

1981*Present : Rose C.J. and Gratiaen J.*

PAUL FERNANDO, Appellant, and EUGENE FERNANDO *et al.*,
Respondents

S. C. 162—D. C. (Inty.) Kalutara, 26,967

Arbitration—Scope of—Relation to pleadings.

An agreement to arbitration should not include matters which are outside the scope of the pleadings in the action.

¹ *5th ed., Vol. IV., p. 105.*

APPEAL from an order of the District Court, Kalutara.

The 1st plaintiff sued the defendants for declaration of title to 1/5 share of a land described in the schedule to the plain and for damages. The plaintiff also instituted a similar action in Case No. 27,119 against one Emmanuel Fernando for declaration of title in respect of 1/5 share of the lands described in the plaint in that action. The defendants in both actions were brothers and the property in question had been inherited from their father D. Peduru Fernando who left other heirs too. Before the trial, but after the issues were framed, the parties agreed that (1) the possession of the land belonging to the estate of D. Peduru Fernando and (2) the exchange of the lands possessed by either of the parties be referred to the arbitration of Mr. Advocate E. S. Fernando. At the subsequent arbitration objection was taken to the continuance of the proceedings on the ground that the reference was *ultra vires* and the objection was urged afresh before the District Judge when it was sought to make the award an order of Court. The objection was overruled by the District Judge. The defendants appealed.

H. W. Jayewardene, for the defendant appellant.—The award is *ultra vires*. The award deals with 44 lands belonging to the inheritance whereas the action involved only 14 lands. A reference to arbitration must be confined to matters coming within the scope of the action and this is to be determined by a reference to the plaint. *Peddapalayam Badachari v. Peddapalayam Muniyachari*¹; *Bawa Gangaram v. Keshavdas Dewandas and others*²; *Taranath Chowdry v. Manick Chunder Doss*³.

J. A. L. Cooray, with *J. R. M. Perera*, for the plaintiffs respondents.—The reference to arbitration is valid. Although the plaint deals with 14 lands, the basis of the plaintiff's claim is his share of the whole paternal inheritance, and that is the "matter in difference" between the parties. See *Loku Banda v. Piyadassa Unnanse*⁴.

Even if the reference is bad, the defendant is estopped from disputing its validity, having signed the application for reference and taken part in the proceedings—*Woodroffe and Ameer Ali, Law of Evidence, 9th Edition, p. 859.*

December 3, 1951. ROSE C.J.—

In this matter it is with regret that I have come to the conclusion that the agreement to arbitrate purported to be come to by the parties on the 4th of May, 1949, is bad in that it included matters which were outside the scope of the pleadings in the action. That being so, the only order that can be made is that the appeal be allowed and the matter remitted to the District Court to be determined according to law. Owing to the attitude adopted by the defendant-appellant in this case I consider that the fair order is that he should pay the costs of the arbitration proceedings. The respondents must pay the costs of this appeal, but the costs of the proceedings before the District Judge will be in the cause.

GRATIAEN, J.—I agree.

Appeal allowed.

¹ *A. I. R. (1921) Madras 709.*

² *A. I. R. (1937) Sind 174.*

³ *14 Sutherland's Weekly Reporter 469.*

⁴ *(1917) 4 C. W. R. 155.*