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Before Sir C. Sargent, Justice, and Mr. Justice Bayley.

VALABDA'S KALLIANDA'S, PLAINTIFF, v. UTAMCHAND
 MA'NEKCHAND, DEFENDANT, AND OTHERS.*

1879
 February 13.

*tion—Agreement to refer to private arbitration by parties engaged in liti-
 —Civil Procedure Code (Act X) of 1877, Secs. 523 and 525, 506 et seq.*

sections 523 and 525 of the Civil Procedure Code (Act X) of 1877, parties
 as well as persons not engaged in litigation may agree to refer matters
 between them to private arbitration without the intervention of the
 Court; and the mere fact that a suit is
 with respect to the matters in dispute, is not of itself a sufficient reason to
 Court to refuse to file the agreement.

plaintiff in these two suits prayed for an account. The
 both suits were the same, but the actions were brought
 of different partnerships. In February 1872, decrees
 in both suits, referring them to the Commissioner for
 of taking accounts between the parties, and subse-
 all questions at issue between the plaintiff and the defen-
 were settled. In February 1877, certain accounts still re-
 to be taken as between two of the defendants, viz., Ghellá-
 mchand and Utamchand Mánekchand. In August 1877,
 defendants agreed to refer the matter to private arbitration;
 no award was made, Ghellábhái Hemchand withdrew
 agreement to refer. Thereupon Utamchand Mánekchand

* Suits Nos. 410 and 411 of 1868.

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took out a summons, calling upon Ghellábhái Hemchand cause why the agreement of reference should not be filed in under section 523 of the Civil Procedure Code (Act X) of 1877.

The *Advocate General* (Honourable *J. Marriott*) and *S* appeared to show cause.—This application should have been in writing, and should have been numbered and registered as provided in section 523 of the Civil Procedure Code (Act X) of 1877, sec. 523.

Section 523 of the Civil Procedure Code of 1877 does not apply to the present case, nor does the corresponding section 326 of the Code of 1859. These suits have been referred to the Commissioner by the decree of the Court, and the parties, except by consent, cannot proceed in the ordinary way. The Court having made a decree dealing with the case, one party cannot force the other to take a different course not contemplated by the Court. Sections 506 and 507 of the Code of 1877 provide for reference to arbitration by the Court to a suit. Section 523 provides for reference to arbitration by persons not parties to a suit. That section, therefore, does not apply to this case.

Macpherson, contra.—There is nothing to prevent parties to a suit from making any agreement between themselves, although the suit has been referred to the Commissioner, and they are bound to abide by their agreement. He referred to *Pestonji Nusserwanji Manockji*,⁽¹⁾ *Allá Aiyáppá v. Nundula Periya*,⁽²⁾ *Randell & Co. v. Thompson*.⁽³⁾

SARGENT, J.—The question in this case arises on a summons taken out in Chambers on 6th April 1878, by the plaintiff Utamchand Mánekchand, in suits Nos. 410 and 411, calling on the defendant Ghellábhái Hemchand to show cause why an agreement of reference made on 15th August 1877 should not be filed in Court as provided by section 523 of the Civil Procedure Code (Act X) of 1877. It appears that an agreement had been made in the two suits on 28th February 1872, referring to the Commissioner to take certain accounts between the parties, and that on the 17th February 1877, all claims had been referred to the Commissioner, except between the defendants Ghellábhái Hemchand and

(1) 3 Mad. H. C. Rep. 183, and 12 Moore P. C. 112 at pp. 129-30.

(2) 3 Mad. H. C. Rep. 83.

(3) L. R. 1 Q. B. D. 7.

Mánékchand. It was ordered that Ghellábhái should have charge of the suit in taking these accounts so far as they had to be taken between himself and Utamchand Mánékchand. Other steps were taken in the summons, owing principally to the death of Ghellábhái Hemchand in June 1878, until the close of the beginning of 1879, when it ultimately came on for trial before Bayley, J., and was adjourned by him into Court on the consent of both parties, to be heard by two Judges. A primary objection has been taken, that the application should have been in writing, and numbered and registered as a suit, as required by section 523. As this objection was not taken in the first instance, and both parties have hitherto proceeded on the assumption that the procedure adopted was the correct one, we think it will be sufficient if the defendant Utamchand Mánékchand undertake to present an application, as contemplated by section 523, for registration as a suit, and the summons be treated as a notice required to be given by the above section.

It was next contended that section 523 is not applicable to a case in difference *in a suit*; and that the earlier sections in Chapter IV, which provide for the case of *parties to a suit* desiring to refer matters in difference to arbitration, are alone applicable in such a case. We think, however, that the very general language of sections 523 and 525 forbids this conclusion. Those sections contemplate arbitration without the intervention of the Court by "any persons" and with respect to "any matter," and do not express any exception as to parties to a suit or to matters in difference in a suit actually pending. Moreover, it is to be observed that there is an absence of any expression in section 523 giving an intention to forbid arbitration by parties to a suit without the intervention of the Court. Undoubtedly, the procedure in such cases, as provided by sections 523 and 525, by a separate suit, is not the best adapted to a case where the parties are already before the Court, and will necessitate an application for stay of proceedings in that suit. It is, therefore, clear that the particular case in question was not present at the time to the minds of the framers of those sections. But, in regard to the general scope of the provisions in this Chapter, we do not think that that consideration is sufficient to

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outweigh the inference to be drawn from the very language of these sections. Whether the existence of a matter which the matters in difference are in litigation, may, under special circumstances afford sufficient cause, as contemplated by sections 523 and 525, for not filing the agreement to arbitrate, it is not necessary to decide. We may add that the sanction arose on section 327 of the old Procedure Code (Act of 1859, the language of which is almost identical with section 525 of the present Code, and was determined in the same manner in *Thakoor Doss Roy v. Hurry Doss Roy*,⁽¹⁾ and that decision has not been departed from or overruled in any subsequent case. Upon the whole, we are of opinion that the mere circumstance of the matters having been agreed to be referred to arbitration, during the pendency of a suit in which they are in litigation, is not of itself sufficient reason for refusing to file the agreement to refer to arbitration.

Attorneys for Utamchand Manekchand—Messrs. *Rimmo, Hore and Conroy*.

Attorneys for Ghellábhái Hemchand.—Messrs. *Macfarlane and Gilbert*.

(1) Calc. W. R. (1864), Misc. Rul. 21.