
(1929) 07 MAD CK 0019
In the Madras High Court

Tummalapalli Subbayya		APPELLANT
	Vs	
Tummalapalli Papayya and Others		RESPONDENT

Date of Decision : 31-07-1929

Acts Referred:

Citation : AIR 1929 Mad 789

Hon'ble Judges : Kumaraswami Sastri, J

Bench : Division Bench

Judgement

Kumaraswami Sastri, J.—This appeal arises out of a suit for partition filed by the plaintiff. A preliminary decree was passed on 2nd

December 1924. After the preliminary decree there were some proceedings for getting a final decree and after examination of two witnesses the

plaintiff and defendant 1 filed a statement agreeing to abide by the decision of defendant 3. This was on 28th October 1925. The suit was

adjourned, and no time was fixed. On 18th November 1925, the commission was revoked as the commissioner who had been appointed under

the preliminary decree did not submit his report. One witness was examined on 28th November 1925, and his statement of account Ex. A was put

in. Defendant 1 put in an application on 30th November 1925 stating that defendant 3 had got his report or award ready and wanted a decree in

terms of that. It is clear from the records that there was no such decision then ready. What happened was that on 22nd December, what is called

an award or list of division was filed by defendant 3. No notice of this was given to the plaintiff nor was any day fixed for the filing of objections.

On the next day a final decree was passed in terms of the award.

2. The appellant who is the plaintiff contends that the whole procedure is illegal,

that a reference to arbitration could not under Schedule 2, Civil

P.C. be made unless all the parties consent, that in this case, admittedly defendants 4 and 2 did not consent, that under the Code some time has to

be fixed for the return of the award and in this case no time was fixed, that under the Limitation Act he has got ten days time to file objections, but

in this case no such time was given and there was no notice given of the filing of the award and so treating it as an award it is invalid both at its

inception and in the procedure adopted for its being incorporated in the final decree.

3. For the respondents, defendants 1 and if, it is contended that there was no reference to arbitration, that under the preliminary decree itself a

commissioner was appointed with duties specified in it, that the commissioner did not carry out his work; that that commission was superseded by an

order of Court dated 18th November 1925, and that what really happened was that defendant 3 was appointed commissioner in place of the old

commissioner and that the report which he sent was not really an award but only a commissioner's report. Unfortunately there is nothing in the

record to show that defendant 3 was appointed either as an arbitrator or as commissioner. On the whole the course adopted by the lower Court

seems to be, if we may say so, not in accordance with any of the provisions of the Code. If the Court wanted to appoint an arbitrator under

Schedule 2, Civil P.C. it was bound to pass an order to that effect and fix a date for the return of the award and also fix a date for objections being

filed. What really seems to have been done in this case is that immediately after the report was filed on 22nd December 1925 without any further

trial the Court passed a final decree in terms of that report This we consider to be wholly irregular whether we consider it as an award or as

commissioner's report. We do not think that it is capable of being "treated as an award and the respondents did not contend that it is an award

and it was therefore merely a commissioner's report.

4. We think that the whole proceedings which led to the passing of the final decree must be set aside and we direct that the matter be disposed of

by the Judge by appointing a commissioner afresh and giving the parties the usual time to file objections and dispose of the case according to law.

5. The costs will abide and follow the result. The court-fee will be refunded.

6. No order is necessary on the civil revision petition.