

**In Re: Joghee Gowder and ors.**

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**Court :** Chennai

**Decided On :** Oct-18-1955

**Reported in :** (1956)1MLJ234

**Appellant :** In Re: Joghee Gowder and ors.

**Judgement :**

**Ramaswami, J.**

1. This is a Civil Revision Petition which is sought to be preferred against the order made by the learned Subordinate Judge of the Nilgiris in I.A. No. 265 of 1954 in O.S. No. 30 of 1951.

2. O.S. No. 30 of 1951 was filed for partition and separate possession of the plaintiffs' share in certain properties. During the pendency of this suit, the 9th defendant therein filed O.S. No. 251 of 1952 for specific performance of an agreement for partition and for a permanent injunction restraining the plaintiffs from further proceeding with this suit. While the two suits were pending trial, a memo was filed under Section 90 of the Code of Civil Procedure, to the effect that the parties agree that matters in dispute in the above two suits may be decided by the Court acting as arbitrator. This memo was subscribed to by all the parties who had entered appearance and their counsel. On the same date the learned Counsel for the plaintiffs also filed an affidavit that as the matter involved is rather small and as it would be to the advantage of minor plaintiffs 3 to 5 in O.S. No. 30 of 1951 if

the suit is settled by arbitration, the Court may be pleased to order that the suit may be settled by arbitration by the Judge. The learned Subordinate Judge passed a judgment on 3rd April, 1954.

3. On 14th April, 1954, the counsel, however, made a joint application I.A. No. 208 of 1954 under Section 151 of the Code of Civil Procedure that as the representations and arguments and submissions made to the Court by the advocates regarding the allotment of the site had proceeded on fundamental mistakes and errors, and as the said mistakes and errors have obviously misled the Court also, the Court may be pleased to set aside or review its earlier order and re-hear the matter and pass suitable orders after hearing further representations. This application was heard on 15th April, 1954, and was allowed. Along with I.A. No. 208 of 1954, another application, I.A. No. 209 of 1954, was also filed under Section 151 of the Code of Civil Procedure to make allotment of the suit property in terms set out therein. This application too was allowed with a direction that the decree will be drawn up in terms of the joint application. Agreeably changes were also made in the judgment in terms stated in I.A. No. 209 of 1954.

4. Now this application I.A. No. 265 of 1954 has been filed on 11th June, 1954, supported by an affidavit in which the first plaintiff alleges that the provisions of the Arbitration Act applies to the case, that no notice of the award was given to any of the parties nor objections called for, that the procedure followed is illegal and that therefore the award should be set aside and the suit disposed of afresh.

5. The learned Subordinate Judge dismissed this application on the ground that it was incompetent and hence this Civil Revision Petition.

6. It is now well settled law that the reference of a pending suit to arbitration to the presiding Judge is not a reference under the provisions of Chapter IV of the Indian Arbitration Act as well as the provisions of Schedule II of the Code of Civil Procedure, 1908 (since repealed) but is a proceeding extra cursum curiae and a decree passed in accordance with that decision should be construed as a consent decree not subject to appeal.

7. In Halsbury's Law's of England, Hailsham Edition, Vol. I, page 624, it is observed:

When in proceedings pending before the Court the parties agree to accept the Judge's decision as final, it is said that they thereby constitute the Judge a quasi-arbitrator. The effect of such an agreement is that the decision of the Judge is unappealable and cannot be questioned in any way; but the Judge is not thereby really placed in the position of an arbitrator; and his decision is not and does not in any way resemble, an award.

8. The Indian case-law on the subject is to the same effect, viz., that when a Judge is asked to arbitrate between the parties to a suit before him, he does not cease to be the Court and become a pure arbitrator and that the provisions of Chapter IV of the Arbitration Act, 1940, as well as the provisions of Schedule II of the Civil Procedure Code (since repealed), necessarily implied that when a dispute in a pending suit is referred to arbitration, the arbitrator must be the person other than the Judge presiding in the Court and that the provisions of Chapter IV of the Indian Arbitration Act would not be applicable at all.

9. In *Chinna Venkataswami Naicken v. Venkataswami Naicken* : (1919)36MLJ291 , a Bench of this Court held that a reference of a pending suit to arbitration to the presiding Judge even along with others, is not a reference under the Second Schedule to the Code of Civil Procedure but is a proceeding extra cursum curiae and that a decree passed in accordance with their decision should be regarded as a consent decree not subject to the provisions of the Second Schedule, and is therefore final. The Bench followed the decisions in *Nanjappa v. Nanjappa Rao* : (1912)23MLJ290 and *Pragdas v. Girdhardass* I.L.R. (1901) Bom. 76.

10. In *Sankaranarayana v. Ramaswami* (1922) 44 M.L.J. 258 : I.L.R. 47 Mad. 39 the learned Chief Justice differing from the reasoning of two former decisions in *Chengalroya Chetti v. Raghava Ramanuja Doss* : (1919)37MLJ100 and *Nidamarthi Mukkanti v. Thammana Ramayya* I.L.R. (1902) Mad. 76, but agreeing with the final orders in both those cases observed in the course of his judgment that a Court acting extra cursum curiae has been said to act as quasi-arbitrator which may be a convenient expression but it does not involve an application of the

Second Schedule to the Code of Civil Procedure which is applicable to arbitration.

11. In the later decision of Divatia, J., in K.P. Dalai v. R.S. Jamadar (1944) 47 Bom. L.R. 388, it has been held that when a Judge is asked to arbitrate between the parties to a suit before him he does not cease to be the Court and become a pure arbitrator and that therefore the provisions of Chapter IV of the Arbitration Act would not be applicable.

12. Therefore, there is no substance in this Revision Petition and it is hereby dismissed.

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