1875. *April* 12. *C. M. P. No.* 181 *of* 1875.

that whereas in this case a delay of 29 days occurs in furnishing a copy of the decree appealed against, the right of appeal is in effect taken away. But as this Act does not, like the Civil Procedure Code (Section 335) require that the appeal shall be presented in a prescribed form "and shall be accompanied by a copy of the decree appealed against," it may well be that an appeal may be duly presented within the meaning of the Act, notwithstanding the appellant's involuntary omission to produce with it a copy of the decree.

Petition dismissed.

Appellate Jurisdiction.(a)

Regular Appeals Nos. 82 *and* 86 *of* 1874.

NAGASAWMY NAIK ... { *(1st Defendant) Appellant in No.* 82 *and Respondent in No.* 86.

RUNGASAMY NAIK ... { *(Plaintiff) Respondent in No.* 82 *and Appellant in No.* 86.

An agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract; and a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable.

S. A. No. 491 *of* 1865, 3 Madras H. C. Rep., p. 82 overruled, *C. P. No.* 246 *of* 1865, Ib., p. 183, and *R. A. No.* 55 *of* 1873, 7 Ib., p. 257, followed.

1875. *March* 19. *R. A. Nos.* 82 & 86 *of* 1874.

THESE were Regular Appeals against the Decree of Mr. F. C. Carr, District Judge of Tinnevelly, in Original Suit No. 13 of 1873.

The plaintiff sued for the recovery of moveable and immoveable property "unlawfully and fraudulently appropriated," by the 1st defendant the elder brother of the plaintiff, and, as head of the family the manager of its affairs.

The plaintiff alleged that the 1st defendant executed a deed of division on the 20th March 1871, whereby (after deducting certain sums for the maintenance of the mother of the plaintiff and defendant, and assigning over to their sisters certain debts) the 1st defendant undertook to collect

(a) Present:—Sir W. Morgan, C.J., and Holloway, J.

1875. *March* 19. *R. A. Nos.* 82 & 86 *of* 1874.

debts, mentioned in the deed of division, and the moveable and immoveable property amounting in value to Rs. 56,687-9-9 was to be equally divided between the plaintiff and the 1st defendant. The plaintiff further alleged that the 1st defendant collected the debts above-mentioned and appropriated the sums collected to his own use, and "concealed certain properties without including them in the division," and that he has collected some of the debts assigned over to the sisters, "and has, subsequent to the division, obtained bonds in his name for some other debts." The plaintiff further alleged that soon after all the above circumstances came to his knowledge in June 1871, he and the 1st defendant appointed certain arbitrators to enquire into the matter in dispute between them, but before the arbitrators could make their award, the 1st defendant withdrew his submission to arbitration by a petition dated the 2nd November 1872. On the 29th of that month the arbitrators published their award.

The 1st defendant admitted that a division was effected between himself and the plaintiff; traversed the allegations of fraud, concealment, and appropriation; alleged that the plaintiff was put into possession of the property to which he became entitled under the deed of division, and further alleged that the plaintiff appropriated certain debts which fell to 1st defendant's share. The 1st defendant submitted that the alleged award was "fraudulent and invalid in law," and that the plaintiff's suit was not brought thereupon.

The Judgment of the District Judge, so far as it relates to the subject of arbitration, is as follows:—

"It is undisputed that on the 20th March 1871, after long consultation, the brothers mutually wrote their deeds of division, Exhibits A and I, which were registered at Vilathicolam on the 1st April 1871. Subsequently, however, disputes arose between them, and on the 9th November 1872 they submitted their disagreement to village arbitrators [Exhibit P 1] putting in lists which detailed their difference [P 3 and 4] upon which the arbitrators appointed one Chockalingam

1875. *March* 19. *R. A. Nos.* 82 & 86 *of* 1874.

Pillay (P 7) to compare their lists of differences, with the schedules of the properties attached to the deeds of division, and a slight amount of evidence (2 witnesses) was heard on the 23rd November 1872; the defendant put in through the post a protest (P 10) withdrawing his submission to the arbitration, mainly on the ground that their proceedings were partial and irregular, and that he had had no fair opportunity of producing before the arbitrators his witnesses and evidence.

"This letter was received by the arbitrators the following day, viz., 24th November 1872. The arbitrators, however, considered the withdrawal was invalid as having only been put in after the defendant knew that the award was going to be against him, and they accordingly proceeded to draw up their award which was completed and signed on the 27th November 1872. P 8 is the original award, and it was produced, in obedience to summons, by the curnam Chockalingam Pillay (plaintiff's 1st witness) who, though not actually one of the punchayet, was employed by them to compare the accounts and to draft and write the award.

"When the plaintiff filed this plaint, he made allusion to this award in the 8th paragraph, which is as follows:—'As 'soon as the plaintiff became aware of the aforesaid deceitful 'circumstance, *i. e.* in June 1872, both parties appointed 'arbitrators to settle the case, but before they gave their 'decision, the 1st defendant knowing that it would go 'against him, withdrew himself from his submission to arbi-'tration, sending on 23rd November 1872 a letter with-'drawing. Subsequently, however, the arbitrators gave their 'award on the 27th November 1872.'

"The prayer of the plaint contained no petition to file the award in Court under the provisions of Section 327 (*a*): and the relief sought by the plaintiff was not in accordance with the award, but, on the contrary, was an adjustment of the division between the brothers on a consideration of the whole circumstances of the case.

"The defendant in his written statement in the 8th para. stated that 'the arbitrator's award referred to in the plaint

(*a*) Act VIII of 1859.

1875. *March* 19. *R. A. Nos.* 82 & 86 *of* 1874.

'is fraudulent and is not sustainable in law, and no claim 'has been preferred thereon by the plaintiff.' At the first hearing of the case no definite reference was made by either party to this award, and the six issues, which were then (October 4th, 1873) settled had no reference thereto; these issues were agreed to and signed by the pleaders of both parties.

"On the 19th December 1873 the plaintiff's pleader put in a Miscellaneous Petition (No. 3 of 1874) saying that the plaintiff's claim was based upon the award of the arbitration, and praying for an additional issue to settle how far it was now binding.

"The defendant's vakil objected to the issue, but I was of opinion that as the question had been raised, it was better to settle it in the suit, although it had not actually formed a portion of the prayer in the plaint. I accordingly recorded the additional issue which is now under consideration. 'Whether the parties are bound or not by the award of the punchayet.'

"On my asking the plaintiff's pleader why he had only so late advanced this plea, he acknowledged that when he drafted the plaint and agreed to the original issues, he was of opinion that the withdrawal of the defendant before the award was effectual to nullify the award, but that owing to the decision of the High Court in Regular Appeal No. 55 of 1873, *Ramaraya* v. *Santaiya* and another (1), which only became known here on its publication in the December number of the Madras Jurist, he now was ready to maintain that the withdrawal by the defendant could not be allowed to operate.

"The defendant's pleader, on the contrary, has urged that the withdrawal was good, having been filed before the award, as is clear from its being mentioned in the award itself, and that as not only he had withdrawn his submission, but also as plaintiff had ignored the award, by framing his plaint independently of it by asking for things which the award

(1) 8 Madras Jurist, p. 455, reported as *Santaiya* v. *Rámaráiya*, in 7 Madras H. C. Rep., p. 257.

1875. *March* 19. *R. A. Nos.* 82 & 86 *of* 1874.

had disallowed, and by not asking for a certain item of Rupees 442½ which the award had given, it was not now open to him upon a new ruling to change his plea.

"Reading, however, the judgment of the Acting Chief Justice in that case, I am not of opinion that it, in any way, alters the former rule relative to the power to withdraw. In that case after an award had been made, one of the parties applied under Section 327 to file the award. Such has not here been done. The objecting party asserted, but did not prove, that he had revoked his assent. In the present instance he has not only proved it, but it is admitted that he did so revoke, upon which the Original Court ordered the filing of the award. Against this the defendant appealed on the ground that he had authority to revoke and did revoke his submission.

"The judgment of Mr. Holloway, Acting Chief Justice, was that the application must be dismissed as there was no appeal.

"He said 'the point urged on appeal does not arise, for there was no evidence of any attempt to withdraw.' In the present instance, the withdrawal was undisputed. Then follows the part on which the plaintiff's pleader relies as laying down that being once in an arbitration, a party can never withdraw.

"'If there had, (been an attempt to withdraw) however, 'and simply on the ground that the appellant did not like his 'agreement, and such withdrawal was allowed to defeat a '*completed* award, this curious consequence would follow ;—

"'No man can withdraw from his contract to submit, and that contract can be filed despite this objection while the arbitration is going on. If, however, the matter proceeds to its natural and legally compellable conclusion, a matter which would be wholly ineffective to stay any part of the proceeding at any stage of its progress, is adequate to destroy it when all the stages have been passed and the goal reached.'

1875. *March* 19. *R. A. Nos.* 82 & 86 *of* 1874.

"These two contingencies do not arise in the present case, the objector did not withdraw simply because he did not like it, but because the enquiry was not full, and the question is not whether a withdrawal should defeat completed awards, but whether there being a withdrawal before award is made there is any authority remaining in the arbitrators to decide the case. The remaining part of the paragraph shows that the *reductio ad absurdum* argument rests on the supposition that the withdrawal is subsequent to the award.

"That a man may object previous to the giving of an award is undoubted. Mr. Justice Holloway himself has so ruled. In the case of *Kula Nágabúshanam* v. *Kula Séshá-chalam* (1) there would have been no necessity for the argument as to whether an award was to date from its rough draft or not if a party could *never* withdraw. In the case of *Alla Aiyappa* v. *Nundula Peraiya,* (2) it clearly sets out that either party may revoke before award. That decision raises the very point now under discussion, and its ruling is authoritative and has not been overruled by the case of *Ramaraya* v. *Santiya.* (3) Mr. Broughton, at page 252 of his Civil Procedure Code, 4th Edition, referring to the decision of the Calcutta High Court, says 'It is an almost universal rule that a submission to arbitration is revocable before award made.' It is true that in the case of *Pestonjee Nusserwanjee* v. *Maneckjee* (4) the Privy Council held that 'when parties have agreed 'to submit the matter to arbitration, no party to the 'agreement can revoke the submission to such arbitra-'tion, unless for good cause: a mere arbitrary revoca-'tion of the authority will not be permitted.' But in the first place this had reference only to cases falling under Section 326 of the Code, *i. e.;* where the case has come before the Court before arbitration has commenced, whereas in the present case, the arbitration and the award were without any

(1) 1 Madras H. C. Rep., p. 178.
(2) 3 Madras H. C. Rep., p. 82.
(3) 7 Madras H. C. Rep., p. 257.
(4) 12 Moore's I. A., p. 112, confirming the judgment of the High Court reported in 3 Madras H. C. Rep., p. 183.

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1875. *March* 19. *R. A. Nos.* 82 & 86 *of* 1874.

Court intervention, and in the second place the defendant assigned a good cause for his withdrawal, viz.; that the enquiry was defective, an objection which seems well founded, considering that before this Court the plaintiff alone examined 44 witnesses occupying many days in the enquiry, and before the arbitrators only two were examined. In the case of *Seonoth* v. *Ramanath* (1), which, in many of its features, was very much like the present suit, the parties had at first agreed to an arbitration by written agreement, but one party subsequently drew back from his agreement and refused to have it registered. Nothing, therefore, came of the attempt to settle the dispute by arbitration. On the case coming before the High Court and Privy Council no objection whatever was taken to this apparently arbitrary revocation of submission. The case is reported in Sutherland's Judgments of the Privy Council, page 616 (1).

"Lastly, a feeble effort was made by the 2nd and 3rd witnesses to prove that the award was really out before the revocation, which so completely broke down that the plaintiff's pleader relinquished that point without comment. Without doubt the defendant withdrew before the award as stated in the plaint, and he so withdrew for a reason, which it is impossible to call inadequate, and hence I hold upon the *Supplemental Issue* that the parties are not bound by the award (P. 8) of the punchayet."

The District Judge then considered the case on its merits and in conclusion observed :—

"The result of the judgment is that the defendant do pay to plaintiff,

	RS.	A.	P.
For moiety of 12 podies of cotton....	360	0	0
For moiety of common debts.....	5,405	3	3
Total...	5,765	3	3

with interest at 12 per cent. per annum from the 10th March 1871, together with proportionate costs upon the decreed amount."

(1) 10 Moore's I. A., p. 413.

1875. *March* 19. *R. A. Nos.* 82 & 86 *of* 1874.

From this decision both parties appealed; the first ground of the plaintiff's appeal being "The award of the Punchayet (P. 8) was final, binding, and conclusive upon both plaintiff and defendant."

Mr. Johnstone, for appellant (1st defendant) in No. 82 and respondent (1st defendant) in No. 86. There is a distinct decision of this Court that either party to an arbitration may revoke before award. *Alla Aiyappa* v. *Nundula Peraiya* (1).

[HOLLOWAY, J.:—That decision is bad. It is one of the worst in the Reports. I then had the jargon of the English Common Law running in my head, and my attention was not called to the fact that the Civil Procedure Code had completely altered the law out here. I would not have thought that the point could be doubted or that it was open to argument had not my attention been drawn by Mr. Mayne, in *Pestonjee Nusserwanjee* v. *Maneckjee,* (2) to the change in the law made by Act VIII of 1859.]

But that case has not been overruled. In the present case the submission to arbitration was a private arrangement not effected through the Court, and the award, made after notice by 1st defendant of his withdrawal from his submission, was not made an order of Court, and was not originally relied upon by plaintiff.

Mr. Tarrant and *Rama Row,* for respondent (plaintiff) in No. 82 and appellant (plaintiff) in No. 86. The case of *Alla Aiyappa* v. *Nundula Peraiya* (2) has been in effect overruled by more recent decisions. *Pestonjee Nusserwanjee* v. *D. Maneckjee & Co.,* (2) and *Santaya* v. *Rámaráya,* (3). *The* subject is governed by Act VIII of 1859.

The Court delivered the following

JUDGMENT:—In this suit, in its origin, both parties seem to have lost sight of the agreement whereby they were minded to close their disputes by a reference to arbitration. Certain disputes having arisen between the two brothers respecting the division of family property of which they had

(1) 3 Madras H. C. Rep., p. 82.
(2) 12 Moore's I. A., p. 112.
(3) 7 Madras H. C. Rep., p. 257.

1875. *March* 19. *R. A. Nos.* 82 & 86 *of* 1874.

lately made deeds of partition they resolved to appoint these seven men to be arbitrators, and the instrument whereby these arbitrators were appointed indicates the large powers intended to be given. It is not therein provided, in formal terms, that they are to hear the witnesses called by the parties, and to examine all documents that the parties might produce; but the submission to arbitration does clearly state that the disputants both agreed to present themselves before the arbitrators with the partition deeds and to abide by such decision as they might pass. The arbitrators held an enquiry and made an award—the substantial justice of which is in no way impugned. It appears that one of the parties to this arbitration, not being able to shew that the arbitrators had in any respect misconducted themselves or that they had proceeded precipitately in their enquiry, on the pretext that their proceedings were partial and irregular and their enquiry defective, withdrew from his submission to arbitration, and the first question for decision in this suit, upon the additional issue framed by the District Court, is whether the submission could in the circumstances be revoked.

The Judge held that there had been a revocation (for reasons which he could not call inadequate) of the arbitrators' authority *before* the award was made, and that the parties therefore were not bound by the award. After a careful examination of the evidence we think it appears, that the arbitrators closed their enquiry on the 21st, and that on the 22nd or 23rd a rough draft of their award was prepared, and the award itself was afterwards, on the 27th, formally made and published.

The arbitrators' decision was made known by themselves, or became known, on the 23rd, and it is in evidence that both the plaintiff and the defendant were present when the arbitrators on that day stated what their decision was.

Upon this evidence, even according to the law relied on by the Judge, there could be no revocation of authority, for the arbitrators had in substance fully executed their task, and the reference was at an end before the 24th when the defendant's letter of revocation was received.

1875. *March* 19. *R. A. Nos.* 82 & 86 *of* 1874.

But we cannot admit that by the law which governs this case a person is allowed to revoke at his pleasure, or without sufficient cause, the authority of arbitrators once appointed, and to whom a difference has been submitted.

In England, no doubt, a rule of law had long prevailed which enabled parties, in breach of binding engagements and without shadow of excuse, to revoke the arbitrators' authority at any time before the making of an award, and in some instances here it had apparently been assumed that a like rule existed.

In the case of a reference through the intervention of a Court or where the order of reference or award is filed in Court, it is now clear that the provisions of the Code of Civil Procedure do not permit such a revocation of authority.*(a)*

In the present case the reference having been made without the intervention of a Court of Justice, can it be said that the authority was revocable even if the fact that it was withdrawn before the award be assumed ?

The "horror" *(b)* which formerly prevailed in the English Courts of a *domestic forum* never found place in British India,

(a) Pestonjee Nusserwanjee v. *D. Maneckjee & Co.*, 3 Madras H. C. Rep., p. 183, confirmed on appeal by the Privy Council, see 12 Moore's I. A., p. 112. See also *Santaya* v. *Rámaráya*, 7 Madras H. C. Rep., p. 257.

(b) In *Livingston* v. *Ralli*, 5 E. and B., p. 132, s. c., 24 L. J., Q. B., p. 269, which was an action on a contract containing an agreement that should any difference arise, the same should be left to arbitration in the usual manner; averment, that a difference arose; and breach, that defendant refused to refer it to arbitration, it was held on demurrer that the action lay. Lord Campbell, C. J., observed, in the course of his judgment (p. 136.) "There seems at one time to have prevailed in our Courts a horror of a domestic forum which I can neither sympathize with nor account for; but the Legislature has recently, in the Common Law Procedure Act, 1834 (17 and 18 Vict., c. 125), s. 11, made a provision in such cases, not that the agreement to refer shall be pleadable in bar, but that the Court may stop the action. This shows the opinion of the Legislature that such agreements are not contrary to public policy."

1875. *March* 19.
R. A. Nos. 82 & 86 *of* 1874.

where it has always been the policy of the Legislature*(a)* to promote the reference of disputes to arbitration; and the framers of the Code in the chapter on Arbitration embodied most of the existing law of the Company's Courts.

Having regard, not only to the former law in force in this country, but to the provisions of the Indian Contract Act (s. 28) of 1872,*(b)* we are inclined to say that an agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract, and that a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable.

Notwithstanding the frame of the Original Suit, having regard to the course of the case in the Court below, we think we may be justified in making the terms of this award those of the decree of this Court. The conduct of the parties has been such that we are of opinion that each should be made to bear his own costs.

Regular Appeal, No. 86 *of* 1874 *allowed.*

(a) Bengal Regulation XVI of 1793, (1st May 1793) "A Regulation for referring suits to arbitration, and submitting certain cases to the decision of the Nazirs" was extended, with the exception of Section 10, to Benares by Regulation XV of 1795 (27th March 1795), was adopted almost literally by Madras Regulation XXI of 1802 (1st January 1802), and literally, except as to the Preamble and Section 10 which were omitted, by Regulation XXI of 1803 (24th March 1803) for the Ceded Provinces. See also Regulation XIII of 1810 superseded by Regulation X of 1829, Section 13. Suits referred under these Regulations were those "concerning disputed accounts, partnerships, debts, doubtful or contested bargains, or non-performance of contracts, in which the cause of action shall exceed two hundred (*sicca*) rupees" and "in all suits for money or personal property, the amount or value of which, shall not exceed the sum of two hundred (*sicca*) rupees." Bengal Regulation VI of 1813 extended the provisions of Regulation XVI of 1793 and Regulation XXI of 1803, so as to include disputes about title to land. See also Madras Act V of 1816, Section 14 of which was repealed by Act XXVIII of 1855, and Section 19 by Regulation IX of 1828, while Section 7 was modified by Act VIII of 1840. See also Madras Regulation XII of 1816 relating to the Collectors' powers to refer disputes as to lands, boundaries, &c., to village Punchayets.

Bombay Regulation VII of 1827 was passed on the 1st January 1827 "to facilitate the amicable adjustment of disputes of a civil nature by means of Arbitrators (a Punchayet.)"

(b) The Indian Contract Act, No. IX of 1872, s. 28, after declaring "every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent" provides that contracts to refer any dispute which may arise (*Exception* 1), or questions which have already arisen (*Exception* 2), to arbitration are not rendered illegal by this section.