APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

APPAVU ROWTHER *alias* KADIRSA ROWTHER (DEFENDANT), APPELLANT,

v.

SEENI ROWTHER *alias* MUHAMMAD ABDUL KADIR ROWTHER (PLAINTIFF), RESPONDENT.*

1916, November, 21 and 1917, March, 14.

Arbitration—Suit after submission, with respect to the subject-matter of the reference—Award given during the pendency of the suit, validity of—Power of Court to stay trial—Civil Procedure Code (Act V of 1908, Schedule II, Sec. 18.)

A private reference to arbitration of a subject of a dispute, does not prevent either party filing a suit in a Court of law in respect of the same matter. The arbitrators thereupon become *functus officio* and any award by them is without jurisdiction.

Where there is a previous agreement to refer a matter to arbitration and a suit is filed in respect of the subject-matter of that agreement the Court has a discretion under section 18 of the second schedule to the Civil Procedure Code to stay the trial of the suit.

Doleman and Sons v. *Ossett Corporation* (1912) 3 K.B., 257 and *Sheo Babu* v. *Udit Narain* (1914) 12 A.L.J., 757, followed.

Rama Chandra Pal v. *Krishna Lal Pal* (1912) 17 C.W.N., 351, explained.

Indian legislation on the subject historically reviewed.

APPEAL against the order of V. DANDAPANI for K. KRISHNAMA ACHARIYAR, the Subordinate Judge of Madura, in Original Suit No. 122 of 1913.

The necessary facts appear from the judgment.

K. V. Krishnaswami Ayyar and *K. V. Sesha Ayyangar* for the appellant.

L. A. Govindaraghava Ayyar for the Hon. Mr. *T. Rangachariyar* for the respondent.

JUDGMENT.—The facts which have led up to this appeal may be thus shortly stated. The appellant and the respondent agreed to refer their disputes to the decision of certain arbitrators on the 20th of August 1912 (Exhibits I and I*a*). For some time nothing was done under the reference. The appellant sent a notice revoking the arbitration and subsequently filed a

AYLING AND SESHAGIRI AYYAR, JJ.

* Appeal Against Order No. 90 of 1916.

APPAVU v. SEENI.

AYLING AND SESHAGIRI AIYAR, JJ.

suit to enforce his rights ignoring the reference altogether. This was on the 25th of August 1913 (Original Suit No. 17 of 1913), while the suit was pending, the arbitrators gave the award on the 1st of October 1913. Thereupon on the 18th December 1913 the respondent filed Original Suit No. 122 of 1913 for a decree in terms of the award. The lower Court passed a decree as prayed for. Mr. K. V. Krishnaswami Ayyar, the learned vakil for the appellant, has raised various objections to the decree. The only one which requires consideration is the contention that on the filing of Original Suit No. 77 of 1913 the arbitrators became *functus officio*, that consequently their award was *ultra vires* their powers and that the Court acted without jurisdiction in passing a decree embodying the terms of the award.

We think this objection is well founded. A short resume of the legislative provisions on this question is necessary to appreciate the appellant's contention. Under section 28 of the Contract Act it was not ordinarily open to parties to ignore the Courts of the country and to set up a tribunal for deciding their disputes. One exception was recognized to the effect that if the parties had agreed to refer their disputes to arbitration, the existence of the agreement shall be a bar to seeking redress in the ordinary courts. The section also recognized the right of one of the parties to sue for the specific performance of the agreement to refer.

Then came the Specific Relief Act of 1877 which by section 21 took away the right to sue for the specific enforcement of the contract, but preserved the right to the party who was willing to abide by the agreement, to object to the trial of a suit filed by the other party.

Lastly, we have section 22 of second schedule to the Code of Civil Procedure which has repealed that portion of section 21 of the Specific Relief Act which enabled the defendant to plead the agreement to refer as a bar to the suit. The result of these various legislative provisions is to bring the Indian Law into conformity with the English Law on the subject. The provisions of the Indian Arbitration Act which apply to Presidency Towns and to Karachi are to the same effect.

In our opinion the intent to be gathered from these Acts is that the rights of a party to seek the assistance of the properly

constituted Courts of the realm are unrestricted. The right inhering in a suitor to sue is preserved intact.

In order to provide against the contumacious conduct of a plaintiff who has agreed to refer, but who wants to resile from it by instituting a suit, section 18 of the second schedule has been introduced. Under that section if the Court is appraised that an agreement to refer was entered into, it may stay the trial of the suit. In a given case, the Court may consider that the arbitrators would be able to decide the case far more efficaciously than the Court itself. In such a case, the Court may ask the arbitrator to give his decision. But the discretion is in the Court, the paramount idea being that a tribunal constituted by the parties should not come in conflict or usurp the function of the tribunal which the sovereign has provided.

This view receives support from the judgment of FLETCHER MOULTON, L.J., in *Doleman and Sons* v. *Ossett Corporation*(1). The learned LORD JUSTICE points out that as soon as an action is brought in respect of the subject-matter of the reference, the arbitrators became *functus officio*. It is also pointed out that the case of an award having been given prior to the suit would be different, for then a new right would have been substituted for the original one to enforce which a suit can be instituted. Mr. L. A. Govindaraghava Ayyar contended that the language of section 18 of the second schedule implies that the arbitrator's jurisdiction ceases only on the settlement of the issues in the suit, because it is open to the defendant till then to ask for stay of the suit. We are unable to accept this contention. The time limit for filing objections should not be construed as validating the reference till then.

The learned vakil for the respondent also argued that his client had referred to the existence of the agreement to refer and to the award passed, in his written statement, and that further steps should have been taken by the Court with reference to these contentions. He also contended that the adjournment of the trial practically amounted to a stay of the suit. On examining the B diary, we are satisfied that the trial was never stayed as contemplated by section 18 of the second schedule. The decision in *Rama Chandra Pal* v. *Krishna Lal Pal*(2) was on section 21 of

(1) (1912) 3 K.B., 257.

(2) (1912) 17 C.W.N., 351.

APPAVU v. SEENI.

AYLING AND SESHAGIRI AYYAR, JJ.

the Specific Relief Act before the last 37 words were repealed. On the other hand *Sheo Babu* v. *Udit Narain*(1) supports the view we have taken.

We must therefore set aside the decree passed in the respondent's suit, Original Suit No. 122 of 1913, and dismiss it. It is said that the suit of the defendant is still pending. In the circumstances, we think each party should bear his own costs throughout.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Bakewell.

1917, March, 20.

THEMA AND ANOTHER (PLAINTIFFS), APPELLANTS IN BOTH SECOND APPEALS,

v.

KUNHI PATHUMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Customary law of South Kanara - Kuzhikanam *lease—Compensation for improvements—Right of tenant to possession until payment—Possession by tenant after period of lease, nature of--Possession, if adverse—Notice to quit, if necessary—Customary law of Malabar—Malabar Compensation for Tenants Improvements Act (Madras Act I of* 1900), *principles of, if applicable.*

Under the customary law of South Kanara, a *kuzhikanam* lessee is, as in Malabar, entitled to remain in possession of the holding after the expiry of the period fixed in the lease until he is paid the value of the improvements; consequently he does not acquire title by adverse possession by remaining in possession of the lands for more than twelve years after the expiry of the lease.

Srinivasa Pillai v. *Venkatammal* (1913) 24 M.L.J., 296 and *Kummatha Vittil Kunhi Kuthalai Haji* v. *Reverend Antoni Goveas* (1913) M.W.N., 330, referred to.

Subbraveti Ramiah v. *Gundala Ramanna* (1910) I.L.R., 33 Mad., 260, distinguished.

A *kuzhikanam* lessee who remains on the land after the period fixed in the lease, awaiting the payment of compensation for improvements, is not holding over as a tenant, and, in the absence of evidence of assent by the landlord to the continuance of the tenancy, is not entitled to a notice to quit.

Section 5 of the Malabar Compensation for Tenants Improvements Act (I of 1900) only embodies the customary law of Malabar and South Kanara.

SECOND APPEALS against the decrees of V. C. MASCARENHAS, the Subordinate Judge of South Kanara, in Appeals Nos. 50 and 51

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(1) (1914) 12 A.L.J., 757.

* Second Appeals Nos. 1504 and 1505 of 1916.