[ORIGINAL CIVIL JURISDICTION.]

1873.
December 19.

ALLA'RAKHIA' SHIVJI .....*Plaintiff.*

JEHA'NGIR HORMASJI.....*Defendant.*

Arbitration—Award—Correction of obvious error—Civ. Pro. Code, Sec. 327.

Upon a motion to amend an award, filed under Sec. 327 of the Civ. Pro. Code, on the ground of obvious errors contained in it, *it was held* that the Court had no power, under Sec. 327, to amend an award or remit it for the re-consideration of the arbitrators, but has only the power to file and enforce the award or reject it.

IN this case *Macpherson* for the plaintiff moved before BAYLEY, J., for an order that an award, dated the 28th of June 1873, made in this matter, by the arbitrator Nasarvánji Ardesir Wadia, be amended in the particulars set forth in the affidavit of Allárakhiá Shivji the plaintiff, and that judgment should pass on the award either as amended, or in its original terms, as to the Court should seem fit; and contended that the Court had power to refer the award back to the arbitrator: *Mordue* v. *Palmer (a)*.

The Honourable A.R. Scoble, Advocate General, opposed the application to modify the award, and contended that the Court had no power under the Civil Procedure Code to do otherwise than enforce the award, or to refuse to pass a decree.

Macpherson, in reply, relied on the inherent power of the Court as a Court of Equity.

BAYLEY, J.:—I do not see how I can go beyond the Code; this is an important point; and as there is no appeal, I think the matter should be argued before two Judges.

The motion to amend the award was accordingly called on before WESTROPP, C.J., and BAYLEY, J., on 18th December 1873.

(*a*) L. R. 6 Ch. App. 22.

1873.

ALLA'RAKHIA' SHIVJI *v.* JEHA'NGIR HORMASJI.

The plaintiff and defendant were partners in 348 shares in the Albert Mills Co., Limited,; there was a difference existing between them with regard to those shares which consisted of two sets—one of 225, the other of 123.

The 225 shares had been purchased at Rs. 1,575 per share. The other shares were bought, during the partnership, in unequal portions by the members of the partnership, and were, for the purposes of the award, estimated by the arbitrator at Rs. 1,050 each in value.

The plaintiff, in his affidavit, said that the arbitrator had intended to divide the whole 348 shares equally between him and the defendant, as regarded cost as well as number, but had by mistake charged the plaintiff with a greater number of the 225 shares, which were the more expensive set.

The second error alleged was that, as appeared from the award itself and the schedule annexed to it by the arbitrator, he had intended to award to the defendant only Rs. 8,650 out of Rs. 12,500 claimed by him. The arbitrator, in endeavouring to carry his intention into effect, rightly debited the plaintiff with Rs. 8,650, but erroneously credited the defendant with Rs. 4,325 and thereby wrongly charged the plaintiff in account with Rs. 12,975 instead of Rs. 8,650.

The arbitrator said in his affidavit that he was convinced that he had made errors in principle in his award, but did not state any particulars.

Macpherson for the plaintiff:—There are two obvious errors in the award, which may be amended without affecting the decision which the arbitrator intended to make: see Sec. 322 Civ. Proc. Code. The word "enforced" in Sec. 327 empowers the Court to apply Secs. 322, 323, 324, 325, to awards filed under Sec. 327—Sec. 321 is expressly confined to references by the Court. Secs. 322, 323, 324, are not so. This award being filed under Sec. 327, without drawing the attention of the Court to the objections, does not amount

to a waiver of the objections, the Court not being able to entertain the objections till the award was filed, it would be a hardship that we could neither sue afresh nor have the award corrected. It is the Court that under Sec. 327 should give the notice, not the party seeking to file the award. The fact of mistake existing in the award would be no objection to its being filed; and in a motion for correction of the award our opponent would have an opportunity of resisting an application for amendment: Russell on Awards 296, 3rd Ed. A Court of Equity will, in a case of admitted mistake by the arbitrator, refer back the award: *Mills* v. *The Master & Society of Bowyers* (*b*).

The Advocate General:—After arguing that one of the errors was improbable, proceeded to say that, even admitting the other to be an obvious error, it did affect the decision, and therefore even if the Court have the power of amendment under Sec. 322, such an error could not be amended. But further, assuming that in awards made under an order of reference, or under Sec. 326, such an amendment as here sought for could be made, it cannot be made in cases under Sec. 327. In Sec. 326 there is a special proviso which is wanting in Sec. 327. Parties who wish to impeach an award, sought to be filed under Sec. 327, should do so within the time named by the Court for showing cause against the filing of the award. Here the party, who alleges the award to be wrong, is the petitioner who has caused it to be filed. He in his petition, under Sec. 327, did not allege any error in the award; it was now, therefore, too late to ask for the amendment, the award was filed without objection; *non constat* that it would have been so, if the alleged error had then been stated. Sec. 327 does not provide for the filing of the proceedings. As to the meaning of the word "enforced" he referred to Secs. 200, 201; and to Russell 9th Ed. 288 as to mistakes.

(*b*) 3 Kay & J. 66.

1873.

ALLA'RAKHIA' SHIVJI v. JEHA'NGIR HORMASJI.

Macpherson in reply:—Secs. 200 and 201 relate to decrees and have no bearing here, and enforcement there means a different thing; previously to decree the Court considered the matter, and the right of appeal exists. Sec. 325 is to be looked upon as showing what "enforcement" is. Sec. 327 is silent as to passing judgment on the award, but it is admitted that we are entitled to judgment on the award under Sec. 325. Sec. 326 required a particularity of language, which Sec. 327 did not. There is no proviso for filing the award under Sec. 326.

WESTROPP, C.J.—The first error, which the plaintiff seeks to have corrected, is not manifest on the face of the award itself, and is not stated by the arbitrator in his affidavit to exist. The arbitrator, in that affidavit, said that his award contained errors in "principle," but he has not stated what they were, so that he has not thrown any light upon the case. His attorney's letter speaks of "an error," but does not show what it is. So far then, as the first error is concerned, it is not an obvious one within the meaning of the 322nd section of the Civil Procedure Code, supposing that the Court had power to apply that section, as to the amendment of obvious errors, to awards filed under Sec. 327. The other error appears to us to be obvious. The manner in which the accounts have been made up by the arbitrator resulted in the plaintiff being charged with a sum half as large again as was intended. But whether it was an obvious error, which affected the decision, we do not, for the following reasons, consider it necessary to decide:—We have perused Secs. 312 to 327, and have come to the conclusion that in the case of awards filed under Sec. 327, which is a clause distinct in itself, we have no power to make amendments. Whether the Court has power, in cases under the other sections, to make such amendments as those sought here, it is not now necessary to say. Under Sec. 327 we are of opinion that we have no power to amend an award or to remit it for the re-consideration of the arbitrators. Secs. 312 to 321

refer to awards made on orders of reference from suits pending in Courts. Sec. 322 has nothing *in itself* which would induce us to apply it to any other than awards under a reference from the Court. Nor has Sec. 323, as the same class of awards are treated of in that section. As to Sec. 324, which says :—"No award shall be liable to be set aside except on the ground of corruption or misconduct of the arbitrators or umpire," it is not perhaps now actually necessary for us to decide whether it would apply to an award under Sec. 327. We do not, however, hesitate to say that, in our opinion, it would not. Sec. 327 gives the parties a certain time within which to show cause against the filing of an award, and, if corruption or misconduct of the arbitrator or umpire existed, it should be shown as cause, and, if established, the Court would refuse to file the award. Sec. 325 applies to awards made under an order of reference made by the Court.

Sec. 326 applies to submissions (in writing) to arbitration made out of Court, but which the Court, on the application of the parties or any of them, if sufficient cause to the contrary be not shown, may direct to be filed in Court. When filed, the Court may found an order of reference to arbitration upon such a submission. Then follows a proviso rendering the previous provisions of Chap. VI. applicable "to all proceedings" made under such an order of reference, and "to the award," and "to the enforcement of the award."

Sec. 327, under which the present case comes, provides :—

"When any matter has been referred to arbitration without the intervention of any Court of Justice, and an award has been made, any person interested in the award may, within six months from the date of the award, make application to the Court having jurisdiction in the matter to which the award relates, that the award be filed in Court. The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring such parties to show cause, within a time to be specified, why the award should not be filed. The application shall be numbered and

1873.

ALLA'RAKHIA' SHIVJI v. JEHA'NGIR HORMASJI.

registered as a suit between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the award, the award shall be filed, and may be enforced as an award made under the provisions of this chapter.'"

There is not, in that section, a word about the previous provisions of Chap. VI. being applicable to the award itself, but only a simple direction that the award may be enforced as an award made under the provisions of that chapter Power to amend an award cannot be implied from a mere power to enforce it. It appears that the only authority the Court has under that section is to file and enforce an award or to refuse to file it, and to leave the applicant to bring a common action upon it, if such be his pleasure. No doubt if sufficient cause were shown, as, for instance, corruption or misconduct of the arbitrators or umpire, as above mentioned, the Court would refuse to file it. The Court must limit itself to the special procedure contemplated by this section, which contains no provision for amending awards. On the contrary, a comparison of Sec. 327 with the one immediately preceding it leads to the presumption that the Legislature did not intend to confer any power of amendment where awards are filed under Sec. 327. As to costs in the present case, we think that, as there is no doubt a considerable mistake in the award to the disadvantage of the plaintiff, and as the question is of importance, and has been raised now for the first time, each party should bear his own costs of this application. Judgment we now pass according to the award.

Attorneys for the plaintiff: *Hearn, Cleveland, and Peile.*

Attorneys for the defendant: *Manisty and Fletcher.*