APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

190 .
August 12.

SAVLAPPA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DEVCHAND VALCHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

Arbitration—Award—Oral award—Arbitrators—Liability of, for delay in making award—Negligence—Fraud.

In 1889 defendant 5 executed a bond to the plaintiff on which the latter brought a suit in 1893. This suit was referred to arbitration, and defendants 1, 2 and 3 and the husband of defendant 4 were appointed arbitrators.

The plaintiff brought the present suit against the arbitrators and defendant 5 to recover damages, alleging that only an oral award had been given and that in collusion with defendant 5 the arbitrators had failed to give a written award, and that not having obtained a written award he had suffered loss by reason of the bonds having "gone out of time" (become barred by limitation).

The lower Court held that inasmuch as the arbitrators had not shown that their delay in giving an award was caused by the negligence of the parties, the presumption was that they acted fraudulently in not doing their duty. It therefore awarded the plaintiff Rs. 1,000 damages against defendants 1 to 4. On appeal,

Held, (1) (reversing the decree and dismissing the suit) that if (as stated in the plaint) an oral award had been made, there was no cause of action, as there was no stipulation that the award should be in writing.

(2) That the fraud alleged, viz., of collusion with the fifth defendant, was negatived by the evidence, which showed that the arbitrators were not unanimous.

(3) That the fact that the arbitrators had failed to account for the delay in making the award did not justify the presumption of fraud. There wa no more reason to presume fraud than to presume negligence, and if there was only negligence, no suit would lie.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Belgaum, reversing the decree of Ráo Sáheb V. V. Kalyanpurkar, Subordinate Judge of Chikodi.

Suit for damages for not making an award.

Defendant 5 in 1889 executed a bond to the plaintiff, on which the latter brought a suit in 1893. This suit was referred to arbitration, and defendants 1, 2 and 3 and the husband of defendant 4 were appointed arbitrators.

* Second Appeal No. 698 of 1900.

The plaintiff brought the present suit against the arbitrators and defendant 5 to recover damages, alleging that only an oral award had been given, and that, in collusion with defendant 5, the arbitrators had failed to give a written award, and that not having obtained a written award he had suffered loss by reason of the bonds having "gone out of time" (become barred by limitation).

The lower Court held that inasmuch as the arbitrators had not shown that their delay in giving an award was caused by the negligence of the parties, the presumption was that they acted fraudulently in not doing their duty. It therefore awarded the plaintiff Rs. 1,000 damages against defendants 1 to 4.

Defendants 2, 3 and 4 preferred a second appeal.

Daji A. Khare for the appellants (defendants 2, 3 and 4) :—No suit will lie against arbitrators for failure to give an award unless express fraud is alleged and proved against them. As the plaint is framed, there is really no cause of action against the arbitrators. The plaintiff alleges that there was an oral award given. If so, the arbitrators have done their duty. They were not bound to give a written award. The finding of the Judge that the arbitrators acted fraudulently cannot be accepted, as fraud is not alleged in the plaint. The first Court disbelieved all the witnesses, but presumed fraud.

So far as the heir of defendant 4 is concerned the decree at any rate is bad, for the action being personal against the arbitrators their heirs are not liable.

Shivram V. Bhandarkar for the respondent (plaintiff) :—The plaint expressly alleges fraud and both the lower Courts have found that the conduct of the arbitrators was fraudulent. That finding is binding in second appeal, for there are materials in the case to justify that finding. An arbitrator is legally liable for damages if he abuses his position. Owing to the conduct of the arbitrators the plaintiff has been put to serious loss. He cannot now bring a fresh suit for the claim, which was withdrawn from Court when the dispute was referred to arbitration. Further, the bonds that were also referred to the arbitrators are now barred. He is, therefore, equitably entitled to some relief.

1901.

SAVLAPPA
v.
DEVCHAND.

JENKINS, C.J.:—In 1889 the fifth defendant passed in favour of the plaintiff a bond payable in two years. In 1893 the plaintiff brought a suit on the bond, but it was withdrawn as the parties agreed to refer their dispute to arbitration. The arbitrators selected were the first three defendants and the husband of the fourth defendant. No award in writing was delivered, and in consequence the plaintiff has brought this suit against the arbitrators, claiming damages, which he assesses at Rs. 1,674.

The allegations in his plaint are that the arbitrators gave only an oral award and that acting in collusion with the fifth defendant they omitted to give a written award, and "that consequently the plaintiff has suffered loss by reason of the bonds having in the meanwhile gone out of time."

The first Court dismissed the suit, but on appeal the District Judge held that the first Court had omitted to try certain issues, which he formulated as follows:

1. What amount was entrusted by plaintiff to the arbitrators?

2. Have the arbitrators, or any of them, acted fraudulently in the discharge of the duties entrusted to them?

3. If so, have they thereby caused damage to plaintiff and to what amount?

The District Judge directed the first Court to find on these issues and to return its findings in a month. The findings were as follows:

"The finding upon the first issue is that there is no satisfactory evidence to determine the amount. The finding on the second issue is that the arbitrators, *i.e.* defendants 2, 3 and 4, have acted fraudulently. The finding on the third issue is that there is no evidence to determine the amount of damages."

As the reason for his finding on the second issue the Subordinate Judge said:

"It is not to be denied that the *panch* were appointed to make an award. Nor is it to be denied that they did not make one. It was no doubt their duty to declare an award, which they have failed to perform. Of course it is contended by them that their failure was due to the negligence of the plaintiff and defendants. But there is no evidence to prove this. The presumption, therefore, is that the arbitrators did act fraudulently

in not doing their duty." Later on he said: "The evidence produced by plaintiff after the remand is more or less to show the fraud of the arbitrators. Though I have held on the strength of presumptions that arbitrators have acted fraudulently, I do not believe witnesses, Exhibits 81, 82."

It is difficult to say what precisely was the view of the District Judge on this point, but he appears to have adopted the finding and reasons of the Subordinate Judge. Even here he is not quite accurate, as the first Court did not (as the District Judge supposes) find there was fraud on the part of defendant 1. In the result he awarded Rs. 1,000 to the plaintiff by way of damages against defendants 1, 2, 3 and 4 and he dismissed the suit against defendant 5. From this decision defendants 2, 3 and 4 have appealed.

Now the plaint alleges there was an oral award: but if that was so the arbitrators did what was required of them, for there is no stipulation that the award was to be in writing, and an oral award, though undesirable, is perfectly valid, and consequently no cause of action is shown. But assuming that the plaint was inaccurate in its statement, we still think the District Judge was wrong. In the first place, the fraud alleged in the plaint was that the arbitrators, having determined the amount to be awarded, refrained from giving a written award in collusion with the fifth defendant; but the District Judge has found as a fact that the arbitrators were not unanimous, and thereby he has negatived the very basis of the charge of fraud. But apart from this the finding of fraud will not stand a moment's examination. It is said that because the arbitrators failed to satisfy the Court that their delay was due (as they alleged) to the negligence of the parties, it must be presumed that they acted fraudulently. But it is impossible to support a charge of fraud built on so flimsy a basis: there is no more reason to presume fraud than to presume negligence, and if there was only negligence, then admittedly the suit will not lie. If there really had been fraud, then I fail to understand how the District Judge could have dismissed the suit against the fifth defendant; for the fraud alleged was one to which he must have been a party, and in truth the most interested party, so that he clearly

1901.

SAVLAPPA v. DEVCHAND.

would be liable: *Batterbury* v. *Vyse*.[1] The case may be a hard one on the plaintiff in the result, but we cannot on that account uphold a decree against the arbitrators, if no sufficient ground exists for imposing on them legal liability.

The result is that as against the appellants, with whom alone we are concerned, the decree must be set aside and the claim rejected with costs throughout.

Decree reversed.

(1) (1863) 2 H. & C. 42.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

1901. *August* 12.

MAGANLAL PUNJASA (ORIGINAL PLAINTIFF), APPELLANT, *v.* CHHOTALAL GHELA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Injunction—Suit to prevent erection of building—Building erected after suit filed, but before hearing—At hearing the Court may grant mandatory injunction directing removal of building although only preventive relief prayed for in plaint—Practice—Procedure.

Plaintiff sued to restrain the defendants from erecting a certain door. The plaint also contained a prayer for "such other relief as the Court might think fit." After filing the plaint the plaintiff applied for an *interim* injunction pending the hearing of the suit, which, however, was refused. The defendants thereupon erected the door, and at the hearing contended that inasmuch as the plaint prayed only to prevent the erection of the door and not for its removal when erected, the plaintiff could not obtain the latter relief in this suit, but must file fresh suit. The lower Court dismissed the suit, holding that on the erection of the door a new and different cause of action had arisen for which a fresh suit must be filed. On appeal,

Held (reversing the decree and remanding the case), that on the suit as framed he Court could grant a mandatory injunction for the removal of the door. The uit was rightly framed in the light of the circumstances which existed when it as brought. It was the defendant's subsequent conduct which rendered it ecessary that the plaintiff should be given, as prayed for in his plaint, such other relief as the Court might think fit.

SECOND appeal from the decision of Ráo Bahádur Thakordas M., Joint Judge of Ahmedabad, confirming the decree of Ráo Bahádur Chunilal D. Kavishvar, First Class Subordinate Judge.

* Second Appeal No. 18 of 1901.