APPELLATE CIVIL.

Before Mr. Justice Mya Bu and Mr. Justice Baguley.

MA SIN
v.
MA PU AND OTHERS.*

1929
June 10.

Arbitration—Award made by three out of four arbitrators without consultation and agreement of the fourth arbitrator—Agreement to abide by decision of majority—Such award not by majority and not binding on parties—Misconduct of arbitrators to ignore the fourth arbitrator.

An award made by three out of the four arbitrators appointed without discussion with the fourth arbitrator and in his absence and to which he does not agree is not a valid award. It cannot be called an award by a majority of four arbitrators which would be binding on the parties who had agreed to abide by the decision of the majority of arbitrators in case of difference. It amounts to misconduct on the part of the three arbitrators to draw up such an award without consulting the fourth arbitrator.

Nand Ram v. *Fakir Chand*, 7 All. 523 ; *Thammiraju* v. *Bapiraju*, 12 Mad 113—*referred to.*

Sanyal for the appellant.

Ko Ko Gyi for the respondents.

BAGULEY, J.—This appeal arises from an application under section 21, Second Schedule, Civil Procedure Code, to file an award.

The parties are heirs of one U Chit, and they entered into an agreement to refer to arbitration the question of the division of the estate left by him. The agreement to refer to arbitration is a fairly lengthy one, and states that the four arbitrators have been appointed by the parties in order that the whole estate of the deceased U Chit, consisting of moveable and immoveable property, might be divided among them according to Mohamedan Law. T agreement also places a time limit on the arbit

* Civil Miscellaneous Appeal No. 48 of 1928 (at Mandalay) from the District Court of Mandalay in Civil Suit No. 8 of 1928.

1929

MA SIN
v.
MA PU.

BAGULEY, J.

and, after referring to what should happen if any of the arbitrators withdrew or was removed from office or unable to act, the parties (in paragraph 10) agree to abide by the decision that may be given by the four arbitrators, or to abide by the decision of the majority if there be any difference of opinion.

The arbitrators began their duties and produced an award, referred to as Exhibit A. In this award they fixed the shares of the heirs, the sister of the deceased taking four shares, his widow two shares, and his cousin one share, each; they also specifically divided up some of the moveable property left by the deceased, but they did not partition the immoveable property among the heirs. In my view the actual division and separation of the shares was the reason for which the arbitrators were appointed. This award (Exhibit A) was unanimous.

After this, in some way or another, the attention of the arbitrators seems to have been drawn to the fact that they had failed in the object for which they had been appointed, because they had not divided up the property and had merely stated the shares into which some of it was to be divided. After this a second award (Exhibit B), which does divide up the immoveable property was drawn up and signed by three of the arbitrators; but it was apparently not agreed to by the arbitrator who did not sign it. It is this second award which plaintiff now seeks to have filed.

The learned District Judge considered the question of whether Exhibit A or Exhibit B was to be filed. He found that Exhibit A was incapable of execution by reason of its incompleteness and inaccuracy and that Exhibit B was invalid because it was not signed by all the arbitrators and "there being no provision regarding the prevailing

1929

MA SIN
v.
MA PU.

BAGULEY, J.

of the majority opinion". This last reason is clearly due to an oversight. The reference to arbitration most clearly provides for the parties accepting the decision of the majority in case of there being lack of agreement. Against this order of the District Judge the original plaintiff has filed the present appeal.

There are two real grounds of importance: the first is that the lower Court erred in holding that Exhibit A was incomplete and incapable of execution, and the second is that Exhibit B being signed by the majority of the arbitrators was a good award. With regard to the first point in which it is contended that Exhibit A was a good award, it seems quite clear that if Exhibit A were accepted and filed we should merely have the state of affairs that the parties were joint owners in certain proportions of certain immoveable property. This would not fulfil the end for which the arbitrators were appointed. It would be incapable of execution and if the parties wished to enjoy their shares separately they would have to file a suit for partition. Exhibit A is clearly incomplete. With regard to Exhibit B, the actual state of affairs seems to be that one party had an advisor or supporter, one Soon Thin, who is not unknown to these Courts as a dabbler in litigation. When the arbitrators produced Exhibit A, he being conversant with a certain amount of law, saw at once that it was not a good award as it failed to divide up the property; so he sent a letter to the arbitrators pointing out that it was inaccurate. This letter first found its way to one of the arbitrators, Hla Din, *vide* his evidence. He gave the letter back to the clerk who brought it and said that no more could be done as the award had already been made. After this it was sent on to another arbitrator, Maung

1929

MA SIN v. MA PU.

EAGULEY, J.

Ba Kyi; it was he who wrote Exhibit B without giving notice to the parties and apparently in the absence of the arbitrator Hla Din. The other arbitrator who has been examined as witness (U Ywet) seems to know very little about it, but he seems to have signed the award blindly without knowing what it was all about. It appears from his evidence that Maung Nyein and Ba Kyi on receipt of this letter from Soon Thin promptly drew up Exhibit B and got him to sign it without discussion and then sent it on to Hla Din for him to sign too, but he refused to sign it. The question then is whether this is an award by the majority of the arbitrators which has got to be accepted by the parties in accordance with paragraph 10 of the reference to arbitration. It is clearly an award by three arbitrators, made in the absence of the fourth and without his being given an opportunity of consulting with them about it.

There seems to be very little authority on this point. An important case appears to be that of *Nand Ram* v. *Fakir Chand* (1). In this case, on page 528, Mahomed, J., says: "What the parties to a reference to arbitration intended is that the persons to whom the reference is made should meet and discuss together all the matters referred, and that the award should be the result of their united deliberations. This conference and deliberation in the presence of all the arbitrators is the very essence of the arbitration, and the sole reason why the award is made binding." This view of the matter appears to me to be correct and as differentiating well between an award by the majority of four arbitrators and an award by three arbitrators without reference to the fourth. This case, it is to be noted, is one in which

(1) (1885) 7 All. 523.

there were three arbitrators and the parties agreed to abide by the decision of the majority, but in actual fact one of the arbitrators never acted at all.

The case of *Gurupathappa* v. *Narasingappa* (1) has been quoted, but this does not help because there was no provision that the award of the majority of arbitrators should be binding.

In *Thammiraju* v. *Bapiraju* (2), there were three arbitrators appointed but one of them was absent during the examination of witnesses. All three whoever were present at the majority of the meetings and at the final meeting when the award was drawn up. In this case nothing is said as to whether it was specially provided that the opinion of the majority of the arbitrators was to prevail, but it was held that one of the arbitrators has been guilty of misconduct by absenting himself from the meeting and the other two arbitrators have been guilty of misconduct in examining witnesses in the absence of the third arbitrator. The case of *Nand Ram* v. *Fakir Chand* (3) was quoted, apparently with approval.

The only other case to which we have been referred is an unofficially reported case in the All-India Reporter, namely, *Sheik Abdulla* v. *M.V.R.S. Firm & Sons* (4), in which Po Han, J., expressed himself as being of opinion that when a matter has been referred to the arbitration of five arbitrators and it was expressly laid down that the parties abide by the award of the majority of them, an award made by three arbitrators out of the five in the absence of the other two, who took no part in the arbitration proceedings, could not be regarded as a valid award by the majority of the five arbitrators which would

(1) (1884) 7 Mad. 174.
(2) (1889) 2 Mad. 113.
(3) (1885) 7 All. 523.
(4) (1924) 2 Ran. 153.

1929

MA SIN
v.
MA PU.

BAGULEY, J.

bind the parties. With this opinion I am in entire concurrence.

For these reasons I am of opinion that an award of three arbitrators, made without final discussion with the fourth arbitrator and in his absence and to which he does not agree, is not an award by a majority of four arbitrators, which under the present deed of reference would have to be accepted, but is an award by three arbitrators. The three arbitrators must be regarded as having been guilty of misconduct in drawing up the final award without consulting the fourth one at all.

I would therefore dismiss this appeal with costs, advocate's fee three gold mohurs.

MYA BU, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Chari and Mr. Justice Brown.

1929

June 13.

LEONG HONE WAING
v.
LEON AH FOON AND OTHERS.*

Religion of a deceased person, how provable when a relevant fact—Declaration by deceased in his will—Evidence Act (I of 1872) ss. 11 (2), 14, 21 (2)—Chinese Confucian, testamentary power of a,—Succession Act, (XXXIX of 1925), s. 58—Undue influence—mere disinheritance of one heir does not prove undue influence.

Where the religion of a deceased person is a fact in issue, his own solemn declaration about his religion made in a formal document, *e.g.* in his will, is admissible in evidence and is entitled to great weight. Such declaration would be admissible under the provisions of *ss.* 11 (2), 14 and 21 (2) of the Evidence Act.

To establish a *prima facie* case of undue influence as regards the execution of a will, it is not enough to show merely that the eldest son was entirely disinherited and another son given the whole estate.

Bur Singh v. *Uttam Singh* (P.C.) 38 Cal. 355—*referred to.*

* Civil First Appeal No. 245 of 1928 from the judgment of the District Court of Amherst in Civil Regular No. 28 of 1927.