1953 *Present :* **Pulle J. and Weerasooriya J.**

NAGALINGAM, Appellant, *and* LEDCHUMIPILLAI, Respondent

S. C. 77—D. C. (Inty.) Anuradhapura, 3,313

Appeal—Dismissal for want of appearance—Effect of such dismissal—Res judicata—*Extension of principle to points decided previously in same suit—Arbitration—Objections to validity of award—Same objection cannot be raised twice—Civil Procedure Code, ss. 687, 692 (1).*

When an appeal is dismissed, there being no appearance for the appellant, the dismissal of the appeal must be regarded as involving a rejection of all the arguments which might have been raised at the hearing of the appeal. The absent party must bear the consequence of his own *laches.*

A decision in a civil suit or other proceeding in regard to any point operates as a bar to a fresh decision on that point in all subsequent stages of that suit or proceeding. In arbitration proceedings, therefore, the requirement in section 692 (1) of the Civil Procedure Code that the parties should be notified of the day on which judgment will be given does not entitle a party to raise on the day fixed for judgment an objection to an award which he had previously raised and was the subject of an adjudication which is binding on him.

APPEAL from a judgment of the District Court, Anuradhapura.

C. E. S. Perera, Q.C., with *C. Shanmuganayagam,* for the defendant appellant.

S. J. Kadirgamar, with *S. T. K. Mahadeva,* for the plaintiff respondent.

Cur. adv. vult.

November 30, 1953. WEERASOORIYA J.—

During the pendency of this action, which was brought by the plaintiff-respondent against the defendant-appellant, the matters in dispute were by consent of the parties referred to arbitration, purportedly under

the provisions of sections 676–678 of the Civil Procedure Code. The award of the arbitrators holding that the plaintiff-respondent was entitled to a sum representing the major portion of the amount claimed by her in the plaint was in due course filed in Court and notice thereof was given to the defendant-appellant on the 18th April, 1952 ; and on the 8th May, 1952, he filed an application containing certain objections to the award and praying *inter alia* that the award be set aside and that the case be fixed for trial before the Court. The inquiry into this application was held on the 12th June, 1952, when Counsel for the plaintiff-respondent took the objection that the application to set aside the award had not been made within the time specified in s. 687 of the Civil Procedure Code. Counsel for the defendant appellant, while not contending that the application had been made within time, raised an entirely new objection on the ground that the award was a nullity in that " the reference to arbitration is illegal " and he also moved to amend the objections already filed by adding this new ground. Mr. Perera, who appeared for the defendant-appellant at the hearing of the present appeal, amplified this new ground of objection by stating that the application to Court for an order of reference to arbitration was not in writing, as required by s. 676 (2) of the Civil Procedure Code, and that the consequent arbitration proceedings as well as the award were void and of no effect in law, and he submitted further that an objection to an award on the ground that it was void need not be taken within the time specified in s. 687 of the Civil Procedure Code.

The learned District Judge refused to entertain the new ground of objection or to grant leave to amend the objections by the addition of that ground, and he dismissed the defendant-appellant's application to set aside the award, holding that the application had not been made within time.

The legal position that resulted from the dismissal of this application was that there was before Court an award according to which the Court was required under s. 692 (1) of the Civil Procedure Code to give judgment after notice to the parties. If the defendant-appellant wished to be relieved from the legal consequences of the award the only remedy he had, it seems to me, was to appeal against the learned District Judge's order. That the defendant appellant's legal advisers correctly apprehended the legal position is seen from the fact that an appeal was duly filed against the order of the learned District Judge. Para 9 (*b*) of the grounds in the petition of appeal specifically sets out that the application for reference to arbitration was not in writing as required by s. 676 of the Civil Procedure Code, that the reference was therefore illegal and that the award was " illegal and void and therefore should be set aside ".

This appeal duly came up for hearing before this Court and was dismissed with costs, there being no appearance for the defendant-appellant. The defendant-appellant cannot, however, be allowed to take advantage of his absence on that occasion in order to re-open any question which might have been raised and determined on that appeal. To adopt (with necessary modifications) the observations of the Judicial Committee of the

Privy Council in the case of *Juggodumba Dossee v. Tarakaut Bannerjee* [1] in considering the effect of a decision in appeal before the Committee which was heard *ex-parte* (the respondents not being represented at the appeal) the dismissal of the plaintiff-appellant's appeal must stand as if all the arguments which he, if present, could have raised upon the case had been addressed to Court. The absent party must bear the consequence of his own *laches*.

The dismissal of the defendant-appellant's appeal must, therefore, be regarded as involving a rejection of his contention that the award is void, either on the argument set out in paragraph 9 (*b*) of his petition in the first appeal or on any other argument which might have been raised at the hearing of that appeal.

One would have thought that with the dismissal of that appeal no further impediment would be placed in the way of the plaintiff-respondent obtaining the benefit of the award in her favour. But the subsequent events proved that the defendant-appellant had not yet exhausted his resourcefulness. The receipt by him of a notice from Court of the date on which judgment was to be entered according to the award served as a fresh incentive for the making of another application to have the award declared null and void and that the trial be proceeded with on the issues that had been framed before the reference to arbitration was made. Two grounds were raised in support of this application, the second of which was, however, not pressed by his counsel at the hearing of the present appeal. The first ground was the same as set out in para 9 (*b*) of the petition in the appeal which was dismissed. This application was refused by the learned District Judge and the present appeal has been taken against that order.

It is clear that what the defendant-appellant seeks to establish in the present appeal is the same contention which he sought to establish at the hearing of his original application, namely, that there is no valid award before the Court. Hukum Chand in his treatise on Res Judicata [2] refers to a principle analagous to that of *res judicata* under which a decision in a civil suit or other proceeding in regard to any point is held to be a bar to a fresh decision on that point in all subsequent stages of that suit or proceeding. In the case of *Ram Kirpal Shukul v. Rup Kuari* [3], the question arose whether a previous decision of a Judge in the course of execution proceedings that the decree sought to be executed, according to its true construction, awarded future mesne profits (no appeal having been taken against that decision by the judgment debtor) could in a later stage of the same proceedings be set aside at the instance of the judgment debtor and future mesne profits disallowed. The Judge before whom this question was raised considered himself bound by the previous decision and he disallowed the judgment-debtor's objection in respect of mesne profits. The High Court, however, reversed this order and held that the execution

[1] *(1880) VI Calcutta Law Reports 121 at 127.*
[2] *Hukum Chand on Res Judicata (1894 Ed.) p. 759.*
[3] *(1883–4) I. L. R. 11 Indian Appeals 37.*

of the decree for mesne profits should be disallowed. On an appeal filed against the order of the High Court, the Judicial Committee of the Privy Council held that the High Court had erred in deciding that the decree did not award mesne profits because the Judge who had construed the terms of the decree as awarding mesne profits had jurisdiction to decide that question and his decision, whether right or wrong, not having been appealed from, was final and binding on the parties and those claiming under them. " If " stated Their Lordships " the subordinate Judges and the Judge were bound by the order of Mr. Probyn in proceedings between the same parties on the same judgment, the High Court were bound by it, and so also are Their Lordships in adjudicating between the same parties."

In the case of *Bani Ram et al. v. Nanhu Mal* [1] it was held by the Judicial Committee of the Privy Council that where a Judge had decided in the course of execution proceedings that a decree according to its true construction provided for payment of interest during a certain period, and such decision had not been appealed from, it was not open to the High Court at a later stage of the execution proceedings to set aside that order and disallow interest for part of that period.

In my opinion the order of the learned District Judge refusing the first application made by the defendant-appellant that the award be set aside, and the dismissal of the appeal filed against that order, preclude the defendant-appellant from again raising the question of the validity of the award. Mr. Perera for the defendant-appellant referred us to the case of *Menichamy v. Muniweera et al.*[2] as authority for his submission that it is open to his client, in the present appeal, to attack the award on the ground advanced by him notwithstanding that, as conceded by him, the same ground formed the basis of the previous appeal. In that case the widow of a deceased defendant in a partition action made an application to this Court by way of *restitutio in integrum* to have set aside the interlocutory decree which had been entered after the death of the deceased defendant and before the substitution of his widow and children as parties in the case. Notwithstanding that an appeal had been filed by some of the parties against the interlocutory decree and the interlocutory decree had been affirmed in appeal, this Court granted the relief claimed and set aside the interlocutory decree and remitted the case to the District Court for steps to be taken to have the heirs of the deceased defendant substituted as parties in his place and for an adjudication on their title to the land sought to be partitioned. It is to be noted, however, that in that case the heirs of the deceased defendant were not bound by the interlocutory decree, and no final decree had been entered which would have been conclusive against all persons including the heirs of the deceased defendant. I do not think that the defendant-appellant is helped very much by the decision in that case.

The appeal is accordingly dismissed with costs. The case is remitted to the lower Court so that judgment may be pronounced according to the

[1] *(1883–4) I. L. R. 11 Indian Appeals 181.*
[2] *(1950) 52 N. L. R. 409.*

award on a day of which notice has been given to the parties in terms of s. 692 (1) of the Civil Procedure Code. While I do not wish to be understood as expressing the view that in no case would it be open to a party to raise on the day fixed for the giving of judgment an objection to an award which had not previously been taken within the time specified in s. 687 of the Civil Procedure Code, I would observe that the requirement in s. 692 (1) that the parties should be notified of the day on which judgment will be given is in accordance with the general rule that judgment should be pronounced in the presence of the parties or their Proctors, or on a day of which they have been given notice—vide s. 184 (1) of the Civil Procedure Code ; and that requirement does not in any way imply that a party is free to raise on the day fixed for judgment an objection to an award which he had previously raised and was the subject of an adjudication which is binding on him.

PULLE J.—I agree.

Appeal dismissed.