APPELLATE CIVIL.

Before Mr. Justice Carr and Mr. Justice Cunliffe.

LALJEE JESANG
v.
CHANDER BHAN SHUKUL.*

1930
Dec. 8.

Pending Suit—Arbitration without order of Court—Award whether a Compromise—Decree in terms of the award—Civil Procedure Code (Act V of 1908) S. 89, O. 23, R. 3.

Where parties to a pending suit refer their disputes to arbitration without the intervention of the Court, and an award is made, such an award is a compromise within the meaning of Order 23, Rule 3 of the Civil Procedure Code, and can be recorded and confirmed in the terms of a decree. The words "any other law for the time being in force" in S. 89 of the Code, refer to the provisions of O. 23, Rule 3.

Chanbasappa v. *Basalingayya*, I.L.R. 51 Bom. 908; *In re the Guardian Assurance Company*, 1917, 1 Ch. Div. 442; *The Mercantile Investment Company* v. *The International Company of Mexico* (1893) C.A. 1 Ch. 484; *Miles* v. *The New Zealand Alford Estate Company*, C.A. 32 Ch. Div. 266—*referred to.*

Amar Chand v. *Banwari Lall*, I.L.R. 49 Cal. 608; *The Dekari Tea Company* v. *The Indian General Steam Navigation Company*, 25 C.W.N. 127—*dissented from.*

Halkar for the appellant.

K. C. Bose for the respondent.

CUNLIFFE, J.—The point of law in this appeal, and it is the sole point raised, may be stated as follows :—

"Where parties to a suit engage in arbitration without an order of the Court, can the award in that arbitration be confirmed in the terms of a decree?"

As far as I know this question is *res integra* in Burma. I can find no decision of this Court, or of the late Chief Court, dealing with the problem. There is also so much divergence of judicial opinion in India on the question that it seems to me that no useful purpose would be served by examining in detail all the conflicting decisions.

* Civil Miscellaneous Appeal No. 35 of 1930 from the order of the Original Side in Civil Regular No. 457 of 1929.

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In the Court below, the learned Judge decided the point in the affirmative; but he gave no detailed reasons for so doing. Apparently the Notes in Mr. Mulla's Edition of the Code of Civil Procedure appended to Order XXIII, Rule 3, were quoted to him. His decision appears to have been based on the numerical majority of the opinions expressed in the different Indian High Courts.

I propose, therefore, to examine those enactments which deal with Arbitration as far as the statutory law in British India is concerned.

The Indian Arbitration Act of 1899 does not, I think, touch the question at all. It is a close copy of the English Act and deals only with those Arbitrations initiated by agreement between parties who are not in litigation before the Courts.

There are a number of decisions to this effect; and, having regard to the wording of section 2 of the Act, it seems impossible that any other view could be taken.

In my view, therefore, we are not concerned with the controlling provisions of the Indian Arbitration Act in appeal before us.

Section 89 of the Code Civil Procedure, under the heading of "Special Proceedings, Arbitration," runs as follows:—

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, *or by any other law for the time being in force*, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule."

The first clause of Schedule II to the Code of Civil Procedure is in these terms:—

"Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, *they may*, at any time before judgment is pronounced, apply to the Court for an order of reference."

There are 23 clauses to the Schedule. They deal strictly with the manner of appointing the arbitrator and with the procedure which is to be followed with regard to the arbitration itself. It seems clear, however, that the main part of the Schedule does not refer to Arbitrations initiated by the parties themselves, although from clause 18 onwards reference is made to the general enforcement of awards commenced without the sanction of the Court.

Order XXIII, Rule 3, of the First Schedule of Orders and Rules, is in these words :—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any *lawful agreement or compromise*, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such *agreement, compromise or satisfaction* to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

It, therefore, falls to be decided firstly with regard to the interpretation of section 89 of the Civil Procedure Code whether the expression "any other law for the time being in force" refers to the Rules and Orders made under the Code ; and secondly whether the words "by any lawful agreement or compromise" employed in Rule 3 of Order XXIII, include and indicate arbitration proceedings.

It has been argued before us that an arbitration award is not a lawful agreement, nor is it a compromise or satisfaction between the parties to a suit. Still less we are invited to say, can a disputed award be brought into any of the above three categories ? I think, however, that there can be no doubt that the word "compromise" in one sense does include an agreement between two or more persons for the ascertainment of their legal rights provided there is some controversy between them. It has been decided in England that the test of the application of the word "compromise"

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in this regard is the existence of a real dispute, or a substantial difficulty between those who require the composition of their differences. See the judgments in *The Mercantile Investment and General Trust Company* v. *The International Company of Mexico* (1); *Miles* v. *The New Zealand Alford Estate Company* (2), and *In re the Guardian Assurance Company* (3).

In the case of *Chanbasappa* v. *Basalingayya* (4), an unanimous decision of the Full Bench, Amberson Martin, C.J., in this connection, quoted the late Mr. Justice Story's work on Equity Jurisprudence, where one of the legal definitions of the word "compromise" is stated to be :—

"arbitration called compromise, a mode of terminating controversies much favoured in the civil law."

This is, of course, an American Jurist's definition and translation of the Latin word "*compromissum*" well known to Roman Law.

The learned Chief Justice in the same case quoted Ainsworth's Latin English Dictionary in support of this view, where a reference is made to Cicero for his use of the word in the same sense.

In the same case also Blackwell, J., made reference to Murray's English Dictionary, where the word compromise is said to bear *inter alia* the following two meanings : (*a*) a joint promise or agreement made by contending parties to abide by the decision of an arbiter or referee ; (*b*) the settlement or arrangement made by an arbiter between contending parties : arbitration.

Turning to the question whether the words "any other law for the time being in force" contained in section 89 of the Code can refer to a rule or order under the Code, it seems to me that, having regard to

(1) C.A. (1893) 1 Ch. 484. (2) C.A. 32 Ch. Div. 266.
(3) (1917) 1 Ch. Div. 442. (4) (1927) I.L.R. 51 Bom. 908.

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the state of arbitration law in British India, the words must refer, and refer only, to Order XXIII, Rule 3. I know of no other law to which these words could possibly be appropriate.

If, then, these two points of view with reference to the interpretation of section 89 and of Order XXIII, Rule 3, are correct, the answer to the question before us must be in the affirmative, and the Court can confirm the award between the parties here in the terms of a decree.

The judicial opinion of the Calcutta High Court is however, *contra* and would answer the proposed question in the negative. This attitude is based on two judgments of Rankin, C.J., delivered on the Original Side of the Court when sitting as a Puisne Judge. In the cases in question—*The Dekari Tea Company* v. *The Indian General Steam Navigation Company* (1), and *Amar Chand Chamaria* v. *Banwari Lall Rakshit and others* (2) the learned Chief Justice appears to have founded his decision upon what he describes as the intention of the Legislature to provide a comprehensive scheme in the Second Schedule of the Code to deal with all arbitrations initiated between parties already in litigation before the Court. He adduced a passage in the Privy Council case of *Ghulam Khan* v. *Muhammad Hassan* (3), to support this opinion. The passage in question quoted from the judgment of Lord Macnaghten runs as follows :—

"Where parties to a litigation desire to refer to arbitration any matter in difference between them in a suit, in that case all proceedings from first to last are under the supervision of the Court."

With the greatest possible respect, I may note that this is a judicial interpretation, and a partial interpreta-

(1) (1920) 25 C.W.N. 127. (2) (1922) I.L.R. 49 Cal. 608.
(3) (1902) I.L.R. 29 Cal. 167.

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tion only, of Chapter XXXVII of the old Code. The sections of that Chapter are not the same as the clauses contained in the Second Schedule to the present Code, either in material or, from an exact point of view, in principle.

It seems to me, further, a straining of language to suppose that, because certain proceedings between the parties have not been conducted under the direct superintendence of the Court, the Court is precluded from confirming them provided it is satisfied that an equitable settlement or an express intention to settle has taken place.

Quite apart from the interpretation of the language used in Order XXIII, Rule 3, I should have thought also that the Court had an inherent power to confirm any reasonable agreement between the parties appearing before it.

It may also be observed that the language of the first clause to the Second Schedule of the Code set out earlier in this judgment is permissive and not mandatory; nevertheless at page 612 of his judgment in *Amar Chand Chamaria* v. *Banwari Lall Rakshit and others* (1), the learned Chief Justice uses these words :—

"But it is difficult to see what point there is in the Second Schedule saying or meaning that arbitration must be done in a particular way if, according to some other law or principle, it may still be done in another."

I am unable to find the word "must" in the Schedule at all, and I think that this enlarged view which the learned Chief Justice formed of the exact meaning conveyed by the first clause to the Second Schedule influenced his mind unduly.

In my opinion the phrase "shall be governed by" found in section 89 is very inappropriate to suggest or

(1) (1902) I.L.R. 29 Cal. 167.

indicate a complete prohibition to adopt a procedure outside that laid down in the following clauses which occur.

Reading the Schedule as a whole, it seems to me that what is meant must be "if you arbitrate, your procedure should be as laid down". But this is a long way from barring any ratification by the Court of an arbitration conducted in a more informal manner.

For these reasons I think the award here should be confirmed in the terms of a decree and accordingly I would dismiss the appeal.

CARR, J.:—On one point I regret to differ from my learned brother. In my opinion the Indian Arbitration Act, 1899, does apply. The preamble to that Act shows that it relates to "arbitration by agreement without the intervention of a Court," and I can see nothing to withdraw the arbitration now in question from the scope of that Act.

This point, however, is really immaterial, for on the facts, as set out in the judgment of learned judge of the Original Side, I consider that the requirements of section 11 of the Act have been fulfilled and the award has been duly brought before the Court.

On all other points I agree with the judgment of my learned brother and concur in dismissing this appeal with costs. Advocate's fees ten gold mohurs.