APPELLATE JURISDICTION (*a*)

Civil Petition No. 246 *of* 1865.

PESTONJEE NUSSERWANJEE.....*Petitioner.*

D. MANECKJEE & Co .....*Counter-Petitioners.*

No appeal lies from an order directing that an agreement to submit matters in dispute to arbitration should be filed under the provisions of Section 326 of the Procedure Code.

The fact of one of the parties to the agreement revoking his submission is not a "sufficient cause" within the meaning of that Section.

The English cases on the subject considered.

1866.
April 28.
C. P. No 24
of 1865.

THIS was a petition against orders of H. D. Cook, the Civil Judge of Calicut, dated the 22nd and 23rd September and 20th October 1865.

Advocate General and *Miller*, for the Petitioner.

Mayne for the Counter-Petitioners.

The facts sufficiently appear from the following :—

JUDGMENT.—The Appellant having asked and obtained permission to appeal to Her Majesty in Council from the order of this Court dated 15th January 1866, we are now required by the Letters Patent to record the reasons for the order made by us, dismissing the appeal.

The decision of this Court was, simply, that no appeal lay from the order of the Civil Judge of Calicut, directing that an agreement to submit matters in dispute to arbitration should be filed under the provisions of Section 326 of the Civil Procedure Code.

It is quite clear that the Section itself gives no appeal, and it was not attempted to shew that any other part of the Code has done so. The appeal was put solely upon the ground that the Civil Judge had, in filing the agreement to

(*a*) Present : Holloway and Innes, J. J.

1866. *April* 28. *C. P. No.* 246 *of* 1865

submit, acted altogether without jurisdiction, because, previously to the filing, the present Appellant had withdrawn from the submission. The language of Section 326 shews that the Judge had jurisdiction to hear and determine the sufficiency of the cause shown against the agreement, and, if no sufficient cause was shown against the agreement, he was bound to file it and make an order of reference to arbitration. After the filing, the other provisions of the Chapter, so far as they are not inconsistent with the terms of the agreement, became applicable, and the matter would proceed naturally to a final judgment. These Sections give the amplest power to enlarge the time for making the award, to nominate other arbitrators, to correct and remit the award, and to set it aside on the grounds of corruption or misconduct. It is manifest, therefore, that the Section under which the Civil Judge acted gave him jurisdiction, and, there being no part of the Chapter or of the Code giving an appeal against such an order, we were bound to dismiss the appeal.

As the matter, however, was of very general importance, we proceeded to consider whether the fact that one of the parties had chosen to withdraw his submission was such a cause against the agreement as should have prevented the Civil Judge from filing the agreement. The Section provides for two cases, one, in which all the parties join in the application, and the other, in which they do not. In the latter case, the only one with which we are at present concerned, the applicant is to be treated as plaintiff and the other parties as defendants in a suit. Notice is to be given to them to show, within a time specified, why the agreement should not be filed, and it proceeds, "If no sufficient cause be shown against the agreement, the agreement shall be filed and an order of reference to arbitration shall be made thereon."

Taking these words alone, it would scarcely be contended that sufficient cause is shown against any agreement, by one of the parties to it saying that he has since altered his mind. What, moreover, could be the purpose of the legislature in providing for the showing of cause and the determination of the sufficiency or insufficiency, of that cause

1866.
April 28.
C. P. No. 246
of 1865.

if any one of the parties could put an end to the matter by simply saying, "I have altered my mind. It is true that I entered into the agreement; I have nothing of fraud, surprise, or invalidity to allege against it, but I have since altered my mind." We should therefore have no hesitation in saying, if the matter were before us in appeal, that one of the parties having altered his mind is not a sufficient cause against an ordinary agreement, and we can see no possible ground in legal principle for saying that it is sufficient cause against an agreement to refer matters to arbitration. It was said in the argument that, by the withdrawal of one of the parties, the agreement was absolutely at an end and that there was nothing to file. This has very often been rather loosely said in the English Courts, but the case of *Livingston* v. *Ralli* (V. El. and Bl. 132) has effectually disposed of that doctrine. All the learned Judges there decided that an action will lie upon the breach of an agreement to refer prospective differences to arbitration, and Mr. Justice Coleridge took occasion to express strong doubts as to the correctness of the opinion, frequently expressed, that nominal damages only could be recovered. The decision unquestionably in accordance with principle, shews that there is no pretence for saying that by English law the agreement becomes, by the withdrawal of one of the parties, a mere nullity.

There is no doubt whatever that an English Court of Equity will not decree the specific performance of an agreement to refer. The *South Wales R. Co.* v. *Wythes* (V. DeG. M. and G. 880) contains a re-assertion of this principle, frequently stated by Lord Eldon. Both Courts of law and of Equity have refused to allow their jurisdiction to be stayed on account of such agreements. *Street* v. *Rigby* (VI. Ves. 815), overruling Lord Kenyon's decision in *Halfhide* v. *Fenning* (2 Bro. C. C. 336), is the first case in which this was distinctly decided in Equity. *Thompson* v. *Charnack* (8 T. R. 139) is the leading case at law.

Without saying any thing upon the policy of these decisions, it may perhaps be doubted whether they would have been arrived at, if the point had come for the first

1866. *April* 28. *C. P. No.* 246 *of* 1865.

time before the majority of the Judges and the law Lords who decided *Scott* v. *Avery* (V. H. L. 811). In England the legislature has by various statutes sought to render such agreements to refer effectual, and Mr. Baron Martin, in the very recent case of *Mills* v. *Bayley* (II Hurls. and Colt. 36-41) took occasion to express his regret, that the legislature did not in all cases prohibit the revocation of agreements to refer. Perhaps the reasons given by Lord Coke in *Vynior's Case* (8 Rep. p. 159) will not be found very satisfactory in point of logic for permitting the revocation. In truth, however, it is difficult to see what the Courts of law could have done. They did not specifically perform any contract, and the proceeding by attachment, both at law and Equity, proceeded upon the ground of a contempt of the Court of which the agreement to submit had been made a rule. It is of course difficult on principle to see why a withdrawal should have been allowed after the submission had been made a rule of Court.

The question of how the agreement shall be enforced is, of course, a question of procedure. The Courts of Equity in England have always considered specific performance a peculiar and discretionary remedy, and the mere refusal on their part to specifically perform a contract to submit disputes to arbitration, is no authority whatever for putting upon Section 326, and the other Sections of this Chapter, the construction that nothing more is to be done under them after the dissent of one of the parties from his own agreement. It seems to us that such dissent is no better cause against this sort of agreement than it is against any other, and, if there had been an appeal, we should unquestionably have decided that the Civil Judge was right in filing the agreement.

The Indian legislature, in the provisions of this Chapter, seems to have been guided by the same policy at the English since the time of William III., but has carried out that policy to its logical conclusion.