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and no other issues have yet been determined. Accordingly we think the successful party, viz., the plaintiff, must get his costs on this preliminary issue throughout in all Courts. The suit will then be remanded to be heard on the remaining issues in the case.

Appeal allowed.

R. R.

APPELLATE CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump

1927 *Sept.* 29

BHOGILAL PURSHOTTAM SHAH (ORIGINAL OPPONENT NO. 1), APPELLANT *v.* CHIMANLAL AMRITLAL SHAH AND OTHERS (ORIGINAL APPLICANT AND OPPONENTS NOS. 2 AND 3), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Schedule II, para. 15—Arbitrator—Misconduct—Delay of five years in making award.

The word "misconduct" in paragraph 15 of Schedule II to the Civil Procedure Code, 1908, does *not necessarily* imply anything in the nature of *fraud*; but it may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator, e.g., delay of five years in making the award.

Coley v. *DaCosta*,[1] followed.

APPEAL from an order passed by M. G. Mehta, Joint First Class Subordinate Judge at Ahmedabad.

The facts are sufficiently stated in the judgment of the Chief Justice.

R. J. Thakor, for the appellant.

H. V. Divatia, for respondent No. 1.

MARTEN, C. J. :—This is an extraordinary case, and one to which, in the view I take, the learned trial Judge has not given the care which it deserves. The suit is one to have an award in an arbitration out of Court filed and a decree passed thereon. A startling circumstance in the case is that whereas the agreement for reference, Exhibit 28, was on September 11, 1920, the award was not made till after five years afterwards, viz., on October 6, 1925. Nor is there any reasonable excuse for that delay put forward. On the facts it would appear that the arbitrator had

* Appeal No. 41 of 1926 from Order,

[1] (1889) 17 Cal. 200.

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two meetings of the parties in 1920 within the first two months or so of the reference, but that thereafter nothing whatever was done except that part of the property included in the reference was divided up by agreement between the parties. Notwithstanding this long lapse of time the arbitrator never called the parties again before making his award ; and he kept no notes of the evidence in 1920 except some memoranda about certain ornaments and accounts. He does not appear even to have given any notice to the parties that he was proposing to make this award, but proceeded to execute this long document which in itself contains provisions which the appellant, defendant No. 1, objects to.

The mere statement of the above facts at once raises the query in the mind of any lawyer as to how an award could be validly enforced after such an unconscionable and unexplained delay. No case of this sort can be found in the books. Nothing approaching it is within my own recollection even in India. The attention of the learned Judge seems mainly to have been diverted to other points in the case, viz., as to two stupid lies which defendant No. 1 told, viz., first that he never signed the reference paper at all, and secondly that, if he did, he at once abandoned the arbitration. The second point, of course, would not really avail him, for even if he purported to abandon the arbitration, he could not do so legally unless good cause was shown for taking that course.

Having disposed of those two points of fact, the learned Judge thus deals with Issue 3 as to whether the long interval between the reference and the making of the award vitiates the award. He says :—

"In the reference paper no date was fixed on or before which the arbitrator had to make his award. The evidence of the arbitrator shows that his award was delayed owing to the difference of opinion in the matter of partition of defendant No. 2's house. No authority has been cited to show that long interval between the reference and the making of the award vitiates the award. My finding, therefore, on issue 3 is in the negative."

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As regards the reason given by the arbitrator, viz., that the parties themselves were disputing about the partition of a particular house, it is really no excuse whatever. It is possible that this lay arbitrator entirely misconceived at one time the real duties of an arbitrator, and thought that he was merely a negotiator to bring the parties together and record an agreement, if any, at which they should arrive. That is not legal arbitration. His duty was not to negotiate, but to decide. And the fact that the parties could not agree was no reason whatever why he should not perform his duty, viz., of deciding Yea or Nay, how certain property should be partitioned so as to give it partly to A and partly to B and so on.

Then as regards the learned Judge's observation about the absence of authority, I would have rather thought that in a strange case of this sort authority would be required not to show that the award could not be made, but to show that it could be made, after this lapse of time.

But it is necessary to consider the matter rather more carefully than the learned Judge has done. This being a mofussil arbitration effected out of Court and not in any suit, the matter comes under the Second Schedule to the Civil Procedure Code, paragraph 20. Then paragraph 21 provides that where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paragraph 14 sets out certain grounds on which the Court may remit the award to the arbitrator. Paragraph 15 provides that an award is not to be set aside except on certain grounds, one of which, viz., (a), is the "corruption or misconduct of the arbitrator or umpire."

Now in reference to arbitrations we are familiar with the use of the word "misconduct." It does not necessarily

or at all imply anything in the nature of fraud. But it certainly may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator, as he is occupying a *quasi*-judicial position. Under English arbitration law for instance, it has been held to be misconduct for an arbitrator to see one of the parties about the case in the absence of the other, and without notice to him.

Was there, then, misconduct within the meaning of paragraph 15 in the present case? It is quite true, as the learned Judge points out, that no time was fixed here for the making of the award, but I take it that one of the commonest terms which are implied by the Court in dealing with contracts of various sorts is to imply that in the absence of an express term on this point the parties intended that the contract, whatever it may be, should be performed within a reasonable time. Otherwise the very purpose of the parties in entering into the contract or arrangement may be entirely frustrated. So here I see no difficulty in holding that the intention of the parties was that the award should be made within a reasonable time.

On the facts I would hold that it is clear that the award was not made within a reasonable time or anything approaching a reasonable time. Then does that imply in any way misconduct on the part of the arbitrator? If that delay is not explained, in my judgment it does imply misconduct on his part, because it was his duty to make up his mind and decide this dispute. It was his duty to see *prima facie* that the proceedings were conducted with reasonable diligence, and if he so far failed in those duties that he did nothing whatever for some five years, then in my judgment he failed in material respects in his ordinary duties as an arbitrator. That being so, in my judgment, he was guilty of misconduct within the meaning of paragraph 15, and accordingly the award may be set aside.

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Now the case is not entirely without authority as the learned Judge seems to think. My brother Crump drew attention to a useful and important case, *Coley* v. *DaCosta*.[1] There there was an agreement to go to arbitration on March 31, 1886. Nothing appears to have been done by the arbitrators beyond the fact that two or three meetings were held, and matters so continued till December 8, 1886, on which date one of the parties wrote withdrawing from the arbitration. The point was whether he was entitled to do that, and the Court held that he was. At page 207 Mr. Justice Pigot says :—

"The powers conferred by the Code upon arbitrators are very great, and we think that a party has a right, if he chooses, to insist upon it that, once an arbitration is decided upon, it shall be proceeded with with reasonable speed. There is no doubt that in the present case the delay that took place was in itself unreasonable, and, being unexplained and not justified by any acts of the appellant, we hold that he had good cause under the circumstances for revoking this agreement. That being so, it was no longer competent to the Court to order the agreement to be filed under section 523, and the proceedings were therefore invalid."

The Court relied there on a dictum of their Lordships of the Privy Council in *Pestonjee Nusurwanjee* v. *Manockjee*.[2] That was an arbitration between two partners. There was some delay in the appointment of an umpire, and then one of the parties gave notice calling on the arbitrators to make their award within ten days or else to appoint an umpire. It was held that on the facts of that case the partner had no power to fix an unreasonably short time as ten days for the arbitrators to make their award. On the other hand, the question of serious delay was gone into, and at page 131 the judgment of the Board says :—

"If nothing whatever had occurred since the appointment of the Arbitrators in *June*, 1864, and all matters between the Appellant and the Respondents had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think, that this delay of the Arbitrators would have justified the course which the appellant adopted. But in truth the facts disclose a very different course of proceeding. In *July*, 1864, the Arbitrators made their Award in a very important part of the matter in difference. They dissolved the partnership, and delivered up the business to the appellant, who has, since that time, carried it on alone, and had done so for a year prior to the Letter

[1] (1889) 17 Cal. 200. [2] (1868) 12 Moo. I. A. 112.

of *July* 24, 1865. A second decision of the Arbitrators relative to the *Ponany* farms was made in *May* 1865, and acquiesced in by both parties, the Appellant and the Respondents.

A notice to the Arbitrators to make their award and to appoint an Umpire in ten days, does not appear to their Lordships to be sufficient time given to entitle the Appellant to stop all further proceedings, and to cancel all further proceedings."

There it will be observed the Board considered that an unexplained delay of approximately a year would entitle one party to withdraw from the arbitration. In the Calcutta case the delay was less than a year. If again we turn to what is reasonable in point of time even in India, we find that in the Indian Arbitration Act, 1899, which applies to the Presidency town of Bombay, the time fixed for making an award is three months in the absence of an agreement to the contrary and subject to the time for making the award being enlarged (see First Schedule, paragraph 3). So we get this much, therefore, as clear on the authorities, that an unexplained delay of even a fraction of the time actually occupied here would entitle the parties to withdraw from the arbitration.

Next as regards the arbitrator himself, it is suggested in Russell on Arbitration, Tenth Edition, at page 197, that an arbitrator might be sued for breach of contract if he refuses to complete the reference and make an award within a reasonable time. The passage runs :—

"It having been established that an arbitrator can recover his fees upon an implied contract by the parties to remunerate him for his services as arbitrator, it would seem that he might be sued as for a breach of contract on his part if he refused to complete the reference and make an award in a reasonable time."

In the present case it does not appear that the arbitrator was working for pecuniary reward. In fact we are told by the learned pleaders that the contrary is the case. That being so, I take it, that an action of the kind suggested would presumably not lie against him. In this connection I may refer to another case cited by my brother Crump, viz., *Savlappa* v. *Devchand*,[1] a decision of Sir Lawrence Jenkins and Mr. Justice Chandavarkar. There the suit

[1] (1901) 26 Bom. 132.

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was brought against the arbitrator for damages for his fraud in collusion with one of the parties. The ground mainly alleged for establishing the fraud was the delay in making the award. But the Court negatived the charge of fraud, and said (p. 135) :—

"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."

It does not, however, appear in that case whether the arbitrator was working for reward, nor is it exactly clear how long the delay in that particular case was.

But be that as it may, it does not really affect the precise point which we have to decide here. No doubt an important distinction between the case of *Coley* v. *DaCosta*[1] and the present case is that in the former the award had not been made, whereas in the present case the award has been made. But we have to remember that here the parties were all laymen, and in my judgment it is not fatal to the appellant that he did not give a formal legal notice withdrawing from the arbitration. In my judgment, on the facts here, we still have it that the arbitrator failed in his duty, and that consequently the award ought not to be filed.

Under those circumstances I need only allude to other points on which the case might be put. I am by no means satisfied that the case here might not be put on this ground that by their conduct the parties, viz., the litigants and the arbitrator, all really abandoned the reference. But that was not the precise way in which the case was put in the Court below, and I do not therefore pursue it. Nor need I go into the complaints as to the details of the award that have been urged before us. But one or two I may notice in passing. The arbitrator has purported to direct that the appellant should pay the debts and recover the outstandings, whereas, as has been pointed out by his

[1] (1889) 17 Cal. 200.

pleader, it may be that after this lapse of time all outstandings have become barred by limitation. *Prima facie* then it is most unfair that the arbitrator should thus allow five years to pass as regards ordinary outstandings without doing anything.

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Then there are several other objections which have been urged before us, based on paragraphs 6 and 8 of the award. They are certainly curious provisions. But we have not gone into them, nor required counsel for the respondents to deal with those points, because in our judgment it is unnecessary so to do, having regard to the main point as regards the lapse of time.

Under these circumstances I would allow the appeal, and discharge the order of the learned Judge and dismiss this application.

As regards costs, the appellant has deliberately attempted to deceive the Court by asserting matters which were clearly false to his own knowledge, viz., that he had not signed the reference, and secondly that he had abandoned it at once. That being so, this is one of those exceptional cases where having regard to his conduct, he should be deprived of all his costs. Our order as to cost will therefore be that each party do bear his own costs throughout.

CRUMP, J. :—I agree.

Appeal allowed.

R. R.

PRIVY COUNCIL

COMMISSIONER OF INCOME TAX *v.* WESTERN INDIA TURF CLUB, LTD.

[On Appeal from the High Court at Bombay]

J. C.*

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November 4.

Indian Income Tax Act (XI of 1922), sections 26, 55 and 58—Super-tax—Registered company—Conversion from association—Rate of tax—Act XIII of 1925, Sch. III, Pt. II.

Where an unincorporated association has been converted into a registered company as from April 1, 1925, although the company, having regard to sections 26 and 58 of the Indian Income Tax Act, 1922, is to be assessed for super-tax (charged by section 55) for the year following at the amount of the income of the association in

**Present:* Viscount Cave, L.C., Lord Buckmaster, Lord Carson, Lord Darling and Lord Warrington of Clyffe.