

**Appellate Jurisdiction. (a)***Civil Miscellaneous Petition No. 56 of 1872.*C. D. BARRACHO.....*Petitioner.*A. D. SOUZA and 14 others.....*Counter-Petitioners.*

B. submitted to arbitration the matters in dispute between himself and the other parties to a suit, on the terms that an umpire should be selected from seven persons whom he named. Those terms were not objected to by the other side. Arbitrators were agreed upon, and R., one of the seven persons named in the submission, was appointed an umpire. But R. and some of the arbitrators declined to act. Fresh arbitrators were then chosen but no umpire ; and, the arbitrators being equally divided in their opinion on the case, the Court of its own motion appointed as umpire L., who was not one of the seven persons named in the submission. B. objected to L.'s appointment, but the Judge overruled the objection and passed judgment in accordance with the umpire's award. *Held*, On Appeal, that as it was stipulated as an essential part of the submission that an umpire should be chosen from seven persons named, the power of the Court to appoint an umpire, under Section 319 of the Civil Procedure Code, was controlled and limited by that stipulation ; and that, the umpire not being one of the seven persons named in the submission, there was no valid award.

1872.  
May 13.  
C. M. P. No.  
56 of 1872.

**T**HIS was a Petition against the order of M. J. Walhouse, the Civil Judge of Mangalore, dated the 24th October 1871, passed on Mis. Petition No. 911 of 1870.

On the death of the Reverend E. A. Barracho, Priest of the Church of Kulawar at Péjavar, his representative, Mr. C. D. Barracho, claimed certain property, moveable and immoveable, on the ground of its being the deceased priest's private property. Mr. A. D. Souza and others, Muktésars of the said Church, contended, on the other hand, that the whole of the property belonged to the Church, and brought a suit in the Civil Court of Mangalore for its recovery. In reply to a proposal to refer the matter to arbitration, Mr. C. D. Barracho, defendant, presented a Petition (No. 144 of 1871) to the Civil Court on the 2nd March 1871, stating that he had no objection to the matter in difference being referred to arbitration, provided that it was agreed that an umpire should be selected out of the seven persons following :—(1.) Mr. L. S. Rosario, (2.) Mr. J. F. Fernandes. (3.) Mr. B. V. D'Rosario, (4.) Rev. D. Pereira, (5.) Rev. B. P. Miranda, (6.) Rev. B. Baretto, (7.) Rev. P. C. Luis, and praying that should the plaintiffs (Petitioners in Mis. Petition No. 911 of 1870) not agree to the above, the case might be settled

(a) Present : Kernan and Kinderslev. JJ.

by the Court and he be permitted to return to Goa on being examined. On the 4th March the Court made the following order :—“ The matter being referred to arbitration with consent of both parties, the 4th, 5th and 6th out of the seven persons named in this Petition are agreed to and approved of as arbitrators on behalf of this Petitioner. Mr. L. S. Rosario is agreed to and approved of as umpire.” On the 7th March Mr. Rosario wrote declining to act as arbitrator, and on the 31st of that month the Court made the further order :—“ Mr. L. S. Rosario has declined to act as umpire, but that need form no obstacle to the arbitrators taking up the matter, as, by Section 316, should there be a majority, the decision will rest therewith, and there is no occasion to delay settlement in view of a contingency that may never arrive. The Court, therefore, directs the arbitration to proceed.” These arbitrators, however, declined to act and on the 15th April 1871 the Court made the order :—“ The arbitrators originally named having declined to serve, the Court, with consent of both parties, names on plaintiffs’ side R. Noreña, Pasco Pai, John Siquera, and on defendant’s side J. F. Fernandes, Rev. P. C. Luis, Rev. A. Coelho, all the abovenamed being willing to serve as arbitrators. The arbitration may be entered upon forthwith.” On the 14th of June the Rev. P. C. Luis wrote declining to serve as an arbitrator, and on the 6th July the Court ordered as follows :—“ Pedro Cussodio Luis, the arbitrator for defendant, having declined to serve, the Court, on the application of defendant’s Vakíl, directs Balúr Vastiva to be substituted in his place.” Accordingly, the arbitrators proceeded to consider the matter in dispute, but were unable to agree upon an award, being equally divided, and on the 26th September following the Court passed the order :—“ The arbitrators named having been unable to agree on an award, and divided equally upon the matter submitted to them, the Court, under Section 319, resolves to appoint B. C. Leggatt, Esq., Treasury Deputy Collector, as umpire for final decision, and directs that all necessary accounts and documents be submitted to him.” On the 28th September Mr. Barracho, through his Vakíl, presented Petition No. 494 of 1871 to the effect that Mr. Leggatt had been appointed umpire without the consent of the parties and without any provision having been made in

1872.  
*May 13.*  
*C. M. P. No.*  
*56 of 1872.*

1872.  
 May 13.  
 C. M. P. No.  
 56 of 1872.

the order to the arbitrators for the appointment of an umpire; that the appointment was thus opposed to Section 316 of the Code, and that the parties would not consent to the appointment. He therefore prayed that the appointment might be cancelled and the case decided by the Court. Upon this Petition the following order was passed:—"In this protracted affair great indisposition has been shown to allow matters to be put in a train that promised a settlement. Arbitrators and an umpire were named with consent of both parties, but declined to serve. At last, after much difficulty, arbitrators were agreed upon by both sides who undertook to serve. As there was so much difficulty in finding an umpire, the Court thought it best not to name one then, but to wait and learn whether the award of the arbitrators would decide the dispute. They have now decided equally, each side returning a different finding, and in consequence the Court resolves to exercise the power it reserved of appointing an umpire for final award. This course the Court considers best and in no wise contrary to law, and therefore dismisses this Petition."

On the 13th October 1871, Mr. Leggatt made his award declaring that the property in dispute belonged to the Church of Kulawar.

On the 24th October 1871, in accordance with the prayer of a Petition presented by the Muktésars of the Church, the following order was made by the Court:—"The umpire having returned his award, finding in favor of Petitioners, the Muktésars of the Péjawar Parish Church, and the Court entirely agreeing with that award, no application to set it aside moreover having been made, it is ordered that the documents and landed property referred to in this Petition be made over to petitioners in accordance with the umpire's award. One-fourth costs also allowed them."

Against this order of the Civil Court, Mr. C. D. Barracho appealed on the following ground:—

1. The Civil Judge had no jurisdiction to make the said order, inasmuch as the Petitioner objected to the appointment of the umpire finally named by the Court, and the submission by the petitioner expressly provided for the appointment of an

umpire by the arbitrators, such umpire to be selected from seven individuals named in the submission.

1872.  
 May 13.  
 C. M. P. No.  
 56 of 1872.

2. The provisions of Chapter VI of the Code of Civil Procedure were not complied with.

*O'Sullivan*, for the petitioner.

*Sloan and Sanjiva Rau*, for the counter-petitioners.

The Court delivered the following

JUDGMENT :—This was a case of arbitration, and, at the hearing before this Court, Mr. Sloan took the preliminary objection that no appeal lay against a decision founded upon an award. If there had been a valid award the appeal would not lie (5, M. H. C. R., 404). But in this case it is contended that there has been no valid award.

Mr. C. D. Barracho submitted the matters in dispute between himself and the other parties to suit No. 911 to arbitration, on the terms that an umpire should be selected from seven persons whom he named. And those terms were not objected to by the other side. Arbitrators were agreed upon and Rosario, one of the seven persons named in the submission, was appointed an umpire. But Rosario and some of the arbitrators declined to act. Fresh arbitrators were then chosen, but no umpire; and, the arbitrators being equally divided in their opinion on the case, the Court appointed as umpire a gentleman who may have been otherwise a competent person, but who was not one of the seven persons named in the submission. To the appointment of that umpire Barracho objected, but the Judge overruled the objection, and passed judgment in accordance with that umpire's award. The question is whether the Judge had the power to appoint an umpire who was not one of the seven named in the submission. Section 319 of the Code of Civil Procedure gives the Court power to appoint an umpire instead of one who may have declined to act. But we think that that section must be read together with those which go before it, and Section 316 places it within the power of the parties to agree beforehand how the matter shall be determined in case of a difference of opinion between the arbitrators. In the present case it was stipulated

<sup>1872.</sup>  
May 13.  
C. M. P. No.  
56 of 1872.

as an essential part of the submission that an umpire should be chosen from seven persons named ; and we are of opinion that the power of the Court to appoint an umpire, under Section 319 was controlled and limited by that stipulation. The Judge appears to have named an umpire, not by reason of the parties to the suit failing to appoint one out of the seven selected or by reason of any of those seven refusing to act, save Mr. Rosario, but of his the Judge's own motion, against the wish of at least one of the parties to the submission. The umpire not being one of the seven persons named in the submission there was no valid award. The order of the Civil Court must, therefore, be annulled, and the case remanded to that Court for disposal. The costs of this appeal will be costs in the cause. We wish to draw the attention of the Judge to Section 316, which requires a formal order. Had such order been drawn up the difficulty, very probably, would not have arisen.

*Appeal allowed.*

---