APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Rampini.

1896. *March* 18.

W. CRISP (PLAINTIFF) *v.* ADLARD AND OTHERS (DEFENDANTS.) *

Specific Relief Act (I of 1877), section 21—Contract to refer dispute to arbitration—When refusal to perform such contract bars a suit.

To bar a suit under section 21 of the Specific Relief Act, a refusal to arbitrate must be before the action is brought.

THIS was a suit for a partnership account and winding-up of the business. The deed, under which the business was carried on, contained the following clause :—

"If any doubt, difference, or dispute shall at any time arise between the said parties touching the construction of these presents, or any clause, matter or thing herein contained or relating to management and settlement of the said joint trade and co-partnership, and such doubt, question or difference, shall not be fully decided between them within one calendar month after the same shall arise, then and as often as the same shall happen, such cause or matter shall be referred to the arbitration of two indifferent persons to be chosen by the said parties."

The defendants pleaded that under section 21 of the Specific Relief Act this clause operated as a bar to the suit, as after the plaint was filed they called on the plaintiff to go to arbitration, who refused to do so. The learned Recorder of Rangoon dismissed the suit, holding that it was barred by section 21. The material portion of his judgment was as follows :—

"Now in the present case, the suit was filed on the 25th March last, and the written statement on the 26th April. On the 4th April the defendants through their advocates called on the plaintiff to go to arbitration. On the following day the plaintiff replied through his advocate, stating that a suit has been filed, and that he objected to any arbitration proceedings taking place during the pendency of such suit. This is clearly a refusal to go to arbitration. The question is whether it can bring section 21 of the Specific Relief Act into operation so as to bar the suit. This point has never been decided, so that I am without authority to assist me. I think that a subsequent refusal is sufficient to bar the suit for this reason, that otherwise it is possible for one of the contracting parties to make the express provisions of the Act a nullity by filing a plaint. The various High Courts cannot have meant to decide that.

* Appeal from Original Decree No. 234 of 1895, against the decree of W. F. Agnew, Esq., Recorder of Rangoon, dated the 23rd of May 1895.

This point was raised in argument in the Calcutta case (1), but all that was decided was that a refusal must be proved, and that filing a plaint is not a refusal. Here a refusal has been proved, and, I think, therefore, that the suit is barred by section 21, and it must accordingly be dismissed with costs."

From this decision the plaintiff appealed to the High Court.

Mr. *C. P. Hill* and Mr. *G. B. McNair* for the appellant.

Mr. *Henderson*, Mr. *W. K. Eddis* and Babu *Dwarka Nath Chuckerbutty* for the respondent.

The judgment of the High Court (PETHERAM, C. J., and RAMPINI, J.) was as follows :—

PETHERAM, C. J. (RAMPINI, J., concurring)—I think that this appeal must be allowed, and for several reasons.

In the first place, it is, I think, extremely doubtful whether this arbitration clause applies to disputes which may arise between the old partners after the partnership has come to an end.

But however that may be, I am very clearly of opinion that the refusal to arbitrate must be before the action is brought in order that it and the arbitration clause may constitute a defence to an action on the agreement. To hold otherwise would be to hold that one party to such an agreement might force the other to bring an action by refusing to go to arbitration, and then, after the action had been commenced, change his mind and defend it successfully, on the ground that it could not proceed in consequence of the arbitration clause, though the plaintiff had a good cause of action when he brought his suit.

Order XXIV, Rule I, under the English Judicature Act, applies, I think, to defences on the merits which arise after the institution of the suit.

Another reason why this defence cannot succeed in this case, is that a question arises under the plaint and written statement as to when the partnership came to an end, and this is certainly not one of the matters included in the arbitration clause.

The result is, that the appeal will be allowed, the judgment set aside and the learned Judge in the Court below directed to reinstate the case on his file and dispose of it according to law.

The costs of this appeal will be in the discretion of the Judge who disposes of the case on the merits.

S. C. G. *Appeal allowed.*

(1) *Koomud Chunder Dass* v. *Chunder Kant Mookerjee*, I. L. R., 5 Calc., 498.