1901.
August 13 and 16.

PROLIS *v.* AMERASURIYA.

D. C., Galle, 5,123.

Appeal against decree in terms of an award—Civil Procedure Code, ss. 676, 692—Want of application to Court for order of reference—Irregular proceedings—Revision.

No appeal lies against a decree made in terms of an award, but if the proceedings before the arbitration and the award are irregular, the remedy is by application to the Supreme Court for revision and not by appeal.

THIS was an appeal against a judgment entered in terms of an award. When the action came on for trial in the Court below, the parties consented to go to arbitration, but they did not sign any application as provided by section 676 of the Code. The

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arbitrator filed his award against the plaintiff on 24th November, but the award was not stamped. The judge granted further time for stamping the award. No definite period was stated. The award was stamped and the parties were served with notice of the filing of the award on the 16th January. Pleaders and parties were absent, and no cause being shown judgment was entered according to the award.

Plaintiff appealed.

Wendt, for appellant.—The decree is curious. The plaintiffs are to pay a sum of money to the first defendant, and the plaintiffs and one of the defendants are to pay another sum to the first defendant. Section 676 of the Procedure Code requires that a written application should be made by the parties for arbitration. Without a written application there cannot be a valid reference, and the fact that parties have appeared before the arbitrator cannot cure the defect. *Casim v. Dias, 2 N.L.R. 319.* The absence of any objection before judgment cannot make an award that is void effective. Subsequent acquiescence may waive an irregularity, but not an act that is absolutely void. *Bambarahami v. Kiribanda, 7 S. C. C. 99.* The award is inoperative, and no decree can rest on it. The award was bad for another reason. When it was filed, it was not stamped, and it could not be stamped afterwards.

James Pieries.—This is an appeal against a decree based on an award, but no such appeal lies under section 692, unless the judgment is not in accordance with, or in excess of, what is granted in the award. That being not the ground here, the appeal cannot be heard. *Casseem v. Packeer, 2 C. L. R. 69.* As to the case in *2 N. L. R.*, the case was not an appeal. It was a case in revision. The points urged by appellant may be raised in revision, but not on an appeal. As to the objection that the want of a written application invalidates an award, the case *Unniraman v. Chathan, I. L. R. 9, Madras 451*, is in point. The Court held there that a party applying under section 622 of the Indian Code for relief must show that he has not contributed by his own conduct to his being placed in that position he finds himself in. [LAWRIE, A.C.J.—In D.C., Galle, 42,400, *2 S. C. C. 85*, the Supreme Court held that the absence of the application in writing was incurable.] But such questions do not arise now, because this appeal does not lie. As to the absence of notice of the filing of the award, the record shows that pleaders were present and took notice on the day the award

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was filed. The only notice required is that of the filing of the award, and here the judge gave the notice instead of serving it. Plaintiff stands on his legal rights, but according to his legal rights this appeal is bad, and the question can only be raised in revision.

Wendt (in reply).—Where there are decisions both in India and in Ceylon, our own must be preferred, and *2 N. L. R. 319* is binding on this Court. *2 C. L. R. 69* is distinguishable. There the award was valid, but irregular. Here the award is void. There the question was whether the arbitrator should not reconsider his award. Here we say that we cannot accept the arbitration. [LAWRIE, A.C.J.—But you are appealing against a judgment based on an award, and you cannot do that.] It is true that I cannot appeal if the judgment is based on an award, but we are now dealing with a groundless judgment. There was no award here at all. What purported to be that was a nullity. Section 692 can only apply to appeals against judgments based on award, but this judgment was not based on an award. Our appearance and acquiescence cannot ratify a nullity.

Cur. adv. vult.

16th August, 1901. LAWRIE, A.C.J.—

This is an appeal against a decree in terms of an award.

The 692nd section is imperative. "No appeal shall lie from "such a decree, except in so far as the decree is in excess of or "not in accordance with the award."

It is urged for the appellant that the award is a nullity, that there was no written consent of the parties to the submission, so that the reference to the arbitrator was bad, he had no proper authority to act. The regularity of the proceedings and of the award might have been objected to; the objection would probably have been sustained, but no objection was taken in the Court below. If the plaintiff had asked the Court to dispose of the objection, an appeal would have been competent against the judgment on that point. There is here no judgment of the District Court which we can consider in appeal. The most recent case (*2 N. L. R. 319*) in which proceedings in an arbitration were held to be void for want of a written submission came before this Court in revision.

In my opinion this appeal must fail.

MONCREIFF, J.—I am of the same opinion.