FULL BENCH (CIVIL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Mosely.

1939

Jan. 2.

MAUNG HLAY *v.* U GE.*

"Compromise"—Adjustment of suit—Award in arbitration in pending suit without intervention of Court—Award not a compromise—Award treated as adjustment by parties—Rules as to arbitration—Compliance necessary to make award valid—"Any other law for the time being in force"—Civil Procedure Code, s. 89; O. 23, r. 3; Sch. II.

An award expressed to be made in an arbitration without the intervention of the Court in a pending suit is not a compromise within the meaning of O. 23, r. 3 of the Civil Procedure Code.

Amar Chand v. *Banwari Lall*, I.L.R. 49 Cal. 608, followed.

Bhimraj v. *Munia*, I.L.R. 14 Pat. 799; *Girimondi* v. *Jarini*, I.L.R. 55 Cal. 538; *Hari Prasad* v. *Soogni Devi*, 3 Lah. L.J. 162; *Mahammad Mirza* v. *Osman Ali*, I.L.R. 62 Cal. 229; *Rukhanbhai* v. *Adamji*, I.L.R. 33 Bom. 69, referred to.

Laljee Jesang v. *Chandra Bhan Sukul*, I.L.R. 9 Ran. 39, overruled.

Chanbasappa v. *Basalingayya*, I.L.R. 51 Bom. 908 (F.B.); *Subbaraju* v. *Venkataramaraju*, I.L.R. 51 Mad. 800, dissented from.

Where, however, subsequent to the making of such an award, it is shown that the parties themselves treated it as a concluded adjustment by agreement within the meaning of O. 23, r. 3 of the Code, then the Order applies.

A.K.A.C.T.A.L. Chettyar v. *A.K.R.M.M.K. Firm*, I.L.R. 14 Ran. 766; *K.T.T. Shanmugam Chetty* v. *C.T.A. Annamalay Chetty*, 6 L.B.R. 55, approved.

Manilal v. *Gokaldas*, I.L.R. 45 Bom. 245, referred to.

Within the compass of the second schedule of the Civil Procedure Code lie all the rules relating to arbitration subject to the proviso contained in s. 89 of the Code. If the parties to a dispute purport to go to arbitration but ignore these rules, there can be no award of which the Courts will take notice as such. And there can be no adjustment of the dispute by lawful agreement by reason of a submission alone unless the third party to whom the parties have recourse brings them to an adjustment by lawful agreement.

The words "any other law for the time being in force" in s. 89 of the Civil Procedure Code cannot include O. 23, r. 3 of the Code.

Gajendra Singh v. *Durga Kunwar*, I.L.R. 47 All. 637, referred to.

Darwood for the applicant. The question is whether an award made in an arbitration without the intervention

* Civil Revision No. 171 of 1938 from the order of the District Court of Thatôn in Civil Appeal No. 10 of 1938.

of the Court in a pending suit is a compromise within Order 23, rule 3 of the Civil Procedure Code, especially when one of the parties contests its validity. In *Laljee Jesang* v. *Chander Bhan Sukul* (1) a Bench of this Court held that such an award is a compromise within the meaning of Order 23. The Bombay, Madras and Allahabad High Courts take that view whilst the Calcutta, Patna and Lahore High Courts take the opposite view.

Arbitration is not synonymous with compromise. Unless the procedure prescribed in the 2nd Schedule to the Civil Procedure Code is followed there can be no award enforceable in the strict sense of the term. A mere submission to arbitration is not sufficient to raise the inference that there has been an adjustment of the dispute by a lawful agreement. Order 23, r. 3 uses the words "lawful agreement or compromise" and not arbitration or award. The words "any other law for the time being in force" in s. 89 of the Code cannot refer to O. 23, r. 3, that is to say another portion of the Code itself. The award must be such as will come within the scope of s. 89 of the Code.

The applicant has not accepted the award, and therefore it cannot be said that there has been an agreement or compromise on the point.

The following cases were referred to :

K.T.T. Shanmugam Chetty v. *C.T.A. Annamalay Chetty* (2) ; *Shavakshan Davar* v. *Tyab Haji Ayub* (3), overruled in *Manilal Motilal* v. *Gokaldas* (4) ; *Chanbasappa* v. *Basalingayya* (5) ; *Dinkarrai* v. *Yeshvantrai* (6) ; *Amar Chand Chamari* v. *Banwari Lall* (7)—the order of reference is important ; *Girimondi*

(1) I.L.R. 9 Ran. 39.
(2) 6 L.B.R. 55.
(3) I.L.R. 40 Bom. 245.
(4) I.L.R. 45 Bom. 245.
(5) I.L.T. 51 Bom. 918.
(6) I.L.R. 54 Bom. 197.
(7) I.L.R. 49 Cal. 605.

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Dasi v. *Jarini Charan* (1); *Mahammad Mirza Pandit* v. *Osman Ali* (2); *Rahim Kanta* v. *Rajani Kanta* (3); *Hari Prasad* v. *Soogni Devi* (4); *Bhimraj Manai Lal* v. *Munia Sethani* (5); *Gajendra Singh* v. *Durwa Kunwar* (6); *Subbaraju* v. *Venkatramaraju* (7).

E Maung for the respondent. All the decisions on the subject have been placed before the Court and the respondent relies on the cases in his favour. Under s. 28 of the Contract Act an agreement to abide by the decision of friends is a lawful agreement. The agreement is enforceable as an agreement though it may not fall within Schedule II of the Civil Procedure Code.

ROBERTS, C.J.—This is an application for revision of a judgment of the District Court of Thatôn dismissing an appeal from the Subdivisional Court which passed a decree in the respondent's favour in the following circumstances. The appellant was prosecuted at the instance of the respondent for the theft of a buffalo, and he was convicted, but his conviction was set aside by the High Court after he had suffered three and a half months' imprisonment. He thereupon brought an action for malicious prosecution against the respondent. In the course of that action the Court was informed that the parties had referred their case to arbitration without the intervention of the Court. It is agreed that the parties mutually consented to accept the award of a majority of the arbitrators, but when the award was made the defendant (applicant in the present revision) contested its validity. Upon application being made the Court filed the award as being an adjustment by lawful agreement or compromise, within the meaning of

(1) I.L.R. 55 Cal. 538.
(2) I.L.R. 62 Cal. 229.
(3) 38 C.W.N. 648.
(4) 3 Lah. L.J. 162.
(5) I.L.R. 14 Pat. 799.
(6) I.L.R. 47 All. 637.
(7) I.L.R. 51 Mad. 800.

Order 23, rule 3, and passed a decree in accordance therewith. It is clear that this was the only course open to the Subdivisional Judge having regard to the decision in *Laljee Jesang* v. *Chander Bhan Sukul* (1) by a Bench of this Court.

I had occasion to remark in *A.K.A.C.T.A.L. Alagappa Chettyar* v. *A.K.R.M.M.K. Chettyar Firm* (2) that the time might come when that case would have to be considered by a Full Bench of this Court and that time has now arrived. The question is whether an award expressed to be made in an arbitration without the intervention of the Court in a pending suit is a compromise within the meaning of the Order to which I have just referred. Order 23, rule 3 runs as follows :

"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."

By section 89 (1) of the Code :

"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."

As Mukerji J. pointed out in *Gajendra Singh* v. *Durwa Kunwar* (3) exhaustive provision has been made in the second Schedule for every kind of arbitration. The first 16 paragraphs deal with cases in which the parties to a suit apply to the Court for an order of

(1) (1930) I.L.R. 9 Ran. 39. (2) (1936) I.L.R. 14 Ran. 766, 774.
(3) (1925) I.L.R. 47 All. 637, 658.

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reference; paragraphs 17 to 19 deal with cases in which the parties to a dispute which has not been crystallized into a suit agree to make a reference to arbitration and application is made that such reference should be under the supervision of the Court; and the remainder of the Schedule, beginning with paragraph 20, deals with references to arbitration without the intervention of a Court. The mode by which the award may be enforced is laid down in paragraph 20; any person interested therein may apply to any Court having jurisdiction over the subject matter of the award that the award be filed in Court. This application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. The provisions of the Schedule are perfectly clear. No attempt has been made to comply with them.

In *Shavakshaw Davar* v. *Tyab Haji Ayub* (1) action had been brought for the price of goods sold and delivered to the defendant. During the pendency of the suit and without the intervention of the Court the parties agreed to refer the matters in dispute to arbitration and an award was made which was disputed by the defendant on the ground that the arbitrators exceeded their jurisdiction and that the defendant was not given a proper opportunity of calling witnesses: the plaintiff sought a decree on the award as an adjustment of the suit by agreement within the meaning of Order 23, rule 3; Macleod J. refused to grant a decree under this Order but treated the application as one under paragraph 21 of the second Schedule.

In *Manilal Motilal* v. *Gokaldas Rowji* (2) a Bench of the same Court overruled this decision and the same learned Judge, then Chief Justice, said he was satisfied

(1) (1916) I.L.R 40 Bom. 386. (2) (1920) I.L.R. 45 Bom. 245.

he was wrong in treating the application in the way he did. At page 263 he said :

"It all comes to this that a party to a suit setting up an award by arbitration out of Court must satisfy the Court that there has been an adjustment by lawful agreement which entitles him to ask that the suit should be stopped and a decree passed in terms thereof. The Court must then decide on the general principles of the law of contract whether or not there has been such an adjustment."

With respect, I agree with this part of his judgment, and that is exactly what was held by this Court in *A.K.A.C.T.A.L. Alagappa Chettyar* v. *A.K.R.M.M.K. Chettyar Firm* (1). Where, subsequent to the making of the award, it has been shown that the parties themselves treated it as a concluded adjustment by agreement within the meaning of Order 23, rule 3, then the Order applies. It matters not how the parties came to terms provided a genuine compromise of their dispute has been reached. This principle is by no means a new one and was accepted in *K.T.T. Shanmugam Chetty* v. *C.T.A. Annamalay Chetty and another* (2) by a Bench of the Chief Court of Lower Burma.

It is to be observed in passing that Macleod C.J. had disagreed with the dictum of Davar J. in *Harakbhai* v. *Jamnabai* (3) that Order 23, rule 3, came within the definition of "any other law for the time being in force" contained in section 89 of the Code of Civil Procedure. The learned Chief Justice added:

"It is only by treating an agreement to refer, combined with the award, as an adjustment by lawful agreement or compromise, that arbitration proceedings can possibly be brought within the scope of that rule."

(1) (1936) I.L.R. 14 Ran. 766, 774. (2) 6 L.B.R. 55.
(3) (1912) I.L.R. 37 Bom. 639

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In *Amar Chand Chamaria* v. *Banwari Lall Rakshit and others* (1) Rankin J. dealt with the precise point now before us. In that case there was an agreement to refer to arbitration without the intervention of the Court in a suit which was already pending. The order of reference is contained in the report and contains an agreement to abide by the decision of the arbitrators. As to an allegation that only one of the defendants signed the submission the learned Judge expressly refrained from saying anything; but he held that there was no provision except in the second Schedule for a submission to arbitration of matters in difference in a suit, and disagreed with the contention that it was open to the parties to put aside the provision thus made and to have an award behind the back of the Court and without its order. I respectfully agree with his observation that

> "informal and uncontrolled arbitrations between parties to a suit leading up to litigation upon the bare issue as to whether there is in fact a valid adjustment, are the very things from which the second Schedule was meant to deliver litigants."

In *Dinkarrai Lakshmiprasad* v. *Yeshwantrai Hariprasad* (2) it was held by a single Judge that an agreement to refer to arbitration matters in difference between the parties in a pending suit without the order of the Court under paragraphs 1 to 3 of the second Schedule was illegal and could not he filed under paragraph 17. In *Chanbasappa* v. *Basalingayya* (3) Amberson Marten C.J. had already considered (at page 937) that the better view was that paragraph 20 did not apply to arbitrations in a pending suit. But this view did not lead him to the conclusion that there could be no room for the informal or uncontrolled

(1 1921) I.L.R. 49 Cal. 608. (2) (1929) I.L.R. 54 Bom. 197.
(3) (1927) I.L.R. 51 Bom. 908.

arbitrations to which Rankin J. had referred. Adopting the definition of "*compromissum*" in Ainsworth's Latin English Dictionary as "a bond or engagement wherein two parties oblige themselves to stand to the arbitration of award of the umpire" he considered that such an award could form the basis of a decree under Order 23, rule 3 of the Code of Civil Procedure.

The parties to a dispute are never, of course, obliged to go to arbitration, and the second Schedule only says they "may" do so. Within the compass of the second Schedule, as it appears to me, lie all the rules relating to arbitration, subject to the proviso contained in section 89 of the Code. If the parties to a dispute purport to go to arbitration but ignore these rules, it seems to me that there can be no award of which the Courts will take notice as such. Whether by some means, other than the methods of arbitration which are recognized by the Courts, they arrive at a lawful agreement or compromise which adjusts their suit wholly or in part does not depend upon any matter relating to arbitration or award, but depends upon a plain issue of fact, independent of any reference to an informal or uncontrolled arbitration.

In order to support the conclusion at which he arrived Marten C.J. referred to the judgment of Sir Lawrence Jenkins in *Pragdas* v. *Girhardas* (1). But this was under the old Code which contained no such rule as has been enacted in section 89 of the present Code, and Sir Lawrence Jenkins expressly said that he could find nothing in Chapter XXXVII, that is of the old Code, which invalidated a proceeding not in accordance with its provisions. When dealing with section 89 Marten C.J. said :

"I think however it is sufficient to give full force to the word 'shall' in the second Schedule if one holds that the second

(1) (1901) I.L.R. 26 Bom. 76.

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Schedule governs any particular case so far as applicable but that it is not intended to be exhaustive or to prevent parties resorting to arbitration in some manner different from that expressly provided for in the second Schedule."

I am unable to follow the argument that because reference to arbitration is permissive and not obligatory, a reference when made can be made outside the rules which have been carefully drawn up to cover, so far as can be seen, every class of arbitration and to ensure a proper supervision by the Court in each of them. I must respectfully dissent from his conclusion that section 89 is not intended to be exhaustive in all cases in which the parties choose of their own free will to adopt a reference to arbitration as the method of settling their disputes.

It is not that they are forbidden to adjust their differences by recourse to a third party ; far from it. But unless the procedure prescribed in the second Schedule is followed, there can be no award enforceable thereunder in the strict sense of the term ; nor can there be any adjustment of the dispute by lawful agreement by reason of a submission alone or unless the third party to whom they have recourse brings them in fact to an adjustment by lawful agreement. In such a case the introduction of language describing his intervention as that of an arbitrator is inaccurate and serves merely to confuse the issues.

In *Girimondi Dasi* v. *Jarini Charan Porel* (1) the earlier Calcutta decision was followed by a Bench, and is now settled law in Bengal. See *Mahammad Mirza Pandit* v. *Osman Ali* (2). Similar decisions are to be found in *Hari Prasad* v. *Soogni Devi* (3) and *Bhimraj Manai Lal Firm* v. *Munia Sethani* (4). In the last

(1) (1927) I.L.R. 55 Cal. 538.
(2) (1934) I.L.R. 62 Cal. 229.
(3) (1920) 3 Lah. L.J. 162.
(4) (1935) I.L.R. 14 Pat. 799.

mentioned case the matter came before the Court by way of revision. It is clear that if a decree under Order 23 Rule 3 cannot be made there was a want of jurisdiction in the Subdivisional Court to make it.

Apart from the cases already mentioned, two important authorities were cited to us by Mr. Darwood who preferred in his argument to deal at once, rather than by way of reply, with every decision which could be found unfavourable to him. The first of these is *Gajendra Singh* v. *Durga Kunwar* (1) ; but on careful perusal of the judgments it will be observed that it is by no means a strong authority for the contention of the respondents here. Walsh J. in one of the majority judgments, explained that he did not propose to consider the differences which had arisen in various cases cited from different High Courts with regard to the difficulties in applying rule 3 of Order XIII. His reason was that he was satisfied that the facts in the case brought it within the provision of the Code ;

" the transaction proved before us seems to me to be an agreement, compromise and satisfaction of the whole of the subject matter in appeal."

Whether he was right in reaching such a conclusion appears to me to be beside the point. Having arrived at it, he could ignore these differences. But Mukerji J. did not view the facts in the same light and he proceeded to make a careful examination of the question of law which thereby became in his opinion a vital one.

One of the questions which has arisen is whether the words " any other law for the time being in force " in section 89 of the Civil Procedure Code can include

(1) (1925) I.L.R. 47. All. 637.

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Order XXIII rule 3. I am firmly of opinion that they cannot. As Mukerji J. dealt with this matter amongst others exhaustively in the judgment referred to I am content to say; first, that "any other law for the time being in force" must in my opinion mean an enactment relating to arbitration, as where in certain classes of agricultural disputes reference may be made by the application of some local enactment to the decision of the Collector for the final determination of matters in issue; secondly, that in my opinion a reference in the Code to "any other law" cannot be construed to mean some other part of the Code itself; and thirdly, that it would have been easy for the Legislature, if recourse to Order XXIII rule 3 in cases of arbitration had been intended, to include some words making this plain rather than deliberately to employ words which do not relate to arbitration at all and would appear to have no connection with it, except by dint of meticulous research in the Latin dictionary. I do not see how a dispute can be said to have been adjusted when one of the parties thereto energetically denies that the adjustment is satisfactory. The rule deals with an adjustment by compromise and not with a compromise merely. In my opinion adjustment means settlement and the harmonizing of disputes, and where there is no settlement and no harmony a dispute cannot be said to have been adjusted by way of lawful agreement or compromise, or at all. It appears to me entirely wrong to import into the meaning of the words used in Order 23 Rule 3 some connotation which is at variance with the provisions of section 89 and of the second Schedule. I respectfully associate myself with the conclusions of law arrived at by Murkerji J. so far as they relate to the present application, as well as with those of Rankin J. to which I have already referred.

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The remaining case cited to us is that of *Subbaraju* v. *Venkataramaraju* (1). A Full Bench in that case agreed with the meaning which had been given to the word " compromise " by Marten C.J. in the Bombay case. Phillips J. said :

" It is difficult to see on what principle parties who agree to accept a fixed sum in satisfaction of a claim can be said to compromise that claim, whereas if they agree to accept a sum which is to be fixed by someone else that does not amount to a compromise."

Now the governing word in Order 23, Rule 3, appears to me to be not " compromise " but " adjustment " and in the former instance given it is clear that the parties have adjusted their dispute : in the latter case if their agreement is merely a reference to arbitration then it appears to me that they must conform to the rules under which the Court will enforce awards. The agreement to proceed to arbitration is not an " adjustment by any lawful agreement or compromise " because it is an agreement to enter upon proceedings which are under the supervision of the Courts. It is not complete in itself, since the validity of the acts to be done and the methods by which they are done remain open to challenge in the Courts according to the rules laid down in the second Schedule. True, the parties may agree to accept the award of an arbitrator ; but the Courts will refuse to enforce the award if his task is performed *mala fide* as for instance if he takes a bribe, or refuses to hear one of the parties. They keep a check upon the proceedings, and once the parties enter into such an agreement their method of enforcing the award is that which is laid down by the second Schedule and none other. If they mutually agree to the terms of the award after it is made it may become an adjustment by lawful

(1) (1928) I.L.R. 51 Mad. 800.

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agreement ; but if they do not it cannot be so recorded. Thus I concur with the observation of Beaman J. in *Rukhanbai* v. *Adamji* (1) that

"a mere agreement to refer a matter to arbitration, cannot logically and without unduly straining language, be fairly called an adjustment of a suit."

It would be unconscionable to say that parties to a dispute may make an agreement to accept as binding an award of an arbitrator, and then to afford to an honest party to such an agreement no remedy if he were defrauded by a corrupt bargain between the arbitrator and the other party. But it seems that the logical conclusion of what is contended for here would be to say that the Court is obliged to record such a corrupt bargain and to pass a decree in accordance therewith ; and this upon the ground that the confidence reposed in the arbitrator by the party defrauded prevents him from saying that the matters in dispute have not been adjusted by lawful agreement or compromise.

With these considerations in mind I pass to consider the case of *Laljee Jesang* v. *Chander Bhan Sukul* (2) which in my opinion can no longer be regarded as good law and which must be over-ruled. It is somewhat unsatisfactory to be unable to learn from the report whether the parties had agreed to accept the award after it had been made and had thus by a lawful agreement arrived at an adjustment of their disputes. That this may have been so appears likely from a passage in the leading judgment of Cunliffe J. at p. 44 :

"Quite apart from the interpretation of the language used in Order 23 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."

(1) (1908) I.L.R. 33 Bom. 69, 74. (2) (1930) I.L.R. 9 Ran. 39.

The existence of an agreement arrived at after the award had been made would of course have enabled the Court to record it as an adjustment upon that basis alone. But the Court proceeded to consider not whether the award had been accepted by both parties, but whether, apart from its acceptance, it could be recorded and confirmed in terms of a decree.

In determining whether the words " any other law for the time being in force " could refer to an order under the Code itself having no express reference to arbitration Cunliffe J. was content to observe that he knew of no other law to which these words could possibly be appropriate. I do not find it necessary to inquire more precisely whether such a law exists here, or may have existed at some time in some part of India. In my opinion the construction to be placed upon the words is not that some enactment must be found to fit them. In other respects my reasons for differing from the conclusions arrived at by this Bench have been sufficiently explained.

I am therefore of opinion that this case must go back to the Subdivisional Judge with the instructions that in the light of these proceedings he has no jurisdiction to pass the decree under Order XXIII Rule 3 against the defendant ; and the decree passed must accordingly be, and is, set aside, with costs *ad valorem.*

MYA BU, J.—I concur.

MOSELY, J.—I concur.