

1925.

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 v.
 THE
 GOVERNMENT
 OF BOMBAY.

in arriving at the conclusion now under appeal, their Lordships are unable to find that there has been any error in principle or in law in the method of arriving at it. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondent: *Solicitor, India Office.*

Appeal dismissed.

A. M. T.

ORIGINAL CIVIL.

Before Mr. Justice Taraporevala.

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February 13.

VALLABHDAS MEGHJI, PETITIONER *v.* CAWASJI FRAMJI & Co., RESPONDENTS².

Arbitration—Resignation of both arbitrators—Fresh appointment by one party—Failure of other party to appoint—Appointment to act as sole arbitrator—Validity—Indian Arbitration Act (IX of 1899), section 9.

Where, in the case of a reference to two arbitrators, one appointed by each party, both arbitrators resign, either party can under section 9 of the Indian Arbitration Act, 1899, appoint a new arbitrator and may, on the failure of the other party after due notice, to make any appointment, appoint that arbitrator to act as sole arbitrator.

ON November 5, 1917, Vallabhdas Meghji entered into partnership with Cawasji Framji & Co. in equal shares to conduct a piece-goods business at the Mulji Jetha Market, Bombay. Clause 8 of the partnership agreement provided: "If any dispute might arise, it will be decided by arbitrators, but perhaps if the arbitrators differ then the matter must be decided by an umpire". Cawasji Framji & Co. dissolved the partnership from October 20, 1922.

Disputes having arisen between the parties, their differences were referred to the arbitration of two piece-goods merchants, Dhanjibhai Purshotam and Narottamdas Bhanji. The two arbitrators acted for some time but failed to make their award and subsequently both declined to continue with the arbitration. On February 27, 1924, Cawasji Framji & Co. appointed a new arbitrator Vithaldas Damodar and informed Vallabhdas Meghji of the same, calling upon him to appoint his arbitrator. Vallabhdas Meghji however did not appoint his arbitrator. Cawasji Framji & Co. thereupon appointed Vithaldas Damodar sole arbitrator under section 9 (b) of the Indian Arbitration Act (IX of 1899).

On December 13, 1924, Vallabhdas Meghji filed a petition in the High Court to have the appointment of Vithaldas Damodar as sole arbitrator, set aside, and for a declaration that the power of appointing arbitrators under the Indian Arbitration Act had been exhausted. He further prayed in the alternative that, if the Court was of opinion that Cawasji Framji & Co. had power to nominate a new arbitrator, he should be allowed to nominate his arbitrator to act along with Vithaldas Damodar.

B. J. Desai, for the petitioner.

Mulla, for the respondents.

TARAPOREWALA, J.:—In this matter the petitioner prays that the appointment of Vithaldas Damodar Govindji as sole arbitrator under section 9 (b) of the Indian Arbitration Act made by the respondents may be set aside and that it may be declared that the power of appointing arbitrators under the partnership agreement, having once been exercised by both the partners, has been exhausted and that the reference to Vithaldas Damodar Govindji be revoked. In the alternative the

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petitioner asks that a fit and proper person nominated by the petitioner may be appointed as an arbitrator on petitioner's behalf to act along with the said Vithaldas Damodar Govindji.

The whole argument as to the revocation of the appointment of Vithaldas Damodar Govindji is based on section 9 of the Indian Arbitration Act. It has been argued that that section applies only where one of the arbitrators dies or becomes incapable or refuses to act, but that where both the arbitrators refuse to act, the arbitration comes to an end and that there is no power in the parties or in the Court to appoint other arbitrators in place of the arbitrators so refusing to act.

In this case it appears that the arbitrators, after proceeding for about eighteen months, declined to act any further. Thereupon after some time the respondents appointed Mr. Vithaldas Damodar Govindji as their arbitrator and called upon the petitioner to appoint his arbitrator under section 9 (*b*), and, as the petitioner refused to appoint his arbitrator, the respondents appointed Vithaldas Damodar Govindji as sole arbitrator in the matter under section 9 (*b*).

The construction of section 9, to my mind, is quite clear. It provides for supplying the vacancy in a case where the submission provides that the reference shall be to two arbitrators, one to be appointed by each party. The previous section provides for supplying the vacancy in a case where the submission is to one arbitrator, umpire or third arbitrator. Section 9, clause (*a*) speaks of "either of the appointed arbitrators refusing to act, &c." That means only that when two arbitrators are appointed one by each party the right of appointing another arbitrator in place of the arbitrator refusing to act, &c., lies with the party appointing him and not with both the parties. The meaning which is tried

to be put upon section 9, sub-clause (a), that the right of a party to appoint an arbitrator in place of the arbitrator appointed by that party who refuses to act, &c., cannot be exercised if the other arbitrator refuses to act, seems to me not the proper construction of the clause at all. The word "either" is used because it may happen that one or both of the arbitrators may refuse to act. &c. In that case each party has a right to appoint an arbitrator in the place of the arbitrator appointed by that party, and if one party so appoints and the other party refuses to appoint an arbitrator in place of his arbitrator, the provisions of sub-section (b) would come into force and the party so appointing would be entitled, after giving notice to the other party, to appoint his own arbitrator as sole arbitrator. Therefore, the petition fails on the first two grounds.

As regards the alternative ground, it was conceded by the respondents that they were willing to have another arbitrator appointed by the petitioner to act with Vithaldas Damodar Govindji.

I, therefore, set aside the appointment of Vithaldas Damodar Govindji as sole arbitrator made under section 9 and I order that the said Vithaldas Damodar Govindji should act with an arbitrator nominated by the petitioner within a fortnight.

The said two arbitrators to proceed with the arbitration.

Solicitors for petitioner: Messrs. *Motichand & Devidas*.

Solicitors for respondents: Messrs. *Mulla & Mulla*.

Order set aside.

O. H. B.

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