

## ORIGINAL CIVIL.

Before Mr. Justice Wilson.

1879  
Dec. 3.

KOOMUD CHUNDER DASS v. CHUNDER KANT MOOKERJEE.

*Pleading—Agreement to refer to Arbitration—Refusal to refer—Plea in Bar—Specific Relief Act (I of 1877), s. 21.*

A contract to sell goods contained the following clause :—“ That any dispute arising hereafter shall be settled by the selling broker, whose decision shall be final.” In a suit to recover damages for breach of the contract, the defendant pleaded, that the dispute should have been referred to the decision of the selling broker, and that the suit was, therefore, barred under s. 21 of the Specific Relief Act, the latter clause of which provides that “ save as provided by the Code of Civil Procedure no contract to refer a controversy to arbitration shall be specifically enforced; but if any person, who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.”

*Hold*, that before that section could be relied upon, it must be shown that the plaintiff had refused to refer to arbitration; and that the filing of the plaint was not such a refusal.

THIS was a suit to recover from the defendant the sum of Rs. 3,824-5-3, as damages sustained by the plaintiff through the defendant's breach of a contract to take delivery of 5,000 maunds of loose Madarepore Dowrah jute sold to him by the plaintiff. The contract contained the following clause :—“ That any dispute arising hereafter shall be settled by the selling broker, whose decision shall be final.”

The plaintiff alleged that he was ready and willing to fulfil his part of the contract, and declared that the defendant had wrongfully refused to take delivery, and was, therefore, liable for the loss which he (the plaintiff) had sustained by re-selling the goods after notice to the defendant.

The defendant contended that the plaintiff was barred from bringing his suit under s. 21 of the Specific Relief Act, I of 1877, the concluding paragraph of which is as follows :—“ And save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be speci-

“fically enforced; but if any person, who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit;” and that the plaintiff was bound by the proviso in the contract to refer the matter in difference, which was a dispute arising after the making of the contract, to the final decision of the selling broker.

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Mr. *Branson* and Mr. *Hill* for the plaintiff.

Mr. *Branson*.—The provisions of the latter clause of s. 21 of the Specific Relief Act do not operate as a bar to this suit. The defendant does not allege, or suggest, that he called upon the plaintiff to refer the dispute to the final decision of the selling broker, or that the plaintiff has, having been so called upon, refused to carry out his part of the contract. The words “and has refused to perform it,” in s. 21 are material. They were inserted in consequence of the decision in the case of *Koegler v. The Coringa Oil Co.* (1), where the plaintiff having called upon the defendant to refer the matter in dispute to arbitration, the defendant refused to do so; and when the plaintiff sued, the defendant pleaded the provisions of s. 28 of the Indian Contract Act in bar of the suit.

Mr. *Phillips* and Mr. *Bonnerjee* for the defendant.

Mr. *Phillips*.—This is a good plea in bar. The plaintiff has, by instituting this suit, refused to perform the contract: a distinct call from the defendant to the plaintiff requiring him to refer the dispute to arbitration was not necessary, but even if it was, the written statement of the defendant contains such a call. [WILSON, J.—But the plaintiff in his letters told the defendant that he was going to sell the goods: surely if they wished him to go to arbitration, they should then have called upon him to do so?] I submit that such a call before suit is not necessary, otherwise when a defendant under such a contract as the present one refuses to take

(1) I. L. R., 1 Calc., 42.

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delivery, the plaintiff may, by at once rushing into Court, prevent the defendant from calling upon him before suit to go to arbitration.

WILSON, J.—I will not trouble you, Mr. Branson. I think Mr. Phillips is right in saying that this is a contract to refer to arbitration, and that he is right in saying that the present suit is brought in respect of the subject-matter which the parties had agreed to refer to arbitration. But I think that before s. 21 of the Specific Relief Act can be relied upon, it must be shown that the plaintiff had refused to refer to arbitration. I do not think that the filing of the plaint is such a refusal. I, therefore, hold that nothing has been shown under the section to bar the present suit.

Attorney for the plaintiff: *A. T. Dhur.*

Attorney for the defendant: *C. D. Linton.*

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*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.*

JOGENDRONUNDINI DOSSEE *v.* HURRY DOSS GHOSE.

1879  
*July 18.*

*Restitution of Conjugal Rights—Hindu Law—Cruelty—Condonation—Maintenance.*

A suit for restitution of conjugal rights may be maintained by a Hindu: but *quere*, if the same state of circumstances which would justify such a suit, or which would be an answer to such a suit in the case of a European, would be equally so in the case of a Hindu?

Where cruelty on the part of the husband has been condoned by the wife, a much smaller measure of offence would be sufficient to neutralize the condonation, than would have justified the wife, in the first instance, in separating from her husband. But the act or acts constituting the offence must be of such a nature as to give the wife just reason to suppose that the husband is about to renew his former course of conduct, and consequently to entertain well-founded apprehension for her personal safety.

THESE were cross-suits: one for restitution of conjugal rights brought by one Hurry Doss Ghose against his wife Jogendronundini Dessee, and the other a suit for maintenance by the