

ENKATA-
CHELLA
CHETTI
v.
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BBA RAO.

original suit appeal No. 36 of 1898—that the contract between the parties cannot be held to be void within the meaning of section 30 of the Contract Act.

If the same objections have been filed in this case, I would disallow them for the reasons stated in my judgment in that case, and, also for reasons stated in that judgment, I would allow this appeal; but as my learned colleague's finding is in favour of the respondent, the decree of the learned Judge in the court below must be affirmed, and this appeal dismissed with costs under section 575 of the Code of Civil Procedure.

Branson & Branson, attorneys for appellant.

Wilson & King, attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1894,
March 29, 30.

BALA PATTABHIRAMA CHETTI (DEFENDANT No. 1), APPELLANT,

v.

SEETHARAMA CHETTI AND ANOTHER (PLAINTIFF AND
DEFENDANT No. 2), RESPONDENTS.*

*Code of Civil Procedure—Act XIV of 1882, ss. 510, 524—Reference to arbitration—
Refusal of person appointed arbitrator to act—Appointment of arbitrator by Judge
under s. 510—Effect of s. 524 on such appointment.*

The words 'so far as they are consistent with any agreement so filed' in s. 524 of the Code of Civil Procedure do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that a Judge may act in conformity to it, and that s. 510 has otherwise no application. The reasonable construction is that the action of the Judge under s. 510 should not be inconsistent with the agreement, if it contains any special provision on the subject.

APPEAL against the decree of D. Irvine, District Judge of Coimbatore, in original suit No. 19 of 1890.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

Ramachandra Rau Saheb for appellant.

Mr. Grant and *Lakshmana Chetti* for respondent No. 2.

Bhashyam Ayyangar for respondent No. 1.

* Appeal No. 107 of 1893.

MUTTUSAMI AYYAR, J.—There was a controversy among³ three brothers governed by Hindu law as to the partition of their family property. They entered into an agreement on the 3rd October 1890, referring the matters in difference between them to two arbitrators and one umpire for decision. The arbitrators named in the agreement, were one Kasturi Chettiar, nominated by one of the three coparceners called Bala Pattabhirama Chetti, and one Padmanabha Chettiar named by the other two coparceners, Seetharam Chetti and Subbaratnam Chetti. The agreement was filed in the District Court of Coimbatore under section 523 of the Code of Civil Procedure, and the Judge made an order of reference in accordance therewith. But Kasturi Chettiar refused to act as arbitrator, and the late Judge, Mr. Irvine, appointed Adinarayana Chettiar in his place under section 510 of the Code of Civil Procedure. The arbitrators, thus constituted made an award on the 3rd August 1891, and the Judge, modifying it in certain matters under section 518, adopted it, and passed a decree in its terms as altered by him. Hence this appeal. For the appellant it is contended that there is no legal basis for the award. It is urged (i) that the words in section 524, “so far as they are consistent with any agreement so filed,” signify that the award should be made by the arbitrators named in the agreement, and that if any of them is unwilling to act, the agreement, which is the basis of the award, becomes inoperative, and (ii) that the Judge’s finding that Kasturi Chettiar consented to arbitrate previous to the order of reference is not warranted by the evidence in the case.

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As regards the first contention, I am unable to accede to it. The words in section 524, “so far as they are consistent with any agreement so filed,” do not mean, as argued by appellant’s pleader, that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act, in order that the Judge may act in conformity to it, and that section 510 has otherwise no application. The reasonable construction is that the action of the Judge under section 510 should not be inconsistent with the agreement, if it contains any special provision on the subject. Section 524 should be read as if it contained the words “in the absence of any thing in the agreement to the contrary, section 510 is applicable.” This view appears to me to be in accordance with the scheme of arbitration contained in Chapter XXXVII of the Code. That

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Chapter provides for arbitration in three modes (i) by an order of reference in a suit already pending; (ii) by an order of reference based on an agreement filed for that purpose; and (iii) by enforcement of an award already made by arbitrators without the intervention of the Court. It enacts distinct provisions as to various matters in order that the order of reference made in a suit pending may not prove abortive, but result in an award according to the original intention of the parties. In dealing with orders of reference made upon an agreement, the code gives effect to the intention of the parties embodied in the agreement, in cases to which section 510 would apply, if the order of reference were made in a pending suit, by providing that the foregoing provisions, viz., sections 509 to 522, shall apply, that is to say, be taken to be intended by the parties to the agreement to apply, provided that there is nothing inconsistent in that agreement with such intention. When a number of incidents are considered to be the ordinary incidents of a contract, such as of a lease or mortgage, &c., and the intention of the legislature is to preserve the contractual freedom of the parties, *quod* those incidents, it is usual for the legislature to indicate that intention by saying that in the absence of a special provision to the contrary the incidents specified shall be taken to be the incidents intended to be included in the particular contract in dispute. It is a rule of convenience designed to avoid repetition. The first contention must be disallowed.

As regards, however, the finding that Kasturi Chetti consented to arbitrate previous to his nomination, I do not think that the evidence supports it. Kasturi Chetti denies that he was ever consulted or agreed to act as arbitrator. The other arbitrator, Padmanabha Chetti deposes that Kasturi Chetti was unwilling to act when he was communicated with after the reference had been made. He was not asked whether previous to the reference Kasturi had consented or not. These are disinterested witnesses, and their evidence does not show that it was ascertained that Kasturi Chetti had consented to act prior to the order of reference. Though the second defendant says that Kasturi consented to act, yet his evidence is that of an interested party, and it is not safe to rely upon it unless it is corroborated. The reason assigned by Kasturi for his reluctance to arbitrate is that both parties are his relatives, and it is not unnatural that he should be unwilling to

occupy a position in which his decision may be obnoxious to one or other of his relatives. It has already been held in the cases of *Pugardin v. Moidin*(1) and *Bepin Behari Chowdhry v. Anneda Prosad Mullick*(2) that section 510 is not applicable unless, as its language implies, the arbitrator who is superseded for being unwilling to act, previously consented to arbitrate. On the ground that Kasturi Chetti never consented to his appointment as arbitrator and that section 510 is not applicable. I would set aside the decree appealed against, and direct that this suit be dismissed with costs.

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BEST, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

ORR (PLAINTIFF NO. 1), APPELLANT,

v.

MUTHIA CHETTI (DEFENDANT NO. 1), RESPONDENT.*

1893.
December 22.
1894.
January 24.

Receiver—Appointment of a receiver by a Court under s. 503 of the Code of Civil Procedure—Misappropriation by the receiver—Whether, subject to the receiver's liability, the creditor or judgment-debtor must bear the loss.

In cases in which a receiver, appointed at the instance of the judgment-creditor under s. 503 of the Code of Civil Procedure, misappropriates moneys collected by him, the decree is not satisfied *pro tanto*, but the loss falls on the estate or its owner, subject to the receiver's liability.

APPEAL against the order of T. Weir, District Judge of Madura, dated 26th August 1892, passed on C.M.A. No. 8 of 1892, confirming the order of S. Dorasawmy Ayengar, District Munsif of Sivaganga, passed on execution petition No. 274 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

The Lower Courts decreed in favour of the defendant and the plaintiff prepared this appeal.

Bhashyam Ayyangar for appellant.

Sundara Ayyar for respondent.

(1) I.L.R., 6 Mad., 414.

(2) I.L.R., 18 Calc., 324.

* Appeal against Appellate Order No. 53 of 1892.