1955 *Present :* **Gratiaen, J., and Fernando, J.**

W. H. BUS CO., LTD., Appellant, *and* S. M. HEEN BANDA, Respondent

S. C. (Inty.) 23—D. C. Kandy M. R. 3,656

Arbitration—Procedure—Section 676 of Civil Procedure Code— Compliance therewith —Scope of terms of reference.

(i) The parties to this action signed an agreement in which they expressly stated their desire to submit their dispute to arbitration. In the same agreement they authorised their proctors to apply to the Court for a reference. This agreement was filed in Court two days later, and, in the presence both of proctors and counsel, the Court entered a minute that a joint motion was filed, it being clear that every one had assumed either that there was in fact a joint motion or that the agreement already signed by the parties constituted the necessary joint motion

Held, that there was substantial and sufficient compliance with the procedure prescribed by Section 676 of the Civil Procedure Code.

Menike v. Ukku Amma (1915) 18 N. L. R. 413, followed.

Madasamy v. Amina (1951) 45 C. L. W. 40, not followed.

(ii) The arbitrator was required by the terms of reference to determine " all matters in dispute in this action and all other matters in dispute ". At the stage when the reference was made, issues had not been framed between the parties nor had answer been filed. The matters in dispute were therefore those upon which the plaintiff relied in his plaint. Notwithstanding that the arbitrator was authorised to determine other matters in dispute, every issue suggested to the arbitrator was one which arose upon the averments in the plaint, and the only matters ultimately determined by the award were matters arising upon those averments.

Held, that in the circumstances the validity of the award could not be challenged on the grounds that no specific issues had been agreed upon for adjudication by the arbitrator and that the reference related to matters outside the plaintiff's pleadings.

APPEAL from an order of the District Court, Kandy.

H. V. Perera, Q.C., with *H. W. Tambiah* and *H. L. de Silva*, for the plaintiff appellant.

C. Thiagalingam, Q.C., with *P. Somatilakam*, for the defendant respondent.

Cur. adv. vult.

July 21, 1955. FERNANDO, J.—

The plaintiff instituted an action against the defendant on 15th September, 1949, claiming certain declarations, orders and damages. Summons was served on the defendant, he failed to appear in response thereto and the matter was fixed for ex-parte trial ; but subsequently

of consent a date was given to file answer. The following entry (initialled by the District Judge) appears on the Journal for the date 12th December, 1949 :—

> " Joint motion filed referring all matters in dispute in this case (and also some other matters) to the arbitration of Mr. Alfred Fernando. Of consent, arbitrator's fees are to be paid direct by plaintiff in the first instance fixed at Rs. 600.
>
> Issue commission to arbitrator re'ble 22 Feb. 1950. "

Subsequently various orders were made of consent, extending the time fixed for the making of the award and increasing the amount of the arbitrator's fees. The award of the arbitrator was ultimately filed on 8th January, 1951, and after certain steps had been taken, the defendant filed his objections as well as a motion that all orders had in the case be vacated, expunged and otherwise rescinded for the following reasons *inter alia* :—

(2) There was no application in writing to refer the matter to an arbitrator.

(3) There was no order in due form relating to the reference to arbitration.

(4) The reference, if any, was in general terms and did not state the particular matters in difference between the parties ; also such reference related to matters outside the plaintiff's pleadings in this case.

(5) The arbitrator had no jurisdiction to act. The entire proceedings are null and void.

It was argued before the learned Judge on behalf of the plaintiff that the objections were made out of time but he held that they were in time and can and have to be considered. He considered those objections (I shall refer to them later), but ultimately held that the matter was concluded on the general grounds set out in the motion. He held in effect that there was no written application by the parties to the action for a reference to arbitration, that the reference was therefore invalid, that the defendant's participation in the arbitration proceedings did not estop him from setting up the invalidity of the award, and directed that the next step was for the case to proceed *in Court* in the ordinary course and for the defendant to file answer.

The plaintiff has appealed against this order and the main question for decision is whether or not there was a valid reference to arbitration on 12th December, 1949. On that day, apart from the oral representations which must have been made to the Judge by counsel for both parties, there was *before the Court* a writing dated 10th December, 1949, signed both by the plaintiff and by the defendant which stated that the parties " are desirous that all matters in dispute in this action and all other matters in dispute between us be referred to the final decision of Mr. Alfred Fernando, Proctor, as arbitrator, and we bind ourselves and agree to accept the award of the said arbitrator " and further that the

parties "do hereby specially authorise our respective Proctors, that is to say, Messrs Liesching and Lee on the part of the said Plaintiff-Company and Mr. V. M. Guruswamy and his assistant Mr. M.A. M. Naheem on the part of the said defendant, to apply to the said Court for an order of reference accordingly". It has been argued in appeal that this document of 10th December, 1949, which was admittedly filed in Court, together with the matters orally before the Court upon which the Journal entry was founded, together constitute sufficient compliance with the requirements of section 676 of the Code.

The section provides as follows :—

(1) If all the parties to an action desire that any matter in difference between them in the action be referred to arbitration, they may at any time before judgment is pronounced apply, in person or by their respective proctors, specially authorised in writing in this behalf, to the Court for an order of reference.

Matter in difference in an action may by consent of parties be referred to arbitration.

(2) Every such application shall be in writing, and shall state the particular matters sought to be referred, and the written authority of the proctor to make it shall refer to it, and shall be filed in Court at the time when the application is made, and shall be distinct from any power to compromise or to refer to arbitration which may appear in the proxy constituting the proctor's general authority to represent his client in the action.

Mode of submission.

Section 676 requires firstly, that all the parties must apply to the Court for an order of reference either in person or by their respective proctors, each specially authorised to make the particular application. The importance of this special authorisation was stressed in the case of *Gonsales v. Holsinger* [1] where it was held (inter alia) that a general power of attorney given to a proctor authorising him in general terms to refer the matter in suit to arbitration if necessary did not constitute the special authorisation required by section 12 of the Arbitration Ordinance of 1866 (which corresponded to the present section 676 of the Code). The application then, for a reference, must be made either by each party in person or by their respective special agents ; and section 676 (2), which purports to deal with the "mode of submission", requires that the application *shall be in writing* and that when it is made by the agent his special written authority shall be filed with the application. Many decisions have stressed the need for literal and rigorous compliance with the section, for such a compliance would ideally demonstrate to the Court the deliberate decision of all the parties both to proceed to arbitration and to move the Court for the requisite order.

As de Sampayo J. said in the *Alim Will Case* [2] at p. 406, "Where the Court is seised of a cause, its jurisdiction cannot be ousted by a private and secret act of the parties, and if they, after having invoked the authority

[1] *(1885) 7 S. C. C. 101.*

[2] *(1920) 21 N. L. R. 405.*

of the Court and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator . . . . they must move in the same suit for an order of reference ".

Section 676 underlines the principle that the subject's right of recourse to the established Courts cannot be abandoned or be construed to have been abandoned except on the clearest possible material demonstrating that he has freely and voluntarily consented to abandon it, and except upon that consent being communicated to the Court in person or by a specially authorised representative. And once a Court becomes seised of the jurisdiction to determine a suit, the Court cannot be relieved of or relieve itself of that jurisdiction, unless all the parties to the suit have in the manner to which I have just referred communicated to the Court their free and voluntary consent to the transfer of the subject matter of the suit to the determination of some other tribunal. Indeed, it is even doubtful whether there can be complete abandonment, and the device of a reference to arbitration merely suspends the jurisdiction of the Court which continues to remain vested with the right to supervise and control the acts of the arbitrator and to declare his ultimate award ineffective in certain circumstances.

The question which the Courts have had to determine in several cases under section 676 is whether an order of reference is void on the ground that no application in writing for the reference was made either by the respective parties or by their proctors acting with the special written authority, and in many of them the decisions were for avoidance. But it is necessary to examine the facts of those cases in order to appreciate the *ratio decidendi*.

In *Ramaswamy Kangani v. Aiya Cutty Kangani* [1] there was a Journal entry " on a joint motion, referred to the arbitration of X ". The entry bore no signature (not even of the Judge) nor was there any signed motion. It was held that there was no valid reference to arbitration, and that no valid appointment having been made, the parties had not by appearing before X " waived all objections and irregularities " in connection with his nomination. I note (without comment for the present) this observation of Dias J. :—

" *If the parties had signed the entry of 8th August, probably a sufficient compliance with the provisions of the Ordinance might be held to have substantially taken place.*"

In *D. C. Galle 42,400* [2] there was a minute signed by the Judge : " parties present with their proctors ; referred to arbitration by consent of parties to X ". Here again there was neither an application in writing nor the signature of the parties to the minute. Dias J. in delivering the judgment of the Court (in a later case referred to as the " fully constituted Collective Court ") pointed out a difference from the circumstances in the earlier case namely, that the minute had been signed by the Judge. But he nevertheless said that the Legislature required that the reference to arbitration should certainly be the act of the parties themselves and that

[1] *(1879) 2 S. C. C. 59.*

[2] *(1879) 2 S. C. C. 85.*

therefore the signature of the Judge did not cure the absence of an application in writing by the parties or their proctors. The learned Judge did not however either re-affirm or modify his observation in the earlier case as to the probable effect of the signature of the entry by the parties.

The next case of *Punchirala v. Medduma Banda* [1] was decided by Clarence J. sitting alone. That was a case between the plaintiff and five defendants ; the reference to arbitration was made upon a written motion signed by the plaintiff and his proctor, by the 1st defendant, by the 3rd defendant for himself and as curator for the 5th defendant as well as by the proctors for the 1st, 3rd, 4th and 5th defendants. In regard to the 4th defendant, he did not sign the motion but he subsequently signed a joint application to enlarge the time for the award. The award was ultimately made in favour of the plaintiff against the 1st, 3rd, 4th and 5th defendants but absolving the 2nd defendant. On these facts it was held that the objection to the award failed, Clarence J. not being " disposed to favour parties who contentedly waived technical objections to the proceedings of arbitrators until they discover that the award is against them ".

In *De Fonseka v. De Fonseka* [2] there was again a written entry signed by the District Judge that the questions at issue are by consent referred to arbitration. Cayley C.J. referred to the fact that the Ordinance (No. 15 of 1886) contemplated the use of a form of application given in the schedule and stressed the importance of insisting upon this formal application. Objection was also taken that there was no formal order of reference to satisfy the provision that the order should be in writing and fix the time for the delivery of the order. But he nevertheless upheld the validity of the order of reference in the following terms:— " In the present case there is an order duly entered and signed by the Judge. This order, if obtained irregularly or if defective in any particular, might have been appealed against and set aside, or amended. But a party, when he has full knowledge of an irregularity in the reference, and a proper legal course open to him for getting such irregularities corrected, cannot be permitted to lie by and take his chance of the award, and then finding it made against him try to escape from it on the ground of the irregularity (see *Bignall v. Gale*, 2, M and G. 830). " He distinguished the case of *Ramaswamy Kangani v. Aiya Cutty Kangani* [3] on the ground that there, there was not only no written application but also no order. Clarence J. in dealing with the same point also thought that the defendant "is estopped from now setting up the objection to the irregularity of the reference ".

It will be seen that while the cases last cited from the 3rd volume of the *Supreme Court Circular* decided in effect that the recording by the District Judge of the reference to arbitration together with the subsequent attendance by the parties before the arbitrator was held to have cured the failure to file a written application, the earlier case of *D. C. Galle 42,400* [4] was to the contrary effect. In this state of things the matter came up again before three Judges in *Bimbarahami v. Kiribanda Muhandiram* [5]

[1] *(1880) 3 S. C. C. 110.*
[2] *(1880) 3 S. C. C. 154.*
[3] *(1879) 2 S. C. C. 59.*
[4] *(1879) 2 S. C. C. 35.*
[5] *(1885) 7 S. C. C. 99.*

where the earlier cases were all reviewed. Here too the minute (signed only by the Judge) was that "the parties consent to this case being referred to the arbitration of X. Let it be referred accordingly". Referring to the case of *D. C. Galle* [1] as a decision of "the fully constituted Collective Court", Fleming A.C.J. pointed out that "in that case it was distinctly held that the absence of an application in writing to refer the matters to arbitration as required by the Ordinance was not cured by a minute of the District Judge". He felt bound as well as inclined to follow the decision of the Collective Court, and held that there was no valid appointment and that *the objection to the award was one which no subsequent conduct of the parties can waive or cure.* The case of *Ramaswamy Kangani v. Aiya Cutty Kangani* [2] was approved, but the Court, which included Dias J., made no reference to his observation as to the probable effect of the signature by the parties to the entry as to the reference.

The case of *Gonsales v. Holsinger* [3] was also one where there was only a minute signed by the Judge. The same Bench that decided *Bimbarahami v. Kiribanda Muhandiram* [4] decided this case also and on the same day; and in setting out the brief facts relating to the reference it is significant that Fleming A.C.J. said that although the note as to the reference was signed by the Judge, "It is not pretended that it was signed by the parties".

Casim Lebbe Marikar v. Samal Dias [5] is yet another case of a signed minute by the Judge without any writing by the parties or their proctors and it was held that the reference to arbitration was void. Bonser C.J. said "It is not sufficient that the parties being present in Court should signify their assent to the District Judge and that he should make a minute to that effect".

In *Pitche Tamby v. Fernando* [6] Wood Renton J. held to be invalid an award made upon an application not signed by all the parties. Although the appellant himself had signed the application, he was not estopped from disputing the validity of the reference on the ground that some of the respondents had not themselves signed it. The learned Judge pointed out "how vitally important it is that the provisions of the Civil Procedure Code in regard to arbitration should be rigorously and literally complied with".

An examination of the facts in all the cases to which I have so far referred reveals that in each of them the reference to arbitration had been made either upon an application which had been signed by some but not all of the parties, or else merely in pursuance of an entry made by the Judge whether signed by him or not. But in none of them was there an entry by the Judge countersigned by the signature of the parties or of their respective special agents. The first case of this description to which we have been referred was that of *Menike v. Ukku Amma* [7] decided in 1915. The entry was to the effect that "the parties agree to refer all matters in dispute to the arbitration of X whose award shall be final". This agreement was "allowed" by the Judge, and the whole entry was

[1] *(1879) 2 S. C. C. 85.*
[2] *(1879) 2 S. S. C. 59.*
[3] *(1884) 7 S. C. C. 101.*
[4] *(1885) 7 S. C. C. 99.*
[5] *(1896) 2 N. L. R. 319.*
[6] *(1910) 14 N. L. R. 73.*
[7] *(1915) 18 N. L. R. 413.*

authenticated by the marks of the parties to whom the entries were stated to have been explained by the Interpreter Mudaliyar. Having referred to the two cases I have last cited (which themselves refer back to the earlier authorities in *7 S. C. C.* and *3 S. C. C.*) the Court held that "the allowance by the Commissioner of Requests of the agreement of the parties and the authentication of that agreement not merely by his signature but by the marks of the parties themselves, seem to me to constitute good evidence that *there was here such an application to the Court as will satisfy even the letter, and certainly the spirit*, of section 676 of the Civil Procedure Code". I should add that this observation was made by Wood Renton C.J. who had in his brief earlier judgment stressed the need for *rigorous and literal compliance.*

An oral application to the Court for a reference to arbitration, followed by the signature of the parties to a minute of consent was held by Dalton J. to be sufficient compliance with section 676. (*Appuhamy v. Dingiri Mahatmaya* [1].)

The case of *Arachchi Appu v. Mohotti Appu* [2] is not in point since there, what purported to be a joint motion was found actually to have been signed only by the proctors for the plaintiffs. In this case too, the question of estoppel was raised, but Bertram C.J. felt compelled to yield to the current of opinion in earlier cases where the plea of estoppel had been rejected.

Despite certain observations to the contrary which were made *obiter* by Wood Renton J. in *Pitche Tamby v. Fernando* [3], Maartensz J. also thought that the plea of estoppel "could not be now raised"—(*Asia Umma v. Abdulla* [4]). Although the term estoppel itself does not occur in the judgments reported in the 7th volume of the *Supreme Court Circular*, I think it is clear that the three judges who decided those cases intended to decide that if an order of reference is void for the lack of the necessary application, then participation by a party in the arbitration proceedings does not estop him from subsequently challenging the order. As will presently appear, it is not necessary for us to re-consider that decision, even if it be open to a Bench of two Judges to do so.

The next case we have been referred to was that of *Giriyoris v. Punchi Singho* [5] decided in 1949 by Basnayake J. The entry reciting the consent to the reference to arbitration in that case was signed by four of the eight plaintiffs and the four defendants, but was not signed either on that day or subsequently by the other four plaintiffs. In view of the fact that the entry was not signed by all the parties, the 1915 case of *Menike v. Ukku Amma* [6] was, if I may say so with respect, rightly distinguished, and would have been of no assistance to those parties who desired to sustain the validity of the reference.

De Silva v. Perera [7] a judgment of two judges, is of no assistance to Mr. Thiagalingam. There was a motion filed on 29th September, 1949, signed by the plaintiff and the defendant in person as well as by their proctors, in which the parties agreed to refer all matters arising in the action

[1] *(1925) 30 N. L. R. 254.*
[2] *(1922) 23 N. L. R. 500.*
[3] *(1910) 14 N. L. R. 73.*
[4] *(1926) 28 N. L. R. 391.*
[5] *(1949) 40 C. L. W. 25.*
[6] *(1915) 18 N. L. R. 413.*
[7] *(1950) 44 C. L. W. 69.*

to the sole arbitration of Messrs. Satchithananda, Schokman and de Silva, Chartered Accountants of Colombo. The learned District Judge made the following order : " Allowed, issue commission returnable 22/12/49 ". When the case came up in appeal it was held that " the proceedings make it clear that neither the application for reference to arbitration nor the order of Court has been made in accordance with the provisions of the Code ", and the order of reference was quashed. But clearly there was in that case a written application signed by the parties which fully complied with the literal requirements of section 676 , and the irregularity which avoided both the application and the order was that, in the opinion of the Court, the reference being one made to three arbitrators, there should have been provision made for a difference of opinion in accordance with the requirements of section 678 of the Code.

The only case brought to our notice which goes directly counter to that of *Menike v. Ukku Amma* [1] is *Madasamy v. Amina* [2] which was decided by Basnayake J. sitting alone. The Journal entry which records the agreement for arbitration was signed by the plaintiff and bore the left thumb impression of the defendant. It was held that " a *lis* may be taken away from the jurisdiction of the Courts to an arbitrator only in strict conformity with the prescribed procedure " and that " the absence of the application in writing contemplated by section 676 (2) rendered the reference void ". Although no express mention is made in the judgment to the 1915 case [1] it seems clear from the observation which had previously been made *obiter* by Basnayake J. in *Girigoris v. Punchi Singho* [3] that he was unwilling to follow the 1915 decision of Wood Renton C. J. and de Sampayo J. That decision of two eminent judges had apparently not been questioned in this Court until 1949, and was presumably followed in Courts of first instance during a long period. But that is far from being the principal reason for my opinion that the decision must be approved. It should be apparent from the examination of the authorities that there had been no case before 1915 in which the contrary view was expressed. In fact this Court had never until then had occasion to consider the validity of a reference made in pursuance of an oral agreement, the purport of which was recorded by the Judge in an *entry subsequently signed both by himself and by all the parties*. The possibilities of such a situation was however expressly referred to in *Ramaswamy Kangany v. Aiya Cutty Kangani* [4] where it was viewed with favour by Dias J., who subsequently delivered the judgment of the Collective Courts in *D. C. Galle 42,409* [5] and who was a member of the Collective Court which decided both the cases reported in the 7th volume of the *Supreme Court Circular*.

The remark of Fleming A.C.J. in the second of the latter cases— " It is not pretended that (the Judge's note) was signed by the parties " — was superfluous and misleading, unless the learned Judge thought that the affixing of the signatures would, or at least might, have made a difference. These observations of Dias J. and Fleming A.C.J. made as they were by Judges who were insisting upon strict compliance with the formal requirements of section 676, must undoubtedly have influenced the minds of

[1] *(1915) 18 N. L. R. 413.*
[2] *(1951) 45 C. L. W. 40.*
[3] *(1949) 40 C. L. W. 25.*
[4] *(1879) 2 S. C. C. 59.*
[5] *(1879) 2 S. C. C. 85.*

Wood Renton C.J. and de Sampayo J. when the contemplated circumstances came up for consideration for the first time in 1915 ; nor could Wood Renton J. be fairly said to have ignored his own observation as to strictness which was made in *Pitche Tamby v. Fernando* [1].

While an actual written application signed by the parties or by their proctors acting in pursuance of a special authority filed of record would be the ideal mode of compliance with section 676, the question which has so often arisen is whether the ideal is the only mode of compliance. The obvious intention of the Legislature was that the Court is authorised to refer the dispute involved in a pending suit to arbitration only if—

(*a*) the minds of the parties have been clearly directed to the course of arbitration ;

(*b*) they voluntarily agree to the adoption of that course, and,

(*c*) their agreement is evidenced in the record in a manner which leaves no doubt that conditions (*a*) and (*b*) are satisfied.

I think that in the 1915 case decided by Wood Renton C.J., all these conditions were fulfilled.

The case before us, while not on all fours with that case, is perhaps a stronger one. The parties on 10th December, 1949, sign an agreement in which they expressly state their desire to submit the dispute to arbitration by a named arbitrator, and they proceed to give effect to that desire by specially authorising their proctors to apply to the Court for a reference. This agreement is filed in Court two days later, and, in the presence both of proctors and counsel, the Court enters a minute that a joint motion is filed, it being clear that every one had assumed either that there was in fact a joint motion or that the agreement already signed by the parties constituted the necessary joint motion. Upon facts somewhat similar to those existing in the case decided by Wood Renton C.J., there might conceivably be scope for the suggestion that the agreement of the parties was made on the spur of the moment in Court and therefore did not represent the free and voluntary decision of all the parties. Indeed, the judges who decided *Bimbarahami v. Kiribanda Muhandiram* [2] as well as *Casim Lebbe v. Samal Dias* [3] (both of which were cases of *entries unsigned by the parties*) were much influenced by the observation of Cayley C.J. in *De Fonseka v. De Fonseka* [4] that " *there is so much proneness on the part of the legal practitioners in this country to refer pending cases on the day of trial to arbitration,* that it is of great importance that the consent of the parties themselves should be formally, expressly and deliberately given ". Such an observation, however, just at the time it was made and approved, could not perhaps be made with equal justification at the present time in a case where parties orally agree to arbitration in the presence of the Court *and subsequently sign a minute to that effect.* But such an observation would be quite out of place in a case like the present one where the parties have executed a document in the terms set out in the writing of 10th December, 1949.

[1] *(1919) 11 N. L. R. 73.*
[2] *(1885) 7 S. C. C. 99.*
[3] *(1896) 2 N. L. R. 319.*
[4] *(1880) 3 S. C. C. 151.*

The Indian case of *Singh v. Mal Dhadha* [1] decided by the Privy Council is of much interest in this connection. There had been (as in the case before us) a written agreement by all the parties that the question in dispute in the suit be referred to arbitration ; the agreement was signed in person by each party to the suit, save that the guardian *ad litem* of one minor party signed on his behalf. Thereafter (as stated in the Privy Council judgment) " The parties appeared before the Trial Judge and produced the agreement and applied for an order of reference. The guardian *ad litem* was present in Court and was a party to the application. The Trial Judge thereupon made an order of reference ". Objection was subsequently taken to the award on the ground that the application for the reference was not signed by the guardian *ad litem* of the minor party. In rejecting this objection Viscount Haldane said :—" In the first place the Second Schedule to the Code of Civil Procedure, which provides, by s.1, that, where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an Order of Reference, *does not require that the writing should of necessity be signed.* As the guardian in this case was in Court and assented to the application it is plain that no injustice has arisen. They (their Lordships) think, therefore, that there is no substance in the technical objection relied on ". The statement of the facts indicates that there was probably only an oral application in Court for the reference ; but even if it be assumed that the application was actually made in writing, the fact that it was unsigned was not held to constitute a material defect. As pointed out by the Chief Commissioner whose order was ultimately upheld at the appeal, the objection was not a good one " *having regard to the fact that the agreement itself was signed by all the parties concerned* ". If there is no prior signed agreement, and the parties themselves wish to apply for a reference, then clearly their signatures to a written application or else to an entry on the record would be essential in order to establish the fact of their consent. But where, as in the present case, there is both a signed agreement and a signed authorisation of the proctors, the fact of consent is already established ; and if thereafter (as held by the Privy Council) an unsigned motion is a sufficient compliance, can an oral motion by the authorised proctors be said not to be sufficient ? An oral statement made to the Court by a specially authorised agent is surely better evidence of his intention to move the Court than a mere writing which bears no signature.

Since I am relying on a Privy Council judgment in an Indian case on the subject of a reference to arbitration, I have thought it necessary to consult the Privy Council decision in *Government of the Province of Bombay v. Pestonji Ardeshir Wadia et al.* [2] which was cited in the judgment in *Madasamy v. Amina* [3] as authority for the statement that " provisions of Civil Procedure are imperative ". Some error appears to have crept into the citation, because I find it is not borne out by the report of the case. The case was one instituted against the Bombay Government by the trustees of a certain trust. In compliance with section 80 of the Indian Civil Procedure Code, the two persons who were trustees served notice of

[1] *(1915) A. I. R. (P. C.) 79.* [2] *A. I. R. (36). 1949 (P. C.) 143.*
[3] *(1951) 45 C. L. W. 40.*

action on the Government in October, 1933. But one of them died in December, 1933, and two other persons were appointed trustees in his place, so that the suit which was ultimately filed in April 1934 was by *three trustees* as plaintiffs. It was held that the trust is not the plaintiff, as the Code does not permit trustees to sue in the name of the trust, and that as the notice given did not specify the names and addresses of all the three trustees who were the plaintiffs, the condition precedent to the filing of the suit was not fulfilled. This view of the High Court was approved by their Lordships of the Privy Council, who stated that "The provisions of *section 80* of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government ". I do not think that the 1949 decision (which contained no general observation as to the imperative nature of procedural provisions) in any way qualifies the judgment of the Privy Council in the earlier case of *Singh v. Mal Dhadha* [1].

For reasons which I have thought it proper to discuss at some length, I would hold that there has been in the present case substantial and sufficient compliance with section 676 of the Code and that the order of reference was therefore valid, and I would further respectfully agree with the decision in *Menike v. Ukku Amma* [2].

There remain for consideration the other objections to the validity of the award which were taken by the defendant. At the hearing before the learned District Judge it was contended —

(1) That due notice of the filing of the award was not served on the defendant.

(2) That no specific issues had been agreed upon for adjudication by the arbitrator and that the reference related to matters outside the plaintiff's pleadings.

(3) That the arbitrator had been guilty of misconduct in that he had asked for and received fees from the plaintiff alone before making the award.

No arguments were urged in regard to other objections taken in the filed statement of objections.

Upon the question of the want of due notice, the learned Judge held that there was a valid notice to the effect that the award had been filed in Court. Counsel for the defendant has not succeeded in persuading us that this finding was incorrect.

Upon the second mentioned objection we were referred to the case of *Fernando v. Fernando* [3]. The judgment there indicates that the reference was bad on its face because it purported to refer matters which were clearly outside the matters in dispute in the action. In the present case however, there is no mention in the order of reference of any specific matter falling outside the scope of the action. The arbitrator was required to determine " all matters in dispute in this action and all other matters in dispute between them ". At the stage when the reference was made,

[1] *(1915) A. I. R. (P. C.) 79.* [2] *(1915) 18 N. L. R. 413.*
[3] *(1951) 53 N. L. R. 486.*

issues had not been framed between the parties nor had answer been filed. The matters in dispute in the action were therefore, all the matters upon which the plaintiff relied in his plaint. Notwithstanding that the arbitrator was authorised to determine other matters in dispute, he was not even requested by the parties to consider any other specific matter. Issues were suggested to him by counsel for both parties and every issue suggested was one which arose upon the averments in the plaint. Accordingly, the only matters ultimately determined by the award were matters arising upon those averments. It is not necessary therefore for the plaintiff even to rely on severability. I note also that, in the case last referred to, the objection that the reference contained extraneous matter was first taken before the arbitrator himself, but was disallowed by him. But in this case, the objection was only taken after the award was filed. The inclusion in the reference " of other matters in dispute " did not have the result that other matters were even mentioned at the hearing before the arbitrator. I think therefore that this part of the second mentioned objection must fail. As to the other part of it, namely that the reference did not specify the particular matters to be determined, I think the objection is purely a technical one. If issues had been framed, and " all the matters in dispute in the action " had been referred, the reference would have been tantamount to a specific recital of the issues as framed. But as no issues were framed, the reference was in my view tantamount to a specific recital of all the matters arising upon the plaintiff's averments. That being so, this part of the second objection must fail.

As to the objection thirdly mentioned, the record indicates that the Judge has found that there was no legal misconduct on the part of the arbitrator, and we were not invited to review the correctness of that finding.

Even assuming that the objections were taken in due time (which the plaintiff did not concede), they have all failed. No ground has been made out for correcting, remitting or setting aside the award. The appeal must therefore be allowed and the order of the learned District Judge set aside.

The case will now go back to the District Court, where, " on a day of which notice shall be given to the parties" (section 692), the Court will proceed to give judgment according to the award. The defendant must pay to the plaintiff the costs of the arbitration proceedings and of the subsequent proceedings in the District Court, as well as the costs of this appeal.

GRATIAEN, J.—

My brother Fernando has admirably distinguished the facts of this particular case from those which came up for consideration in the earlier decisions. He has by this means found a just solution to the problem before us without doing violence to the rules of *stare decisis*, and I agree to the order proposed by him.

The decisions in *Bimbarahami's* case [1] and *Gonsales'* case [2], though pronounced by a Collective Court, do not strictly possess the conclusive

[1] *(1885) 7 S. C. C. 99.* [2] *(1885) 7 S. C. C. 101.*

authority which attaches to decisions of a Bench constituted under section 51 of the present Courts Ordinance. Nevertheless, they have consistently been followed ever since, sometimes without enthusiasm, in the later rulings referred to by my brother. It is therefore too late for a Bench of two judges to revive the controversy at this stage. At the same time, if they be construed too narrowly, we would fall into error by forgetting the true principle which underlies the provisions of section 676.

What then is the *ratio decidendi* which we must acknowledge as binding on us ? The answer is to be found in the observations made 40 years ago by Wood Renton C.J., with whom de Sampayo J. agreed, in *Menike v. Ukku Amma* [1]. The learned Chief Justice there pointed out that " the main object " of section 676 was to ensure " that there is on the face of the record affirmative evidence of the assent of both sides to a proposed reference to arbitration ". As Wood Renton C.J. had, on a previous occasion, considered himself bound by the ruling in *Gonsales'* case [2], his later clarification is of special value.

The principle of the thing is perfectly clear. Once a dispute is brought before a Court of Justice, the legal rights of the parties must generally be determined by the regular tribunal vested with jurisdiction in the matter. An exception arises when the parties, having themselves mutually agreed that the dispute should be referred to arbitration, invoke the jurisdiction of the Court to implement that agreement. Section 676 gives recognition to this fundamental principle and also prescribes the procedure which ought to be followed in order to give effect to it. Here, as in England, it is the free consent of the parties which is the foundation of the Court's jurisdiction to refer any dispute in a pending action to the decision of an extra-judicial tribunal (which acts, however, under the general supervision of the regular Court). But in Ceylon, a futher precaution is taken to eliminate the temptation to repudiate agreements which are not evidenced in writing. Accordingly, section 676 (2) requires that there should be incontrovertible proof on the face of the record (1) that all the parties (or their proctors specially authorised in the matter) had agreed that the reference to arbitration should be made, and (2) that they had formally requested the Court to implement their agreement. Provided that the consent of the parties to divert the proceedings to an arbitrator has been conclusively established, and provided also that the underlying principle of section 676 (2) has been substantially complied with, it is idle thereafter to challenge the authority of the Court to vest the arbitrator with jurisdiction over the dispute. An order for reference is not reduced to the status of a " nullity " merely because of some immaterial omission to cross a " t " or dot an " i " in the formal application.

In *Menike's* case [1] it was held that if an oral agreement communicated to the Court by the consenting parties was reduced to writing (in the form of a journal entry) by the Judge and signed by the parties in his presence, there was sufficient compliance with section 676 (2). As my brother Fernando observes, this is a much stronger case. The formal agreement dated 10th December, 1949, signed by both parties, was tendered to the Court by their proctors who had been specially authorised in the same document to make the application on their behalf under section 676.

[1] *(1915) 18 N. L. R. 113.* [2] *(1885) 7 S. C. C. 101.*

The Court treated the document so tendered as "an applicaton in writing" within the meaning of section 676 (2), and both parties adopted that ruling as correct. It would therefore be monstrous to uphold the objection that (after both parties had submitted to the arbitrator's jurisdiction at every stage of the proceedings) the document was, for some hyper-technical reason, defective from a purist's point of view.

Appeal allowed.