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front, and insist that error occurred in making her a party defendant. Courts of justice cannot be trifled with in this way. Parties litigant are not allowed to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold. Having elected to adopt a certain course of action, they will be confined to that course which they adopt."

The plaintiff must be taken to have represented to the Court in the earlier suit that the President was sued in a representative capacity, that the suit was well constituted, and invited or allowed the Court to try the suit in a wrong way, and now he wants to go back upon it. He must be taken in the earlier suit to have insisted upon the President being sued in a representative capacity. In my opinion, there can be no stronger case of an absolute waiver or election or of conduct rendering it wholly inequitable to permit him now to resile from the position he then adopted.

In the result, therefore, the appeal must be dismissed with costs.

Appeal dismissed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Broomfield and Mr. Justice Sen.

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October 15

GANGADHAR LAXMAN DESHPANDE AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* DATTATRAYA LAXMAN DESHPANDE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Schedule II, paragraph 20—Application to file award—Award leaving matters of detail to be settled by mutual arrangement—Award declaratory and not void for indefiniteness—Award dealing with insignificant property outside British India—Award can be filed by deleting the property outside jurisdiction.

Where an award (in an arbitration without the intervention of a Court) deals with an estate which is a considerable one and one item of property which is quite insignificant is outside British India, the award can be maintained on the principle

*Appeal from Order No. 39 of 1935.

of separability; if the part which is outside the jurisdiction is separable without disturbing the basis and equilibrium of the award as a whole, the Court may delete that part of it and order the rest to be filed.

S. A. Nathan v. *S. R. Samson,*[1] relied on.

Amir Begam v. *Badr-ud din Husain,*[2] *Ramlal Hargopal* v. *Kishanchand,*[3] *Raghawendra Ayyaji* v. *Gururao Raghawendra,*[4] *Kashinath* v. *Gangubai,*[5] referred to.

Krishna Iyer v. *Subbarama Iyer,*[6] disapproved.

Where an award is declaratory and leaves certain matters of detail to be settled by mutual arrangement the award cannot be said to be void for indefiniteness. In such a case the principle of separability may be applied, if necessary.

Raghawendra Ayyaji v. *Gururao Raghawendra,*[4] followed.

An award after dealing with certain ornaments which were ordered to be distributed among four persons stated that if any one desired to purchase them, the market price of all the ornaments should be assessed and deducting the amount of his own share distribute the balance among the three sharers. So also in dealing with the house the award directed that it was neither convenient nor desirable to partition the same according to shares; and any one of the four sharers who desired to keep the house for himself may keep it after paying to each of the remaining sharers Rs. 750.

Held, that the award was not void for indefiniteness.

APPEAL against the order passed by V. G. Gupte, Joint First Class Subordinate Judge at Poona.

An application made to file an award under paragraph 20, Schedule II of the Civil Procedure Code.

One Laxman Moreshwar Deshpande died at Poona on November 18, 1929, leaving him surviving his widow Radhabai and three sons Dattatraya, Gangadhar, Wasudeo and two grandsons Ganesh and Manohar, sons of his pre-deceased son Manohar. The family owned considerable moveable property in cash and securities and also houses and lands in Poona District. Among the securities was a mortgage bond in respect of lands at Angaon in Bhor State outside British India. A dispute arose regarding the partition of joint family properties and it was settled that it should be referred

[1] (1931) 9 Ran. 480, F. B.
[2] (1914) 36 All. 336, P. C.
[3] (1923) L. R. 51 I. A. 72 at p. 81, s. c. 51 Cal. 361.
[4] (1913) 37 Bom. 442.
[5] (1928) 31 Bom. L. R. 349 at p. 354.
[6] (1932) 55 Mad. 689.

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to the arbitration of two friends of the family. Accordingly a reference paper was drawn on July 28, 1931, in terms as follows :—

"The immoveable and moveable property shown and described in the appendix hereto annexed is of the ownership and *vahiwat* of all of us. A dispute has arisen between all of us as to what share each of us has in the aforesaid property or what right and interest each one of us has in the aforesaid property. There is also dispute as to the way in which the whole of the property good and bad is to be divided. The dispute is being settled between us by mutual consultation. Hence all of us are appointing both of you as arbitrators unanimously. Whatever award is given by you unanimously will be acceptable to us . . ."

The award was given by the arbitrators on July 27, 1933. It divided the entire property as mentioned in Schedules A, B, C, D. Schedule A divided moveable property and Schedule B dealt with cash and ornaments. Regarding the ornaments it was directed that they should be divided among the four persons named and if one of them desired to purchase them the market price of all the ornaments should be assessed and deducting the amount of his own share the balance should be distributed equally among the three other sharers. Schedule C related to the recovery of debts. Dattatraya was directed to make the recoveries and to distribute the proceeds in equal shares as directed. Schedule D divided the houses and lands. The particulars in respect of the same are stated in the judgment.

On August 19, 1933, Gangadhar and Wasudeo made an application to file an award in Court under paragraph 20 of Schedule II of the Civil Procedure Code. Dattatraya and other members of the family opposed it.

The Subordinate Judge held that the parties sought the help of the arbitrators to make a complete partition; so that after the award was given, no dispute as regards division of property should be left between the parties for settlement. This being his view, he refused to file the award on two grounds (1) that in certain respects the award was indefinite and incapable of execution; and (2) that one item of property

dealt with by the award was outside British India. His reasons were as follows :—

"Gangadhar did not want any share in the house in Narayan Peth. * * *

The three other sharers who wanted division in the Narayan Peth house are directed in the award, to make partition of that house in two parts only, between them and to settle between them who should take and which half and who to take money in proportion to the value of his one-third portion in this house.

So also as regards the house No. 149, then in litigation between the family and other *bhaubands*, the Arbitrators direct in the award, that after litigation would be over, one of the sharers should keep the whole house with him and pay the other sharers, the value of their respective shares in the house.

They do not settle as to what individual sharer should keep possession of this house and pay the rest.

Thus the matter is left unsettled, as to who should demand money or possession and from whom. Similar direction is given in the award as regards the land of Survey No. 5 of Vadgaon. The matter as who should keep possession and who should pay money and to whom is left unsettled.

And the same remarks have to be made, as regards ornaments and silver pots directed to be divided in four equal parts, in the award.

There also, the matter is left unsettled and it is not known who to keep ornaments and who to pay and to whom and what.

* * * * * * * *

The Arbitrators in making the award have dealt with the mortgagees' interest in the lands situated in the village Angaon in the Bhor State. The mortgagees' interest in the lands mortgaged is immoveable property. For, it is a right to recover his money by sale of the land.

The right to his money is thus inseparable from the land mortgaged. This character of the property at Angaon, of the family in the lands there, mortgaged to it, has been the same since mortgage till now. It was the same while Arbitrators dealt with it, in deciding points of disputes between parties, for arriving at the award they have given. The property in the mortgage lands at Angaon in Bhor State, which forms a part and parcel of the subject matter of the award was and is immoveable property situated in Bhor State, over which this Court has got no jurisdiction.

The case cited from Indian Cases, Volume XLV, page 166, of the Punjab Chief Court—*Govindlal* v. *Munilal*—on behalf of plaintiffs is not applicable here.

That case appears to have been decided considering the law of section 158, sub-section (2) of the Land Revenue Act, 1887.

The case quoted from Madras Law Reports in Volume LV, page 689, *V. N. Krishna Iyer* v. *V. N. Subbarama Iyer*, is decisive on the point. Following the ruling in that case, the award cannot be filed as the mortgagees' interest in the lands at Angaon is outside British Court's jurisdiction."

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Gangadhar and Wasudeo appealed to the High Court.

G. N. Thakor, with *P. B. Gajendragadkar*, for *M. G. Honap*, for appellant No. 1.

G. N. Thakor, with *P. B. Gajendragadkar*, for appellant No. 2.

B. G. Modak, for respondent No. 1.

V. D. Limaye, for respondents Nos. 3 and 4.

BROOMFIELD J. This is an appeal from an order of the Joint First Class Subordinate Judge of Poona refusing to file an award in an arbitration without the intervention of a Court. The award relates to the estate of the late Laxman Moreshwar Deshpande of Poona. There were disputes among the members of his family which were referred for settlement to two distinguished lawyers, Rao Bahadur Narhar Krishna Deshmukh and Rao Bahadur Ganesh Krishna Chitale. They are intimate friends of the family. The reference was made on July 28, 1931, and the award was given on January 27, 1933. The application for filing it in Court under paragraph 20 of Schedule II of the Civil Procedure Code was made by the appellants on August 19, 1933. Some of the other members of the family raised objections of various kinds which were made the subject of seventeen issues. Practically every point was decided in favour of the award, but the trial Judge refused to file it on two grounds; because he found (1) that one item of the property dealt with by the award is outside British India, and (2) that in certain respects the award is indefinite and incapable of execution. It may be mentioned that the second point was not the subject of any issue.

This is obviously a very unfortunate result. The estate is a considerable one. The portion of the award affected by the first objection is quite insignificant and even the part affected by the second objection appears to be less than a quarter of the whole. The trial Judge was evidently satisfied, and rightly, in our opinion, that the award is

and equitable, and on most points a final settlement of the disputes between the parties. He thought, however, that in these two particulars which I have mentioned the award was invalid and that he had no alternative but to refuse altogether to file it. We are of opinion that the learned Judge was wrong on both points.

The point of jurisdiction arises in this way. Among the outstandings due to the estate there is a small debt (the principal being only Rs. 90) secured by a mortgage of land in a village called Angaon or Khoda, which is in the Bhor State. In the schedule of properties attached to the reference paper this land was included among the immoveable properties to be dealt with, but in the award it is not included among the immoveable properties nor are any instructions given about the mortgaged land. The only directions given are these : "In Schedule (C) the debts taken by people on hand and on mortgages are mentioned. All those debts should be recovered by Dattatraya. Whatever amount remains with him after defraying the expenses should be distributed by him equally among the three sharers after retaining one share for himself." Then the names of the sharers are mentioned. Schedule (C) contains this provision :—"Lands at Powd and Angaon. These are mortgaged in the name of Mr. D. L. Deshpande who should arrange to make the recoveries."

The learned counsel who appears for the appellants argues that the land is not dealt with at all. All that the award says is that Dattatraya is to recover the money and after recovery—by which time it would be moveable property within the jurisdiction—he is to distribute it among the persons entitled to it. We hold that this contention is correct. It may be that in order to recover the money proceedings would have to be taken in respect of land outside the jurisdiction. But on that point the award is silent. So far as the award goes, it cannot be said that it deals with any property outside the jurisdiction. That being so, the

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legal difficulty which the learned trial Judge found to be insuperable does not really arise. But we think that there is no substance in it anyhow. No doubt *Krishna Iyer* v. *Subbarama Iyer*,[1] cited by the learned Judge, supports the view which he has taken. The Madras High Court has held in that case that the language of paragraph 20 of the second schedule requires that the Court must have jurisdiction over every item of the property dealt with by the award, and that if this is not so, the award cannot be split up and nothing can be done but to refuse to file it. This 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 we are not satisfied that this is the law. In *Ramlal Hargopal* v. *Kishanchand*[2] their Lordships of the Privy Council declined to commit themselves to the proposition that an application to file an award can only be dealt with by a Court having jurisdiction over the whole of the subject-matter. In *Amir Begam* v. *Badr-ud-din Husain*,[3] which was a case of an arbitration without the intervention of the Court, the Privy Council treated it as settled law that if the part of an award which is invalid is separable, it may be separated and the rest of the award maintained. No doubt, the invalidity in that case consisted in the fact that the arbitrators had exceeded their powers under the terms of the reference. But if the principle of separability is to be accepted (and that principle is recognized in paragraph 14 of the second schedule to which paragraph 21 refers back), it is not easy to see why it should not be applied so as to get rid of the invalid part of the award, whatever the nature of the invalidity.

There are decisions of this Court which are inconsistent with the view taken in Madras. In *Raghawendra Ayyaji* v.

(1) (1932) 55 Mad. 689.
(2) (1923) L. R. 51 I. A. 72 at p. 81, s. c. 51 Cal. 361.
(3) (1914) 36 All. 336, P. C.

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Gururao Raghawendra[1] this Court held that it does not follow that an award cannot be filed because it deals with some matters which are not within the jurisdiction. I may refer also to the observations of Mr. Justice Baker in *Kashinath* v. *Gangubai*.[2] In the referring judgment of Page C. J. and Mr. Justice Mya Bu in *S. A. Nathan* v. *S. R. Samson*,[3] the position is stated thus (p. 485) :—

"Whether such want of jurisdiction vitiates the decree as regards both the property over which the Court has jurisdiction, and that over which the Court has no jurisdiction, or only as regards the latter depends, in our opinion, on whether the nature of the case permits of a separation of the part concerning the one from that concerning the other without affecting its basis."

We hold that that is the correct view to take. Even in cases where a part of an award deals with property outside the jurisdiction, if that part is separable without disturbing the basis and equilibrium of the award as a whole, the Court may delete that part of it and order the rest to be filed.

The provisions in the award which have been held to be bad for indefiniteness are the following :—After dealing with certain ornaments which are ordered to be distributed among the four persons named, the award says this :— "Or if any one desires to purchase them the market price of all these ornaments should be assessed and deducting the amount of his own share distribute the balance equally among the three sharers."

Then one of the houses (house No. 377) is dealt with in this way :—

"There are three claimants to this. But in order that there may be no dispute and as if the house is divided into three parts it will not be convenient to any one and it will not be convenient for residence also and if the house is so divided the value of the house and of the parts also will not remain the same—considering all these things we decide that this house should be divided into two parts only by an equitable partition. Each one of those two who take the whole house

(1) (1913) 37 Bom. 442.
(2) (1928) 31 Bom. L. R. 349 at p. 354.
(3) (1931) 9 Ran. 480, F. B.

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as their shares should pay to the third sharer Rs. 2,667 as the price of his third share. That is to say both together should pay Rs. 5,334. Then they should make two equal divisions by an equitable partition and take possession thereof."

Another house No. 149 was dealt with as follows :—

"The four sharers, viz., (1) Dattatraya, (2) Gangadhar, (3) Vasudev, and (4) Ganesh and Manohar have got four-fifths share. The disputes between the *bhaubands* regarding this house are not settled as yet. We have assessed the value of the said four-fifths share as Rs. 3,000. It is our opinion that it is desirable that the said house, considering its condition, should be kept by any one. It will be neither convenient nor desirable to partition the same according to shares. Hence we decide that any one of the four sharers who wants to keep the house for himself may keep it after paying to each of the remaining sharers Rs. 750."

Then a piece of land, Survey No. 5 at Vadgaon, is disposed of thus :—

"Disputes are up to now going on regarding Survey No. 5 at Vadgaon (that means admittedly disputes with third parties, not among the parties to the award). After that dispute is settled any one who wants that land should pay to the remaining three sharers the amount of his share of the market value of that land and keep the same in his possession."

The learned trial Judge referring to these provisions in the award says :—

"They (that is the arbitrators) do not settle as to what individual sharer should keep possession of this house and pay the rest. Thus the matter is left unsettled, as to who should demand money or possession and from whom. Similar direction is given in the award as regards the land of Survey No. 5 of Vadgaon. The matter as to who should keep possession and who should pay money and to whom is left unsettled. And the same remarks have to be made, as regards ornaments and silver pots directed to be divided in four equal parts, in the award. There also, the matter is left unsettled and it is not known who is to keep ornaments and who to pay and to whom and what. If application for execution of the decree is made to the executing Court, the decree will be found incapable of execution in the absence of explicit and unequivocal orders."

The learned Judge is mistaken in saying that the award does not settle the amount to be paid. But apart from that we do not consider that the objection taken by him is really substantial. He appears to consider that the cardinal point in the controversy was a complete partition. If he means by that however that under the terms of the reference the arbitrators were bound to specify in every particular

which person was to take a particular portion of the estate, he appears to be wrong. No support for that view can be deduced from the terms of the reference. What is stated in Exhibit 40 is this :—

"A dispute has arisen between all of us as to what share each one of us has in the aforesaid property or what right and interest each one of us has in the aforesaid property. There is also dispute as to the way in which the whole of the property is to be equitably divided. The dispute is being settled between us by mutual consultation. Hence all of us are appointing both of you as arbitrators unanimously. Whatever award is given by you unanimously will be acceptable to us."

As I have mentioned, the arbitrators are all friends of the family and no doubt well-acquainted with the character and circumstances of its members. It may well be that certain matters of detail must be left or are better left to be settled by mutual arrangement. It cannot be said that the provisions to which objection has been taken render the award an invalid award. The most that can be said I think is that the award in these respects is only declaratory. That does not mean however that it is void for indefiniteness. In that connection I may refer to *Raghawendra Ayyaji* v. *Gururao Raghawendra.*[1] Here also of course the principle of separability might probably be applied, if necessary. We hold, however, that it is not necessary at all.

The result is that the appeal must be allowed. The trial Judge is directed to file the award and to proceed in accordance with paragraph 21 of Schedule II. The parties will pay their own costs in the trial Court. In the appeal the appellants will get their costs from the respondents who have appeared.

Appeal allowed.

J. G. R.

[1] (1913) 37 Bom. 442 at p. 444.