

(1919) 01 MAD CK 0008
In the Madras High Court

Polita Pavana Panda and Others

APPELLANT

Vs

Narasinga Panda and Others

RESPONDENT

Date of Decision : 23-01-1919

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 1

Citation : (1919) ILR (Mad) 632 : 51 Ind. Cas. 155 : (1919) 36 MLJ 538

Hon'ble Judges : Seshagiri Aiyar, J; Oldfield, J

Bench : Full Bench

Judgement

Oldfield, J.—I have had the advantage of reading the judgment to be delivered by my learned brother and, as I agree with it, I propose to

deal with one aspect of defendants' case.

2. Stated at its strongest, their case was that their dispute with plaintiff and 23rd defendant involved adjudication on two distinct matters, firstly their

right and plaintiffs' to recover the property in 23rd defendant's possession from him, secondly, their rights as against plaintiffs to a particular share

in it if it in fact was recoverable. On the first point for the reasons given by my learned brother, there could be no valid submission to arbitration

without 2nd defendant's concurrence and although the record does not indicate what method of decision, if any, was really in the parties' minds

the wording of paragraph 2, Ex. I, is in fact inconsistent with any intention on their part to submit this part of the case. But, it is argued, the absence

of any valid submission on this point does not affect the validity of the submission on the other above referred to, in which 23rd defendant had and

could have no interest, since, if he was to surrender the property, the shares in which it was afterwards to be divided would not be his concern. It

is possible that there is nothing in Section 1, Schedule II of the CPC irreconcilable with this statement of the defendants' case and that the interest of the parties contemplated therein is in the question referred, not in the case as a whole. But it is unnecessary at present to decide whether that is so, because the assumption in defendants' argument, as stated above that 23rd defendant had no interest in the result of the submission to arbitration is incorrect in two respects. For, firstly, the submission included the question of the validity of an adoption, on which plaintiff's rights to sue at all depended; and secondly, 23rd defendant, if he purchased in good faith, may be entitled to have his items assigned, to his alien or in order that his transfer might, so far as possible, remain effective. In these circumstances the submission cannot be accepted as valid; and I therefore concur in the decree proposed by my learned brother.

Seshagiri Aiyar, J.

3. Plaintiffs and defendants 1 to 10 claim to be the nearest heirs of the deceased owner of the plaint properties. The suit was brought for a division of the properties and for setting aside certain alienations in favour of the other defendants. There was a dispute among the heirs as to whether adoptions set up by the defendants 1 to 7 were true and valid. After the settlement of the issues on the 25th September 1916, plaintiffs and defendants 1 to 11 agreed that the matter in dispute should be referred to the decision of three arbitrators, Paragraph 3 of the agreement says: They have further agreed that the rest of the defendants except the 23rd defendant who was declared *exparte* be exonerated from the suit with the respective properties in their possession as per schedule attached thereto." That is to say, their heirs agreed that the alienations in favour of defendants other than the 23rd, should not be contested. Apparently, as the 23rd defendant was *exparte*, they did not exonerate his property from the suit. It was suggested by Mr. Narayanamurthy that in fact the claim against the 2nd defendant was withdrawn. There is nothing on record to justify such an assumption. On the other hand the express language of the agreement to refer shows that the alienation in favour of the 23rd defendant was not accepted as binding. Subsequent to the agreement on the 17th of April 1917, the plaintiffs and the defendants 1 to 7 settled the shares to which they were entitled and asked the arbitrators to determine after

examining the parties themselves the following issues: "" 1st part of the 2nd issue, 8th issue, 9th issue, 10th issue, 11th issue, 12th issue and 15th issue."" The arbitrators by a majority decreed the claim in a particular manner. There was a minority decision also. The court accepted the award of the majority and passed a decree in accordance therewith. Against that decree the present petition has been presented.

4. The main objection argued by Mr. Ananthakrishna Aiyar related to a point not specifically put forward in the Court below. But as that relates to jurisdiction. I fail to see how we can refuse to adjudicate upon it. The short point is this. The 23rd defendant was a party against whom relief was claimed in the original plaint. He was *exparte*. In the agreement to refer the parties to the reference did not exonerate him from liability. In these circumstances, is the reference a valid one and had the Court jurisdiction to accept the reference and to act on it? I am constrained to hold that the court had no jurisdiction to refer the dispute to arbitration. It is to be regretted that the legal advisers should" not have taken steps either to include the 23rd defendant in the reference or to exonerate him in terms from liability.

5. The question turns on the interpretation to be placed upon the words ""parties interested"" in Section 1 of the second schedule to the Civil

Procedure Code. In the old Code of 1882, Section 506 provided "" if all the parties to a suit desired and so on."" In the place of those words we

have in the present section these words : ""Where in any suit where the parties interested agree"". It was strenuously argued by Mr. Narayanamurthy

that if a person is *exparte*"" he is not an interested party. He is supported by some authority which with all deference I am unable to follow. It has

been consistently held in Allahabad that if a person is *exparte* he is not a party interested *Ishar Das v. Herat Deo* ILR (1910) All 657 and the

earlier cases have taken this view. Reference may also be made to *Ajudhia Prasad v. Badarul Hussain* ILR (1917) All 489. In *Vaithianatha Iyer v.*

Vaithilinga Mudaliar (1915) 18 M.L.T. 374 a Bench of this Court took the same view. Phillips, J says: ""further in the present case the appellant has

no equitable claim to set aside the decree, for by remaining *exparte* he left the conduct of the suit in the hands of the Court, and it is really

immaterial to him whether the suit was decreed upon examination of witnesses in court or upon an award made by arbitrators. By not. contesting

the suit he submitted to whatever decree might be passed provided that it was not in excess of the relief chimed."" With all deference I am unable to accept this conclusion. A person may remain *exparte* for various reasons. He may be too poor to defend the suit, He may think that his co-defendants would fight his case and that it is not necessary for him to put in a separate defence. He may trust to some obvious defect in the case of the plaintiff which should attract the attention of the Judge. He might also have kept away from the Court because he had confidence in the judicial capacity of the presiding officer. These considerations do not apply to a reference to arbitrators. The *exparte* defendant knows nothing about their capacity, character or antecedents. Simply because a defendant is *exparte* it does not follow that he consented to his case being decided by arbitrators. Further if a person is *exparte* he has got a right of appeal if the decision goes against him. He may satisfy the appellate court that on the materials placed before the Judge, his conclusion was wrong or that the Judge had taken a wrong view of the law, or that the procedure had been irregular. In the case of an award all these rights could not be exercised. Therefore by remaining *exparte*, defendant cannot be said to have consented to the arbitrators disposing of his case and to giving up all rights of appeal against the decision that may be passed against him. After giving my best consideration, to the cases which have been cited i am unable to accept the view taken in them that a defendant who is *exparte* is not interested in the dispute. As regards *Sivalinga Pillai v. Marutha Pillai* (1912) 14 Ind.Cas. 562 it is enough to say that in that case it was held that the *exparte* defendant had no interest in the suit. On the other hand, in *Girija v. Kanai Lal* (1917) Cri.L.J. 339 and the earlier case in *Seth Dooly Chand v. Mainuji Musaji* (1916) Cri.L.J. 339 it was held that the *exparte* defendant does not cease to be an interested party.

6. The next argument was that there is nothing to prevent a few among the parties to the suit adjusting their differences by submitting them to the decision of arbitrators. Granting for a moment without deciding that a partial reference is possible because a partial compromise is allowed by law and also a partial adjustment, it is not clear whether a partial award is within the rights of the parties--I am however not prepared to hold that in this case the 23rd defendant was not interested in the decision of the question which plaintiffs and defendants 1 to 11 submitted for the consideration of

the arbitrators. For example the extent of the impracticability of the alienation in his favour will depend upon whether the adoption in dispute was really made or not and some of the other questions covered by the issues which the arbitrators were called upon to try also relate to matters in which the 23rd defendant was to some extent interested. Therefore this is not a case in which the subject-matter of the reference was one in which the 23rd defendant had no interest. It follows that the 23rd defendant was a person interested in the whole suit as well as in the particular subject-matter of the reference and that as he was not a party to the reference, the order referring the matter to the arbitrators was ultra vires and without jurisdiction. In this view all subsequent proceedings must be regarded as infructuous and must be set aside. The decree of the lower court must be reversed and the Subordinate Judge must be directed to deal with the suit on the merits. Costs will abide the result.