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the course of the judgment the case of *Gurumurti* v. *Sivayya* (1) was expressly overruled. In *Subramanya Tevan* v. *Arunachala Tevan* (2) this latter case was followed. In our own Court in the case of *Dori Lal* v. *Sewak Ram* (3) the point was considered by a Judge sitting alone. The facts there were on all fours with the facts here, and that learned Judge followed the view taken in the later Madras cases to which we have referred. We agree with his view. We think that the decision of the first court was correct. The result is that we allow the appeal and setting aside the decree of the court below, restore that of the court of first instance with costs.

Appeal allowed.

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January, 6.

Before Mr. Justice Piggott and Mr. Justice Walsh.

CHIMMAN LAL, POSTI MAL (PLAINTIFF) *v.* PHUL CHAND, FATEH CHAND (DEFENDANT) *

Act No. IX of 1899 (Indian Arbitration Act), section 19—Arbitration—Reference made by one party—Subsequent institution of suit by the other—No application for stay of suit, but award delivered by sole arbitrator—Application to file award.

Under the terms of a contract which provided that all disputes arising thereunder should be referred to arbitration, one of the parties made a reference and sent notice to the other to appoint another arbitrator on their side. The other party refused to join in the arbitration and filed a suit. The first party never applied for stay of the suit, but their arbitrator proceeded with the arbitration and delivered an award. *Held*, on application to make the award a rule of court, that the applicant, not having asked for a stay of the suit, must be taken to have waived his right to arbitration and was not entitled to a decree on the award. *Ram Prosad Suraj Mull* v. *Mohan Lal Lachminarain* (4) and *Appavu Rowther* v. *Seeni Rowther*, (5) referred to.

UNDER a contract, dated the 7th of August, 1918, the respondents agreed to sell 20 bales of cloth to the appellants. One of the terms of the contract was that in case of a dispute between the parties the matter shall be referred to arbitration.

On the 16th of February, 1919, the respondents despatched the goods. The appellants refused to take delivery on the ground that the goods were not according to sample.

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* First Appeal No. 106 of 1921, from an order of I. B. Mundle, District Judge of Cawnpore, dated the 30th of April, 1921.

(1) (1897) I. L. R., 21 Mad., 391. (3) (1915) 13 A. L. J., 695.
(2) (1907) 18 M. L. J., 186. (4) (1920) I. L. R., 47 Calc., 752.
(5) (1917) I. L. R., 41 Mad., 115.

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On the 30th of August, 1919, the appellants appointed one Mr. Khosla as their arbitrator, gave notice of the same to the respondents and asked the latter to nominate their arbitrator. The respondents, however, sold the goods and instituted a suit for damages against the appellants. On the 17th of September, 1919, they gave the arbitrator and the appellants notice of their having instituted the suit and of their unwillingness to refer the matter to arbitration. On the 25th of September, 1919, the arbitrator made an *ex parte* award in favour of the appellants and filed it in the Court of the District Judge of Cawnpore who, on objection being taken, refused to file it and subsequently set it aside. Hence the appeal.

Dr. *Surendra Nath Sen* (with him Munshi *Ajudhia Nath*), for the appellants :—

The grounds on which the award has been set aside by the learned District Judge are, firstly, that the institution of the suit nullifies the award ; secondly, because the appellants did not make an application under section 19 of the Arbitration Act (IX of 1899) for the stay of the suit. My submission is that section 19 does not apply to the circumstances of the present case. That section applies only when, the matter not having advanced beyond the stage of mere agreement to refer, a suit is instituted by one of the parties. It has no application when a reference has already been made. In the latter case no application need be made under section 19. I am supported by *Sawyer* v. *Louis Dreyfus & Co.* (1).

Supposing the award had been made a day before the institution of the suit, it could not be said that an application should have been made to refer the matter to arbitration *de novo*.

The case of *Dinabandhu Jana* v. *Durga Prasad Jana* (2) is distinguishable because in that case no reference had been made to arbitration. As regards the case of *Ram Prosad Suraj Mull* v. *Mohan Lal Lachhminarain* (3) it is submitted that the Hon'ble Judges have gone too far. Their Lordships base their decision on *Doleman & Sons* v. *Ossett Corporation*, (4) but it was not decided in that case that the mere institution of the

(1) (1913) 20 Indian Cases, 504.
(2) (1919) I. L. R., 46 Calc., 1041.
(3) (1920) I. L. R., 47 Calc., 752.
(4) (1912) 3 K. B., 257.

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suit took away the jurisdiction of the arbitrator and made the reference invalid. Absence of an application under section 19 could at the most be taken as a submission to jurisdiction, but it could not invalidate the reference which was otherwise valid. Section 14 lays down that an award can be set aside either when the arbitrator has misconducted himself or when the award has been improperly procured. None of these circumstances occur here. Institution of a suit by the opposite party is not laid down as a ground for setting aside an award.

The existence of an award will be a complete answer to the suit. Under section 5 a submission is irrevocable. The respondents, therefore, could not ignore the arbitration proceedings and rush to the court with their suit. Their suit will be sufficiently met by the award.

Mr. *G. W. Dillon* (with him Mr. *B. E. O'Conor* and Babu *Saila Nath Mukerji*), for the respondents :—

The law will not enforce the specific performance of an agreement to refer to arbitration. The court, if duly appealed to, has the power to refer the matter to arbitration, but if it refuses to do so or if no application is made to it, it has the seisin of the cause and the arbitrator becomes *functus officio*. There cannot be two tribunals having jurisdiction at the same time. Before the time had elapsed for us to nominate an arbitrator we gave notice of our unwillingness to refer to arbitration and before the expiration of the same period we filed the suit. Reference by one party under such circumstances cannot be a complete reference. Therefore the case should be governed by section 19. An application should have been made under that section. If they had made that application we could have shown to the court how the matter was hurried through the arbitration even after notice of the suit. The court, in all probability, would not have granted their application. Having failed to make an application it does not lie with them now to object to the suit. The award was improperly procured, inasmuch as it was given after notice of the suit to the arbitrator and the opposite party.

Dr. *Surendra Nath Sen* in reply :—

It is not competent to the respondents to argue that there was no completed reference. If one party fails to appoint an arbitrator, the other party is entitled to appoint his own arbitrator as sole arbitrator. Such a reference will be a complete reference. We had under the terms of the contract appointed an arbitrator, and reference had been made to him. Under section 5 the respondents could not revoke the submission.

PIGGOTT and WALSH, JJ. :—We have decided to dismiss this appeal on the simple ground that the defendant having deliberately refused to utilize the machinery provided by section 19, namely, by applying for a stay, must be taken to have waived his right to arbitration. We would merely add that we are not prepared, as at present advised, to go the length of the decisions in *Ram Prosad Suraj Mull* v. *Mohanlal Lachminarain* (1) and *Appavu Rowther* v. *Seeni Rowther* (2), and to hold that in all such cases an award must necessarily be set aside. It must be borne in mind that some of the observations of Lord Justice FLETCHER MOULTON relied upon were unnecessary for the decision of the case, and were not adopted by the other members of the English Court of Appeal and that the case was one in which the circumstances were peculiar. We are not prepared to adopt, without qualification, the view which the Madras High Court seems to have adopted in I. L. R., 41 Mad., 115 referred to above, that the moment a suit is brought the arbitrators have become *functi officio* and any award made by them is without jurisdiction. That statement must be qualified by the existence of the power of stay contained in the second schedule to the Code of Civil Procedure or in section 19 if the arbitration is one under the Act of 1899. This power may be taken advantage of by the other party to the suit applying for a stay of the suit brought against him.

Subject to these remarks we dismiss this appeal with costs.

Appeal dismissed.

(1) (1920) I. L. R., 47 Calc., 752. (2) (1917) I. L. R., 41 Mad., 115.