

## APPELLATE CIVIL.

*Before Mr. Justice Melvill and Mr. Justice Pinhey.*

DANDEKAR, APPLICANT, v. DANDEKARS, OPPONENTS.\*

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August 14.

*Arbitration—Award—Oral award—Written award not signed by all the arbitrators—Setting aside award—Practice—Procedure—Civil Procedure Code Act X of 1877, Sections 525, 526, 520, clause (a)—Arbitration without the intervention of Court.*

The term 'to show cause' in sections 525 and 526 of the Code of Civil Procedure, Act X of 1877, does not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.

Matters in dispute between the parties were referred to seven arbitrators without the intervention of a Court. The arbitrators, or so many of them as could be got together, held sittings extending over some months, and at each sitting they came to a decision, either unanimously or by a majority, on different questions submitted to them. These decisions were entered on the minutes of their proceedings; and at their last sitting the arbitrators all agreed, and informed the parties, that the decisions so arrived at constituted the final award, and gave directions for embodying those decisions in the shape of a formal document, which was drawn up on a subsequent day, but was signed by four only out of the seven arbitrators. The remaining arbitrators not being asked to sign it, they never did sign it.

*Held* that the actual award was an oral award made by all the arbitrators on the last day of their joint sitting, and the drawing up of the formal award was a purely ministerial act to give effect to the previously completed judicial act. The omission to take the signatures of the minority of the arbitrators to the document, which formed the record of the award, was not fatal to the award.

Amongst other matters the arbitrators were asked to make a division of certain fields to which the parties were equally entitled. The arbitrators decided the other matters, but as regards the fields said that it was inconvenient to do so in consequence of the rains, and ordered the parties "to receive the profits half and half, and to pay the assessment half and half".

*Held* that the award left undetermined one of the principal subjects of dispute; and as the Court had no power to remit the award to the arbitrators, the applicant was entitled to a judgment setting aside the order for filing the award.

THIS was an application for the exercise of the Court's extraordinary jurisdiction for the setting aside of an award of arbitration which was directed to be filed by R. B. Gopal G. Phatak, First Class Subordinate Judge of Nasik.

The parties are members of the Dandekar family of the village of Mahim in the Thana Collectorate. The applicant and the father of the opponents were brothers living in union. They

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separated, but before the separation could be fully effected the father of the opponents died. The applicant and the opponents thereafter divided among themselves so much of the property as they could amicably agree to take, and with regard to the rest appointed seven persons arbitrators on the 17th of November, 1877, to partition it within a year. An award was accordingly made, which Gopal Ramrav Dandekar applied to the First Class Subordinate Judge of Nasik to file under section 525 of Act X of 1877. His nephews, Sakharam, Abaji and Vaman, opposed the application on the grounds (*inter alia*) that the award was not signed by all the arbitrators; that it was not unanimous; that it was not made known to all the parties; that it was not made on the day it bore date; that it was incomplete, and left undetermined important points submitted to the arbitrators' decision.

The Subordinate Judge directed the award to be registered.

The applicant applied to the High Court.

*Inverarity* and *Pandurang Balibhadra* for the applicant.

*K. T. Telang* and *M. C. Apte* for the opponents.

MELVILL, J.—This is an application to set aside an order of the First Class Subordinate Judge of Nasik, by which he directed that an arbitration award should be filed under the provisions of section 526 of Act X of 1877.

Section 525 and 526 relate to arbitration awards which, as in the present case, have been made without the intervention of the Court. Section 525 provides that an application to file such an award shall be numbered and registesed as a suit, and that notice shall be given to the parties, other than the applicant, requiring them to show cause why the award should not be filed. Section 526 says: "If no ground, such as is mentioned or referred to in section 520 or 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter."

It was contended for the applicant that it was not competent to the Subordinate Judge, under the provisions of this section, to order the award to be filed, inasmuch as certain *bona-fide* objections, of the nature mentioned in sections 520 and 521, were

taken to the award, though they were not established to the satisfaction of the Subordinate Judge.

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The case principally relied upon was that of *Sree Ram Chowdry v. Denobundhoo Chowdhry*(1) in which Mr. Justice Pontifex said : " It is true that, in cases under section 525, the parties cannot obtain the advantages of the provisions contained in sections 518 and 520, and, therefore, an appeal might be more necessary under section 525 than under section 522. But, in my opinion, this goes to show that it was not intended that an award should be filed under section 525, if either of the parties to the reference showed cause against it by affidavit or verified petition within the provisions of section 520 or 521. In such cases I think it would be the duty of the Court, without inquiring into the validity of the cause so shown, to refuse the application to file the award, and to leave the applicant to his remedy by suit." The reasons given for this opinion seem to be that questions of considerable delicacy and difficulty may be raised under sections 520 and 521, and that grave inconvenience and possible injustice might arise if a Subordinate Court were allowed to dispose of such questions finally and without appeal. It appears to us, however, that, while this may be a very good reason for an alteration of the law in respect to appeal, it is not a sufficient reason for putting upon the words of the existing law a construction other than that which they would ordinarily bear. Moreover, it would be unreasonable to suppose that the Legislature intended that a mere allegation of the existence of cause, without any inquiry whatever into the validity of the cause alleged, should be sufficient to prevent the filing of an award. This would be to render the filing of the award impossible in almost every case. Mr. Inverarity admitted this, but suggested that the Court to which the award is presented may inquire into the cause shown, so far as to ascertain whether there is a *bona-fide* contention, but no further ; and he referred us to an unreported decision of Mr. Justice West in Chambers (*Moolchand Ranchode v. Chotalal, Hurlochand*, 8th December 1881), in which it appears from the learned Judge's notes that he expressed an opinion that when a *prima facie* substantial case is made out against an award, the Court

(1) I. L. R., 7 Cal., 490.

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should refuse to file it, and should leave the applicant to his remedy by a suit on the award. We confess that we feel great difficulty in adopting this construction of section 526; and we think that, if the Legislature had intended it, it would have expressed its intention in much more distinct words. The term "to show cause" is a technical term, having a well-understood meaning. It does not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court. We think we may safely say that the term is used in this sense in every other part of the Code in which it occurs, (*e. g.*, in sections 479 and 485); and we do not see how we should be justified in putting a different construction upon it in sections 525 and 526.

Two principal grounds were shown against the award before the Subordinate Judge, and have been relied on in this Court. The first is that the award was drawn up and signed by four only out of the seven arbitrators, and that the remaining three were not asked to sign, and never did sign it. It is proved, and, is, indeed, admitted, that this is true in regard to the document in which the award is set forth, and which was signed on the 5th October, 1878. But the case made for the opponents before us was that the award was not effected by the document in question, nor on the date on which it was signed, but that what really took place was this. The arbitrators, or so many of them as could be got together, held sittings extending over some months, and at each sitting they came to a decision, either unanimously or by a majority, on different questions submitted to them. These decisions were entered on the minutes of their proceedings; and at their last sitting on the 25th August, 1878, the arbitrators all agreed and informed the parties, that the decisions so arrived at constituted the final award, and gave directions for embodying those decisions, in the shape of a formal document. Thus, the actual award was an oral award made by all the arbitrators on the 25th August, and the drawing up of the document was a purely ministerial act to give effect to the judicial act already completed. If this contention be made out, we think that the omission to take the signatures of the minority of the arbitrators to the document, which formed the record of their award, would not be fatal to the award; and the

Subordinate Judge has held that the contention is made out. He says : " The judgment of th *panch* was pronounced on the 25th August, 1878. The formal award, of course, was not ready for some time, and the want of signatures to it of three out of the seven arbitrators does not, in my opinion, render the award now before the Court invalid. The statements now made by the arbitrators, Rungo, Ganesh and Trimback, are untrustworthy and corrupt. I hold that the award before the Court was made by the said persons, and that there is no reason why the award should not be filed." This is a very clear finding on a question of fact; and sitting as a Court, not of appeal, but of revision, we are bound to accept that finding, unless it appears that there is no evidence on which it could be supported. We have read the evidence bearing on the question, and though possibly we might not have arrived at the same conclusion as the Subordinate Judge, we cannot say that there is no evidence to support that conclusion. The deposition of the arbitrator Pandurang (witness No. 33) contains statements which, if believed, would justify the finding of the Subordinate Judge that, as set forth in the document (exhibit 3) itself, " the arbitrators heard what both the parties had to say, and their evidence, and at different times settled the subjects of division, according to the opinion of the majority or of all the arbitrators, and finally on the 25th August, 1878, finished and decided the whole matter regarding the division referred to the arbitrators."

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The second objection to the award is, in our opinion, such as to entitle the applicant to a judgment in his favor. This objection is that the award has left undetermined a matter, and a very important matter, referred to arbitration, viz., the partition of certain field lands, situated in twelve villages, regarding the division of which the parties were at issue. The agreement of reference says : " Partition of some of the property was made by ourselves, and the rest has remained undivided. As there is no certainty of the same being divided by ourselves, the arbitrators have been appointed." It is admitted by both sides (exhibits 56 and 68) that at the time of the reference the parties received the rents of the undivided lands, and paid the assessment, in equal moieties. It is, therefore, quite clear that the object of the reference

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was, so far as regarded these lands, to obtain a division by metes and bounds, which the parties were unable to make for themselves. Now, how is this matter dealt with in the award? Paragraph 23 is as follows:—

“As it is not now convenient to divide and take the field lands mentioned below, it is decided that the parties should act in respect thereof as stated below. The lands are, &c. : (the lands are then enumerated). At present it is not convenient to divide and take the above field lands. Therefore, it is decided that the two parties are entitled to the lands in equal moieties ; and, until the same are divided and taken, the two parties are to receive the profits thereof half and half, and to pay the assessment half and half.”

It is admitted that the inconvenience referred to in this paragraph was simply the inconvenience which the arbitrators would experience in going upon the lands in the rainy season—a very insufficient reason for the omission to divide the lands, inasmuch as the award need not have been given till the 17th November, *i. e.*, at least a month after the rains would have ceased. But even if the reason assigned were better than it is, it would not alter the fact that the award leaves unsettled one of the principal subjects of dispute and reference. In respect to the field lands it leaves the parties in exactly the same position in which they were before. It declares them to be equal sharers—a matter regarding which there was no dispute ;—but instead of partitioning the lands, it obliges the parties to do this for themselves, or to have recourse to litigation, although the whole motive of the reference to arbitration was that the parties could not agree to a partition among themselves, and wished to avoid the necessity of litigation. It seems to us that, as ground has been shown against the award, such as is mentioned in section 520, clause (a), and affecting the award in an important particular ; and as we have no power to remit the award to the arbitrators for reconsideration and amendment, the applicant is entitled to a judgment setting aside the order for filing the award.

We reverse the Subordinate Judge's order accordingly, with costs on the opponents Sakharam, Ganesh and others throughout.

*Order reversed.*