to be accepted it would lead, as my learned brother has observed, to startling results; it would really result in denying altogether to a litigant an easy and inexpensive remedy by way of application in every case where the subject-matter of the award lies in more jurisdictions than one. In fact, if such were the case no Court whatever would have jurisdiction to deal with an application under the paragraph. If this was the intention of the Legislature, one would expect to find more explicit language to have been used. In my opinion it is a forced construction that is sought to be placed upon the word subject-matter in para. 20. It is not to be forgotten that the primary object of the Legislature is to place in the hands of litigants an easy, speedy and inexpensive remedy by resort to a domestic tribunal of their own choice without the necessity of having to institute a suit with all the delay, expense, worry and trouble it might entail. Paragraph 20 appears to my mind to be conceived with the object of promoting such a beneficent purpose and I am of opinion that if I accede to the contention of the appellant, it would result, in an appreciably large number of cases, in the frustration of the very object behind the paragraph. Beyond stating that such

was the law and the plain construction of the language, the appellant's learned Counsel was unable to point to any intelligible or rational basis for the distinction that he drew between a suit and an application for enforcing an award. And I find it difficult for my part, more especially when the language is not plain, to give my assent to a construction which, far from advancing justice, has the effect of" hindering it.

16. It is true that para. 20 speaks of any Court having jurisdiction. Jurisdiction may be territorial, or pecuniary and may also depend on the nature of the dispute brought up for settlement before the Court. Whether or not an objection to jurisdiction which is based upon the limits of pecuniary jurisdiction or has reference to the nature; of the disputed matter can be waived, it seems to me that an objection having reference to the local or territorial jurisdiction of the Court is capable of being waived. This furnishes the second ground for repelling the contention. Section 21, Civil P.C., enacts that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity. Some argument - I confess it was a little too subtle for me - was advanced on behalf of the appellant to the effect that there was a distinction recognised by the Code between what was called "the place of suing" which is the heading under which Sections 15 to 25 appear and the jurisdiction of the Court to take cognizance of a matter although that jurisdiction-may turn on its local or territorial limits. To my mind the determination of the place of suing is the same thing as the determination of the local or territorial jurisdiction of the Court. If, either by reason of Section 17 of the Code or by reason of the omission of the party to take the objection to the territorial jurisdiction of the Court at the proper time, the Court entertains or deals with a litigation it seems to me that it is a case where there was either no initial defect of jurisdiction, or if there was such a defect it is one that must be deemed to have been waived. As my learned brother has pointed out, para. 20, Clause 2 makes it fairly clear that the procedure applicable to the determination of applications coming within it is the procedure relating to suits and, if I understood the appellant s learned Counsel aright, he seemed to concede this proposition. The considerations adverted to above incline me to the opinion that the District Court of East Godavari which had admittedly jurisdiction over a part of the subject-matter of the award had ample jurisdiction over the whole and was therefore competent to make the order it has made.

17. It has been contended that there are judicial pronouncements in this Court and in the Privy Council which make it obligatory on us to hold that where the whole of the subject-matter is not within the jurisdiction of a Court but only a part of it, that Court has no power to entertain the application. Before referring to the cases relied upon for the appellant, it is perhaps well to remember that in Section 16 of the Code which lays down the essential test for fixing the venue there is an important explanation added, namely that "property" in the section means "property situate in British India". Section 16, is the most important

section of the group of sections relating to the place of suing. Section 17 and the later sections in the group proceed to widen and enlarge the scope of Section 16 by enacting other and more liberal rules. However that may be, it is not permissible in view of the explanation to Section 16 to extend the jurisdiction of the Court beyond British India or even to any place within it to which the CPC does not extend. In *Ramabhadra Raju v. Maharaja of Jaipur* ('19) 6 AIR 1919 P.C. 150 the question was whether a mortgage decree for the sale passed by the subordinate Judge of Vizagapatam comprising properties not only within his jurisdiction but also in the Agency tract governed by the Scheduled Districts Act could be held to be valid. The CPC did not extend to the agency and the subordinate Judge who was only exercising jurisdiction under the Code had no power whatever to deal with, or pass any decree relating to, property in the agency. That being so, the objection to the jurisdiction of the Court was held to be one which went to the very root of the matter and the decree was held to be null and void so far as that property was concerned. For the term "Courts" in Section 17, Civil P.C., as their Lordships point out, could have reference only to Courts to which the Code applies and where the Code did not apply, it was no use referring to Section 21 or any other provision in it, for validating an invalid order. The importance of this decision lies in this, that a distinction must be made between cases where the property lies within British India though in different jurisdictions to which the Code applies and a case where some portion of the property is within British India and some portion out of it, in a Native State or in any other place to which the Code as such is not and could not be made applicable.

18. It is on the decision in *Iyer v. Subbarama Iyer* ('32) 19 AIR 1932 Mad. 462 that the appellant relied almost exclusively for the argument that the Court below, not having jurisdiction over the whole of the subject-matter, had no jurisdiction at all to deal with the application. A reference to the facts of the case makes it clear that the award in that case comprised property partly situate in British India and partly in Travancore. The Court held that the application could not be entertained as the word subject-matter in para. 20 of Schedule 2, Civil P.C., meant the whole matter dealt with and decreed by the award and not any particular portion of it only and that the Court being incompetent to pass a decree in respect of the whole of the award property could not split it up and deal with only those portions of it that were within its jurisdiction. The learned Judges were concerned as pointed out by Ananthakrishna Iyer J. at p. 696 with the question whether the Court in British India had jurisdiction to pass a decree in accordance with the award when that award dealt with property outside British India. The actual decision was thus circumscribed by reason of the inapplicability of the Code to part of the award property and the consequential incompetency of the Court to deal with it. It is thus clear that Section 17 can be displaced only in a case where part of the property is situate outside British India and not in a case where, as here, the whole of it is in British India though in different jurisdictions and therefore governed by the Code. In fact neither side has been

able to point to any precedent governing a case like the one before us. There are however observations in the judgment which tend to support the appellant though the actual decision, as I understand it, does not. We have examined the facts in all the cases referred to by the learned Judges who decided 55 Mad 6893 and we find that there is none among them which can be said to furnish a parallel to the, present case. It will be found on examination that either they are cases where the question did not turn upon territorial jurisdiction at all as for example, Collett J. reported in *Gangappa v. Kapinappa* ("70) 5 M.H.C.R. 128 and *Rethamali Servai v. Ramaswami Servai* ("19) 6 AIR 1919 Mad. 22 or where a single inseparable award had dealt with property situate partly in British India and partly outside. Ananthakrishna Iyer J. has also expressed the opinion that para. 20 provides a special procedure and confers an extra and special statutory right under special conditions imposed by that paragraph. He thinks that there is no hardship in construing Section 20 in the way he does as there is an alternative remedy available to the party by a regular suit which he can by virtue of Section 17 institute in any one of the several Courts within whose jurisdiction the property or any part of it is situate. I regret that with great respect I am unable to agree that this aspect of the question affords a true guidance to the construction of para. 20 which, as I have indicated, must receive a liberal rather than a restricted construction. The Bombay High Court has expressed a view contrary to the one which has found support in *Iyer v. Subbarama Iyer* ("32) 19 AIR 1932 Mad. 462 The latest case in Bombay brought to our notice is that reported in *Gangadhar Laxman Deshpande Vs. Dattatraya Laxman Deshpande*, , to which I shall not refer as it has been already dealt with in detail by my learned brother.

19. Reference was made to the decision ,of the Privy Council reported in *Ramlal Hargopal v. Kishanchand* ("24) 11 AIR 1924 P.C. 95. In that case an award relating to the management of three Hindu temples for the support of which three villages had been, endowed "two of which were in Berar, was sought to be filed in the District Court of East Berar. Two of the temples were in the Dominions of the Nizam, and the third in British India but not in Berar. The objection to the jurisdiction taken before the District Judge himself in the first instance though not pressed afterwards was allowed to prevail in the Privy Council. The ground of the decision was that all the temples were outside Berar and although two of the endowed villages were within the jurisdiction, there was no dispute concerning their ownership or management or the application of their revenues to the upkeep of the temples. In other words, the award did not in fact deal with properties outside the jurisdiction, or as the Board pointed out, there was no substantial question decided by the award which affected property within the jurisdiction of the Berar Court. It was no doubt contended that if an award relates to more than one subject-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court; in fact that it can be filed in no Court, because no one Court would have jurisdiction over the whole subject-matter. But their Lordships did not find it necessary to pronounce on any such general

proposition. I am unable to treat this decision as containing any support for the appellant's contention. The point is merely mentioned and not decided, and the relevant provisions of the Code were not noticed. For the reasons which I have endeavoured to explain I am unable to see any substance in the objection to jurisdiction raised on behalf of the appellant and agree that it must be overruled.

20. After the decision of the preliminary points their Lordships delivered the following judgments.

Mockett, J.

21. I will now deal with the objections to this award as stated by Mr. V.V. Srinivasa Iyengar who appears on behalf of defendant 1 Venkatachalam. (1) Chalamiah having died in 1925 was not thereafter a party to the reference which was thereby revoked. (2) If the reference was not thereby revoked, Chalamiah's legal representative should have been added. (3) Matters referred were not decided. (4) Matters not referred were decided. (5) The arbitrators misconducted themselves. (6) The award is bad in part on the face of it. As far as it is possible, I will deal with the arguments addressed separately on these points although many arguments overlapped. Reference must again be made to the following facts : By Ex. C dated 2nd October 1917 by which the family were divided in status there appears also to have been a scheme for the division of the family property. This scheme contains in para. 3 a provision for the building of a house for a purohit and for a choultry. Provision was also made for the mother of the plaintiff and defendants and other lady members of the family. That such provisions are normally expected to be found in a partition in a Hindu family is beyond doubt. The appellant's learned Counsel does not seriously contend otherwise. He, however, has frankly stated his position which is this : that his client is aggrieved by this, award and that he intends to attack it in every way open to him so far as the law allows. It is well to consider the circumstances under which this award came to be made, the persons concerned and the conditions under which these people lived and where they lived. This is not a reference with the formality associated with a reference under the auspices of the Chamber of Commerce in a commercial city. It is a reference by a Hindu family all of whom had quite manifestly lived happily together for a long time. Who were the arbitrators? They were three old friends of the family fitted and chosen by the family for their knowledge of the family lands and for their character. Defendant 1 has stated in his evidence that Surappa Raju was to attend to the cultivation of the family lands at Vundur which he knew. He had been doing this for 5 or 6 years before 22nd May 1921, the date of the muchilika. Furthermore the arbitrators were respectable men as defendant 1 conceded in his re-examination. The arbitration was an informal affair and I have little doubt that to the very end they carried it out in a manner approved and known to all concerned including defendant 1. It is agreed that by 1922 nearly all the immovable properties had been divided among the family by the arbitrators. This, it should be observed, was before Ex. A. The date taken for the completion

of the division of the immovable property is 30th November 1922 and regard was had to this date in the award by the arbitrators when making what they considered to be fair adjustments between the parties.

22. It will be convenient to deal first with the broad question of misconduct by the arbitrators. In the grounds of appeal it is very broadly alleged without particulars in para. 38, although para. 27 may be relevant to this allegation. But before us - and we have perhaps been somewhat indulgent to the appellant in hearing him at large on the subject - because particulars of misconduct should be explicit, it has been suggested that this in short was a hole and corner arbitration largely behind the back of defendant 1 and that certain findings by the arbitrators of themselves show prejudice and bad faith against defendant 1. The learned Judge has not been impressed with the truthfulness of defendant 1 and has stated so in no uncertain terms. I have already expressed the view that Venkatachalam knew all about what was going on throughout. Exhibits Q-2, Q, Q-1 and Q-3 and N show that Venkatachalam was corresponding with Venkata Raju with regard to this arbitration and was unquestionably at that time not giving the arbitrators the assistance by his presence to which they were entitled. I have no doubt that he was being requested by Venkata Raju to examine the books. Exhibit r dated 29th April 1924 is a letter to Venkata Raju acknowledging receipt of books. In Ex. P-1 Yenkatachalam writes with regard to matters in the books. In this letter he says:

Posting of ledgers has been almost completed; there is yet a little work to be done, I shall complete it and go there.

23. In his evidence he says, referring to Ex. O-1:

I wrote I had prepared the balance sheet up to Sidharathi year. All these show that I had the account books with me at my house for enough time to examine them thoroughly. I never gave the Panchayatdars anything in writing, that I objected to any of the entries in the account books. I told them orally but except my own word there is nothing to show that I did make any representation to the Panchayatdars. The Panchayatdars sent word to me once or twice to go over and complete the award proceedings.

24. He refers to Ex. Q series. Narasu Raju gave evidence, the other arbitrators being dead. He gave evidence which the learned Judge accepted and which I accept. He says:

We commenced the division of the properties a month or two after the execution of Ex. A. First the brothers looked into the accounts and settled them. That occupied a year or two. They had scrutinised the accounts by the time we attempted a division of the immovable property. The account books were with my brothers when defendant-plaintiff 1 and defendant 2 examined them.

25. It is evident that the procedure was very leisurely and that nobody was in any particular hurry. This witness states that defendant 1 took the books to

examine all the accounts. I have no doubt that this witness carried out his duties with his colleagues in collaboration with all the referring parties. Yet Venkatachalam states the Panchayatdars did not scrutinise the accounts. That this is wholly untrue is obvious from an examination of the award itself which is elaborate. I can quite understand that in any matters in which the evidence of Venkatachalam conflicted with the evidence of P.W. 2, Narasaraju the learned Judge preferred the latter's evidence. Defendant 2 who gave evidence as P.W. 1 gives an elaborate account of the circumstances concerning this award. He says, all the records with the Panchayatdars were handed over to him after the award had been passed, and that they were all with the Panchayatdars two months after the execution of Ex. A. One or two questions by defendant 1 were directed towards inquiring why the arbitrators had not obtained signatures from the parties on certain occasions. Their answer "we might have thought their signatures were not material", is perfectly reasonable. At that time nobody was objecting to anything, certainly not to the procedure. Another allegation on which it is attempted to found misconduct is that money was lent to the arbitrators by the defendants, that the arbitrators were therefore in a position to be influenced in their judgment by their obligations. Of course, if it is shown that an arbitrator has debts unknown to other of the referring parties, it might well entitle a Court to hold that it would not be safe to rely on his judgment. But, in this case, these people were all friends and it is evident that there were debts due to Venkatachalam himself by the arbitrators. Exhibit n is an example and Ex. H shows that in August 1923 during the course of the arbitration Venkatachalam gives a receipt for monies paid to him on account. That Venkatachalam knew all about the financial transactions between the arbitrators and his brothers and was himself having similar transactions is clear. There is nothing whatever in the financial relations between these parties that would suggest that there were any secret or improper obligations affecting the judgment of the arbitrators. It appears that a sum of Rs. 25,000 money in the hands of the arbitrators was lent by them to a rice-mill concern of which Narasaraju was a part proprietor. This money was subsequently divided among all the brothers and there is nothing in the transaction suggesting any impropriety. On the contrary, the money appears to have been invested temporarily in this manner without objection by any one. The position is stated clearly by Narasaraju in Ex. XIV-D. It is evident from the evidence of Venkatachalam himself that from 30th November 1922 he knew that Narasaraju was indebted to the family and raised no objection. He states on 10th November 1922:

Narasaraju's liabilities were settled, the amount was apportioned between plaintiff and defendant 2. I agree to this apportionment Ex. V-a.

26. A reference to this exhibit shows that this was so. To return for a moment to the Rs. 25,000, Ex. V-a shows quite clearly that there was no sort of secrecy about Rs. 25,000 being deposited with Venkataraju, indeed Venkatachalam's signature is appended to a statement to that effect. Further allegations have been made with regard to misconduct. At the end of Ex. B-II dated 30th

November 1922 there is a schedule of debts due to the family. Items 43 to 45 are debts due by Surappa Raju, one of the arbitrators. Narasaraju in his evidence states that the three brothers admitted that these debts were of doubtful recovery. The complaint is that under this award defendant 2 was to have discretion in collecting these debts or not as he thought fit and it is argued that this was a back door method of making Surappa Raju likely to favour the other brother to the prejudice of Venkatachalam. According to P.W. 1 Ex. B-11 was drafted at the same time as Ex. B-13 at which time all three brothers were present and says P.W. 1's debts due to Surappa Raju were time-barred even when B-11 was drafted and that all the brothers agreed that that was so and that these debts were all of doubtful value. I have no doubt that this arrangement to which B-11 and paras. 60 and 67 of the award are relevant had nothing sinister behind it and was known to defendant 1. Then it is stated that para. 49 of the award dealing with the distribution of jewels reveals bad faith by the Panchayatdars. It will be seen that lacking the assistance of any of the parties the Panchayatdars got the jewels weighed, fixed the price and delivered the jewels to Ammiraju on condition that he should pay the value to joint account with a bond to Venkatachalam to pay it to Ammiraju within a month thereafter. I must confess that how on the face of it this reveals bad faith amounting to misconduct is past my comprehension. A further reference to this allegation will be made later. Then it has been argued that para. 52 of the award can be impugned either as being bad on the face of it or as misconduct. I confess I am not clear under which heading it is alleged. The arbitrators chose on settling accounts in respect of property in the shape of cash and outstandings to fix the date as being the date of the muchilika. It is said that the date chosen should be the date of the severance in status. It is enough to say that even if this is wrong and the learned Counsel for the respondent has argued very forcibly to the contrary, it is not misconduct for an arbitrator to be wrong. It seems to me in this difficult task in which it must be remembered that all the immovable properties had been divided by 1922 that there is nothing amounting to misconduct in the choosing of the date of the muchilika. A word only is required to deal with the suggestion that the fact that Narasaraju had a lease of some lands from the plaintiff and defendant 2 is such as to taint his award. The learned Judge has, I think, dealt adequately with that in para. 26 of his judgment with which I am in complete agreement. Exhibits 10 and 10a, sale deeds dated 13th January 1923 and 1st August 1923 were attacked on similar lines. They were to Ammiraju by Surappa Raju. In Ex. 10-a, there is actually a provision made for payment to Venkatachalam himself and it was admitted before us that this amount was paid. These last objections are characteristic of the manner in which the defendant was prepared to attempt to base charges of misconduct on the flimsiest possible material. Paragraph 64, it is stated, shows such partiality as to render this award bad. It reads as follows:

The sum of Rs. 12,541-3-9 given to Suryanarayanamurthy from the cash balance amount has been debited as pakka on 30th November 1922. Therefore the sum

of Rs. 4210-12-9 being the yearly compound interest on that amount at Rs. 0-12-0 per cent, per mensem should be remitted (paid) to Suryanarayanamurthy from the joint account.

27. In this connexion it must be emphasised that before us it is admitted that defendant 1 had received more immovable properties in the partition which was completed in 1922 than the others, and 30th November 1922 was chosen because by then the immovable properties had been divided. There is a similar provision, Ex. B-12 relating to the jewels. This provision with regard to compound interest is attacked by the appellant. There seems to me to be nothing amounting to either misconduct or dishonesty in the arrangement at all. The answer given by the respondent seemed entirely reasonable, namely that if the date of the award had been taken, defendant 1 having been in possession of more immovable properties than the others would have had to account for those excess properties since 30th November 1922. Instead, date 30th November 1922 was selected and adjustments for the payment of interest made in order to equalise the position between the parties. Whether this is an ideal arrangement is not for me to decide. All that appears is that it was an attempt to adjust these people's affairs and there is nothing in it to suggest that it was a dishonest attempt or that there were any circumstances surrounding it which make it possible for this Court to set aside this award. Owing to the state of the pleadings and the grounds of appeal it is, as I have said, difficult to appreciate exactly what misconduct is alleged in this case. But we have heard the appellant fully and I have dealt with the points under this heading which were made from the bar.

28. In my opinion these charges of misconduct are wholly unfounded and are a pure after-thought on the part of a disgruntled party to the reference. I think a reasonable latitude should be allowed in examining awards such as these having regard to the people concerned and the circumstances. More especially would I be unwilling to, assist a party who, with full knowledge of the circumstances, allows an arbitration to proceed and takes part in it and then seeks to evade it later on by raising a number of objections which have never occurred to him before. The observations of their Lordships of the Judicial Committee on this topic in *Chowdhuri Murtaza Hussain v. Mt. Bibi Bachunnissa* ('77) 3 I.A. 209 can clearly be called in aid by the respondent. This applies not only to that part of the case which I have dealt with but also with regard to what follows. The appellant has argued that in importing terms of Ex. C into the award the arbitrators have gone outside the scope of the reference. Exhibit O is dated 2nd October 1917. The reference of muchilika is dated 22nd May 1921. Exhibit A is a curiously worded document. It does not say that the property should be divided equally among Chalamiah and his three sons. It says:

You should effect a partition as you think fit according to your pleasure and give a decision, that you should give some property you think fit to Chalamiah of us out of the properties mentioned above and make proper arrangements therefor

as as you please, that you should divide and give the remaining property to Venkatachalam, Suryanarayanamurthi and Ammiraju.

29. I do not think it has really been doubted in this case that the intention" was, Chalamiah being over 90, so we are told, to make reasonable provision during his life and partition between the brothers. The history leading upto Ex. A, is unfortunately not clarified in the evidence. I think this has been one of those cases where knowledge of all the circumstances seems to have been assumed by those in charge of the case in the lower Court and so not proved. According to Ex. 3-B Chalamiah gave a notice to Venkatachalam calling on him to divide the property into four equal shares. That is dated 3rd July 1918 some nine months after Ex. C. What happened I do not know but it seems to me that Ex. A, replaced Ex. C. The arbitrators considered Ex. C very fully and they said regarding it:

Considering the position and circumstances, status, etc., of this family we are of opinion that the above arrangements subject to the alterations specified hereunder are very proper. All the parties accepted the above terms and have given effect to them till now. The said terms are hereby confirmed subject to the alterations hereunder and it is decided that the same should be given effect to. The properties proposed to be given to the various individuals in pursuance of the above terms should be determined and the necessary alterations should be specified according to the partition which we are now effecting.

30. It seems to me that what the arbitrators did, was to take as the framework of their award a previous agreement which had been entered into between the parties but made era-lain adjustments which were necessary, for instance, Chalamiah had died and so provision had to be made naturally for his wife, the mother of the plaintiff and the male defendants. It must again be remembered that long before then the immovable properties had been divided by consent. I do not think it was outside the terms of the reference in a Hindu family for the arbitrators to make the provision for charity and for the women members. In fact that such criticism could be directed to a family division of property caused me some surprise which was, I understand, shared perhaps even in a greater degree by my learned brother. But any difficulty over this disappears if the evidence of the arbitrator P.W. 2 is accepted, because he stated at the conclusion of his evidence that the allotment of the land to the sisters and to the choultry was agreed to by the parties. This witness's evidence has been accepted throughout by the learned Judge and in my view rightly. In Ex. L, dated 23rd April 1926 Venkatachalam is writing with reference to the registration of the land for the choultry and for the sisters. No objection was taken to these matters in Ex. XV, the notice sent to the arbitrator. I think it is perfectly evident that this ground also is an after-thought. Apart from the affirmative evidence of the arbitrator the whole of the probabilities in this case point to members of the family assenting to the arrangement being made for pious purposes and for the ladies of their family.

31. Considerable arguments have been addressed to us on the following topic. It

has been contended for the appellant that Chalamiah was one of the referring parties, that as he died on 15th October 1925, the award of 25th August 1926 is bad in law on the ground that the reference was wholly revoked by the death of Chalamiah, a referring party. The Arbitration Act of 1899 applies only to presidency towns and arguments have therefore been based on the common law. Mr. Srinivasa Ayyangar has argued that he is entitled to go back to the position as it was in England before legislation affecting arbitrations and reference is made to the case in *Orphan Board v. Van Reenan* (1829-36) 1 Knapp. 83. We have been referred to the judgment of Lord Wynford in the course of which the following observation is made:

If men who submit to arbitration in the instrument of submission bind their representatives in a case where the action would survive to or against their representatives although one or both of the parties should die before the award be made, the arbitrators may proceed with the reference. They have provided for the event of death, and agreed, that those who take their property should take it, subject to the decision of the arbitrators appointed. But if the representatives are not included in the reference, and one of the parties dies, that reference is determined.

32. Mr. Srinivasa Iyengar contends that in the absence of legislation the whole position turns on the relationship of principal and agent between the referring parties and the arbitrator, that as the death of the principal, in this case one of the referring parties, determines the authority of the agent, so the arbitrator's authority is withdrawn by the death of a referring party. In fact he relies on the general law as he claims it was and still is. It has been contended before us that an agreement to refer cannot be specifically enforced under the Specific Relief Act. This no doubt is so, but an arbitration, the subject of Schedule 2, Civil P.C., can be enforced by the provisions of paras. 17 and 19. If this is a matter to be judged by a consideration of the relationship of principal and agent, it would seem that if the death of the principal revokes his authority, it is equally open to the principal during his lifetime to revoke it himself. But that view is negated by a decision of this Court in *Nagasawmy Naick v. Rungasawmy Naick* ('76) 8 M.H.C.R. 46, in which a Bench of this High Court held that in India an agreement to refer an existing dispute to arbitration was as binding and capable of enforcement as any other lawful contract and a submission cannot be revoked without just and sufficient cause. The Court took the view that the English rule was not in consonance with the law of India and referred to the provisions of the then CPC which are to-day reproduced in the present Code. The learned Judges pointed out that the dislike of private forums which prevailed in the early days in English Courts have never found favour in the Courts of British India where the policy of the Legislature was rather to promote references to arbitration than to discourage them. That case was decided in 1875. In 1868 the Judicial Committee in *Pestonjee Nusserwanjee v. Manockjee & Co.* ('68) 12 M.I.A. 112 had held that the appellant cannot at his own will and pleasure revoke the authority of an arbitrator in whose appointment he has concurred. Their Lordships took the view

that an agreement to refer was by the Indian Legislature put on the same footing as any other lawful agreement. In *P. Satyanarayana v. P. Venkatarangayya* ("04) 27 Mad. 112, a Bench of this High Court again dealt with the subject more directly now under discussion. The learned Judges made the following observation:

It follows therefore that contracts to refer to arbitration should not, in this country, be treated as standing upon the peculiar footing that such contracts are revocable at the mere will of a party so as to warrant the view that every such contract is essentially of a personal nature, as the District Judge seems to have thought, and the question whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representatives.

33. In *Datta v. Khedu* ("11) 33 All. 645 *Kuramat Hussain and Chamier JJ.*, accepted the Madras view and stated:

It seems clear, however, that the authority of an arbitrator is not necessarily revoked by the death of one of the parties to a proposed arbitration. In the present case the right to sue survived, and therefore after substitution of the representative of the deceased party the case should have been referred to the arbitration as prayed.

34. In the case reported in *P. Satyanarayana v. P. Venkatarangayya* ("04) 27 Mad. 112, the reference to arbitration had been filed in Court. In *Manindra Nath v. Mohanunda Roy* ("12) 15 C.L.J. 360 *Mookerjee and Granduff JJ.*, had before them a case such as the present, namely where there had been a private submission to arbitration and counsel in that case sought to distinguish between a reference filed in Court and a private submission. The learned Judges observe:

But, clearly there is no substantial difference in principle between the cases mentioned and the case before us; as pointed out by the learned Judges of the Madras High Court in *P. Satyanarayana v. P. Venkatarangayya* ("04) 27 Mad. 112, the rule of the English Common law that a submission to arbitration stands revoked by the death of one of the parties is not applicable to this country. The test to be applied here is, what is the true nature of the submission 1 Were the matters in different personal questions in respect whereof it was not intended that the successors in interest of the parties should be affected by the decision of the arbitrators 1 If the intention of the parties was that not merely themselves but their representatives in interest should be bound by the decision of the arbitrators, the reference plainly does not stand revoked merely by the death of one of the parties.

35. The learned Judges go on to say:

If the hearing had not been completed, it would have been necessary to bring the representatives of the deceased party on the record and to make them

parties to the submission. Here however the hearing had terminated and nothing remained for the arbitrators to do but to deliver their award.

36. I cannot see in the case of a private submission to arbitration how the legal representatives of a referring party can be brought on the record, there being no record in the ordinary sense. The only question that arises is whether the result would bind their personal representatives.

37. In *Binayakdas v. Sashi Bhusan* ("22) 9 AIR 1922 Cal. 226 Woodroffe and Ghose JJ., observed:

It is true as a general principle that a person who is not a party to, or properly represented, in any proceedings should not be bound by those proceedings. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the Code of Civil Procedure. If there is a binding reference to arbitration all that is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. The question whether the award would be binding or not must depend upon the circumstances of each case.

38. *Tegha v. Ram Singh* ("24) 11 AIR 1924 Lah. 725 is a case of death of a party to a reference. "It is true" says Moti Sagar J.,

that if, before the death of the party, the hearing of the case has been completed and nothing remains to be done except the delivery of the award, and it is also shown that the intention of the parties was that not merely themselves but the legal representatives should also be bound by the decision of the arbitrator, the award delivered after the death of the party would be binding upon his representatives in interest.

39. It is important to note that the objection here is not taken by the executor under the will of Chalamiah but by one of his sons and it is not suggested there are any merits in this objection. It is frankly conceded to be purely technical. Personally, I have very little doubt that by this muchilika Chalamiah intended that there should be a division of the property among his sons and provision for him during his few remaining years as he was then a nonagenarian must necessarily have been in his view. But taking all the circumstances into consideration and the absence of any serious objection by the legal representatives or the executor, I think that the underlying intention of this reference was a final division of the properties and the probable early-death of Chalamiah must have been in contemplation. That being so, I do not think it can lie in the mouth of one of the sons to argue that there was no intention that his legal representatives should be bound. Paragraph 11 of the judgment deals apparently with this topic which has been so fully developed here. I doubt very much whether it was argued in its present form before the lower Court. The objection, the learned Judge says, is that provision was not made for Chalamiah. This is a curious objection coming from defendant 1. On the date of Ex. L, Chalamiah had been dead six months. Nobody took any objection to the continuance of the reference. The conclusion 1

have arrived at with regard to this objection is that it is now clearly established that in India there is no rule that the death of a referring party of itself recalls the reference to arbitration, that is, brings it to an end. Whether it must continue depends upon the special circumstances of each case. I am satisfied in the circumstances of this case that it was the intention of Chalamiah and of all concerned that it should go on and that was fully understood by defendant 1. So far as the will is concerned, I think it was no doubt completely lost sight of in the two partition proceedings, Exs. A and C. It has not even been printed in this appeal and I have not heard what its terms are. Defendant 1 at no time relied on its provisions. For the reasons which I have given, I think the learned Judge arrived at the right conclusion and that he rightly disbelieved the evidence of Venkatachalam on questions of fact which conflicted with that on the other side and rightly held that the arbitrators acted in good faith throughout and that they did nothing without the knowledge and consent of all concerned. Personally I should be very reluctant to interfere with these arbitrations relating to the adjustment of family disputes unless some real injustice or substantial divergence from the law can be proved. When, as in this case, the matter has gone on without objection by anybody until after the result, it would be most undesirable to interfere especially in matters of procedure unless the Court felt itself constrained to do so in the interests of justice.

40. In the result this appeal must be dismissed with costs. We consider that we should exercise our powers under Rule 46, Appellate Side Rules, in fixing the fee for this case which we fix at Rs. 1000. Our reason is this. In whatever form the case has been brought before us, it has in fact been in substance and has been argued as a first appeal. It has occupied six days of the time of this Court, it has involved investigation of a nice question of law, and we think that it is a proper case for such an order to be made. The civil revision petition and the memorandum of objections which have not been argued are also dismissed, but as to these matters I would make no order as to costs. It is right that I should add that although objections 3 and 4 set out in Para. 1 of this judgment are under Para. 14, Schedule 2, Civil P.C., grounds for remitting the award, not for setting it aside, this case has been argued before us throughout on the basis that the award should be set aside and no application to remit it was made. Indeed it seemed to me that headings 3 and 4 were really included as charges of misconduct rather than under Para. 14, Schedule 2.

Krishnaswami Ayyangar, J.

41. I agree that there is no substance in this appeal, but I would however like to add a word or two on some of the matters on which stress was laid in the course of the arguments of the learned Counsel for the appellant. I may at once say that there is no ground for thinking that there is any error of law apparent on the face of the award so far as I can see, nor can I see any ground for attributing corruption or misconduct either in fact or in law to any of the arbitrators. I am satisfied that the arbitrators did not decide any matter not referred to them or

omitted to decide any matter referred to them. The objection under this head is that a share should have been allotted to the father, which was not done and that no property should have been set apart for the choultry or for the sisters which is charged as an act outside the reference. The arbitrators were in this case appointed to effect a partition of what was originally a joint family estate between the three brothers, namely the appellant and respondents 1 and 2. The father Chalamiah was alive at the time of the reference and was in fact himself a party to it though he was very very old. Looking at the language employed in the muchilika, Ex. A, there is clear indication that he did not want a share to be allotted for himself but that he only desired that some property should in the discretion of the arbitrators be given to him apparently for the purpose of maintaining himself during the brief period during which he expected to live. The age of the father and the nature of the provisions to which he had himself agreed in the Samakhya deed, Ex. C, suggest, that such must have been his intention. Nor is there much substance in the contention that the arbitrators exceeded their powers in making certain other minor provisions which are usually made at the time when partitions in a joint family take place. A reasonable provision for charity or by way of portions to sisters, more especially when the family estate is large, is so common a feature of partitions in general that it is a rare thing to see parties raising a controversy about it at the time or later. Even, in the present case, the appellant does not object to the provisions themselves as being either improper or extravagant. His learned Counsel has been quite frank when he said that he has a legal right to take advantage of any handy weapon that may be available to him in order that he might get rid of what, according to him, is a hateful award.

42. In the special circumstances of this case and in view of the very large discretion vested in the arbitrators by the words "you should effect a partition as you think fit according to your pleasure and give a decision." I am unable to agree that in setting apart some property for the sisters of the appellant and some for the choultry the arbitrators travelled outside the reference. In fact it would seem that in this matter they had the consent, express or implied, of all the parties including the appellant who only thought of raising this objection in the appeal before us.

43. It was strenuously urged that the death of Chalamiah during the pendency of the proceedings before the arbitrators brought about a complete termination of the arbitrator's power to proceed further with the reference. The death of Chalamiah, it was contended, operated in law as a revocation of their authority. The principle relied on is the familiar one of an agent's authority coming to an end on the death of the principal. Whether an arbitrator fills the position merely of an agent whose agency is revocable by the happening of those events which have the effect of determining an ordinary agency is a question not altogether free from difficulty at the first look. The theory of agency had apparently some support in the old common law of England but it must be remembered that it had reference to the authority of the arbitrator rather than to the agreement to refer

between the parties. The former was deemed revocable by the exercise of a legal power supposed to be implicit in the submission itself. The latter was irrevocable, being in the nature of a contract which could not be broken without giving rise to a claim for damages. Even in England the integrity of the common law seems to have been materially interfered with by the enactment of statutes. In this country we are governed by the statutory provisions on the subject and it seems to me that it is scarcely permissible to go in search of an ancient principle of the common law, when we find that it has been definitely abrogated even in the country of its origin by Section 1 of Statute XXIV and XXV, George V, Ch. XIV, which enacts that

an agreement shall not be discharged by the death of any party thereto either as respects the deceased or any other party but shall in such an event be enforceable by or against the personal representative of the deceased.

44. The idea that the appointment of an arbitrator contemplated in every case the exercise of personal judgment by the party which appears to be the foundation on which the doctrine of revocability by death rested, would thus seem to have been definitely given up in England. We here are not bound by any rule of the common or statutory law of that country except in so far as it furnishes a standard of justice, equity and good conscience to be applied to the decision of questions arising for consideration by the Courts of this country. The question was considered by the Privy Council in *Pestonjee Nusserwanjee v. Manockjee & Co.* ("68) 12 M.I.A. 112, with special reference to Section 326 of the Code of 1859, which was the predecessor of the present para. 17 of Schedule II. At pp. 130 and 131, the following pertinent observations occur:

Their Lordships are of opinion that according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to such an agreement can revoke the submission to arbitration unless for good cause and that a mere arbitrary revocation of the authority is not permitted. Their Lordships do not think it necessary to refer to the English law on this subject further than to point out, that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration; and to put such agreement for arbitration on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract. Their Lordships are, therefore, of opinion, that it was not in the power of the appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he had

concurred.

45. The effect of this decision, as I understand it, was to get rid finally and for ever of the doctrine of revocability at -will and the distinction supposed to exist between the agreement to refer and the authority of the arbitrators. It is in this sense that this important decision has been understood and acted upon in this Court. In *Nagasawmy Naick v. Rungasawmy Naick* ('76) 8 M.H.C.R. 46, the learned Judges expressed themselves at page 55 as follows:

The "horror, which formerly prevailed in the English Courts of a domestic forum never found place in British India where it has always been the policy of the Legislature to promote the reference of disputes to arbitration; and the framers of the Code in the Chapter on Arbitration embodied most of the existing law of the Company's Courts. Having regard, not only to the former law in force in this country, but to the provisions of the Indian Contract Act (Section 28) of 1872, we are inclined to say that an agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract, and that a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable.

46. When the Court was pressed with a previous contrary ruling in *Aiyyappa v. Nundla Peraiya* ('66) 3 M.H.C.R. 82, to which Hollaway J., himself was a party, he appears to have expressed himself in a somewhat pungent and, if I may say so with respect, a refreshingly frank manner. He is reported to have observed at page 53 as follows:

That decision is bad. It is one of the worst in the reports. I then had the jargon of the English Common Law running in my head, and my attention was not called to the fact that the CPC had completely altered the law out here. I would not have thought that the point could be doubted or that it was open to argument had not my attention been drawn by Mr. Mayne in *Pestonjee Nusserwanjee v. Manockjee & Co.* ('68) 12 M.I.A. 112 to the change in the law made by Act 8 of 1859.

47. After this pronouncement, it is scarcely possible to accede to the contention that the Common law of England should be taken as a guide for our decision. Further in *P. Satyanarayana v. P. Venkatarangayya* ('04) 27 Mad. 112 we have a modern decision of a strong Bench of this Court which has acted upon the principle recognized in the earlier case. In that case pending a reference by Court on an agreement filed u/s 523 of the Code of 1882 corresponding to the present para. 17, one of the parties died and the question was whether the authority of the arbitrator became ipso facto revoked and whether the legal representatives of the deceased could not continue the proceedings. The learned Judges adverted to the difference between the old English Common law and the law as understood to be applicable in this country and ruled

that contracts to refer to arbitration should not, in this country, be treated as standing upon the peculiar footing that such contracts are revocable at the mere

will of a party so as to warrant the view that every such contract is essentially of a personal nature...and the question whether a, legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representative.

48. This view was expressed after the relevant cases both in England and in this Court had been considered. The decision was that a right to partition which formed the subject-matter of the submission in that case, as it is here, being of such a nature that it would survive to the legal representative, the death of a party could not cause a revocation of the arbitration. In view of these decisions to which no exception seems to have been ever taken since, it serves no purpose to pursue the matter further. It only remains to say that the fact that the remedy by way of specific performance has been limited to the mode indicated in the Code is no reason for holding that the contract can be put an end to at the will of one of the parties to it. It rather emphasises its enforceability by the other, though not by suit but by the process of an application. The contention therefore that the death of Chalamiah put an end to the arbitration must be overruled.

49. It is however urged that Chalamiah had left a will dated 1st February 1919 by which he had made a disposition of his property appointing his widow, respondent 3 here, as executrix. The argument was that an award passed without notice to, and in the absence of, the executrix is bad and cannot be sustained. It is not necessary to deal with this contention at any length as in my opinion it is enough to say that the only party who could be said to have had a grievance was the executrix herself who has not however chosen to challenge the judgment of the Court below. It seems to me that the appellant who never thought of this objection and never put it forward before the arbitrators cannot now be permitted to take advantage of a ground which might have been available to some party other than himself. Further the objection loses all its force when it is remembered that the fight all along was between the brothers and the mother seems never to have taken any real part in it at all. I also entirely agree in the view of my learned brother that, so long as a dispute is pending before arbitrators on a private reference, the proceedings before them are not governed by the provisions of Order 22, Civil P.C., and there can be no question therefore of the legal representative of the deceased Chalamiah being brought on the record. Finally, I may add that almost all the objections which have been pressed before us were objections that could well have been taken before the arbitrators themselves, had the appellant chosen to do so. It is now too late to entertain any of them.