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necessary implication. In the Tenancy Act we can find no indication of an intention that it shall take away from a landlord any vested right derived from a forfeiture which occurred before the Act came into operation. Section 178 is specifically made retrospective in one respect, for it says, that "nothing in any contract between a landlord and a tenant *made before or after the passing of this Act* (c) shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of this Act." But the present case does not depend on contract, and, if it did, there is a great difference between a forfeiture under a contract made before the Act, and a forfeiture actually completed before the Act.

For these reasons, we think that the old law governs this case. The appeal is dismissed with costs.

J. V. W. *Appeal dismissed.*

APPELLATE CIVIL

Before Mr. Justice Pigot and Mr. Justice Beverley.

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April 17.

O. R. COLEY (DEFENDANT) *v.* V. A. DACOSTA (PLAINTIFF).*

Arbitration—Long and unreasonable delay in the conduct of the proceedings—Revocation—Civil Procedure Code (Act XIV of 1882), *s.* 523—*Appointment of arbitrator by the Court.*

A submission to arbitration can only be revoked on good grounds.

The claimant in a reference to arbitration is the person on whom, *cæteris paribus*, it is incumbent to promote the conduct of the proceedings; and when, therefore, there is a long and unreasonable delay unexplained by any act of the other party either conducing to it or consenting to it or waiving it, the latter is, *primâ facie*, entitled to decline to go on with the reference and to revoke the agreement for submission.

Where an agreement to refer has been duly revoked, the Court is incompetent to order it to be filed under s. 523 of the Code of Civil Procedure.

Semble:—Where no arbitrator has been named in an agreement, and the aid of the Court in the appointment of an arbitrator is invoked, the parties ought to have an opportunity of being heard upon the selection to be made.

Pestonjee Nussurwanjee v. *Manockjee* (1) referred to.

THIS was an appeal from a decree in terms of an arbitration award passed by the Subordinate Judge of Bhagulpore.

* Appeal from Original Decree No. 105 of 1888, against the decree of Baboo Jogesh Chunder Mitter, Subordinate Judge of Bhagulpore, dated the 20th of July 1887, and amended on the 9th of February 1888.

(1) 12 Moore's I. A., 112.

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The appellant, Osbourne Richard Coley, and the respondent, Victoria Anne DaCosta, entered into an agreement, dated the 31st March 1886, by which they agreed that all matters in dispute between them should be referred to the arbitration of Baboo Shib Chunder Banerji, Rai Bahadoor, Government Pleader, and Baboo Shoshi Bhusan Mookerjee, Pleader, whose joint-decision on each point should be final; and that, in the event of any difference of opinion between the said arbitrators upon any point, such point should be referred to the decision of Mr. T. C. Curtis, of Colgong, as umpire, whose decision should be final. The agreement did not fix any date on which the award should be delivered, nor was any provision made for the appointment of other arbitrators in case any of the arbitrators thereby appointed should refuse or become incapable to act. This agreement was registered by the appellant on the 1st April.

There was no evidence to show that anything had been done by the arbitrators beyond a statement that two or three meetings had been held. But soon after the submission, Baboo Shoshi Bhusan Mookerjee, the arbitrator appointed by the respondent, went to Darjeeling for the benefit of his health, and the proceedings, if any had taken place, were suspended. On the 11th June 1886 the respondent wrote to Mr. Curtis, suggesting that Baboo Soorji Narain Singh should be appointed arbitrator in the place of Baboo Shoshi Bhusan Mookerjee: to this the appellant agreed by his letter to Mr. Curtis of the 15th June. This fact does not appear to have been proved before the Subordinate Judge, though it was admitted on appeal before the High Court. The suggestion of appointing a fresh arbitrator in the place of Baboo Shoshi Bhusan was not carried out. Nothing was done from the time when the suggestion was made, nor was any attempt made to re-open or continue the proceedings until after the 8th December 1886, on which date the appellant sent a letter to Baboo Shoshi Bhusan Mookerjee, withdrawing from the arbitration, and requesting the return of all books, papers, letters, and documents filed by him.

In consequence, the respondent filed a petition, dated the 21st December 1886, in the Court of the Subordinate Judge of Bhagulpore, to have the agreement for submission, dated the

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31st March 1886, filed under s. 523 of the Civil Procedure Code. Notice was given to the appellant to show cause why the agreement should not be filed, and cause was shown by him.

On the 28th February 1887, the Subordinate Judge ordered the appellant to file the agreement within nine days from the date of the order, and that both the appellant and respondent should file the points of difference between them by that time. The reasons for this decision were that the delay on the part of the arbitrators, of which the appellant complained, was due chiefly to the illness of one of them; that there was no evidence that the appellant had been put to any inconvenience or annoyance in consequence of such delay; that there was no provision in the agreement that it should be void unless the award was filed within a fixed time; that, as the appellant had registered the agreement, he was the proper person to have taken it out of the Registry Office and to have filed it: and that, therefore, the cause shown by the appellant was neither sufficient nor satisfactory.

On the 29th March 1887, the Subordinate Judge appointed Baboo Shoshi Bhusan Mookerjee and Shib Chunder Banerji, arbitrators, and Mr. Curtis, umpire. On the 2nd April, Baboo Shib Chunder Banerji declined to act, and on the 12th April, Mr. Curtis sent a notice to the same effect. In consequence of the refusal of Baboo Shib Chunder Banerji and Mr. Curtis to act, the Subordinate Judge, by his order of the 19th April appointed Baboo Kirti Chunder Chatterji, arbitrator, and Baboo Saukata Churn Mitter, umpire, in their places. This order was made without any notice to the appellant.

Notice of the first meeting, which was fixed for the 1st June, was sent to the appellant under registered cover, but he did not attend it, nor any of the subsequent meetings. The arbitrators heard the matter *ex parte*, and delivered their award on the 18th June 1887.

On the 28th July 1887, the appellant filed his petition of objections, in which he objected to the award on the following grounds:—

(*a*) That there has not been a legal award in the case within the meaning of the Civil Procedure Code.

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(*b*) That the nomination of, and reference to, the arbitrators were not made in the manner required by law, and as such, all proceedings subsequent to the reference were illegal and without jurisdiction.

(*c*) That some of the arbitrators were appointed without the knowledge and consent of the appellant.

(*d*) That the arbitration could not proceed inasmuch as it had been revoked by the appellant by his letter of 8th December 1886.

(*e*) That the arbitrators have no power to go on with the case *ex parte*, *i.e.*, in the absence of the appellant.

(*f*) That the entire proceedings were *ultra vires* and without jurisdiction.

On the 20th July 1887, the Subordinate Judge overruled all these objections and made a decree in terms of the award.

From this decree an appeal was filed in the High Court.

Mr. *Phillips*, Mr. *R. E. Twidale*, and Baboo *Umakali Mookerjee*, for the appellant.

Mr. *C. Gregory* and Mr. *H. E. Mendes* for the respondent.

Mr. *Phillips*.—The appellant was perfectly right in withdrawing from the arbitration. Section 523 contemplates that the application for filing an agreement should be made, while the matter is *res integra*, that is, not while the arbitration is going on, and before anything happens to put an end to the agreement.

There is no provision in the Code for an arbitration which is partly conducted out of Court.

[PIGOT, J., referred to the case of *Pestonjee Nussurwanjee* v. *Manockjee* (1).]

Mr. *Phillips*.—The question in that case was as to the filing of an award.—See pages 126, 127. The entire proceedings here are more in the nature of an abuse of the sections. There was nothing done almost from the beginning. There is no necessity to resort to the Court in the case of a pending arbitration as the award can be filed after it has been made. Either there is a power to revoke, or there is none. If none, then the arbitration

(1) 12 Moore's I. A., 112.

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must go on, and objections must be taken when the award comes to be filed.

[PIGOT, J., referred to the case of *Brooke* v. *Surdyal* (1).]

Mr. *Phillips*.—The order appointing arbitrators is bad, because it directs them to proceed *de novo*. The provisions as to the incapacity of an arbitrator do not apply to agreements to refer. The sections of Chapter 37 are to apply so far as they are not inconsistent with the agreement to refer.—See s. 524. The question is whether the Court has power to substitute arbitrators for those appointed by the parties. When parties come to an agreement to refer to certain persons, it would be a perversion of their intention to refer it to others. In the case of a reference by the Court, the Court can substitute others; and, in the case where no arbitrators have been appointed, it can appoint arbitrators or supersede the arbitration.—See s. 510. To refer to unknown persons, in whom there can be no confidence, is inconsistent with s. 523, by which the Court cannot supersede, as there is no case pending before it. The arbitrators were not duly appointed. There was no notice served upon the appellant of anything done in Court, or of the appointment of the arbitrators. The Court had no power to appoint any persons arbitrators besides those named in the agreement.

[PIGOT, J., referred to *Barracho* v. *D'Souza* (2).]

Mr. *Phillips*.—In that case there was a reference of a matter in Court and by the Court. Section 316 of Act VIII of 1859 and s. 507 of the present Code are similar. The Judge has misapplied s. 508.

[PIGOT, J.—The words "order of reference," in s. 524, refers to what the Court does under s. 523. The term is not appropriate.]

Mr. *Phillips*.—Appointments by the Court cannot be made without notice. The Courts are most reluctant to enforce such agreements. The agreement here was rescinded, and therefore there was no agreement to file. The observations of their

(1) 12 B. L. R., App., 13. (2) 7 Mad. H. C. Rep., 72.

Lordships of the Privy Council in the case of *Pestonjee Nussurwanjee* v. *Manockjee* (1), if anything, are rather an authority in my favour on the question here.

In the case of *Barracho* v. *D'Souza* (2) there was a special stipulation for the appointment of an umpire. He also referred to *Burla Ranga Reddi* v. *Kalapalli Sithaya* (3) and *Muhammad Abid* v. *Muhammad Asghar* (4). The entire proceedings were illegal, and consequently the award is bad.

Mr. *Gregory*.—The revocation was not good; the arbitrators were duly appointed and the award made in the regular way.

I rely upon the cases of *Pestonjee Nussurwanjee* v. *Manockjee* (1), *Barracho* v. *D'Souza* (2), and *Muhammad Abid* v. *Muhammad Asghar* (4) as to the appointments by the Court. In the absence of any authority, there is nothing in the Code that would vitiate the appointment and the award. Section 510 speaks of no notice, but leaves it in the discretion of the Court to appoint arbitrators. I therefore submit that notice was not imperative, and there is no authority which would make an appointment a nullity for want of notice, and consequently the award a nullity.

Mr. *Mendes* followed on the same side.

Mr. *Phillips* replied.

The judgment of the High Court (PIGOT and BEVERLEY, J.J.) was as follows:—

The award in this case is impeached in appeal on two main grounds; one, that the submission to arbitration was duly revoked before the order of the Court was made under which the agreement for reference was ordered to be filed under s. 523; and the other, that the proceedings had in the Court of the Subordinate Judge were irregular, and such that the arbitrators who made the award, upon which the decree is based, were not a properly-constituted body of arbitrators at all, and that the award for that reason is bad. The first question is as to the right of the appellant to revoke the submission to arbitration which, it is clear, can only be on good grounds.

(1) 12 Moore's I. A., 112.
(2) 7 Mad. H. C. Rep., 72.
(3) I. L. R., 6 Mad., 368.
(4) I. L. R., 8 All., 64.

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The submission was in March 1886. We have nothing before us to enable us to determine whether anything was done by the arbitrators, though it is stated that two or three meetings were held. But, after the submission, the arbitrator appointed by the respondent went to Darjeeling for the benefit of his health, and the proceedings, if any had taken place, were suspended. A suggestion was made on the part of the respondent in June, that a fresh arbitrator should be appointed in his place: this was assented to by the appellant. This was admitted before us; it does not appear to have been proved before the Subordinate Judge. Nothing, however, was done from that time until the following December, and there is no evidence that, until after the letter of December 8th revoking his submission was sent by the appellant, any attempt to re-open or continue the proceedings was made. In answer to a question put by us, the respondent's pleader stated to us that he was instructed that a meeting, or an attempt to hold a meeting, did take place in December, shortly before the appellant sent his letter of revocation. This is denied by the appellant; and as there is no proof of it, it cannot, of course, be taken into consideration. It is most probably incorrect: there is nothing said of such a meeting in the respondent's petition of December 21st. As the case stands, therefore, we have only these facts: (1) a submission to arbitration in March; (2) a suspension of the arbitration soon after, by reason of the incapacity of the arbitrator nominated by the respondent; (3) a proposal by the respondent for the substitution of another person in his place, assented to by the appellant in June, but not carried out; (4) the lapse of six months, during which nothing is done; (5) the fact that the respondent, being the claimant as against the appellant, was the person on whom, *cæteris paribus*, it was incumbent to promote the conduct of the proceedings.

It appears to us that, under these circumstances, unexplained by any act of the appellant either conducing to this long delay, or consenting to or waiving it, the appellant was, *primâ facie*, entitled to decline to go on with the reference.

Had the Subordinate Judge thought fit to enquire into the circumstances, it is possible, of course, that facts might have been

proved, which would have shown that the appellant was not entitled to revoke. But we have only to deal with what is before us; and must assume, for the purposes of our decision, that there was nothing more in the case than appears.

It is true that the appellant did not verify his written statement. But the delay mentioned in it was an admitted fact before the Subordinate Judge as before us.

We think that, on these facts, there appears such an unreasonable neglect in the prosecution of the arbitration as entitled the appellant to put an end to it. In the case of *Pestonjee Nussurwanjee* v. *Manockjee* (1) the subject was considered as to whether or not the appellant was justified in revoking in that case; and we think that the circumstances of the present case are not wholly dissimilar to those which, in the case supposed by their Lordships in the decision of that case at page 131, would have justified, or might have justified, the appellant in that case in declining to proceed; no doubt, as we pointed out during the argument yesterday, the period in that case between the submission to arbitration and the attempt to revoke was longer than that in the present case. But here we have a period of nine months elapsing during which, so far as the case before us shows, nothing was done to make any change in the state of things between the appellant and the respondent. In the case of *Pestonjee Nussurwanjee* v. *Manockjee* (1) almost immediately after the reference the partnership was dissolved, and the appointment of the person, who was to have the business in future, had been, as their Lordships point out, speedily determined, and, subsequently to that, several important decisions in the arbitration had been arrived at. We agree with the argument of the learned Counsel for the appellant that, if anything, the observations of their Lordships are rather an authority in his favour on the question at issue here. 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

(1) 12 Moore's I. A., 112.

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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 s. 523, and the proceedings were therefore invalid.

Having determined the appeal on this point, it is not necessary to go into the question elaborately argued before us as to the character of the proceedings taken by the Subordinate Judge; but we may say that, under no circumstances, could we have allowed the award arrived at, as it was, to stand. A proper opportunity ought, we think, to have been given to the appellant to come in before the appointment of the arbitrator in place of Babu Shib Chunder, whose letter, declining to continue as arbitrator, was received apparently by the Subordinate Judge on the 4th April; and, on that day, on his receiving that intimation, he appointed a fresh arbitrator. We think that, the Court ought to have allowed the parties an opportunity of being heard as to the selection of an arbitrator. It is not necessary, however, for us to base our decision upon this ground, and the less so, because, were we to determine the case with reference to the validity of the proceedings taken, and apart from the question of the power of the appellant to revoke on the 8th of December, we should be obliged to send back the case again for the appointment of fresh arbitrators. But inasmuch as, in our judgment, the submission had been on that date validly revoked, that order was inoperative, and the proceedings had under it were likewise inoperative.

We, therefore, allow the appeal, reverse the order of the Subordinate Judge made under s. 523 directing that the reference be filed, and set aside his decree on the award, with costs throughout.

C. D. P. *Appeal allowed.*