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If these principles be applied to the facts of the present case, it seems to me that the present appellant should have been placed on his guard by the mere magnitude of the debt.

He is a near neighbour of the alienors and of at least one of the antecedent debtors and he must have been aware that he was making an aleatory bargain.

For these reasons I concur with my learned colleague in dismissing the appeal and making no order as to costs.

Appeal dismissed.

APPEAL FROM ORIGINAL CIVIL.

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March 24.

Before Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

ABDUL RAHMAN AND OTHERS (PLAINTIFFS)—*Appellants,*

versus

SHAHAB-UD-DIN (DEFENDANT)—*Respondent.*

Civil Appeal No. 1741 of 1916.

Civil Procedure Code, Act V of 1908, order XXII rule 3—death of appellant—application by some of the legal representatives under belief that they are the sole heirs—Arbitration—award—not signed by all arbitrators at the same time and place—whether valid.

The plaintiffs and defendant in this case referred their dispute in respect of a contract to arbitration. The arbitrators gave their award, and plaintiffs applied to have it filed in Court. The lower Court rejected the application saying "it is I think quite clear that Ali Ahmad, arbitrator, did not sign the award on the same date or at the same place as Ilam Din, and this is in itself sufficient to invalidate the award."

The plaintiffs appealed to the High Court. At the hearing it was objected that the appeal had abated, as the appellant had died and only his sons and not his daughters and the widow had been brought on the record as his legal representatives, although the latter were also his heirs by Muhammadan Law. For the appellants it was urged that the parties were governed by custom and they therefore *bonâ fide* believed that the sons were the sole heirs and legal representatives of their father.

Held, that as the applicants (present appellants) *bonâ fide* believed that they were the sole heirs and legal representatives of the deceased appellant and had made their application for substitution on that belief the appeal did not abate, notwithstanding that

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by Muhammadan law other persons would also be co-heirs of the deceased.

Musala Reddi v. *Ramayya* (1), followed.

Ghamandi Lal v. *Amir Bejum* (2), and *Haidar Hussain* v. *Abdul Ahad* (3), referred to.

Held also, that an award cannot be invalidated, at least in this country, simply on the ground that it had not been signed on the same day and at the same place by both the arbitrators. The concurrence of the arbitrators is the judicial act and the signing is merely ministerial. All that is necessary is that there must be combined action of the arbitrators and judicial exercise of their minds upon the matter to be decided.

Banerji's Law of Arbitration in India, second edition, pages 230 and 231.

Bhabasundari Dasi v. *Makhunlal Dey* (4), *Muthukutti Nayakan* v. *Acha Nayakan* (5), and *In re Hopper* (6), approved.

Thammiraju v. *Bapiraju* (7) and *Nand Ram* v. *Fakir Chand* (8), distinguished.

Bhagwan Das v. *Shiv Dial* (9), not followed.

First appeal from the decree of H. B. Anderson, Esquire, Senior Subordinate Judge, Rawalpindi, dated the 12th May 1920, dismissing the plaintiffs' suit.

SHEO NARAIN, for Appellants.

NANAK CHAND, for Respondent.

The judgment of the Court was delivered by—

ABDUL RAOOF, J.—This is a first appeal from the decision of Mr. H. B. Anderson, Senior Subordinate Judge of Rawalpindi, dated the 12th of May 1916, and has arisen under the following circumstances:—Muhammad Din, the Plaintiff, and Shahab-ud-din, the defendant, were partners in respect of a contract business of Military Works Department, Murree. They held equal shares. The business had extended over a number of years, but no final settlement of accounts had taken place between the parties. In order, therefore,

(1) (1899) I.L.R. 23 Mad. 125.
(2) (1894) I.L.R. 16 All. 211.
(3) (1907) I.L.R. 30 All. 117.
(4) (1871) 8 Beng. L.R. 123.
(5) (1894) I.L.R. 18 Mad. 22.
(6) (1867) 2 Q.B. 367.
(7) (1888) I.L.R. 12 Mad. 113.
(8) (1885) I.L.R. 7 All. 523.
(9) 92 P.R. 1913.

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to have the accounts settled they agreed to refer the matter privately to arbitration and by an agreement, dated the 6th of December 1904, they appointed two arbitrators, namely, Ilam Din and Ali Ahmad, and empowered them to go into the contract accounts and decide what was due to one party from the other with reference to the accounts. In the agreement they stated that "whatever amount both the arbitrators will unanimously find as due from one party to the other with reference to the account will be accepted by us and we shall abide by their decision without any objection." In case of difference of opinion the arbitrators were empowered to appoint an umpire. It appears that the arbitrators began to check the account books and other papers relating to the partnership business and had worked for three or four months when the parties unanimously asked them to postpone the arbitration proceedings until a final decision had been given by the Chief Court in a suit between the parties and one Nur Din who claimed to be sharer in the partnership business. The arbitrators accordingly stayed the proceedings by the following order dated the 16th of July 1905 :—"The proceedings are postponed pending the final decision of the case Muhammad Din, etc. and Nur Din, as desired by the parties. The accounts will be settled between them, and award given at any time they would wish after the decision of the said case." On the 13th of December 1914 the following application was made to the arbitrators :—"We both the parties had appointed you arbitrators in writing in 1904, for checking the accounts relating to Murree contract and you had for some time examined the accounts. Then the examination of the accounts was postponed with our consent till the decision of the case of Muhammad Din, etc., plaintiffs *versus* Nur Din. Now that case has been decided by the Chief Court. It is therefore prayed that our accounts may now be checked and the award given." This application was signed by both Shahab-ud-din and Muhammad Din. By the final decision of the Chief Court Nur Din was awarded a four-anna share in the partnership business and Shahab-ud-din and Muhammad Din were therefore held to have a half share each in the remaining business after deducting the share of Nur Din. The arbitrators

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proceeded to check the accounts and hear the objections of the parties. They are said to have given a unanimous award on the 24th of January 1915. Muhammad Din accordingly made an application under paragraph 20, Schedule II of the Code of Civil Procedure, to have the award filed in Court and to have a decree passed in the terms of the said award. This application, according to the provisions of the law, was registered as a suit between Muhammad Din, plaintiff and Shahab-ud-Din, defendant. After some preliminary proceedings before the Court below the hearing of the suit was adjourned at the request of the defendant to enable him to file his defence. Eventually a written statement was put in on his behalf on the 6th of May 1915. He contested the suit mainly on two grounds, namely, (1) that he had never entered into an agreement to refer the matter to arbitration, that he had no knowledge of the arbitration proceedings and that the award was not binding upon him; and (2) that the award was illegal inasmuch as the so-called arbitrators never sat to arbitrate, that no notice of the proceedings was given to the defendant, that no evidence was recorded in his presence, that no opportunity had been given to him to plead his cause or produce his evidence, that no account had been gone into in his presence, and that the whole transaction, being fictitious and bogus, the award relied upon was altogether null and void. Two issues were accordingly framed by the Court, namely :—

(1) Was there any valid reference to arbitration?

(2) If so, was there any valid award thereon?

The Court decided the first issue in favour of the plaintiff and against the defendant. The second issue was decided against the plaintiff, and it was held that there was no valid award on which the decree could be passed. The suit was accordingly dismissed, and the present appeal was preferred to this Court by Muhammad Din, the plaintiff. The sole plaintiff, Muhammad Din, died on the 20th of March 1919, leaving five sons, the present appellants in the appeal, and two daughters, *Mussammat* Aishan and *Mussammat* Karam Bibi, and a

widow *Mussammat* Begam Bibi. An application under Order XXII, rule 3, was made on behalf of the present appellants to have their names alone substituted in the appeal in the place of their deceased father Muhammad Din, the sole appellant in the case. The application was granted subject to all just exceptions and the names of the present appellants were brought on the record. On the appeal being called on for hearing a preliminary objection was raised by Mr. Nanak Chand, the learned Counsel for Shahab-ud-din, respondent, that as the names of the daughters and the widow who were also heirs of Muhammad Din under the Muhammadan law, had not been brought on the record along with the names of his five sons, the appeal must be held to have abated. It was contended by him on the authority of *Ghamandi Lal* v. *Amir Begam* (1) and *Haidar Husain* v. *Abdul Ahad* (2) that under Order XXII, rule 31 all the legal representatives ought to have been brought on the record, and as this was not done the appeal should be dismissed as having abated. In reply to this preliminary objection Pandit Sheo Narain on behalf of the appellants relied on the case of *Musala Reddi* v. *Ramayya* (3) and argued that as the parties were governed by Customary Law and not by Muhammadan Law, the appellants *bonâ fide* believed that they were the sole heirs and legal representatives of the deceased Muhammad Din, and accordingly had made the application for substitution relying on that belief. In our opinion the decision in the Madras case applied to the facts of the present case. We accordingly overruled the preliminary objection and proceeded to hear the appeal on the merits.

The decision on the second issue has been challenged in appeal on behalf of the appellants and that on the first issue is contested on behalf of the respondent, for the learned Counsel of the defendant Shahab-ud-din has tried to support the judgment of the Court below on the ground decided against his client. We have therefore to decide in this appeal both the issues raised in the Court below.

(1) (1894) I. L. R. 16 All. 211. (2) (1907) I. L. R. 30 All. 117.
(3) (1899) I. L. R. 23 Mad. 125.

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The argument addressed to us on behalf of the defendant-respondent on the first issue was necessarily somewhat feeble, for the evidence on the record in support of the view of the Court below was so overwhelming that the decision of the learned Subordinate Judge could not be seriously contested. The agreement for reference, dated the 6th of December 1904, bears the signature of Shahab-ud-Din and the oral evidence of the scribe Muhammad Hussain fully proves its execution by him. The register of deeds kept by the scribe also bears the signature of the defendant and the genuineness of this signature is also testified to by him. The agreement dated the 12th of January 1995, and the *Mukhtarnama* executed by Shahab-ud-din in favour of Qutab Din on the 28th of April 1905 have also been proved by cogent evidence to have been executed by him. On the 16th of July 1905 Shahab-ud-din made a statement before the arbitrators to have the arbitration proceedings postponed. Then on the 13th of December 1914 he joined the plaintiffs in making an application requesting the arbitrators to proceed with the arbitration. The learned Subordinate Judge has felt some doubt as to the attestation of this application by Shahab-ud-din, but even putting this last piece of evidence aside the remaining evidence, both oral and documentary, is so overwhelming and convincing that we hold that the attempt on the part of Shahab-ud-din to deny the reference to arbitration is wholly futile and dishonest. After considering the evidence we find ourselves in complete agreement with the learned Subordinate Judge as regards the decision of this issue. The lower Court rightly rejected the plea of *alibi* set up on behalf of the defendant on the allegation that on the day of the execution of the agreement to refer, the defendant was not present in Rawalpindi. The entry in the register produced to support this plea does not appear to be genuine and cannot be relied upon.

The second issue raises a question of some difficulty. The learned Subordinate Judge has felt some doubt as to the existence of the award on the date of the suit and has felt inclined to hold that Ali Ahmad, one of the arbitrators, had not signed it at the time alleged by the plaintiff. The evidence of Ali

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Ahmad clearly shows that he had been won over by the defendant as on the face of it it is clear that he made every attempt to destroy the case of the plaintiff by trying to make out that he had never taken part in the arbitration proceedings and that he had not signed the award at the time it was made. The Court below appears to have attached too much significance to the circumstance that Ilam Din, the other arbitrator, in his statement, dated the 27th of April 1915, had not said a word about the completion of the award. The decision of the Lower Court, however, is not very definite as to this point. We, however, after considering the evidence feel no doubt on the point and hold that the award had been completed before the institution of the suit. The evidence of Ali Ahmad, as we have mentioned above, on the face of it appears to be partial to the defendant and is therefore unreliable. The lower Court, not being quite sure as to the correctness of its view on the point, went on to hold in the alternative that "In any case it is I think quite clear that Ali Ahmad, arbitrator, did not sign the award on the same date or at the same place as Ilam Din and this is in itself sufficient to invalidate the award." We are not perpared to accept this statement of the law by the learned Subordinate Judge. In support of his view he has relied upon *Bhangwan Das* v. *Shiv Dial* (1). In that case the award was impugned upon two grounds, namely : (1) that it was not conclusive as to all the matters in dispute between the parties, and (2) that the arbitrators had signed it on different dates.

It was held that the arbitrators having failed to decide all the matters in dispute between the parties and having left undecided the dispute as to two out of twenty-three cases of goods, the award was bad in law. This decision was quite sufficient for the disposal of the question before them, but the learned Judges proceeded to decide the second point also and relying on Russell on Arbitration, page 169, held that the award was bad also for the reason that it had not been executed at the same time and place. In our opinion the decision on the second point was unnecessary and went beyond the exigencies of the case. Even according to the passage

(1) 92 P. R. 1913.

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at page 169 of Russell's book all that appears to be necessary is that the arbitrators must all act together in order to pronounce a valid award. At page 230 of D. C. Banerji's Law of Arbitation in India, second edition, the rule of law on the subject, is thus stated:— "Where a case has been regularly heard by the arbitrators sitting together, evidence taken in the presence of all, and an award has been made, drawn up, and signed by them, the mere omission to sign the award at the same time and in each other's presence does not necessarily invalidate the award." In support of this statement of the law *Bhabasundari Das* v. *Makhunlal Dey* (1) and *Muthukutti Nayakan* v. *Icha Nayakan* (2) are cited. At page 231 of the book reference is made to the observation of Cockburn, C. J. *in re Hopper* (3) and the rule of law is stated in these words: "The concurrence of the arbitrators is the judicial act, and the signing is merely ministerial. All that is essential is that there must be combined action of the arbitrators and judicial exercise of their minds upon the matter to be decided." We have therefore to see in this case whether the arbitrators did as a matter of fact combine in the consideration of the materials on which they had to base their award.

Ghulam Hussain's evidence (printed at page 40 of the paper book) gives a full account of the proceedings in arbitraton. At page 41 he is said to have stated that "After the execution of Ex. P/A I used to go to the arbitrators when they started going through the accounts. I made up the whole accounts and gave it to the arbitrators. They looked through the accounts but gave no award, as Muhammad Din and Shahab-ud-din asked them to postpone their decision till after the case brought by Nur Din in respect of the same *khata* was decided." In his cross-examination he made a fuller statement as to how the accounts were prepared by the *mukhtars* appointed by the parties and how they were checked and examined by the arbitrators. This being the most important point in this case we give this portion of the statement *in extenso* :—

"We saw and went through the accounts in the house in the city already referred to. There were about fifteen or twenty ooks. They were given to us by Muhammad Din and Shahab-ud-

(1) (1871) 8 Beng. L. R. 128. (2) (1894) I. L. R. 18 Mad 22.
(3) (1867) 2 Q. B. 367.

din. Qutab Din also used to look through the accounts with me. This was after the execution of Exhibit P. A. and Exh. P. 3. Some of the accounts plaintiff had at home and some were in *Kacheri*. We got them from here. All these books were in the City house when we went there. I had not met the arbitrators up to the time I went to the house. We were looking through the accounts for 3½ or 4 months. During this time the arbitrators used to come to see us here. Ilam Din used to come every second or third day and Ali Ahmad once a week. We prepared the accounts at the instance of the arbitrators. Part of the accounts were prepared by Qutab Din and part by me. We gave these accounts over to the arbitrators. They had come to the house and I gave them to them there. The statements in Exhibit P. 8 were recorded by the arbitrators in the City house. Ilam Din recorded the statements. The accounts shown me Exhibit P. 10 were prepared by me. These are not all the accounts prepared by me. These accounts were prepared by me in 1905. These accounts are only a part of the accounts prepared by me. These accounts were prepared by me after the perusal of the books. The arbitrators struck out a number of items in the accounts prepared by me and then asked me to prepare the accounts from the items left by them. The accounts Exhibit P. 10 were prepared before the statements in Exhibit P. 8 were recorded. Some of the accounts were prepared in 1914 also by myself and Qutab Din. These accounts also comprised several pages. We made these accounts over to the two arbitrators. I do not remember to which of the two arbitrators I made over the P. A. * * * * * * The parties did not say anything *re* accepting the accounts as correct or not. Muhammad Din and Shahab-ud-din saw the accounts prepared by Qutab Din and myself in 1905. They looked through the accounts but did not object to any of the items therein. Fresh accounts were prepared in 1914 as a part of the accounts had been left undone in 1905."

Thus it is clear from this evidence that the accounts were fully gone into and checked. Ghulam Hussain was appointed a *Mukhtar* by the plaintiff Muhammad Din to act and look after the arbitration proceedings before the arbitrators on his behalf. Qutab Din was appointed by Shahab-ud-din as his *Mukhtar* to conduct the proceedings before the arbitrators. Qutab Din has also been examined as a witness in this case. He also has described the procedure as to the preparation of the accounts by the arbitrators. According to him the accounts were gone into for about 3 or 3½ months by the arbitrators before the proceedings were postponed at the request of the parties to await the decision of the claim of Nur Din. When the proceedings before the arbitrators were recommenced at

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the request of the parties the accounts were again gone into and checked. Ilam Din the arbitrator, has also given a full account of the procedure adopted by the arbitrators in deciding the case referred to them. According to his evidence Shahab-ud-din, appointed Qutab Din as his *Mukhtar* and Muhammad Din appointed Qazi Ghulam Hussain as his *Mukhtar*. Shahab-ud-din executed Exhibit P. A. in favour of Qutab Din. If Ilam Din is to be believed the interest of Shahab-ud-din was fully looked after by his *Mukhtar* Qutab Din and this is corroborated by Qutab Din himself. Ilam Din first gave his evidence in Court on the 3rd of December 1915. He was again examined on the 24th of January 1916, when he stated that Ali Ahmad, the other arbitrator, used also to be present when the *kacha* accounts used to be produced by the *Mukhtar* before them. When the arbitration proceedings re-started in 1915 Ali Ahmad and he began comparing items in Exhibit P. 10 and P. 10 (*a*) with the *bahis* of the parties. The examination of the books was conducted in the pxesence of the *Mukhtars* of the parties in the *baithak* of the plaintiffs in the *sadr*. After going through the accounts they were satisfied as to the correctness of the items in Exhibit P. 10 and P. 10 (*a*) and they sat together in the *sadr baithak* and drew up the arbitration award jointly. After the award was read Ilam Din took it to his house to write it out on a stamped paper. During the preparation of the draft Ali Ahmad made certain corrections with his own hand, and so did Ilam Din. After writing it on a stamped paper at his own house Ilam Din took it to Ali Ahmad for his approval and signature. Ali Ahmad compared the fair copy with the original draft and pronounced it to be correct. The fair copy was left with Ali Ahmad with the rest of the papers and the evidence of Ali Ahmad shows that after the institution of the suit he produced it in Court. In his statement, made on the 7th of June 1915, Ali Ahmad totally denied having taken part in the examination of the accounts or having signed the award. When he was reminded that the fair copy of the award along with other papers had been handed over to him he undertook to make a search for it at his house. An adjourn-

ment was granted (see order of Court printed at page 33 of the paper book) and he was again examined on the 10th of July 1915. He was then driven to admit that four or five months previously Ilam Din had given him the award and the papers and told him to go through the accounts and sign the award after understanding them. Ilam Din, he stated, left the award with the other papers with him. He checked the papers which were explained to him by Ilam Din. He could not say whether he put his signature on it then or not. He could not remember what was settled about the copying of the papers and could not give any reasons why the papers were kept by him. As we have already remarked Ali Ahmad apparently was inclined to be partial to the defendant and tried his best to defeat the claim of the plaintiffs. Even when compelled to admit the reference to arbitration and the preparation of the award he added the following words to his statement of the 10th of July 1915 :—" All the proceedings in the said papers were taken by Ilam Din. I only joined in giving the award. I took no part in the other papers. I signed the award after going through it and the papers." It is not very clear what he meant by saying that " I took no part in the other papers." One thing is, however, clear that he admitted the signing of the award. In his cross-examination he stated that he got the papers after a search ' 10 or 15 days ago,' and that after he had found the papers Ilam Din again explained them to him at his request ' 10 or 15 days ago.' To a question put in cross-examination by the pleader for the defendants he gave the following reply :—" I read the award again on that day. I did not sign the award after reading it 10 or 15 days ago." This was clearly an admission that he had signed the award previously, *i. e.*, about the time it was originally handed over to him by Ilam Din. The evidence discussed above in our opinion sufficiently proves that both the arbitrators had taken part in the examination of the accounts and had conjointly drawn up a draft of the award which was subsequently faired out on a stamped paper and was signed by them though not at the same time. The learned Subordinate Judge in our opinion was not right in holding that the arbitrators were guilty of

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misconduct and that they did not do their duty by acting together in deciding the dispute referred to them for arbitration The rulings *Thammiraju* v. *Bapiraju* (1) and *Nand Ram* v. *Fakir Chand* (2) relied upon by the learned Subordinate Judge therefore have no bearing on this case. The main ground, however, upon which the learned Subordinate Judge appears to have held the award to be invalid was that it had not been signed on the same day and at the same place by both the arbitrators. This is not a valid ground for invalidating an award so far as the law of arbitration in this country is concerned. We have already referred to the authorities bearing on the question. In our opinion the lower Court was wrong in refusing to pass a decree in accordance with the award.

We accordingly decree the appeal, set aside the decision of the first Court, order the award to be filed in Court and pass a decree in accordance with the award with costs to the successful plaintiff throughout.

Appeal accepted.

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(1) (1888) I.L.R. 12 Mad. 113. (2) (1885) I.L.R. 7 All. 523.