

CIVIL REVISION.

Befors Cunliffe and Henderson J.J.

RAJANI KANTA KARATI

v.

PANCHANAN KARATI.*

Arbitration—Appointment of a new arbitrator, when can be made—Code of Civil Procedure (Act V of 1908), Sch. II, paras. 5, 17, 18, 19, 20.

An agreement to have a dispute settled by one or more individuals is one thing, and an agreement to go to arbitration rather than to litigation in the Court is another.

Where, by an agreement, parties decide to settle any dispute by the arbitration of ascertained persons without the intervention of the Court, in a proceeding following the filing of the award under para. 20 of Sch. II to the Code of Civil Procedure, the Court has no power under para. 5 to direct the appointment of a new arbitrator in the place of one declining to act.

Narayanappa v. Ramchandrappa (1) followed.

Fazal Ilahi v. Prag Narain (2) dissented from.

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The two petitioners in this case and the opposite party were three brothers. By an agreement, dated September 28, 1933, they referred to arbitration of three named gentlemen their dispute with regard to the partition of their joint properties. Before the award could be made, the two petitioners filed a suit for partition before the Court after serving on the opposite party a pleader's notice that the arbitration should not be proceeded with. The arbitrators, however, proceeded with the arbitration and made an award. The opposite party filed it in Court under para. 20 of Sch. II of the Code of Civil Procedure and prayed for and obtained from the Court an

*Civil Revision, No. 923 of 1936, against the order of Dhaerendra Nath Guha, First Subordinate Judge at Howrah, dated June 9, 1936.

(1) (1930) I. L. R. 54 Mad. 469.

(2) (1922) I. L. R. 44 All. 523.

order for stay of the partition suit. On November 21, 1933, the Court by its order held that the award was invalid. The arbitrators were left free to resume the proceedings on the basis of the original agreement. One of the three arbitrators, however, declined to act. The Court thereupon directed the appointment of a new arbitrator in his place. The present Rule was obtained against that order.

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*Heera Lal Chakrabarti and Rabeendra Nath
Bhattacharjya* for the petitioners.

*Panchanan Ghosh and Bhupendra Narayan
Bera* for the opposite party.

Cur. adv. vult.

CUNLIFFE J. This Rule was granted in the following circumstances : The parties were three brothers, who were in dispute with regard to certain land, and by way of endeavouring to compose their differences they decided to submit them to a private arbitration. This was, accordingly, done by means of an agreement, which was drawn up. But, subsequently, further disagreement arose, which resulted in the petitioners before the Court now filing a suit for partition. The other side, however, and the arbitrators went on with the arbitration and the arbitrators made an award which was filed under para. 20 of Sch. II to the Code of Civil Procedure.

For some reason or another this award was not given effect to, but there was an order issued by the Court for a stay of the partition suit under s. 18 of the second schedule. The arbitrators were ordered by the Court to proceed afresh and then one of them declined to act. Whereupon cross applications came before the Court, one on the part of the respondent to this petition asking the Court to appoint an arbitrator in place of the gentleman who had refused to act, and the other application on the part of the

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petitioners here to have the stay order which had been issued by the Court in relation to the partition suit set aside and to allow the suit to continue.

The learned Judge preferred the first application. He ordered a new arbitrator to be appointed, and it is on the question as to whether that order on the part of the learned Judge was legal that we granted the Rule. The learned Judge was, if I understood the position rightly, making use, when he took this course, of the provisions contained in para. 5 of the second schedule to the Code, and it falls to be determined whether it was possible for him to put this paragraph into operation in the circumstances of the case. The second schedule to the Civil Procedure Code is of course too well known for me to dilate upon its objects with great particularity ; but I may say that it seems to me primarily to be intended to deal with that type of arbitration which comes into being after a suit had been filed, and when the parties come to the Court to ask its sanction for them to substitute arbitration proceedings for their original intention of having the Court to decide their dispute. But in the latter part of the schedule there are sections which refer back to the earlier or main sections of the schedule and make them operative in certain circumstances. The key paragraph in this regard is para. 19, and that paragraph is in the following terms :—

The foregoing provisions, so far as they are consistent with any agreement filed under para. 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.

Of the important words in para. 19 are undoubtedly the words :—“So far as they are consistent with “any agreement filed under para. 17.” To test whether the particular circumstances in this case warrant the action of the learned Judge in appointing a fresh arbitrator, it is necessary to consult the actual agreement come to between the parties. This agreement, the translation of which is before me,

is a very short one and it recites that there is this dispute about land and that the three brothers having come to an agreement through the intervention of several (5) gentlemen, that—

our rights and shares in respect of the aforesaid properties, etc., might be determined and partitioned by metes and bounds by taking evidence from us, we, this day, appoint you gentlemen as arbitrators and promise hereby that the decision arrived at by you in respect of our individual rights and shares after partition by metes and bounds, or any judgment passed thereon relating to the aforesaid properties, etc., will be considered by us as the decision passed by the Hon'ble High Court, and against that we also will not raise any objection. If such an objection is raised, that will be rejected.

The language, as can be seen, is not very precise, but it seems to me to be, what I may describe, as somewhat archaic in form and precatory, and it indicates to me that it was the intention of these three brothers, at the time the deed of agreement was entered upon, that their differences should be settled by three ascertained persons and no one else. If I am right in my reading of the agreement it also seems to me that the language of para. 19 is not applicable to this case because the expression "so far as they are consistent with any agreement "filed under para. 17" is not fulfilled.

It is evident that a number of cases were cited to the learned Subordinate Judge on this point, one of which is a decision of the Allahabad High Court which is against the view that I hold. That is the case of *Fazal Ilahi v. Prag Narain* (1), but with all due respect to the learned Judges who decided that case and who gave a very short judgment therein, I can see no arguable reason which they adduced to support the view that para. 5 of the Sch. II can be used in almost any circumstances which seem fit to the Judge dealing with the matter under dispute. To my mind a far more valuable decision which was cited to the learned Subordinate Judge was a decision of the Madras High Court in the case of *Narayanappa v. Ramchandrappa* (2). There most of the cases

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dealing with this question are set out and discussed. It is noted by the learned Judges that there is no decision of the Calcutta High Court on the point, but they came to the conclusion that it is primarily the original intention of the parties which should be cherished by the Court and that another arbitrator in circumstances very similar to the circumstances of the case before us now should not be forced upon any of the parties against their wish.

No doubt, all questions of arbitration procedure are highly technical. Schedule II of the Civil Procedure Code which sets out a compendium of rules of procedure to control arbitration is not a very easy part of the Code to interpret. But the old principle that where it is at all possible, if parties desire arbitration, they should be as free as possible under the guidance of the Court to have their disputes settled by arbitrators they chose themselves is, I think, to be respected.

For these reasons, this Rule must be made absolute. The order of the learned Subordinate Judge with regard to the appointment of a new arbitrator will be set aside, and it will be further directed that he should dispose of the case in accordance with law, namely, the partition suit which is in his file.

The petitioners are entitled to the costs of this Rule, the hearing fee is assessed at three gold mohurs.

HENDERSON J. I agree that this Rule must be made absolute. An agreement to have a dispute settled by one or more individuals is one thing; an agreement to go to arbitration rather than to litigate in the Courts is quite another. It seems to me that the learned Judges, who decided the case upon which the learned Subordinate Judge relied, failed to observe this great distinction. I respectfully agree with the decision of the Madras High Court on the point.

In the course of his argument, Mr. Ghosh contended that, inasmuch as the agreement is silent with regard

to the replacement of any of the arbitrators, para. 19 automatically comes into play. It seems to me that this is to beg the question. The agreement was that the dispute should be decided by three named gentlemen. There was, therefore, nothing more to be said, and we cannot infer from that that in the event of one of the arbitrators either being unable or unwilling to act, the Court should appoint another in his place.

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