APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

HALIMBHÁI KARIMBHA'I, (ORIGINAL DEFENDANT No. 1), APPLICANT, *v.* SHANKER SÁI AND OTHERS, (ORIGINAL PLAINTIFFS), OPPONENTS.* 1885. *December* 12.

Arbitration—Civil Procedure Code (Act XIV of 1882), Secs. 506, 508, 510, 521 *—Revocation of the authority of an arbitrator after an order of reference made under Section* 508 *of the Code.*

On 19th June, 1884, an application for an order of reference was made, under section 506 of the Civil Procedure Code (XIV of 1882), by both parties to a suit. It was signed by both defendants and by the plaintiffs' pleader. As the plaintiffs' pleader had not been "specially authorized, in writing," to join in the application, the Court postponed making any order on the application till the 23rd idem. On that day the first defendant did not attend the Court, but the plaintiffs' pleader produced the requisite authority, and the Court made an order referring the suit to the decision of the arbitrator nominated in the application of the 19th. On 27th June, the first defendant made an application to the Court to revoke the authority of the arbitrator and appoint a new arbitrator in his place, on the ground that, after signing the application of the 19th, he had become aware of certain circumstances connected with the arbitrator which showed that he was not worthy of the confidence reposed in him. No final order was made upon this application till after the submission of the award, when it was rejected on the ground that the charges of misconduct and partiality imputed to the arbitrator were not made out.

Held, first, that the first defendant not having objected to the appointment of the arbitrator on or before the 23rd June, 1884, when the order of reference was made, must be taken to have tacitly acquiesced in the course adopted by the Court, and that such acquiescence amounted to a fresh submission.

Ardesar Hormasji Wádiá v. *The Secretary of State for India in Council*(1) and *Sreenáth Ghose* v. *Rái Ckunder Paul*(2) followed.

The objections raised by the first defendant could only be considered after the submission of the award, and then only to the extent permitted by section 521 of the Code of Civil Procedure (XIV of 1882).

When once a matter is referred to arbitration, it is not competent to the Court, under the second paragraph of section 508 of the Code of Civil Procedure (Act XIV of 1882), to "deal with" the matter in difference between the parties, except as provided in Chapter XXXVII of the Code. There is no section of that chapter which authorizes the Court to revoke the authority conferred on an arbitrator and to appoint a new one, except in cases falling strictly within the purview of section 510 of the Code, where "the scope and object of the reference cannot be executed." It is only in those cases, apparently,

*Application No. 175 of 1884 under Extraordinary Jurisdiction.

(1) 9 Bom. H. C. Rep., 177. (2) 8 Calc. W. R., Civ. Rul., 171.

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that the authority conferred on arbitrators can be revoked "for good cause," the cause being such as is contemplated in that section, as where "an arbitrator refuses, or neglects, or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return to India at an early date."

The enactment of the second paragraph of section 508 of the Code of 1882, which does not occur in the corresponding section (315) of Act VIII of 1859, has the effect of rigidly restricting the Courts to the exact procedure laid down when dealing with cases in which the appointment of a new arbitrator becomes necessary.

THIS was an application, under the extraordinary jurisdiction of the High Court, against the order of Khán Bahádur Burjorji Edalji Modi, First Class Subordinate Judge at Surat, in Suit No. 86 of 1882.

The facts of the case, so far as they are material for the purposes of this report, are as follows :—

A suit (No. 86 of 1882) was brought in the First Class Subordinate Judge's Court at Surat to recover possession of certain immoveable property from the petitioner, Halimbhái Karimbhái, and one Dámodar Mánoklál. On the 19th of June, 1884, an application was made to the Court for a reference to arbitration of all matters in dispute between the parties to the suit. This application was signed by both the defendants and by the plaintiffs' pleader.

The Subordinate Judge, finding that the plaintiffs' pleader was not "specially authorised, in writing," to join in the application, as required by section 506 of the Civil Procedure Code (Act XIV of 1882), postponed making the order of reference until the requisite authority was produced. The plaintiffs' pleader produced it on the 23rd June. On that day the petitioner, Halimbhái, was not present in Court, but he was treated by the Subordinate Judge as a consenting party to the submission, and an order was made referring the suit to the decision of the arbitrator named in the application of the 19th June.

On the 25th June, the arbitrator gave the petitioner notice of the order of reference and of the day fixed for the commencement of the proceedings before him, *viz.*, the 28th June.

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On the 27th June, the petitioner applied to the Subordinate Judge for a revocation of the authority conferred on the arbitrator, on the ground that, after he had signed the application of the 19th June, he had learned that the arbitrator was related to some of the parties to the reference, and was strongly biased in their favour, and was, moreover, completely under the influence of the plaintiffs' pleader. The petitioner, therefore, asked that a new arbitrator should be appointed in his place. The Subordinate Judge refused to deal with this application till after the submission of the award. On the 27th July, the Subordinate Judge found that the objections to the award, on the ground of partiality and incompetency on the part of the arbitrator, were unfounded, and passed a decree in terms of the award.

Thereupon the petitioner applied to the High Court, under its extraordinary jurisdiction, for a reversal of the decree.

A *rule nisi* was granted, and now came on for hearing.

Gokuldás Kálándás appeared for opponents Nos. 1 to 4; and *Shántárám Náráyan*, for opponent No. 5, showed cause:—The application of the 19th June, 1884, was made by all the parties to the suit. Upon that application the Court made the order of reference on 23rd June. The applicant did not appear in Court on that day to object to the order of reference. His silence, therefore, amounted to acquiescence, and that acquiescence amounted to a fresh submission—*Ardesar Hormasji Wádiá* v. *The Secretary of State for India in Council*[1]; *Sreenáth Ghose* v. *Ráj Chunder Paul*[2]. His application for revocation of the arbitrator's authority was not made till 17th June, when it was too late. Under section 508, para. 2, of Act XIV of 1882, the Court has no power to deal with the matters referred to arbitration, except as provided by Chapter XXXVII. Para. 2 of section 508 is a new provision, and restricts the Court's power of interference with the authority of an arbitrator. The only cases in which the Court can interfere, or revoke the authority of an arbitrator, are cases where, as the Privy Council say, "the very scope and object of the reference is frustrated": see *Pestonji Nussarwánji* v. *Mánockji*[3]. Such

(1) 9 Bom. H. C. Rep., 177. (2) 8 Calc. W. R., Civ. Rul., 171.
(3) 12 Moore I. A., 112.

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cases are provided for in section 510 of the Code. Except in these cases, the Court cannot revoke an authority once conferred on an arbitrator. In *Haradhun Dutt* v. *Radhanath Shaha*(1) it was laid down that when once a matter is referred to arbitration it cannot again be dealt with by the Court, unless the reference becomes fruitless. In the present case, the only ground on which the applicant applied for the appointment of a new arbitrator was that he had heard bad reports about the arbitrator's conduct. That is not a ground contemplated by section 510. The misconduct of an arbitrator is a ground for setting aside the award after it is made: see section 521 of the Code.

Ráv Sáheb *Vásudev Jagannáth Kirtikar*, for the applicant, in support of the rule:—The application of the 19th June, 1884, was informal and incomplete. The plaintiffs' pleader was not "specially authorised in writing" to join in the application as required by section 506 of the Civil Procedure Code (Act XIV of 1882). The applicant, therefore, had a right to recede from such an informal application; and he did recede from it before the arbitrator entered upon his duties. In *In re Fraser* v. *Ehrensperger*(2) it was held by the Court of Appeal in England that an arbitrator's authority could be revoked, and a party could withdraw from the submission before an award was made. That was a much stronger case than this, because there the arbitrator had already entered upon his duties. Here we made the application for revoking the arbitrator's authority two days before the arbitration proceedings had begun. The Court was wrong, therefore, in rejecting this application. The absence of the applicant from Court on 23rd June ought not to be taken as an acquiescence on his part in the course adopted by the Court. That course was entirely irregular. The application of the 19th June is admittedly informal. When it was renewed on the 23rd, the applicant was not present. He was not a consenting party to it. The renewed application, too, is, therefore, informal. That being so, the Court was not competent to make the order of reference, either on the original or on the renewed application. That order is, therefore, bad, and the award based upon it must necessarily fall to the

(1) 10 Calc. W. R., Civ. Rul., 398. (2) L. R., 12 Q. B. Div., 310.

ground. Section 508, para. 2, does, no doubt, prevent the Court from dealing with the matter in difference between the parties after the order of reference is made. But the order contemplated by that section must be a valid and proper order, made upon a proper application. Here neither the application nor the order is a valid or proper one. The provisions of Chapter XXXVII of the Code are, no doubt, stringent; but their stringency was never meant to work hardship or injustice.

BIRDWOOD, J.:—The applicant seeks the reversal of an order, made by the First Class Subordinate Judge of Surat on the 16th July, 1884, refusing to set aside the award of an arbitrator, to whom the matter in difference between the parties to Suit No. 86 of 1882 of the Subordinate Judge's file had been referred, by an order under section 508 of the Code of Civil Procedure (Act XIV of 1882). The applicant was the first defendant in the suit. The first five opponents were the plaintiffs, and the sixth opponent was the second defendant. It has been contended for the applicant in this Court that there was no legal application for a reference to arbitration, such as is contemplated in section 506 of the Code, and that, so far as the applicant was concerned, the submission had been revoked before the arbitrator commenced proceedings.

An application for an order of reference was made to the Subordinate Judge on the 19th June, 1884. It was signed by the pleader for the plaintiffs and by both the defendants, who were in Court when it was presented. The plaintiffs' pleader had not, however, been "specially authorized, in writing," to join in the application, which could not, therefore, be granted at once. It is stated in the application to this Court that the application of the 19th June "was rejected by the Subordinate Judge, on the ground that it was not in accordance with section 506 of the Civil Procedure Code (Act XIV of 1882)." But this was not the case. The Subordinate Judge really postponed the making of an order till the plaintiffs' pleader should obtain special authorization from his clients. The endorsement on the application is to the effect that no order could be made without such authorization, and that a proper order would be made

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after the plaintiffs themselves, or their pleader, specially authorized in that behalf, had made an application. At the time when this endorsement was recorded, the plaintiffs' pleader applied for four days' time to produce a special authorization, and his application was granted. On the 23rd June, the required authorization, dated the 21st June, was produced by the pleader, the second defendant being then present. The applicant was *not present; but* he was treated by the Subordinate Judge, evidently in consequence of the proceedings of the 19th June, as a consenting party to the submission; for an order of reference was made on the 23rd June to the arbitrator nominated in the application of the 19th idem. On the 25th June, the arbitrator gave notice to the applicant of the order of reference and of the time fixed by him for the commencement of proceedings before him, *viz.*, 8 o'clock A.M., on the 28th June. On the 27th June, however, the applicant represented to the Subordinate Judge that, after signing the application for an order of reference, he had become aware of certain circumstances affecting the arbitrator nominated by the parties, who had misconducted himself, and that he placed no confidence in him. He asked, therefore, that another arbitrator, whom he named, should be substituted. In his application of the 27th June, the applicant took no exception to the order of reference, on the ground that there was no joint application by the defendants and the duly authorized pleader of the plaintiffs on the 19th June. Indeed, it is admitted that such an objection to the award finally made was at no time taken in the lower Court. No final order was made by the Subordinate Judge, on the application of the 27th June, till after the submission of the award. On the 16th July, the Subordinate Judge found that the objections taken to the award, whether on the ground that the arbitrator was partial or incompetent, were not substantiated, and refused the application.

Such being the course of proceedings in the lower Court, we are of opinion that it is not now open to the applicant to say that the application of the 19th June was incomplete and ineffectual. No doubt, it was not complete when presented. It would have been competent to the Subordinate Judge to reject it then, be-

cause it was incomplete. But the course actually adopted by him was not illegal. He gave the parties an opportunity of complying with the requirements of the law; and it is quite clear, from the record of the case, that the applicant must have acquiesced in the course adopted by the Subordinate Judge. All that was wanted to complete the application of the 19th June was the special authorization in writing, by the plaintiffs, of their pleader to join in the application. When that authorization was produced on the day to which the hearing was adjourned, it was competent to the parties to treat the application as legally complete. If there was any defect or irregularity then noticeable in connection with it, arising from the circumstance that the plaintiffs' pleader had actually signed the application before he was specially authorized to do so, such irregularity was certainly not brought to the notice of the Subordinate Judge. The applicant must be held to have been aware of the adjournment to the 23rd June. Up to the date, he could clearly have withdrawn from the application to refer, because it was not in legal form; but when the application was once completed, with his acquiescence, the Court would have been justified in holding that he had waived any objection that might be taken on account of any irregularity. The consent or tacit acquiescence of the applicant amounted, indeed, to a new submission. See *Ardesar Hormasji Wádiá* v. *The Secretary of State for India in Council*[1] and *Sreenath Ghose* v. *Raj Chunder Paul*[2]. The applicant says, in his application to this Court, that the application of the 19th June, for a reference to arbitration, was repeated by the plaintiffs' pleader on the 23rd idem without his knowledge or consent; but we are unable to accept this statement as true, in view of the circumstance that the applicant was present in Court when the application of the 19th June was endorsed by the Subordinate Judge in the terms already referred to, and that the endorsement was evidently written with reference to the application for time made by the plaintiffs' pleader. We have no doubt that the applicant was aware of the adjournment to the 23rd June, and acquiesced in it and in the object for which it was granted; and

(1) 9 Bom. H. C. Rep., 177. (2) 8 Calc. W. R. Civ. Rul., 171

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it is only reasonable to hold that such acquiescence lasted till the 27th June, when the applicant, for the first time, applied to the Court to revoke the submission. But the order of reference had then been made; and it was not then competent to the Court, under the second paragraph of section 508 of the Code of Civil Procedure (Act XIV of 1882), to "deal with" the matter in difference between the parties, "except as * * provided" in the sections of Chapter XXXVII of the Code, following section 508.

There is no section of that chapter which authorized the Court to revoke the authority conferred on the arbitrator, and to appoint a new one, as desired by the applicant. Section 510, which permits the appointment of a new arbitrator in certain cases, had no application to the circumstances of the present case. We have, indeed, been referred to the decision of the Court of Appeal, in appeal from the judgment of the Queen's Bench Division, *In re Fraser* v. *Ehrensperger*(1), as showing that the authority of an arbitrator may, under certain circumstances, be revoked by either party to a submission before an award is made. But, as regards the law to be enforced in India, it has been held by the Privy Council that, according to the proper construction of the Code of Civil Procedure of 1859, "when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to such an agreement can revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority is not permitted"—*Pestonji Nussarwánji* v. *Mánockji*(2). That was a ruling under section 326 of Act VIII of 1859, which corresponds to section 523 of the present Code, and would apply also to a case falling under sections 312 to 315 of the old Code, which correspond to sections 506 to 508 of the present Code. It was extended by the Madras High Court, in *Nagasawmy Náik* v. *Rungasamy Náik*(3), to the case of a reference made without the intervention of a Court of Justice. In *Nil Monee Bose* v. *Mohima Chunder Dutt*(4), decided by the Calcutta High

(1) L. R. 12 Q. B. Div., 310.
(2) 12 Moo. I. A., 112.
(3) 8 Mad. H. C. Rep., 46.
(4) 17 Calc. W. R. Civ., Rul. 516.

Court in 1872, no reference is made to the ruling in *Pestonji's* case[1], which was decided by the Privy Council in 1868; but the opinion was expressed, without any reservation, that "as this arbitration is under an order of the Court, the plaintiff cannot annul or revoke that order; he is bound by it, and the arbitration must proceed subject to the provisions of the law." (See also the opinion of West, J., as to the submission by a Court, in *Samal Nathu* v. *Jaishankar Dalsukhrám*[2],—at p. 258 of the Report.) It is clear, as remarked by Holloway, J., in *Nagasawmy's* case[3], that "the 'horror' which formerly prevailed in the English Courts of a *domestic forum* never found place in British India." And it was pointed out by their Lordships of the Privy Council in *Pestonji's* case[4] that the tendency of recent legislation, both in England and in India, was to put agreements for arbitration "on the same footing as all other lawful agreements, by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire, unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract." *Cf.* also section 28 of the Indian Contract Act IX of 1872. In *Haradhun Dutt* v. *Radhanath Shaha* [5] it was held that when once a matter was referred to arbitration, it could never again be dealt with by the Court, unless the reference were fruitless. Since the law was thus laid down, an express provision has been added to the Code of Civil Procedure, by the enactment of the second paragraph of section 508 of the Code of 1882,—which does not occur in the corresponding section (315)of Act VIII of 1859,—which has the effect of rigidly restricting the Courts to the exact procedure laid down when dealing with cases in which the appointment of a new arbitrator becomes necessary. Section 510 provides for certain cases where "the scope and object" of the reference "cannot be executed;" and it is only in those cases, apparently, that the authority conferred on an arbitrator can now be revoked, under the ruling of the Privy

(1) 12 Moo. I. A., 112.
(2) I. L. R., 9 Bom., 254.
(3) 8 Mad. H. C. Rep. at p. 55.
(4) 12 Moore I. A., 112.
(5) 10 Calc. W. R. Civ. Rul., 398.

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Council, "for good cause;" the cause being such as is contemplated in that section, as where an arbitrator "refuses or neglects or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return at an early date." The section also provides for the appointment of a new arbitrator or the supersession of the arbitration on the death of an arbitrator. No such objections as were stated in the applicant's application of the 17th June would have furnished a good and sufficient cause, under the present Code, for the appointment of a new arbitrator in the present case. The objections raised by the applicant could only be considered,—as the Subordinate Judge considered them,—after the award was submitted, and then only to the extent permitted by section 521 of the Code. No reason has been shown us for holding that the decision finally arrived at by the Subordinate Judge on the 16th July, 1884, was wrong.

We, therefore, discharge the rule *nisi* granted in this case, with costs.

Rule discharged.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1885. *December* 16.

G. I. P. RAILWAY COMPANY, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* NOWROJI PESTANJI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Injunction—Right of way—Obstruction to right of way—Special damage—Injunction and not compensation granted.

The defendants closed a gateway leading across a level crossing of their railway over which there was a public right of way. The plaintiff alleged that by the closing of this gateway access to his bungalow during the monsoon was completely stopped; and he sued to have the gateway re-opened. The lower Appellate Court found that there was a public right of way over the level crossing; that it had been obstructed by the defendants; and that the plaintiff had suffered special damage by the obstruction. On special appeal to the High Court, it was contended by the defendants that the plaintiff was only entitled to compensation, and not to an injunction.

*Second Appeal, No. 296 of 1885.