MISCELLANEOUS CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge and Mr. Justice E. M. Nanavutty

HAJI ABDUL HAMID (PLAINTIFF-APPELLANT) *v.* HAJI ABDUL AZIZ AND ANOTHER (DEFENDANTS-RESPONDENTS)* 1933 *November*, 24

Civil Procedure Code (Act V of 1908), Schedule II, paragraphs 5, 17 and 19—Arbitration—Agreement to refer a matter to certain specified arbitrators—Some arbitrator refusing to act—Court, whether can make reference to arbitrators willing to act—Agreement, whether becomes void.

Held, that an agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators dies or refuses to act and thus makes the agreement incapable of performance, and in such a case the court has no jurisdiction under clause 4 of paragraph 17 of Schedule II of the Code of Civil Procedure to make a reference to the arbitrators who are willing to act. Under paragraph 5 of Schedule II of the Code the court has the power to appoint arbitrators in place of the arbitrator who dies or refuses to act but that paragraph and paragraph 19 of Schedule II can only come into operation when an order of reference has already been made under paragraph 17 of the said Schedule. *Muthyala Narayanappa* v. *Muthyala Ramachandrappa* (1), *Ma Ba U* v. *Maung Pe Lan* (2), *Mohan Lal* v. *Damodar Das* (3), *Brooke* v. *Gurdial* (4), *Lachhman Prasad* v. *Pran Nath* (5), and *Laxman* v. *Manju Nath Damodar Prabhu* (6), relied on. *Rahat Ullah Khan* v. *Ibad Ullah Khan* (7), *Mirza Sadiq Husain* v. *Musammat Kaniz Zohra Begam* (8), *Fazal Ilahi* v. *Prag Narain* (9), and *Bhagwan Das* v. *Gurdayal* (10), distinguished. *Sheopal Kuar* v. *Bhaya Tara Bakhsh Singh* (11), referred to.

Mr. *Mohammad Ayub*, for the appellant.

Messrs. *Naim Ullah* and *Faiyaz Ali*, for the respondents.

HASAN, C. J. and NANAVUTTY, J.:—This is an appeal against a judgment and decree of the learned Subordinate Judge of Fyzabad dismissing the suit of Haji Abdul

*Miscellaneous Appeal No. 39 of 1932, against the order of Babu Shiva Charan Lal, Subordinate Judge of Fyzabad, dated the 23rd of August, 1932.

(1) (1930) I.L.R., 54 Mad., 469.
(2) (1917) 42 I.C., 911.
(3) (1918) 44 I.C., 866.
(4) 12 B.L.R., app. p. 13.
(5) (1932) A.I.R., Oudh, 108.
(6) (1921) I.L.R., 45 Bom., 1181.
(7) (1917) 4 O.L.J., 131.
(8) (1911) 14 O.C., 289.
(9) (1922) I.L.R., 44 All., 523.
(10) (1921) 19 A.L.J., 823.
(11) (1899) 2 O.C., 355.

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Hamid, the plaintiff-appellant, who prayed that the agreement, dated the 18th of April, 1932, between him and the defendants-respondents to refer the matter between them to arbitration, should be filed in court and an order be passed directing that arbitration proceedings be taken in accordance with the terms of the said agreement. There was also a prayer in the plaint to the effect that if any arbitrator or umpire be found to have refused to arbitrate in the matter, the court should by its order nominate another arbitrator or umpire in his place.

The plaintiff Haji Abdul Hamid and his two brothers, Haji Abdul Aziz and Haji Abdul Halim, the defendants-respondents, executed a deed of agreement, dated the 18th of April, 1932, in which they set forth that, their father Abdul Wahid having executed a deed of gift on the 3rd of October, 1924, in their favour, disputes arose amongst them in respect of the gifted property and that for the settlement of those disputes the parties to the deed had of their own free will appointed Haji Ewaz Mohammad, Abdul Khalliq and Wajih Ullah as their arbitrators to settle the dispute, Hafiz Ewaz Mohammad being appointed *sarpanch* or umpire, and it was stipulated in the agreement that the umpire and arbitrators named above were to decide the disputes which existed among the three brothers on the basis of *bahikhata* accounts to be produced before the arbitrators.

After the execution of this agreement of the 18th of April, 1932, Hafiz Ewaz Mohammad refused to act as *sarpanch* or umpire in the matter, and thereafter Hafiz Abdul Hamid applied to the court under paragraph 17 of Schedule II of the Code of Civil Procedure to have an order of reference on the agreement to refer the dispute to arbitration. The plaintiff prayed that the court should order the parties to abide by this agreement of the 18th of April, 1932, and that arbitration proceedings should be taken in accordance with it and that, as the *sarpanch* Haji Ewaz Mohammad had

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declined to act as such, the court should appoint another arbitrator in his place. The defendants, on the other hand, urged that as the *sarpanch* Haji Ewaz Mohammad had declined to accept the position of *sarpanch* and arbitrator, the remaining two arbitrators could not proceed in the matter and the agreement of the 18th of April, 1932, had thus become unenforceable.

The learned Subordinate Judge framed a preliminary issue which is as follows:

> "Is the agreement referring the dispute to arbitration not enforceable as the *sarpanch* named therein has refused to act"?

Following the view of law laid down by the Madras High Court in *Muthyala Narayanappa* v. *Muthyala Ramachandrappa* (1), the learned Subordinate Judge held that the agreement of the 18th of April, 1932, was not enforceable because Haji Ewaz Mohammad had declined to act as *sarpanch*, and he therefore dismissed with costs the application filed by Haji Abdul Hamid under paragraph 17 of Schedule II of the Code of Civil Procedure. Dissatisfied with the judgment of the learned Subordinate Judge the plaintiff Abdul Hamid has filed this appeal.

The first contention urged on behalf of the appellant by his learned counsel is, that the lower court erred in holding that the intention of the parties to the agreement of the 18th of April, 1932, was to abide by the decision of the three *panches* and not by the award of the majority of the arbitrators. After carefully perusing this agreement, we are clearly of opinion that there is no force in this contention. The executants to this agreement have clearly stated in it that they stipulated and reduced to writing their desire that *the umpire and the arbitrators* mentioned in the deed should decide the disputes which existed amongst them. The intention of the parties is quite clear, and it was that they referred the decision of the dispute between them to the

(1) (1930) I.L.R., 54 Mad., 469.

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arbitration of the three specified arbitrators named in the deed of agreement.

The next contention urged on behalf of the appellant by his learned counsel is that the view of law taken by the learned Subordinate Judge that under paragraph 17, clause (4) of Schedule II of the Code of Civil Procedure the court could not act beyond the agreement arrived at between the parties was erroneous, and that the lower court should have taken proceedings under paragraph 5 of Schedule II of the Code.

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We have heard the learned counsel for the appellant at some length and have taken time to consider our decision. It seems to us that the view of law advanced by the learned counsel for the appellant cannot be sustained. The question whether after the refusal of the *sarpanch* to act as an arbitrator in this matter the deed of agreement could still be enforced and given effect to by the court passing an order of reference, has to be determined with reference to the provisions of clause (4) of paragraph 17 of Schedule II of the Code of Civil Procedure. Clause (4) runs as follows:

> "Where no sufficient cause is shown, the court shall order the agreement to be filed, and shall make an order of reference to the arbitrator (or arbitrators) appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the court may appoint an arbitrator."

These provisions clearly show to our mind that, when the agreement was to refer the matter to certain named arbitrators, the court was bound to make an order of reference to such arbitrators and the court could not make an order of reference to two out of the three arbitrators named in the deed of agreement of the 18th of April, 1932, for such an order of reference would not be in accordance with the terms of the agreement, within the meaning of clause (4) of paragraph 17 of Schedule II of the Code of Civil Procedure. In our opinion the court had no power to appoint a fresh

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arbitrator in place of Haji Ewaz Mohammad, who had refused to act as *sarpanch* unless an order of reference had already been made under paragraph 17 of Schedule II of the Code. Thus, when the court was unable to order the agreement to be filed and make an order of reference under clause (4) of paragraph 17, the application of Haji Abdul Hamid made under this paragraph had necessarily to be dismissed. This view of the law has not only found acceptance in the Madras High Court, but has also been accepted by the learned Judges of the Burma Chief Court in *Ma Ba U* v. *Maung Pe Lan* (1), where it was held that apart from my enactment an agreement to refer a matter to certain specified arbitrators became void and of no effect if one or more of the aribtrators died or refused to act, and thus made the agreement incapable of performance and that in such a case the court had no jurisdiction under clause (4) of paragraph 17 of Schedule II of the Code of Civil Procedure to make a reference to the arbitrators who were willing to act. It was pointed out in this case that under paragraph 5 of Schedule II of the Code the court had the power to appoint arbitrators in place of the arbitrator who died or who refused to act, but that paragraph 19 of Schedule II of the Code could only come into operation when an order of reference had already been made under paragraph 17 of the said Schedule. The same view of the law was taken by the Punjab Chief Court in a ruling reported in *Mohan Lal* v. *Damodar Das* (2). In this case an earlier ruling of the Calcutta High Court reported in *Brooke* v. *Gurdial* (3), was cited. PONTIFEX, J., in that case observed as follows:

> "After an agreement, such as that now before me, has been executed, any person who is a party to it is entitled to apply to the court to have such agreement filed, and no party to such an agreement could hope successfully to oppose such application

(1) (1917) 42 I.C., 911. (2) (1918) 44 I.C., 866.
(3) 12 B.L.R., app. 13.

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if all the arbitrators named in it were alive and willing to act. But it is quite a different thing when, upon making such an application, a party to the agreement is able to come in and show that before the application was made, one of the arbitrators named in the deed had in fact died or, as in this case, had refused to act in the matter. In such a case I think the contention is right that the reference to the arbitration agreed upon between the parties no longer exists so as to enable the court to direct that it should be filed, and if it were filed, I do not think the court could exercise the powers of appointing a new arbitrator, because the arbitrator, who has refused to act, refused before the order of reference, directed by section 326, was made by the court."

At the close of this judgment the learned Judges of the Punjab Chief Court remarked as follows:

"The actual agreement to refer the matter in dispute to five specified arbitrators became incapable of performance when one of those arbitrators died. This, in our opinion, is a sufficient reason for refusing to file the agreement in court. Clause 19 has been referred to by counsel for the respondents, but, as pointed out by the Burma Chief Court, clause 19 only comes into operation when an order of reference has been made under clause 17."

The learned counsel for the appellant has relied upon the ruling reported in *Rahat Ullah Khan* v. *Ibad Ullah Khan* (1), in support of his contention. This ruling can be distinguished from the facts of the present case because it was after an order of reference had been made under paragraph 17 of Schedule II of the Code that one of the arbitrators refused to act, and in that case, under the provisions of paragraph 5 read with the provisions of paragraph 19, the court would be entitled to appoint another arbitrator in place of the arbitrator

(1) (1917) 4 O.L.J., 131.

who refused to act. This ruling, in our opinion, does not support the contention urged by the learned counsel for the appellant.

The ruling reported in *Lachhman Prasad* v. *Pran Nath* (1), cited by the learned counsel for the defendants-respondents, is more appropriate to the facts of the present case. In that case Mr. Justice DANIELS made the following observation:

> "Quite apart from this, the simple answer to the appellant's contention is that the submission to arbitration no longer remains in force That submission was a submission to arbitration by four particular arbitrators of whom it appears that three were relations and that Mohan Lal, who refused to arbitrate, was the only independent member. The carrying out of this submission having been rendered impossible by the refusal of Mohan Lal to arbitrate, the submission no longer remains in force and can be pleaded as a bar to the suit."

The decision of their Lordships of the Privy Council in *Mirza Sadiq Husain* v. *Musammat Kaniz Zohra Begam* (2), does not touch the question for decision by us. All that was decided in that case was that the expression "refusal to act," occurring in the Code, included also a case where an arbitrator never accepted the arbitration and refused to have anything to do with the arbitration, and was not confined to the case of an arbitrator accepting the arbitration but subsequently refusing to act. Moreover in that case there was a reference to arbitration regarding proceedings in a matter of which the court had already taken seizin, and substantially it was an order of reference by the court itself and it did not come within the purview of paragraph 17 of Schedule II of the Code of Civil Procedure. There is, however, an observation by their Lordships of the Privy Council in that case which goes

(1) (1932) A.I.R., Oudh, 108.

(2) (1911) 14 O.C., 289: I.L.R., 33 All., 743.

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directly against the contention advanced by the learned counsel for the plaintiff-appellant. At the close of the judgment their Lordships remarked:

> "But the objection which has been taken—that the rights having been remitted to one tribunal have been settled by another—is, in their Lordships' opinion, a fatal objection."

Thus their Lordships laid down that parties who agreed to set up a tribunal of arbitration are not bound to submit the case to another tribunal. In other words parties who specify the arbitrators before whom they wish their case to come up for arbitration cannot be made to submit to the arbitration of another tribunal consisting of other arbitrators.

In *Laxman* v. *Manju Nath Damodar Prabhu* (1), the Bombay High Court has taken the same view of the matter as that which found favour with the Madras High Court. At page 1185 of the report mentioned above the learned Chief Justice of the Bombay High Court, Sir NORMAN MCLEOD, observed as follows:

> "However it is obvious that the court ought to have proceeded to deal with the suit and decide it on its merits as the arbitration had become impossible owing to the parties failing to agree to any particular course being followed after one arbitrator refused to act."

In *Sheopal Kuar* v. *Bhaya Tara Bakhsh Singh* (2), it was observed by the Additional Judicial Commissioner of Oudh that "the parties to the agreement having limited the agreement to five specified persons it was open to doubt whether the action of the Subordinate Judge on the 21st of August, 1898, in appointing three fresh arbitrators could be said to be consistent with the original agreement within the meaning of section 524 of the old Code of Civil Procedure."

The learned counsel for the appellant has laid stress upon the rulings of the Allahabad High Court reported

(1) (1921) I.L.R., 45 Bom., 1181. (2) (1899) 2 O.C., 355.

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in *Fazal Ilahi* v. *Prag Narain* (1), and in *Bhagwan Das* v. *Gurdayal* (2). The facts of those cases, however, are different from the facts of the present case. In those cases the arbitration had begun and therefore the court had power under paragraphs 5 and 19 of Schedule II of the Code of Civil Procedure to appoint a fresh arbitrator in place of the one who subsequently declined to act. We are, however, very doubtful as to the correctness of the reasoning of the learned Judges who decided those two cases, and we prefer to follow the conclusion arrived at by the learned Judges of the Madras High Court in the ruling reported in *Muthyala Narainappa* v. *Muthyala Ramachandrappa* (3).

For the reasons given above, and after giving this matter our best consideration, we are of opinion that the decision arrived at by the learned Subordinate Judge is right. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

FULL BENCH

Before Mr. Justice Bisheshwar Nath Srivastava, Mr. Justice E. M. Nanavutty and Mr. Justice H. G. Smith

GIRJESH DATT AND OTHERS (DEFENDANTS-APPELLANTS) *v.* DATA DIN AND OTHERS (PLAINTIFFS-RESPONDENTS)*

1933 *December*, 4

Transfer of Property Act (IV of 1882), sections 13 and 16—Gift by female absolute owner to her brother's son's daughter—Deed of gift providing that if donee died issueless gifted property shall go to donee's father—Gift over to donee's father, validity of.

Where a female who was the absolute owner of her property executed a deed of gift in favour of the daughter of her brother's son giving her only a life interest and providing that if there be any male descendants of the donee on her death, whether born of son or daughter, he will be the absolute owner of the property, and if the donee may have only daughters, they

*First Civil Appeal No. 10 of 1932, against the decree of Babu Bhagwati Prasad, Subordinate Judge of Partabgarh, dated the 31st of October, 1931.

(1) (1922) I.L.R., 44 All., 523. (2) (1921) 19 A.L.J., 823.
(3) (1930) I.L.R., 54 Mad., 469.