

1957

Present : H. N. G. Fernando, J., T. S. Fernando, J., and Sinnetamby, J.

K. A. SOMASUNDERAM SARMA *et al.*, Appellants, *and*
S. KRISHNAPILLAI *et al.*, Respondents.

S. C. 200—D. C. Batticaloa, 954/Mis.

Arbitration—Award of arbitrator—Grounds for setting it aside.

An arbitrator who was appointed by Court, with the purported consent of all the parties to an action, to investigate and decide all the matters in dispute between the parties did not permit the 2nd defendant to present his case at the inquiry.

Held, that if the Court had had no power to include the 2nd defendant's claim in the matters under reference, the consent of the 2nd defendant to the reference to arbitration was invalid because it was given in the expectation that his claim would be entertained by the arbitrator. If on the other hand the 2nd defendant's claim was properly made a subject of the reference, then the award was invalid because the arbitrator refused to entertain and consider that claim.

APPPEAL from an order of the District Court, Batticaloa.

H. W. Jayewardene, Q.C., with T. P. P. Goonetilleke, V. Thillainathan and N. R. M. Daluwatte, for the defendant-appellant.

C. Ranganathan, with P. Naguleswaram, for the plaintiffs-respondents.

Cur. adv. vult.

December 10, 1957. H. N. G. FERNANDO, J.—

In this action a number of persons as plaintiffs sued the present first defendant for ejectment from the premises of a Hindu temple and for certain other reliefs on the footing that the plaintiffs are the lawfully elected committee of management of the temple, that the 1st defendant had been appointed priest of the temple by the ten trustees thereof, and that the plaintiffs had given notice terminating the services of the 1st defendant on the ground of alleged misconduct. The 1st defendant filed answer on 7th August 1952 and subsequently filed an amended answer on 5th November 1952. On 6th November the original 3rd plaintiff filed an affidavit moving to withdraw from the case. This motion was put off for consideration and on 24th February 1953 the 3rd plaintiff filed fresh proxy for the purpose of cancelling the proxy originally granted by him to the Proctor for the plaintiffs. The journal entry made by the District Judge on this occasion was to the effect that the consent of the latter Proctor to the revocation should be filed. It would appear that this consent was ultimately filed although no mention of the matter is made in the journal entry.

On 4th August 1953 the following entry was made of record and it was signed by the present 1st defendant and by some of the plaintiffs :—

“ Mr. Subramaniam for plttf. & Mr. Adv. Kanagasunderam. Mr. Edwards for defdt. & Mr. Adv. Ariaretnam. Parties are agreeable to refer all matters in dispute to the arbitration of Mr. Rasamanikam M. P. for Padirippu whose decision parties agree to accept as final. Parties agreed to meet expenses in equal shares.

Papers for 7.8.53 and Receipt. ”

Thereafter on the same day the learned Judge has made the following further entry which has been signed by the original 3rd plaintiff who is now the 2nd defendant and described as such below his signature.

“ 3rd plaintiff K. P. Seenitamby states that he is not (sic) a sole trustee of the temple and as such his interests are adverse to the plaintiffs and other defdts.

He is agreeable to have this claim of his also decided by the Arbitrator. Under sec. 18 C. P. C. I now make him a defendant styling him as the 2nd defendant. He now signs record. Mr. Subramaniam consents to the revocation of this proxy.

Mr. Theivanayagam will file fresh proxy on 6/8. Call 6/8 for the other plttfs. to appear to sign their consent reference for arbitration. ”

On 6.8.53 the remaining parties plaintiff signed the record after the terms of settlement and the reference were read to them.

We understand from Counsel that when this Appeal was argued before a Bench of two Judges there was disagreement on the question whether the signing of the record by the parties was a sufficient compliance with the requirement that there should be an application *in writing* for a reference, signed by all the parties. In the event, however, we find it unnecessary in the circumstances of this case to deal with that question.

At the inquiry before the arbitrator the 2nd defendant desired to present his case, namely that he had title to the land on which the temple stood and that he is the sole heir to the administration and management of the temple. The arbitrator however thought that this rival claim to the property would be outside the scope of the inquiry and that the 2nd defendant's claim should be the subject of a separate action in the Courts. He therefore did not permit the 2nd defendant to present his case at the inquiry. The principal objection taken before the District Judge to the award ultimately made was based on the failure of the arbitrator to decide the matter in dispute raised by the 2nd defendant.

In my opinion the simple question which arises is whether in signing the record on 6th August 1953 the 2nd defendant consented to the reference to arbitration only of the dispute between the plaintiffs and the 1st defendant outlined in the pleadings, or whether on the contrary his agreement to the reference to arbitration was based on the understanding that the claim he mentioned to the Judge on that day would be investigated and determined by the arbitrator either as part of or in addition to the determination of the first-mentioned dispute.

In considering this question it is of importance to bear in mind that the provisions in the Code relating to references to arbitration are designed to secure that a Court will not yield its jurisdiction to any other tribunal unless it is manifest that all the parties voluntarily and deliberately consent to an adjudication by another tribunal. To hold therefore that there was such a voluntary and deliberate consent, there must be circumstances which clearly establish the consent, and conduct which is ambiguous or equivocal should not properly be regarded as establishing consent.

In the present case the entry signed by the 2nd defendant makes it clear that he informed the Judge on 6th August 1953 of the nature of his claim and of his desire that it should be decided in the action. His statement recorded by the District Judge that he is agreeable to have this claim also decided by the arbitrator means on its face that he understood that it would be in fact so decided; but it is argued for the respondents that his mere oral statement to the Judge did not constitute a

proper statement for the purposes of an action, that the statement was only an expression of an intention to have his claim investigated by the arbitrator in addition to the substantial dispute between the plaintiff and the 1st defendant, that that intention could only have been carried out either by filing an answer or by presenting an instrument of reference incorporating the matter to be referred for arbitration, and that that intention was ultimately not carried out. On this basis it is further argued that the signature of the 2nd defendant constituted only an agreement to refer the principal matter to arbitration and that the claim mentioned by the 2nd defendant to the Judge was not matter in dispute in the reference.

It is not necessary to decide in this case whether, when the nature of the 2nd defendant's claim was stated orally in Court, the proper procedure would have been for him to file answer or to set out his claim clearly in an instrument of reference. It is almost obvious that the 2nd defendant expected, when he signed the entry, that his claim would be investigated and determined by the arbitrator. This question whether the intention of the parties was that this claim should be considered merely as an independent one or should else be taken into consideration also in determining the substantial dispute can receive no clear answer, but it is sufficiently clear in the circumstances that if the 2nd defendant's claim that he was the sole trustee had been determined in his favour, that determination might well have militated against the plaintiffs who had set out to prove that they were trustees and had installed the 1st defendant as priest by virtue of their powers as trustees.

In the result only two views appear to be possible, both of which are against the plaintiffs. If the Court had no power to include the 2nd defendant's claim in the matter under reference, the consent of the 2nd defendant to the reference was invalid because it was given in the expectation that his claim would be entertained by the arbitrator. If on the other hand the 2nd defendant's claim was properly made a subject of the reference, then the award was invalid because the arbitrator refused to entertain and consider that claim.

I would accordingly allow this appeal with costs and set aside the award of 14th March 1954 made by the arbitrator. The case is remitted to the District Court for further proceedings to be taken *in Court*, but it will be open to the parties to seek a fresh reference to arbitration if they so desire. The costs of the previous proceedings will abide the ultimate event.

T. S. FERNANDO, J.—I agree.

SINNETAMBY, J.—I agree.

Appeal allowed.