

APPELLATE CIVIL.

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

1922.

January 18.

BHAVSAR KHMCHAND NAROTAMDAS (ORIGINAL DEFENDANT No. 1).
APPELLANT *v.* SHAH BHOGILAL HIRACHAND AND OTHERS (ORIGINAL
PLAINTIFF AND DEFENDANTS NOS. 2 TO 4), RESPONDENTS*.

*Civil Procedure Code (Act V of 1908), Schedule II, para. 3—Arbitration—
Disputes referred privately to arbitration—Award made by arbitrator—
Subsequent application for appointment of arbitrator through Court—
Annulment of previous arbitration proceedings.*

A suit was filed on 8th February 1918. On 13th February 1918 the matters in dispute were referred to two arbitrators. Later on the parties informed the Court that they had cancelled the reference and had privately appointed one T, as the sole arbitrator. T delivered his award on 18th April 1919. The plaintiff, thereupon, filed a suit on the award and also presented an application to file the award as an adjustment under Order XXIII, Rule 3, of the Civil Procedure Code 1908. On 18th March 1920, the parties applied to the Court to appoint T as an arbitrator to settle the disputes and on the same day the Court appointed him as the sole arbitrator. A question being raised as to the effect of the fresh order of reference of 18th March 1920 on the previous proceedings,

Held, that by reason of the fresh order of reference all the previous arbitration proceedings were annulled and the parties were relegated to their former position.

APPEAL against the order passed by M. N. Choksi,
First Class Subordinate Judge at Ahmedabad.

The facts material for the purposes of this report are sufficiently stated in the judgment.

Jinnah with *H. D. Nanavati*, *T. P. Munim* and *H. V. Divatia*, for the appellants.

B. J. Desai with *G. N. Thakor*, for the respondents.

* Appeal from Order No. 32 of 1921.

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MACLEOD, C. J. :—The plaintiff sued for dissolution of partnership. The suit was filed on the 8th February 1918. On the 13th February 1918, an order was passed under the 3rd clause of the Second Schedule of the Civil Procedure Code referring the matters in dispute to two arbitrators, Mr. Thakordas and Mr. Trikamlal. Later on the parties informed the Court that they had cancelled the reference to these gentlemen, and had privately appointed Mr. Trikamlal alone as the sole arbitrator. That was consequently an arbitration without the intervention of the Court. Mr. Trikamlal delivered his award on the 18th April of 1919. On the 15th August 1919, the plaintiff presented an application to file the award as an adjustment under Order XXIII, Rule 3, of the Civil Procedure Code. But previous to that, on the 25th June 1919, he had filed a suit on the award, Suit No. 572 of 1919.

Then on the 18th March 1920, the parties made an application to the Court that as certain contentions had been raised against the award by the first and second defendants, for the sake of settling disputes between the parties, the Court would be pleased to appoint Mr. Trikamlal as an arbitrator through the Court, and after taking evidence which the parties might have to adduce, he should give his award and the parties should treat that award as final. On the same day the Court appointed Mr. Trikamlal sole arbitrator with the consent of the parties, and he was to submit his award on or before the 15th April 1920. Mr. Trikamlal was unable to submit his award by that date, and eventually returned the papers, so that the arbitration proceedings fell to the ground.

On the 17th November 1920, the plaintiff withdrew Suit No. 572 of 1919, and continued his application under Order XXIII, Rule 3.

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The first issue was whether the application, Exhibit 29, for recording an adjustment on reference, dated 14th October 1918, and the alleged award, dated 18th April 1919, could be entertained any longer after the application and order, dated 18th March 1920. On that issue the Judge found that the terms of Exhibit 47, i.e., the application for a fresh order of reference, did not make the previous reference nugatory and of no effect, so that the previous reference and the award thereon remained to be enforced. The learned Judge admitted that no exact authority could be found, but he held that the previous contract was not cancelled, nor was a new complete contract that could be enforced substituted. It appears to us obvious that when the parties applied to the Court on the 18th March 1920, to appoint Mr. Trikamlal sole arbitrator, they agreed that all the previous arbitration proceedings should be annulled.

It was suggested by the respondents that the effect of the application and order of the 18th March 1920 was merely conditional, that if for any reason what we may call the third arbitration proceeding should result in nothing, the second arbitration proceeding could be revived, and any of the parties who wished to rely upon the second arbitration proceeding as an adjustment of the suit, should apply to the Court under Order XXIII, Rule 3.

We cannot accept that proposition, which is opposed to general principles, and it is impossible to conceive what complications might result if such a suggestion were acceded to. But we must read, in our opinion, the application and order of the 18th March 1920, according to its ordinary meaning, and the only construction we can put on that application and order is that the previous arbitration proceedings were considered as at an end, as the parties had agreed to a

fresh arbitration of a different character to the previous arbitration, although the arbitrator was the same. We think, therefore, that the finding of the learned Judge in the Court below that the present application to record the award of the second arbitration proceeding as an adjustment was a good application, was wrong, and that that arbitration having failed, the result was that the parties were relegated to their original position and the suit must continue.

It is not, therefore, necessary to deal with other issues in the case, and to decide whether a decree could be passed in terms of the award of the 18th April 1919. The appeal must be allowed and the suit must continue. The appellant to have his costs throughout from the plaintiff and defendants Nos. 2, 3 and 4.

Decree reversed.

J. G. R.

PRIVY COUNCIL.

THE KARA DENIZ.

[On Appeal from the High Court at Bombay, Admiralty and Vice-Admiralty
—In Prize.]

*Prize Court—Ship—Owner naturalized neutral—Commercial domicile in
Enemy country—Burden of proof.*

In prize proceedings for the condemnation of a steamship seized in Bombay harbour shortly after the declaration of war between Great Britain and Turkey, the ship was claimed by the appellant, a naturalized Persian subject who, down to the outbreak of war, had a commercial domicile at Constantinople. The Judicial Committee, affirming a decision of the Prize Court at Bombay, held that the ship was liable to condemnation as enemy property, since the appellant had not discharged the burden of proof, which lay upon him, of showing that he had proved an intention, or taken steps, such as would have the effect of divesting him of his commercial domicile in Turkey.

Judgment of the High Court (in Prize) affirmed.

^o*Present* :—Lord Sumner, Lord Parmoor, Lord Wrenbury, and Sir Arthur Channell.

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