ORIGINAL CIVIL.

Before Rankin J.

1921

Nov. 24.

AMAR CHAND CHAMARIA

v.

BANWARI LALL RAKSHIT AND OTHERS.*

Arbitration—Award—Civil Procedure Code (Act V of 1908) s. 89, O. XXIII, r. 3, Schedule II., paras. 20, 21—Indian Arbitration (IX of 1899)—Reference to arbitration in pending suit without intervention of Court.

Where in a pending suit the parties go to private arbitration without the consent of the Court, the award cannot be enforced either under Order XXIII, r. 3. of the Code or under the provisions of the Indian Arbitration Act.

Dekari Tea Co., Ld. v. *India General Steam Navigation Co., Ld.* (1) referred to.

If the Civil Procedure Code is looked into as a scheme for dealing with arbitrations in the course of litigation, it intends these to be under the strict conditions and stipulations of the second schedule and under the supervision of the Court. The Indian Arbitration Act does not apply to arbitrations in the course of litigation.

Shavakshaw D. Davar v. *Tyab Haji Ayub* (2) followed.

Manilal Motilal v. *Gokaldas Rowji* (3) dissented from.

THIS was an application on behalf of the plaintiff to have filed of record in this suit a certain award, dated 1st day of August 1921 made under the following circumstances. On the 29th day of April 1920 the defendants were sued for the recovery of arrears of rent, for damages, for mesne profits and for vacant possession of premises No. 2-7, Darpanarain Tagore Street. The parties agreed to refer the dispute to the

* Original Civil Suit No. 820 of 1920.

(1) (1920) 25 C. W. N. 127. (2) (1916) I. L. R. 40 Bom. 386.
(3) (1920) I. L. R. 45 Bom. 245.

arbitration of two private gentlemen by a written agreement, dated the 14th day of June 1921. The agreement which was drafted and approved by the attorneys of the respective parties was as follows:

"Suit 820 of 1920.

We, the undersigned parties to the above suit hereby agree to refer all disputes between ourselves in the above suit to the arbitration of . . . We do hereby agree to abide by the decision of the said arbitrators apppointed by ourselves. The arbitrators, if necessary, shall proceed with the arbitration according to the procedure laid down by the Indian Arbitration Act and the award must be made within one month from date thereof."

The reference to arbitration was made without the intervention of the Court. After time had been extended by the consent of the parties, the arbitrators made their award on the 1st day of August 1921.

One of the defendants stated in his affidavit that he alone signed the agreement and had no time to consult the others or get their consent. He submitted that the award was not valid and not in accordance with the provisions of law.

Mr. P. N. Chatterjee, for the plaintiffs. The applicant was entitled to come under Order XXIII, r. 3 of the Civil Procedure Code to record an adjustment of the suit. Firstly, such an application lay inasmuch as Sir Norman McLeod in *Manilal Motilal* v. *Gokal Das Rowji* (1) had gone behind his earlier decision in *Shavakshaw D. Davar* v. *Tyab Haji Ayub* (2) which was a reason for your lordship's view as to the inapplicability of Order XXIII, r. 3. as seen in your judgment in *Dekari Tea Co. Ltd.* v. *India General Steam Navigtion Co. Ltd.* (3). Secondly, all the defendants were represented by an attorney. Neither the Arbitration Act nor the second schedule required

(1) (1920) I. L. R. 45 Bom. 245. (2) (1916) I. L. R 40 Bom. 386.
(3) (1920) 25 C. W. N. 127.

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the submission to be signed but only that it should be in writing and therefore there was no want of consent on the part of the defendants.

Mr. B. K. Ghosh, for the defendants. The application should be dismissed. First, the notice was bad. Secondly, assuming it was for an order under Order XXIII r. 3, your Lordship's decision in the case in *Dekari Tea Co. Ld.* v. *India General Steam Navigation Co., Ld.* (1) was conclusive. Such applications can only be made under the second schedule of the Code. Further, it was an attempt to oust the jurisdiction of the Court. The consent of one defendant was not enough.

RANKIN J. This is an application on behalf of the plaintiffs in the suit 820 of 1920 to have filed of record in this suit a certain award dated the 1st day of August 1921.

There are three defendants who are sued by name as carrying on a certain kind of business at No. 27, Darpanarain Tagore Street in Calcutta.

The applicants' case is that there was an informal agreement of reference to arbitration of all the disputes in this suit made between the parties in or about June 1921. He says also that the arbitrators have made their award, which would appear to be dated 1st August 1921.

The original drafting of the notice of motion would lead one to suppose that the provisions of Order XXIII, r. 3 of the Civil Procedure Code were not in the mind of the draftsman. However that may be learned counsel for the applicant rests his case entirely upon Order XXIII, r. 3. He asks me to record the award as being an adjustment by lawful agreement or compromise within the meaning of that rule. Now I

(1) (1920) 25 C. W. N. 127.

have already decided in the case reported is 25 Weekly Notes 127, *Dekari Tea Coy.* v. *I G. S. N. Coy.* that in such a case the award cannot be enforced under order XXIII, r. 3, and I propose in this case to follow that decision, among other reasons, for the reason that I believe it to be right. In that case I expressed the opinion that the decision of Macleod J. in *Shavakshaw D. Davar* v. *Tayab Haji Ayub* (1) was correct in so far as he construed the Code and in particular section 89 of the Code, as preventing any attempt to admit any informal arbitrations or awards under the provisions of Order XXIII, r. 3.

In the case cited, however, the learned Judge came to a further conclusion, namely, that the rules under the second schedule (Rules 20 and 21) of the Code, could be applied in such a case. So far as that matter is concerned, I did not agree with that view at that time, and the learned Judge, now Chief Justice of Bombay, has in a recent case [*Manilal Motilal* v. *Gokal Das Rowji* (2)] come to the conclusion that these rules of the second schedule cannot be employed for that purpose.

It appears fairly certain that they relate solely to a case where the reference to arbitration is not a reference in the course of a suit.

Mr. Chatterjee very properly relies on the authority of the case last mentioned, because in that case the Court went back upon the previous decision that Order XXIII, r. 3 could not in such a case as this be employed. The Court held the previous decision to that effect to be erroneous, holding that on ordinary principles of the law of contract the award was an adjustment and came within the meaning of Order XXIII, r. 3. It was considered further that under that Order, either by directing an issue or otherwise

(1) (1916) I. L. R. 40 Bom 386. (2) (1920) I. L. R. 45 Bom. 245.

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as might be necessary, the validity of a disputed award might be gone into and the award enforced, if valid. It was further held that this might be done, if necessary in a separate suit. I desire to adhere to my opinion in the *Dekari Tea Co.'s Case* (1) and to say that in my judgment, the judgment of Mr. Justice Kajiji in 45 Bombay is in substance right. Apart altogether from the terms of section 89 of the Civil Procedure Code, with regard to which the Appeal Court in the Bombay case seems to have felt great difficulty, it is, I think, impossible to look at the scheme of the Code for dealing with arbitrations in the course of suits, without seeing that the Legislature intended to make sure that, as said by the Privy Council in a case [*Ghulam Khan* v. *Muhammad Hassan* (2)] frequently referred to on this subject "where parties to a litigation desire to refer to arbitration any matter in difference between them in a suit, in that case all proceedings from first to last are under the supervision of the Court." It is quite true that this was said of what is now the second schedule. But it is difficult to see what point there is in the second schedule saying or meaning that arbitration must be done in a particular way if, according to some other law or principle, it may still be done in another way. In any case the logical gap, if there be any, is stopped up by section 89. Without adverting any further to the terms of section 89, I desire to point out that if a submission to arbitration of matters in difference in a suit is to take place, there is no provision for it other than the provisions in the second schedule. All parties interested must consent, and their consent must be evidenced in a certain way. The Court from the first is to limit the time within which the award

(1) (1920) 25 C. W. N. 127. (2) (1901) I. L. R. 29 Calc. 167, 182.

is to be made, and it has certain powers of interference after the award is made. It may in certain cases correct an award, or set aside an award. It may set aside the proceedings before award in certain cases and recall the matter into Court. It may also remit the matter to the arbitrators in certain cases. That is the scheme of the Code applicable to cases where parties to a suit desire arbitration. It is now said that by virtue of Order XXIII, r. 3 which does not specially deal with arbitrations or awards at all it is open to the parties to put aside all these careful provisions and to have an award behind the back of the Court and without the order of the Court. There may always be questions for litigation as to the validity of an award. Under Order XXIII, r. 3, everything is at large at common law. There is no power on the part of the Court to prevent submission as between some parties where all the parties interested are not agreed. There is no power to prevent or control delay; no power to remit such an award; no power to correct such an award. The only issue to be tried is, is it a valid award? If valid, decree must follow, if not, the whole thing comes to an end and the suit must proceed. That never was the intention of the Civil Procedure Code; and indeed it ruins the whole scheme. I do not rely merely on the words of section 89. It seems to me if the Code is looked into as a scheme for dealing with a difficult and highly important matter, viz., arbitrations in the course of litigation—it intends these to be under the strict conditions and stipulations of the second Schedule and under the supervision of the Court. The Indian Arbitration Act does not apply to arbitrations in the course of litigation. There are decisions of this Court in which arbitrators, acting under the Indian Arbitration Act without leave from the Court after the matter has

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been put in suit, have been held to be doing that which is wrong and outside their power. Apart from this general principle, which may be quite inapplicable and as a matter of interpretation of the Code, I cannot agree that a submission, neither under the second schedule nor under the Indian Arbitration Act, may be enforced in the suit under the general law of contract Even if an award comes fairly within the notion of "adjustment by consent," it is a very special kind of adjustment by consent, and, if section 89 requires the species to comply with the second schedule, the general language of Order XXIII, r. 3, is cut down thereby as regards that species. Informal and uncontrolled arbitrations between parties to a suit, leading up to litigation upon the bare issue as to whether there is in fact a valid adjustment, are the very things from which the second schedule was meant to deliver litigants. The contention of the applicant here is no one to which any Court can lightly commit itself, knowing, as every Court ought to infer, that the careful provisions of the Code in the second schedule are no more than was thought absolutely necessary for the protection of ignorant litigants in many of the Courts in India. My opinion is, although there was prior to 1908 some authority in Bombay to the contrary, that under the Code, arbitration in suits is a specific subject matter, and that where the Code means to deal with arbitrations and awards, it says so.

On this I observe that Mr. Justice Fawcett in the case already cited says : (45 Bom. 273) "No doubt the words "other law for the time being in force" are inappropriate for covering a provision of the Code itself such as Order XXIII, r. 3. But the Legislature in enacting section 89 probably had not that particular rule in their mind, and had no intention of affecting it one way or the other."

That seems to me to take a point which tells against the applicability of Order XXIII, r. 3. I should put it that when the Legislature in section 89 says "all references to arbitration, whether by order in suit or otherwise, and all proceedings thereunder," it probably had not in mind anything so remote in character as adjustments or settlements of suits. In any case, it dealt with a specific subject matter in a specific way and other principles are only to be applied to other things.

In my opinion this motion being brought under Order XXIII, r. 3, is bad.

Mr. Ghose for the defendant has taken other points, firstly, the point that in this case only one of the three defendants signed the submission, and that there are matters dealt with by the award which do not arise in this suit. There is a case also on the part of the defendant of misconduct against the arbitrators. As regards none of these matters do I say anything. I dismiss the application with costs.

S. K. R.

Attorney for the plaintiffs: *M. N. Mitra.*
Attorney for the defendants: *G. H. Mukerjee.*