LETTERS PATENT APPEAL.

Before Addison Acting C. J. and Din Mohammad J.

1938

June 16.

SALIG RAM-BHAGAT RAM (DEFENDANT) Appellant,

versus

KISHAN SINGH-SANT RAM (PLAINTIFF) Respondent.

Letters Patent Appeal No. 49 of 1938.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 5, 17 — Reference to Arbitration without intervention of Court — Refusal of arbitrator to act — Agreement to refer to arbitration containing no provision for nomination of another arbitrator — Application to Court for appointment of another arbitratotor — Court whether competent to make such an order.

One of the conditions of business between the two firms was that in case of dispute between them the matter would be referred to two arbitrators, one to be nominated by each party from among the members of the two associations. In case any party failed to nominate an arbitrator within seven days of the date when requested to do so, the party making the request would be entitled to nominate both. On a dispute arising between the firms, each nominated its own arbitrator. A draft agreement was drawn up by the plaintiff firm but the defendant firm refused to sign it and therefore the plaintiff firm, exercising their right of nominating both the arbitrators, nominated the person already named by the defendant firm as another arbitrator and referred the matter in dispute to the arbitration of the two arbitrators so nominated. The other arbitrator refused to act and the plaintiff firm thereupon made an application to the Court under paragraph 17 of Schedule II to the Code of Civil Procedure for the appointment of another arbitrator. It was contended by the defendant firm that, under the circumstances, the Court had no power to nominate an arbitrator or to refer the matter to arbitration.

Held, that inasmuch as the agreement between the parties in the present case made no provision for the nomination of an arbitrator in case the arbitrator already nominated refused

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to act, the Court had no power to make the agreement operative and effectual. If the parties to an agreement leave a contingency unprovided for, the Court will not be proceeding consistently with the agreement if it makes a provision for such contingency. The *lacuna*, if any, is to be filled by the parties themselves and not by the Court.

Mohan Lal v. *Damodar Das* (1), *Sri Ram* v. *Sorabji* (2), *Narayanappa* v. *Ramachandrappa* (3) and *Rajani Kanta Karati* v. *Panchanan Karati* (4), relied upon.

Balla Pattabhirama v. *Seetharama* (5) and *Jaitum Bi* v. *Nabi Saheb* (6), referred to.

Fazal Ilahi v. *Prag Narain* (7) and *Jowahir Singh-Sundar Singh* v. *Fleming Shaw and Co.* (8), distinguished.

Letters Patent Appeal from the judgment of Bhide J. passed in First Appeal from order No.217 of 1937, on 8th February, 1938, reversing that of Bakhshi *Shiv Charan Singh, Subordinate Judge, 1st Class, Amritsar, dated 18th August, 1937, and remanding the case to him with the direction that the application be allowed to be amended as prayed for by the appellant and then the case be disposed of on merits.*

R. C. SONI and ACHHRU RAM, for Appellant.

DEV RAJ SAWHNEY, for Respondent.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—This Letters Patent Appeal has arisen in the following circumstances :—The firm Salig Ram-Bhagat Ram of Patiala had dealings in forward contracts with the firm Kishen Singh-Sant Ram. One of the conditions of their business was that in case any dispute arose between them, it would

(1) 71 P. R. 1918.
(2) 155 P. R. 1919.
(3) I. L. R. (1931) 54 Mad. 469.
(4) I. L. R. (1937) 2 Cal. 434.
(5) I. L. R. (1894) 17 Mad. 498.
(6) (1912) 17 I. C. 389.
(7) I. L. R. (1922) 44 All. 523.
(8) 1937 A. I. R. (Lah.) 851.

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be referred to two members of either of the Produce Merchants Association or the Traders Association or both, one to be nominated by each party. In case any party failed to nominate an arbitrator within seven days of the date when requested to do so, the party making the request would be entitled to nominate both. In the case of the arbitrators' disagreement, they would select an umpire and the award of the arbitrators or the umpire, as the case may be, would be binding on both parties. Differences between the two firms arose and according to the plaintiff firm, Kishen Singh-Sant Ram, they nominated Sundar Singh as their arbitrator and requested the defendant firm, Salig Ram-Bhagat Ram, to nominate an arbitrator of their own. This happened on the 9th June, 1936. On the 17th July the defendant firm informed the plaintiff firm that they had nominated one Sohan Lal. A draft agreement was then drawn up by the plaintiff firm and was forwarded to the defendant firm for signature. The defendant firm, however, refused to sign this agreement and on the 2nd October the plaintiff firm nominated the same Sohan Lal on behalf of the defendant firm and referred the matter in dispute to the arbitration of the two arbitrators so nominated. Sohan Lal refused to act and consequently the plaintiff firm made an application under paragraph 17 of Schedule II to the Civil Procedure Code. Various defences were taken by the defendant firm but at present we are mainly concerned with the contention of the defendant firm that inasmuch as one of the arbitrators had refused to act, the Court had no power to nominate an arbitrator or to refer the matter to arbitration. The Subordinate Judge, holding on another issue that the application was not competent, dismissed the application remarking at the same time

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that if he had not taken that action, he would have found that the Court was competent to nominate an arbitrator in place of the one who had refused to act and refer the matter to the arbitration of the two arbitrators, one appointed by the plaintiff firm and the other by the Court. The plaintiff firm appealed to this Court and the appeal came for hearing before Bhide J. He set aside the judgment of the Court below on the point on which it had been decided against the plaintiff firm and holding at the same time that the application could be entertained in spite of the objection of the defendant firm, he remanded the case to the Court below to dispose of it in accordance with law. Hence this Letters Patent Appeal.

Counsel for the appellant has urged that although the provisions relating to 'arbitration in suits' apply *mutatis mutandis* to 'order of reference on agreement to refer' by virtue of paragraph 19 of Schedule II yet in this case no reference could be made inasmuch as the agreement between the parties did not contemplate the appointment of an arbitrator in case an arbitrator nominated by the party refused to act and the action of the Court in this respect would accordingly be inconsistent with the agreement. In support of his contention he referred to *Mohan Lal* v. *Damodar Das* (1) *Sri Ram* v. *Sorabji* (2), *Naranyanappa* v. *Ramachandrappa* (3) and *Rajani Kanta Karati* v. *Panchanan Karati* (4). In *Mohan Lal* v. *Damodar Das* (1), it was held by a Division Bench composed of Scott-Smith and leRossingnol, JJ., that an agreement to refer a matter in dispute to several specified arbitrators becomes incapable of performance when one of those arbitrators dies, and if such death takes place

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(2) 155 P. R. 1919.
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before an application is made under paragraph 17, Schedule II of the Code of Civil Procedure, this is sufficient reason for refusing to file the agreement in Court. It was further observed that paragraph 19 only comes into operation when an order of reference has been made under paragraph 17. In *Sri Ram* v. *Sorabji* (1), it was held that under paragraph 17 of the Second Schedule an agreement to refer to arbitration may be filed in Court notwithstanding one of the arbitrators named therein has declined to act *if the agreement makes provision for another arbitrator being appointed in place of one declining to act.* In *Narayanappa* v. *Ramachandrappa* (2), a Division Bench, in a case where parties had privately agreed to refer their disputes to certain named arbitrators and to abide by their unanimous decision and one of the arbitrators had died in the course of arbitration proceedings and prior to the matter being brought before the Court, held that the agreement became inoperative and came to an end on the death of the arbitrator inasmuch as it did not contain any provision as to what should be done in case any of the arbitrators died in the course of the arbitration proceedings. The agreement could not be filed in Court under paragraph 17, for the Court could not thereafter make an order of reference in accordance with the agreement within the meaning of clause (4) of paragraph 17 and consistently with it within the meaning of paragraph 19 of that Schedule. In *Rajani Kanta Karati* v. *Panchanan Karati* (3), it was held by Cunliffe and Henderson JJ., that where in a dispute the parties agree that the dispute should be decided by certain named persons, the Court is not entitled to appoint

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another in the event of one of the arbitrators being unable or unwilling to act. *Narayanappa* v. *Ramachandrappa* (1) was referred to in this case with approval. The learned Judge of this Court has sought to distinguish these cases on the ground that here no arbitrators were specified and as they were to be chosen from among the members of the two Associations named in the agreement, the Court had full authority to make a choice from among the persons so specified and that consequently if it did the action of the Court would be consistent with the agreement so as to attract the provisions of paragraph 5 of Schedule II. We are, however, unable to agree. A choice had been made under the agreement and specified persons had been nominated by the parties and it was only after that choice had been made and that nomination had taken place that one of the persons so nominated had refused to act. It cannot be said, therefore, that no specified person had been named in the agreement—in fact the draft agreement contains the names of these two persons—and, in these circumstances, we do not consider that it is possible to distinguish the present case from the cases mentioned above.

On behalf of the respondents our attention has been drawn to *Fazal Ilahi* v. *Prag Narain* (2), *Balla Pattabhirama* v. *Seetharama* (3) and *Jowahir Singh-Sundar Singh* v. *Fleming Shaw & Co.* (4). In *Fazal Ilahi* v. *Prag Narain* (2), a Devision Bench of the Allahabad High Court observed that in the case of a private arbitrator refusing to act the Court may, on the application of either party to the reference, make an order under paragraph 17 and take action under

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(2) I. L. R. (1922) 44 All. 523.
(3) I. L. R. (1894) 17 Mad. 498.
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paragraph 5 by appointing a new arbitrator, although there is no provision to that effect in the deed of agreement. Reference in this case was made to *Balla Pattabhirama* v. *Seetharama* (1) with approval. In that case the words ' so far as they are consistent with any agreement so filed ' were given a wide interpretation and it was remarked that the reasonable construction is that the action of the Judge should not be inconsistent with the agreement if it contains any special provision on the subject. It is noteworthy, however, that a Division Bench of the same High Court in a later case reported as *Jaitum Bi* v. *Nabi Saheb* (2) held that where certain matters in dispute had been referred to three named arbitrators, two of whom had expressed their unwillingness to act, the agreement did become inoperative and ineffectual, inasmuch as it did not contain any provision to appoint arbitrators in the place of those unwilling to act. *Jowahir Singh-Sundar Singh* v. *Fleming Shaw & Co.* (3), so far as we can see, proceeds on different grounds. These authorities, therefore, can be of no avail in the present case. Even otherwise we are disposed to think that if parties to an agreement leave a contingency unprovided for, the Court will not be proceeding consistently with the agreement if it makes a provision for such contingency. The *lacuna*, if any, is to be filled by the parties themselves and not by the Court and inasmuch as the agreement now before us made no provision for the nomination of an arbitrator in case any arbitrator already nominated refused to act, the Court had no power to make the necessary appointment so as to make the agreement operative and effectual.

(1) I. L. R. (1894) 17 Mad. 498. (2) (1912) 17 I. C. 389.
(3) 1937 A. I. R. (Lah.) 851.

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We accordingly accept the appeal, set aside the order of the learned Judge of this Court as well as that of the trial Judge and dismiss the application. In view of the peculiar circumstances of the case, however, we leave the parties to bear their own costs throughout.

A. N. K.

Appeal accepted.

APPELLATE CIVIL.

Before Addison Acting C. J. and Din Mohammad J.

1938

June 21.

JALAL DIN AND ANOTHER (DEFENDANTS) Appellants,
versus
HUKAM CHAND (PLAINTIFF) Respondent.

Regular First Appeal No. 31 of 1938.

Punjab Alienation of Land Act (XIII of 1900), SS. 3, 6, 9, 14, 21-A — Alienation of land by an agriculturist to a non-agriculturist — without sanction of Deputy Commissioner — Legal effect thereof — Provisions of S. 14 explained — Contract — whether void under S. 65 of the Indian Contract Act (IX of 1872) — Alienee whether entitled to sue for refund of money.

The plaintiff purchased some land from J. by a sale-deed which was registered against the provisions of s. 17 of the Punjab Alienation of Land Act as both the vendor and the vendee knew that the vendee was a non-agriculturist and could not, therefore, purchase land from the vendor who was an agriculturist. The vendor having moved the proper authorities in the matter, the Deputy Commissioner purporting to act under s. 14 of the Act converted the sale into a usufructuary mortgage for 20 years as provided by s. 6 (*a*) of the Act. The plaintiff instituted the present suit claiming refund of the sale price on the ground that, the contract being void, the vendor was bound to restore the advantage that he had received under the transaction. The trial Court granted him a decree for Rs.5,000 odd giving him at the same time a lien on the land for that amount.