

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

LAXMAN AND TWO OTHERS, SONS AND HEIRS OF THE DECEASED UPENDRA SANTAPPA SHANBHOG (HEIRS OF ORIGINAL PLAINTIFF), APPELLANTS v. MANJUNATH DAMODAR PRABHU AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS*.

1921.

January 17.

Civil Procedure Code (Act V of 1908), Order XVII, Rule 3, Schedule II, Clauses 18 and 22.—Reference to arbitration—Stay of suit—Arbitrator unwilling to act—Suit not barred by agreement to refer—Power of Court to proceed with the suit.

The plaintiff and defendant who were partners dissolved the partnership by an agreement, one of the terms of which was that certain matters of account should be referred to the decision of two named persons. Thereafter, in spite of this agreement, the plaintiff filed a suit which was subsequently stayed under para. 18 of the second schedule of the Civil Procedure Code, 1908, to enable the parties to refer their dispute to the arbitration of the two agreed persons. One of these persons, however, having been found unwilling to act and the arbitration appearing impracticable the plaintiff eventually applied for removal of stay. The Court, however, without removing the stay, proceeded to decide the suit upon the materials before it, purporting to act under Order XVII, Rule 3, of the Civil Procedure Code, 1908, and held that the suit was barred by the agreement to refer. The plaintiff having appealed to the High Court,

Held, that the suit was not barred by the agreement to refer to arbitration by reason of the provisions of para. 22 of the second schedule of the Civil Procedure Code; and that the Court should have removed the stay and decided the suit on its merits.

FIRST appeal against the decision of V. M. Ferrers, District Judge of Kanara, in Suit No. 2 of 1919.

The plaintiff and the defendant in partnership took certain contracts from the forest department. The arrangement, however, did not work well and the partnership was dissolved. One of the clauses of the agreement of dissolution provided: "You (i.e., defendant) should hand over to me (i.e., plaintiff) all

* First Appeal No. 231 of 1920.

1921.

LAXMAN
v.
MANJUNATH.

the accounts and papers that you have in connection with the said company. I shall take the same into my possession after passing a separate receipt for them. If on examining the said accounts and papers I find within six months that any balance is outstanding against you, and that if Murari Govind and Padmanabh Govind decide as Panchas that such balance should be paid by you, I shall recover the said amount from you and pass a receipt to you for the same."

In spite of this agreement the plaintiff filed a suit. The parties next applied for and obtained a stay of the suit for one month, under para. 18 of Schedule II of the Civil Procedure Code, to enable them to refer their disputes to the arbitration of Murari and Padmanabh.

When the disputes were thus referred, one of the arbitrators Padmanabh said that he would dispose of the matter if four months' time was allowed; the other arbitrator Murari refused to act.

The plaintiff, thereupon, applied to the Court to have the suit proceeded with. The trial Judge rejecting the application proceeded to dispose of the suit on the materials before it under Order XVII, Rule 3, of the Civil Procedure Code, 1908, and dismissed it as barred by agreement to refer.

The plaintiff appealed to High Court.

G. P. Murdeshwar, for the appellants.—No doubt there was an agreement to refer the matters in dispute to the arbitration of Murari and Padmanabh but the arbitration had become impossible by reason of the fact that Murari refused to act. Under the circumstances the Court ought to have proceeded with the suit. It erred in dismissing it. The suit was not barred by the agreement to refer, vide para. 22 of Schedule II of the Civil Procedure Code, 1908.

1921.

LAXMAN
v.
MANJUNATH.

Nilkanth Atmaram, for respondent No. 1 :—
The view that the lower Court has taken is correct. Directly the Court became aware of the fact that there was an agreement to refer to arbitration, and that defendant was ready and willing to do all things necessary to the proper conduct of the arbitration at the time when the suit was instituted, it had the power to stay the suit and compel the parties to have the matter settled by arbitration. If for any reason the plaintiff refuses to have it so settled the Court has the inherent power to dismiss the suit. The appellant deals with the case as if the lower Court has no jurisdiction to dismiss the suit. That is wrong. My submission is that it has got the power to dismiss the suit though it may not be quite right in putting the case under Order XVII, Rule 3. I would even submit that even under that rule the order of the lower Court is right. The lower Court has dismissed the suit as a result of the decision upon the materials that were then before the Court.

Apart from the case under Order XVII, Rule 3, the Court, as already said, has the power to dismiss the suit for plaintiff's refusal to have the matter settled by arbitration. The only question is whether the lower Court has properly exercised the power. Having regard to various circumstances enumerated in the judgment of the lower Court I would submit that the power was rightly exercised.

G. S. Mulgaonkar, for respondents Nos. 4 and 5.

MACLEOD, C. J. :—The plaintiff and defendant were partners. The partnership was dissolved by agreement, and it was arranged that the defendant should hand over to the plaintiff all the account books and papers in connection with the partnership. The plaintiff was to examine the said accounts and papers,

1921.

LAXMAN
v.
MANJUNATH.

and if he found that any balance was outstanding against the defendant, and if two persons Murari Govind and Padmanabh Govind decided as Panchas that that balance should be paid by the defendant, the plaintiff should recover the said amount. In spite of this agreement the plaintiff filed a suit, and thereafter the parties informed the Court that they intended to carry out their agreement and to abide by the decision of Murari and Padmanabh. The suit was, therefore, stayed under section 18 of the second schedule of the Code. Then it appears that difficulties arose. One arbitrator Padmanabh sent a letter saying that if four months' time was allowed he would dispose of the matter. Then the other arbitrator, the plaintiff's nominee, stated that he refused to act as an arbitrator. A case, therefore, had arisen for an application to the Court to remove the stay of the suit if the parties did not come to an arrangement to remove the difficulties which had arisen, so as to enable the arbitration to proceed. The plaintiff's application that the suit might be proceeded with was rejected, for what reason it does not appear. Although the learned Judge said that the plaintiff could not refer to any decided case in which the course which he proposed had been taken, it is always open to the Court to remove the stay of a suit if in the opinion of the Court the stay ought to be removed. Here the suit was stayed to enable the arbitration to proceed. Facts were proved to show that there were difficulties in the way of the arbitration proceedings. Therefore it was open to the Court to remove the stay. However, although the stay was not removed, the Court proceeded to decide in what manner the suit should be disposed of, and under Order XVII, Rule 3, the learned Judge thought that the Court might order the suit to proceed and be decided upon the materials already before it. As far as I can see, Order XVII does

not apply to the case at all. If the Court declined to remove the stay, then obviously the suit could not proceed. Rule 3 of Order XVII applies to cases where a party to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed. In such cases the Court may, notwithstanding such default, proceed to decide the suit forthwith. However, it is obvious that the Court ought to have proceeded to deal with the suit and decide it on its merits, as the arbitration had become impossible owing to the parties failing to agree to any particular course being followed after one arbitrator refused to act. The learned Judge, having determined to decide the suit, then held that the suit was barred by the agreement. That, with all due respect, could not be a right finding, because the suit itself was not barred by the agreement, since under para. 22 of Schedule II of the Code the last 37 words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of that Schedule apply. As soon as the stay was removed the Court should have proceeded to decide the suit on its merits. The appeal, therefore, must be allowed. The suit must be restored to the Board and be heard according to law. The appellant to have his costs of the appeal.

Appeal allowed.

J. G. R.

1921.

LAXMAN
v.
MANJUNATH.