ORIGINAL CIVIL.

FULL BENCH.

Before Chief Justice Farran, Mr. Justice Starling and Mr. Justice Tyabji.

1895. *September 9.*

FA'ZULBHOY MEHRALI CHINOY (PLAINTIFF) v. THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED (DEFENDANTS).*

Civil Procedure Code (Act XIV of 1882), Sec. 523—Agreements to refer within the section—Arbitration—Agreement to refer future differences to arbitration—Naming of arbitrators.

A general agreement to refer future differences to arbitration comes within section 523(1) of the Civil Procedure Code (Act XIV of 1882) and may be filed under that section. The section is not confined to cases in which a dispute actually existing at date of agreement is agreed to be referred to arbitration.

But the agreement must name the arbitrator or arbitrators, and an agreement which provides for the future appointment or election of arbitrators does not fall within the section.

The effect of the last clause of section 523 is to give the parties to such an agreement power to nominate the arbitrator, even when they have agreed that he shall be appointed by the Court. In such cases the Court must appoint their nominee.

APPLICATION by the plaintiff under section 523 of the Civil Procedure Code (Act XIV of 1882) for an order that the matter in dispute between the parties should be referred to arbitration.

* Suit No. 282 of 1895.

(1) Section 523 of the Civil Procedure Code (Act XIV of 1882) :—

"When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

"The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

"On such an application being made, the Court shall direct notice thereof to be given to all the parties to the agreement other than the applicants, requiring such parties to shew cause within the time specified in the notice why the agreement should not be filed.

"If no such cause be shewn, the Court may cause the agreement to be filed, and shall make an order of reference thereon and may also nominate the arbitrator when he is not named therein, and the parties cannot agree as to the nomination.

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By a charter-party dated the 6th October, 1894, the defendants agreed to carry salt for the plaintiff in the S. S. "Nadiri" from Calcutta to Mombása, thence to Zanzibár, and thence to Muscat, delivering part of the cargo at each intermediate place and the last portion thereof at Muscat. The voyage was duly performed as far as Zanzibár, but instead of going thence to Muscat the ship deviated to Bombay and, after some delay there, proceeded to Muscat, arriving there (as the plaintiff alleged) at a date later than the date at which, but for the deviation, she would have arrived. The plaintiff consequently claimed damages from the defendants.

The charter-party contained a clause providing for reference to arbitration in case of dispute between the parties. The clause was as follows:—

"Any disagreement arising between the contracting parties as to the proper interpretation or meaning of any of the clauses of this charter-party or any other disputes or objections being raised by the parties, such disputes, objections, disagreements and matters shall be referred to two arbitrators duly elected by them. In case of dissidence between the arbitrators, an umpire shall be named by them, and his decision shall be final and without appeal. Such disagreements, &c., if any, incurred at any ports be only settled through arbitrators in Bombay and by the owners and charterers only."

The plaintiff desired that the matter in dispute should be referred to arbitration, but the defendants objected. The plaintiff accordingly applied by petition to the Court under section 523 of the Civil Procedure Code (Act XIV of 1882) praying for a direction that the charter-party should be filed, and that an order of reference should be made regarding the said dispute.

The application was in the first instance heard by Starling, J., who, on the 4th July, 1895, gave judgment for the plaintiff and ordered the charter-party to be filed, and an order of reference made thereon. Subsequently on the application of the defendants His Lordship withdrew his judgment, and the question now came before a Full Bench.

Macpherson (Acting Advocate General) for the defendants:—The agreement in question is not one that comes within section 523 of the Civil Procedure Code (Act XIV of 1882), and it ought not to be filed. General agreements to refer differences to arbitration

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are not within this section. The agreements contemplated by the section are only those (1) which refer to disputes which at the time of the agreement to refer have actually arisen and (2) in which arbitrators are named. There must be a specific controversy in existence. Until Statute 3 and 4 Will IV, c. 42, there was a distinction between a general agreement to refer such as this is, and an agreement to refer existing disputes: see per Mellish, J., in *Randell* v. *Thompson*(1). In India, general agreements to refer were provided for by the Contract Act (IX of 1872), section 28, and see section 21 of the Specific Relief Act (I of 1877). The Civil Procedure Code deals only with agreements to refer existing disputes: see sections 506 to 522. So also section 525 refers to existing disputes. It is improbable that sections 523 and 524 were intended to refer to a different class of agreements. He referred to Stat. 53 and 54 Vic., c. 49, sec. 27; *A'dhibái* v. *Cursandás*(2); *Smith* v. *Nelson*(.

Inverarity and *Lowndes* for the plaintiff:—This agreement ought to be filed. It comes within section 523 of the Civil Procedure Code. The words of that section are wide enough to include such an agreement as this. The arbitrator is sufficiently named in this agreement. He is to be a person elected by both parties. That is a sufficient naming or indication of who the arbitrator is to be. Counsel referred to the English Common Law Procedure Act, 1854, sections 11 and 17; Act VIII of 1859, section 326.

FARRAN, C. J.:—This is an application to this Court to file an agreement of reference under section 523 of the Civil Procedure Code. It was made in the first instance to Mr. Justice Starling in chambers. That learned Judge entertaining doubts as to his jurisdiction to grant the application, and considering the question involved to be an important one, has referred it to this Bench. It was argued before us on the 20th instant. I read the judgment of Mr. Justice Tyabji and myself.

The agreement to refer, which it is sought to file, is contained in a charter-party and is in the following terms: "Any dis-

(1) 1 Q. B. D., 748, at p. 753.) I. L. R., 11 Bom., 199, at pp. 212, 213.
(3) 25 Q. B. D., 545.

agreement arising between the contracting parties as to the proper interpretation or meaning of any of the clauses of this charter-party or any other disputes or objections being raised by the parties, such disputes, objections, disagreements and matters shall be referred to two arbitrators duly elected by them. In case of dissidence between the arbitrators, an umpire shall be named by them, and his decision shall be final and without appeal. Such disagreements, &c., if any, incurred at any ports (shall) be only settled through arbitrators in Bombay and by the owners and charterers only."

The dispute which has arisen between the parties is, we are informed, as to the liability of the steamer owners for not landing goods belonging to the applicants at Muscat. It is contended that the above agreement does not fall within the purview of section 523 of the Code (Act XIV of 1882), inasmuch as it is an agreement to refer future differences, and not a present existing dispute or present existing disputes, to arbitration; and also because (it is said) the parties have not agreed that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates. We are unable to accede to the contention of the Advocate General that section 523 of the Civil Procedure Code is confined to cases in which a dispute actually existing at the date of the agreement is agreed to be referred to arbitration. The section doubtless does not contemplate an agreement to refer future differences being filed until differences have actually arisen. Its concluding paragraph directs the Court in imperative language, upon the agreement being filed, to make an order of reference thereon, which could not be done if no present difference had arisen. It appears to us, however, that when a difference has arisen it is immaterial whether the agreement to refer is contained in a previously existing contract between the parties, or whether it is an agreement entered into for the purpose of determining the existing dispute. Each equally falls within the scope of the section. The words "any difference" embrace alike, we think, any present difference and any future difference arising out of the contract. They appear to us to be a comprehensive mode adopted by the draftsman of

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the Civil Procedure Code to express the same idea as the draftsman of the Common Law Procedure Act expressed in the words "any then existing or any future differences" which are found in the 11th section of the statute (17 and 18 Vict., c. 125) from which the 523rd section of the Code was probably adapted. We do not think that the position of section 523 in Chapter XXXVII of the Code, which was relied upon by the Advocate General in his learned argument, between sections 503 and 527, which are conversant with the reference of existing matters of dispute, is sufficient to show that the Legislature used the expression "any difference" in the restricted sense for which he contends.

It is not, however, necessary for us actually to decide this point, as we think that the second objection raised by the Advocate General must prevail. It is clear, if we construe the words of the section in their plain ordinary grammatical sense, that the parties here have not agreed in writing that their differences shall be referred to the arbitration of any person named in the agreement. They have left the appointment of arbitrators to a future election by them, and this election has not taken place. Mr. Inverarity contends that the election of arbitrators by the parties to be thereafter made is equivalent to a naming of them in the agreement. "Named" in the section (523) must, he argues, be read as "designated, or described;" but even giving to the word its widest meaning which we should be anxious to do in order to bring within the scope of the section cases in which the arbitrator, though not actually named, is designated, as for example, by the office which he holds, we feel unable to hold that arbitrators who are left for future election are "named" in the agreement within the meaning of the section. To do so would be to alter the language of the section and not to interpret its existing language according to its plain ordinary meaning. We cannot vary the language which the Legislature has used in order to make the law accord with preconceived notions of what it might be. We can, however, in this case see reasons why the Legislature should have framed the enactment in the restricted form which in our view it has adopted.

It is, however, argued that the context of this section renders it necessary for us to give the extended meaning contended for to the

expression. This argument is based upon the last clause of the section, which directs that the Court may also nominate the arbitrator when he is not named in the agreement, and the parties cannot agree as to the nomination. This clause of the section is, it must be admitted, not happily worded, nor does it adapt itself readily to, or fit in with, the provisions of its earlier clause. It appears to us inferentially to give the parties power by agreement to nominate their arbitrator, even when they have agreed that their difference shall be referred to an arbitrator to be appointed by the Court. In such case the Court must appoint their nominee, which is not unreasonable. This seems to us to be the only mode of reading the section so as to make it harmonious throughout. The first clause cannot, we think, be read so as in effect to strike out the words "of any person named in the agreement," from the opening clause and to make it apply to agreements to refer generally when it is in terms restricted to agreements to refer of a special or limited class, *viz.*, those in which the arbitrators are named, or in which it is agreed that they are to be appointed by a Court. The Common Law Procedure Code allowed of any agreement to refer being made a rule of a Court; but the practice under it seems to have been not to make such an agreement a rule of Court until arbitrators were appointed. Per Bowen, L. J., in *Re Smith* (1). The section with which we are now dealing needs, in any view of the law intended to be enacted, redrafting. Similarly, the parties here have not agreed that their difference shall be referred to a person to be appointed by the Court. Even if an open agreement of reference could be construed as a reference to an arbitrator to be appointed by the Court—a question upon which it is unnecessary for us to give an opinion in this case—the parties here by indicating the manner in which their arbitrators are to be elected have inferentially excluded an appointment by a Court.

The agreement cannot, therefore, be brought within the scope of section 523 of the Code, and no order for its filing can be made.

B. TYABJI, J., concurred.

(1) 25 Q. B. D., 545 at p. 554.

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STARLING, J.:—I agree with the judgment just delivered so far as it decides that the words "any difference" include differences which may arise in the future as well as those which have already arisen, and that "naming" of the arbitrator in the agreement is sufficiently effected by his being described by an official title. I also agree that in the present case it cannot be said that the arbitrators are in any way named in the agreement. With regard to the main point in this case, whether the agreement in question can be filed under section 523 of the Civil Procedure Code, I had written a judgment deciding that question in the affirmative, but the perusal of the judgment just delivered has made me doubt the correctness of the arguments in support of my decision. At the same time it has not convinced me of the correctness of the judgment on this point, and I am in doubt as to how the judgment ought to go. As, however, this is a point of practice, and two members of the Bench agree as to the order to be passed, I do not intend to occupy the public time by going into the grounds of my doubts.

Attorneys for the plaintiff:—Messrs. *Payne, Gilbert and Sayáni.*

Attorneys for the defendants:—Messrs. *Crawford, Burder and Bayley.*

TESTAMENTARY JURISDICTION.

Before Mr. Justice Candy.

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GHELLA'BHAI A'TMA'RA'M, PLAINTIFF, *v.* NANDUBA'I, DEFENDANT.*

Probate—Application for probate—Executor—Arbitration—Reference by executor to arbitration—Award—Power of executor to refer to arbitration—Effect of award—Jurisdiction—Jurisdiction of Testamentary Court to decide question of award.

An executor having propounded a will and applied for probate, a caveat was filed denying the execution of the alleged will, and the matter was duly registered as a suit. The executor and the caveatrix subsequently referred "the dispute" to arbitration, and an award was made that the alleged will had not been executed. The executor nevertheless subsequently continued the suit. At the hearing the caveatrix pleaded the award and contended that it was binding on the plaintiff (executor). The plaintiff (executor) contended that the Court as a Court of Probate had no jurisdiction to try any question as to the award, but was limited only to the question of the execution of the will.

* Suit No. 21 of 1893 (Testamentary).