4 B. 1=4 Ind. Jur. 410.

1879
FEB. 13.
ORIGINAL CIVIL.
4 B. 1=4 Ind. Jur. 410.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice, and Mr. Justice Bayley.

HARIVALABDAS KALLIANDAS (*Plaintiff*) *v.* UTAMCHAND MANEKCHAND (*Defendant*) AND OTHERS.* [13th February, 1879.]

Arbitration — Agreement to refer to private arbitration by parties engaged in litigation— Civil Procedure Code (Act X of 1877), ss. 523 and 525, 506, et seq.

Under ss. 523 and 525 of the Civil Procedure Code (Act X) of 1877, parties to a suit as well as persons not engaged in litigation may agree to refer matters in dispute between them to private arbitration without the intervention of the Court, and may apply to have the agreement filed; and the mere fact that a suit is pending with respect to the matters in dispute, is not of itself a sufficient reason to induce the Court to refuse to file the agreement.

[Diss., 30 C. 218 (223)=7 C.W.N. 180 (185); 15 Ind. Cas. 140=115 P.R. 1912=6 P.L.R. Sup. 1912=191 P.W.R. 1912; R, 26 B. 76 (80)=3 Bom. L.R. 431 (433); 6 C. 251=7 C.L.R. 92; 8 Bom. L.R. 777.]

THE plaintiff in these two suits prayed for an account. The parties to both suits were the same, but the actions were brought in respect of different partnerships. In February 1872, decrees were made in both suits, referring them to the Commissioner for the purpose of taking accounts between the parties, and subsequently all questions at issue between the plaintiff and the defendants were settled. In February 1877, certain accounts still remained to be taken as between two of the defendants, *viz.*, Ghellabhai Hemchand and Utamchand Manekchand. In August 1877, these defendants agreed to refer the matter to private arbitration; but, before any award was made, Ghellabhai Hemchand withdrew from the agreement to refer. Thereupon Utamchand Manekchand [2] took out a summons, calling upon Ghellabhai Hemchand to show cause why the agreement of reference should not be filed in Court under s. 523 of the Civil Procedure Code (Act X) of 1877.

The Advocate-General (Honourable *J. Marriott*) and *Starling* appeared to show cause.—This application should have been in writing, and should have been numbered and registered as a suit: see Civil Procedure Code (Act X) of 1877, s. 523. Section 523 of the Civil Procedure Code of 1877 does not apply to the present case, nor does the corresponding s. 326 of the Code of 1859. These suits have been referred to the Commissioner by the decree of the Court, and the parties, except by consent, must proceed in the ordinary way. The Court having made an order dealing with the case, one party cannot force the other to a different course not contemplated by the Court. Section 506, *et seq.*, of the Code of 1877 provide for reference to arbitration by parties to a suit. Section 523 provides for reference to arbitration by persons not parties to a suit. That section, therefore, does not apply to this case.

* Suits Nos. 410 and 411 of 1868.

1879
FEB. 13.
ORIGINAL CIVIL.
4 B. 1=
4 Ind. Jur. 410.

Macpherson, contra.—There is nothing to prevent parties in a suit from making any agreement between themselves, although the suit has been referred to the Commissioner, and they are bound to abide by their agreement. He referred to *Pestonji Nusserwanji* v. *Manocji* (1), *Alla Aiyappa* v. *Nundula Periya* (2), *Randell Saunders & Co.* v. *Thompson* (3).

JUDGMENT.

SARGENT, J.—The question in this case arises on a summons taken out in Chambers on 6th April 1878, by the defendant Utamchand Manekchand, in suits Nos. 410 and 411 of 1868, calling on the defendant Ghellabhai Hemchand to show cause why an agreement of reference made on 15th August 1877, should not be filed in Court as provided by s. 523 of the Civil Procedure Code (Act X) of 1877. It appears that a decree had been made in the two suits on 28th February 1872, referring it to the Commissioner to take certain accounts between the parties, and that on the 17th February 1877, all claims had been settled, except between the defendants Ghellabhai Hemchand and Utamchand [3] Manekchand. It was ordered that Ghellabhai should have the carriage of the suit in taking these accounts so far as they remained to be taken between himself and Utamchand Manekchand. No further steps were taken in the summons, owing principally to the death of Ghellabhai Hemchand in June 1878, until the close of 1878 or the beginning of 1879, when it ultimately came on for hearing before Bayley, J., and was adjourned by him into Court with the consent of both parties, to be heard by two Judges. A preliminary objection has been taken, that the application should have been in writing, and numbered and registered as a suit, as provided by s. 523. As this objection was not taken in the first instance, and both parties have hitherto proceeded on the supposition that the procedure adopted was the correct one, we think it will be sufficient if the defendant Utamchand Manekchand undertake to present an application, as contemplated by s. 523, for registration as a suit, and the summons be treated as the notice required to be given by the above section.

It was next contended that s. 523 is not applicable to matters in difference *in a suit*; and that the earlier sections in the chapter, which provide for the case of *parties to a suit* desiring to refer matters in difference to arbitration, are alone applicable to such a case. We think, however, that the very general language of ss. 523 and 525 forbids this conclusion. Those sections contemplate arbitration without the intervention of the Court by "any persons" and with respect to "any matter," and contain no express exception as to parties to a suit or to matters in litigation in a suit actually pending. Moreover, it is to be remarked that there is an absence of any expression in s. 506 showing an intention to forbid arbitration by parties to a suit without the intervention of the Court. Undoubtedly, the procedure in such cases, as provided by ss. 523 and 525, *viz.*, a separate suit, is not the best adapted to a case where the matters are already before the Court, and will necessitate an application for stay of proceedings in that suit. It is, therefore, probable that the particular case in question was not present at the time to the minds of the framers of those sections. But, having regard to the general scope of the provisions in this chapter, we do think that that consideration is sufficient to [4] outweigh the inference to be drawn from the very general language of these sections.

(1) 3 M. H.C. R. 183 and 12 Moo. P.C., 112 (129, 130).
(2) 3 M. H.C. R., 83.
(3) L.R. 1 Q.B.D. 748.

1879
FEB. 13.
ORIGINAL CIVIL.
4 B. 1=
4 Ind. Jur. 410.

Whether the existence of a suit, in which the matters in difference are in litigation, may under special circumstances afford sufficient cause, as contemplated by ss. 523 and 525, for not filing the agreement to arbitrate, it is not necessary to decide. We may add that the same question arose on s. 327 of the old Procedure Code (Act VIII) of 1859, the language of which is almost identical with that of s. 525 of the present Code, and was determined in the same manner in *Thakoor Doss Roy* v. *Hurry Doss Roy* (1), and that decision has not been departed from or overruled in any reported case. Upon the whole, we are of opinion that the mere circumstance of the matters having been agreed to be referred to arbitration, during the pendency of a suit in which they are in litigation, is not of itself sufficient reason for refusing to file the agreement to refer to arbitration.

Attorneys for Utamchand Manekchand—Messrs. *Rimington, Hore and Conroy.*

Attorneys for Ghellabhai Hemchand—Messrs. *Macfarlane and Gilbert.*

---

4 B. 5.

[5] ORIGINAL CIVIL.

Before Mr. Justice Green.

CASSIBAI, WIFE OF VITHALDAS JAGGANNATH, EXECUTRIX OF MANKUVARBAI (*Plaintiff*) *v.* RANSORDAS HANSRAJ, INFANT, BY HIS GUARDIAN JUMNABAI (*Defendant.*)*

[4th July, 1879.]

Executor—Power of, to charge the estate of his testator.

H. K. died on the 5th July 1871, leaving two widows, J. and A., and one son (the defendant), him surviving. By his will he appointed D. his executor, and named the defendant his residuary legatee. At the time of his death, H. K. was indebted to M in a large amount, for which M. held mortgages on his property. On the 5th March 1873, M.'s debt amounted to Rs. 1,33,631, and it was agreed between M. and D. *as executor*, that the mortgaged property (estimated at one lakh in value) should be made over to M. absolutely in part payment, and that D. should become *personally* liable to her for the balance of Rs. 33,631 with interest at 9 per cent. payable within twelve months. In consideration thereof, M. was to release D. *as executor* and the defendant from liability for the sum of Rs. 1,33,631. An indenture carrying out this agreement was executed on the same day, and D. gave a bond making himself *personally* liable to M. for Rs. 33,631. Shortly afterwards a new arrangement was made. M. agreed to abandon Rs. 10,631 of the Rs. 33,631 due under the bond and to accept Rs. 23,000 payable in yearly instalments of Rs. 3,000 in satisfaction of her whole claim. In pursuance of this agreement D. *as executor*, paid the first instalment J. paid the second instalment, D. having made over the estate of H. K. to the Administrator-General under the provisions of Act II of 1874. M. died in October 1874, and the plaintiff, as her executrix, sued the defendant for the instalments due in 1876, 1877 and 1878.

Held that the estate of H. K. having been released by M. by the deed executed on the 5th March 1873, it was not competent for D. as executor, by a new contract to charge it with any liability in respect of the amount due to M.

Childs v. *Monins* (2), *Rose* v. *Bowler* (3), and *Powell* v. *Graham* (4) followed.

---

* Suit No. 586 of 1878.

(1) W. R. (1864) Mis. Rul. 21.
(2) Brod. & Bing. 461.
(3) 1 H. Bl. 109.
(4) 7 Taunt. 581.