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default the plaintiffs will be entitled to have the misuse remedied by the Court at the cost of the defendants and to execute the decree for the amount of damages. The plaintiffs will get half their costs of the first Court and the defendants will get half their costs in the lower appellate Court. Parties will bear their own costs of the second appeal.

AGARWALA, J.—I agree.

Appeal allowed in part.

K.D.

APPELLATE CIVIL.

Before Harries, C.J. and Chatterji, J.

1940.

April, 30.
May, 1.

TARA PRASAD BALIASEY

v.

BAIJNATH PRASAD BALIASEY.*

Arbitration—Code of Civil Procedure, 1908 (*Act V of* 1908), *Schedule II, paragraphs 5 and* 17—*agreement to refer —refusal to act by one or more of the named arbitrators—no provision in agreement for such a case—Court, power of, to make a reference under paragraph* 17— *paragraph* 5, *applicability of.*

There is some difference between the procedure that is to be followed where the reference to arbitration is made in a pending suit and where there is a mere agreement for reference to arbitration which is sought to be filed in Court. In the latter case the Court cannot go beyond the terms of the agreement, and if it specifies the persons who are to be appointed arbitrators and makes no provision for the case where the arbitrators refuse to act, the Court cannot substitute in the place of the named arbitrators certain other persons.

In such a case the agreement becomes void and of no effect and the Court has no jurisdiction, under paragraph 17(*4*) of the Second Schedule to the Code of Civil Procedure, 1908,

*Appeal from Original Order no. 252 of 1939, from an order of Babu B. Dhar, Subordinate Judge of Deoghar, dated the 9th August 1939.

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to make an order of reference. Paragraph 5 can come into play only after there has been an order of reference made by the Court under paragraph 17.

Muthyala Narayanappa v. *Muthyala Ramchandrappa*(1), *Haji Abdul Hamid* v. *Haji Abdul Aziz*(2) and *Rajani Kanta Karati* v. *Panchanan Karati*(3), followed.

Bhagwan Das v. *Gurdayal*(4) and *Fazal Ilahi* v. *Prag Narain*(5), not followed.

Zahur Ahmad v. *Taslim-un-nissa*(6) and *Pestonjee Nussurwanjee* v. *Manockjee and Co.*(7), distinguished.

Appeal by the applicants.

The facts of the case material to this report are set out in the judgment of Chatterji, J.

Dr. D. N. Mitter and *Girendra C. Banerji*, for the appellants.

B. C. De and *D. N. Varma*, for the respondents.

CHATTERJI, J.—This is an appeal from an order refusing to make a reference to arbitration on the appellants' application under paragraph 17, Second Schedule, Code of Civil Procedure. The appellant no. 1, who is the father of the other appellants, is the elder brother of respondent no. 1 of whom the other respondents are the sons. The parties are members of a joint Mitakshara family. The application under paragraph 17 was to the effect that there was an agreement, dated the 11th of May, 1937, between the appellant no. 1 and the respondent no. 1 to refer their disputes regarding the division of their joint family properties to the arbitration of four gentlemen named in the agreement. There was some attempt by the arbitrators to carry on the arbitration,

(1) (1930) I. L. R. 54 Mad. 469.
(2) (1933) I. L. R. 9 Luck. 321.
(3) I. L. R. [1937] 2 Cal. 434.
(4) (1921) 19 All. L. J. 828.
(5) (1922) I. L. R. 44 All. 523.
(6) (1925) I. L. R. 48 All. 27.
(7) (1868) 12 Moo. I. A. 112.

but owing to the laches of the parties they could not proceed in the matter. Afterwards the respondents filed a partition suit (no. 1 of 1938) against the appellants. Thereupon the appellants presented their application under paragraph 17 praying that the agreement, dated the 11th of May, 1937, be filed in Court.

The application was opposed on various grounds, the most important of which is that the arbitrators refused to act and give their award. At the hearing three of the arbitrators gave evidence in support of the respondents' version. The learned Subordinate Judge, accepting their version, dismissed the application.

Dr. D. N. Mitter, on behalf of the appellants, contends that the grounds on which the Court below has refused to make the order of reference were not sufficient within the meaning of paragraph 17 of the Second Schedule of the Code of Civil Procedure. The relevant portion of that paragraph is clause (*4*), which is 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 appointed in accordance with the provisions of agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator."

Dr. Mitter's contention is that "sufficient cause" under this clause does not contemplate the position that has arisen in the present case. According to him, the Court, when it found that there was a valid agreement, was bound to make a reference, and he suggests that, although some of the arbitrators are not willing to proceed with the arbitration, the Court may, in exercise of its powers under paragraph 5 of the same Schedule of the Code of Civil Procedure, appoint new arbitrators in their place. It will be necessary here to refer to paragraph 5 which provides, among other things, that where an arbitrator refuses or neglects to act or becomes incapable of acting, any

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party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator and then if, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator is appointed, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator.

It is, however, to be observed that paragraphs 1 to 16 of the Second Schedule relate to " arbitration in suits ", whereas paragraphs 17 to 19 relate to " Order of reference on agreements to refer ". It cannot be seriously disputed that there is some difference between the procedure that is to be followed where the reference to arbitration is made in a pending suit and where there is a mere agreement for reference to arbitration which is sought to be filed in Court. In the latter case the Court obviously cannot go beyond the terms of the agreement, and if it specifies the persons who are to be appointed arbitrators and makes no provision for the case where the arbitrators refuse to act, the Court cannot substitute in the place of the named arbitrators certain other persons. Clause (*4*) of paragraph 17, which I have already quoted, makes it clear that the reference should be made " to the arbitrator appointed in accordance with the provisions of the agreement ". In the present case four persons were specifically named as arbitrators in the agreement. That being so, I do not see how in the face of the clear provision of clause (*4*) of paragraph 17 a Court can substitute anybody else in their place.

Dr. Mitter invites our attention to paragraph 19 of the same Schedule of the Code of Civil Procedure, which runs as follows :—

" The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon."

It is contended that by the operation of this paragraph the provisions of paragraph 5 will apply to the present case. This contention, to my mind, is quite untenable. What is actually meant by paragraph 19 is that where there is an order of reference made by the Court under paragraph 17 " the foregoing provisions " shall be applicable to all proceedings under the order of reference. It by no means follows that the Court, before it is competent to make an order of reference, can exercise the powers conferred under paragraph 5. Otherwise it would be stultifving the very provisions of paragraph 19. Dr. Mitter in support of his contention relies upon *Bhagwan Das* v. *Gurdayal*(1), *Fazal Ilahi* v. *Prag Narain*(2) and *Zahur Ahmad* v. *Taslim-un-nissa*(3). In the case of *Bhagwan Das* v. *Gurdayal*(1) the facts were that it was not known whether the arbitrators named in the agreement were actually willing to proceed with the arbitration. The trial Court dismissed the application on the ground that the plaintiff had no cause of action. On appeal it was held that before the application could be dismissed it should be ascertained whether in fact the arbitrators were unwilling to act. The case was, therefore, remanded to ascertain the real facts. In the course of the judgment, however, Walsh, J. observed that if any of the arbitrators was unwilling to act, the Court in exercise of its powers under paragraph 5 can appoint somebody else in his place and then refer the matter to arbitration. With all respect to the learned Judge, I am unable to agree with his view. As I have already pointed out, paragraph 5 can come into play only after there has been an order of reference made by the Court. The same view was followed in *Fazal Ilahi* v. *Prag Narain*(2) where Walsh, J. was one of the Judges who decided it. In this case the learned Judges go further

(1 (1921) 19 All. L. J. 823.
(2) (1922) I. L. R. 44 All. 523.
(3) (1925) I. L. R. 48 All. 27.

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and state "If it were necessary, we should be prepared to hold that the words in paragraph 17, subclause (4) (which enables a Court to make an order of reference to a particular arbitrator at the time of filing the reference), 'if there is no such provision and the parties cannot agree', cover a case where there has been a provision for a particular arbitrator who is either dead or has retired. If he has died or refused to act, it is as though there were no provisions". With all respect I must say this is an extreme view which is not justified by the clear provisions of clause (4) of paragraph 17.

The decision in *Zahur Ahmad* v. *Taslim-unnissa*(1) does not really support the contention of Dr. Mitter. There the question was whether an order revoking a reference under paragraph 17 was appealable. In the course of the judgment Sulaiman, J. referred to the decisions in *Bhagwan Das* v. *Gurdayal*(2) and *Fazal Ilahi* v. *Praq Narain*(3), but it does not appear that he approved of those cases.

On the other hand, Mr. B. C. De for the respondents has referred to the cases of *Muthyala Narayanappa* v. *Muthyala Ramachandrappa*(4), *Haji Abdul Hamid* v. *Haji Abdul Aziz*(5) and *Rajani Kanta Karati* v. *Panchanan Karati*(6). These cases support the view which I have already expressed. In the case of *Muthyala Narayanappa* v. *Muthyala Ramachandrappa*(4) the parties privately agreed to refer their disputes to certain named arbitrators, but the agreement did not contain any provision as to what should be done in case any of the arbitrators died in the course of the arbitration proceedings, and one of them died in the course of such proceedings. It

(1) (1925) I. L. R. 48 All. 27.
(2) (1921) 19 All. L. J. 823.
(3) (1922) I. L. R. 44 All. 523.
(4) (1930) I. L. R. 54 Mad. 469.
(5) (1933) I. L. R. 9 Luck. 321.
(6) I. L. R. [1937] 2 Cal. 434.

was held that the agreement became inoperative and came to an end on the death of the arbitrator and that it could not therefore be filed in Court under paragraph 17 of the Second Schedule of the Code of Civil Procedure. In the case of *Haji Abdul Hamid* v. *Haji Abdul Aziz*(1) it was 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 the Second Schedule of the Code of Civil Procedure to make a reference to the arbitrators who are willing to act. In this case it was pointed out that paragraph 5 can come into operation only when an order of reference has already been made under paragraph 17. This, to my mind, is the correct view of the law.

In the case of *Rajani Kanta Karati* v. *Panchanan Karati*(2) it was held that " an agreement to have a dispute settled by one or more individuals is one thing, and an agreement to go to arbitration rather than to litigation in the Courts is another. Where, by an agreement, parties decide to settle disputes by the arbitration of ascertained persons without the intervention of the Court, in a proceeding following the filing of the award under paragraph 20 of the Second Schedule to the Code of Civil Procedure, the Court has no power under paragraph 5 to direct the appointment of a new arbitrator in the place of one declining to act ". No doubt it was held in this case that paragraph 5 will have no application even after the order of reference is made under paragraph 17. It is unnecessary for the purposes of this case, to decide whether that view is correct or not. The case, however, is an authority for the proposition that the

(1) (1933) I. L. R. 9 Luck. 321.

(2) I. L. R. [1937] 2 Cal. 484.

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Court cannot substitute any arbitrator in the place of the arbitrator named by the parties themselves in their agreement.

Dr. Mitter also referred to the case of *Pestonjee Nussurwanjee* v. *Manockjee and Co.*(1); but that case merely decided that where certain persons agreed to submit their differences to the arbitration of one or more specified persons, no party to such an agreement could revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority could not be permitted. This case is, therefore, of no assistance to the appellants.

There is another serious objection to the filing of the agreement. The agreement was between the two brothers, and the parties to the partition suit include their minor sons also. In fact, the minor sons also are parties to the present proceeding under paragraph 17 of the Second Schedule of the Code of Civil Procedure. From the agreement it appears that the elder brother is to get more than ten annas in the joint family properties. A serious question may arise as to whether this agreement would be binding on the minor sons of the younger brother who agreed to take a little over five annas in the place of eight annas which would be his normal share.

For the reasons which I have given above, I am of opinion that the Court below was quite right in refusing to make an order of reference. I would accordingly dismiss the appeal with costs.

HARRIES, C.J.—I agree.

S.A.K. *Appeal dismissed.*

(1) (1868) 12 Moo. I. A. 112.