ORIGINAL CIVIL.

Before Mr. Justice Crowe, and on appeal before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Russell.

1900. *August* 18, 25.

VULLEY MAHOMED AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DATTUBHOY HASSAM AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Award—Ground for setting aside an award—Specific Relief Act (I of 1877), Ch. V, Sec. 39—Exercise of Court's discretion—Conduct of plaintiffs—Reasonable apprehension of injury—Coercion.

The plaintiffs and defendants together with one Jaffer Gargji, who died before the date of this suit, entered into a partnership in February, 1895, to do certain work for the Mahárája Holkar at Indore. The work was done and paid for, whereupon disputes arose among the partners as to the allocation of the payments. Criminal proceedings were instituted at Indore by the first and the third defendants and the fourth plaintiff Cooverji against the first and second plaintiffs, who were arrested under warrants on the 20th June, 1895. They were subsequently released on bail, and while the proceedings against them were still pending, the matters in dispute between the plaintiffs and the defendants were referred to arbitration on the 9th September, 1895, and an award made on the 17th September, 1895. The submission paper and the award were signed by all the parties except the fourth plaintiff Cooverji. The criminal proceedings at Indore were then withdrawn.

On the 21st June, 1898, the first and second defendants filed a suit against the first three plaintiffs in the Court at Indore to recover from them the amount due under the award, but on the 7th July following the plaintiffs (four in number) filed this suit to have the award declared null and void and for an injunction against the defendants Nos. 1 and 2 restraining them from proceeding with their suit at Indore.

The lower Court held that the allegations of collusion and fraud made by the plaintiffs were false, but held that the award was not binding on any of the parties, inasmuch as the fourth plaintiff (Cooverji) had not signed the submission paper.

In appeal the Court agreed with the lower Court as to the allegations of collusion and fraud, but, without expressing any opinion on the question whether the award was rendered invalid by reason of the fact that the fourth plaintiff (Cooverji) had not signed the submission paper, their Lordships reversed the decree and dismissed the suit on the ground that no case had been made out by

* Suit No. 306 of 1898; Appeal No. 1063.

the plaintiffs for the special intervention of the Court under Chapter V of the Specific Relief Act (I of 1877). The plaintiffs had not shown that they had reasonable apprehension that the award if left outstanding would cause them serious injury, nor had their conduct been such as to call for an exercise of the Court's discretion under section 39 of the Act in their favour.

Per JENKINS, C. J.:—In a suit of this nature, three points must be made good by the plaintiffs: (1) that the award is void or voidable; (2) that the plaintiffs have a reasonable apprehension that such instrument if left outstanding may cause them serious injury; (3) that the Court ought, under the circumstances of the case, in the exercise of its discretion to adjudge the award void or voidable and order it to be delivered up and cancelled.

Antram v. *Chace* (1) discussed and distinguished.

SUIT to have an award declared null and void.

The plaintiffs and defendants together with one Jaffer Gangji, who had died before the date of this suit, entered into a partnership in February, 1895, to do certain work for the Mahárája Holkar at Indore. The work was done and paid for, whereupon disputes arose among the partners as to the allocation of the payments. Criminal proceedings were instituted at Indore by the first and the third defendants, and the fourth plaintiff (Cooverji) against the first and second plaintiffs, who were arrested under warrants on the 20th June, 1895. They were subsequently released on bail, and, while the proceedings against them were still pending, the matters in dispute between the plaintiffs and the defendants were referred to arbitration on the 9th September, 1895, and an award made on the 17th September, 1895. The submission paper and the award were signed by all the parties except the fourth plaintiff (Cooverji). The criminal proceedings at Indore were then withdrawn.

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(1) (1812) 15 East, 209.

1900.

VULLEY MAHOMED v. DATTUBHOY.

The plaint alleged that the defendants "put pressure" on the first and second plaintiffs to get them to consent to the arbitration, the criminal proceedings against them being then pending; and it alleged that the award was made fraudulently and in collusion with the defendants. At the hearing the plaintiffs also relied on the fact that the fourth plaintiff (Cooverji) had not signed the submission paper or the award. The lower Court held that the award was bad because the fourth plaintiff (Cooverji) had not signed the reference, but found that there had been no fraud or intimidation by the defendants. The following judgment was delivered:—

CROWE, J. (having found on the evidence that there was no fraud or intimidation as alleged by the plaintiffs continued):—

The conduct of the plaintiffs themselves affords support to the defendants' case. Admitting for a moment that they had not been present when the award was made, and had not ratified it and signed it, the first steps they would have taken when the prosecution was withdrawn would have been to revoke the submission on the ground that it had been extracted from them by threats or undue pressure. Even if the award was not made on the date alleged, they must have known that it would be promulgated shortly, yet so far from seeking to avoid their act, they paid one or two visits to the arbitrators to ascertain how they were getting on with the award and what was being done, and this after the criminal proceedings were stayed and all pressure was removed. The evidence shows that they acted freely and voluntarily, and not under intimidation; that the agreement come to between the parties was a perfectly reasonable one and was the best possible arrangement for the parties, and that plaintiffs did attend the meetings of the arbitrators while the preparation of the award was proceeding. The cases cited by the learned counsel for the plaintiffs in support of the argument that the contract was void on account of undue pressure—*Nicholls* v. *Nicholls*(1); *Scott* v. *Scott*(2)—are none of them on all fours with the present case. No case goes so far as to say that a party who is being criminally prosecuted may not of his own free will agree to refer the matter in dispute to

(1) (1737) 1 Atkins, 409. (2) (1846-47) 11 Ir. Eq. Rep., 74.

civil arbitration, or that in such circumstances he is not a free and voluntary agent. In this connection the observations in Kerr on Fraud and Mistake (2nd Ed.), page 334, are in point. The author observes: "But as soon as a man with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly and deliberately permits another to deal with the property, or incur expense, under the belief that the transaction has been recognised, or freely or advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although orginally impeachable, becomes unimpeachable in equity."

I come now to the last point in the case, which is comprised in the sixth and seventh issues, whether the agreement and award are binding on the plaintiffs having regard to the fact that the said agreement is not signed by all the parties. It is admitted that the fourth plaintiff Cooverji has not signed the submission, nor, if reliance is to be placed on the 4th paragraph of the written statements of the first and second defendants, has the third defendant. The defendants there state distinctly that the two reference papers were signed on the 9th September, 1895. The other parties to the original partnership agreement (*viz*, the fourth plaintiff and the third defendant) having before this withdrawn from the matter as having little or no interest in it. It was contended by defendants in the course of these proceedings that Exhibit 15 was signed by Ghulam Husen Somji on behalf of all the defendants under a power-of-attorney, but that power-of-attorney has never been produced. Many cases have been cited to show that a reference to arbitration which is not signed by all partners is invalid. The case of *Strangford* v. *Green*[1] was relied on to show that the partner submitting would be bound, but his partner who had not submitted would not. That, however, was a case between a partnership and an outsider, and not, as in the present, where the affairs and matters in difference

(1) (1677) 2 Mod., 228.

1900.

VULLEY MAHOMED v. DATTUBHOY.

between the partners *inter se* were referred. The authority which appears to me to govern the case is to be found in the decision in *Stead* v. *Salt*[1], where it was held that one of several partners cannot bind the others by a submission to arbitration even of matters arising out of the business of the firm, and also that entering into submission to arbitration is no part of the ordinary business of a trading firm. This was the case of special partnership, but in *Adams* v. *Bankart*[2] a similar conclusion was arrived at; Lord Abinger remarking that *Stead* v. *Salt*[3] was in point, as there was no distinction between a general partnership and one in a particular transaction. The decision in *Antram* v. *Chace*[4] is entirely in point. The principle underlying the decision is clearly and tersely put by Lord Ellenborough, C. J. He says: "This was a reference of the aggregate accounts between all and each of these partners, and the consideration to each for entering into the submission was that each party's account should be liquidated not only as to one but as to all . . . . and they mutually stipulated with each other that the arbitrators should liquidate not only partnership accounts but also separate accounts between any two of them. Now here the arbitrators were not shown to be armed with authority to decide the whole question between the parties. * * * * The principle is so strong that it wants no authority to support it, that there should be the accession of all the parties to the common agreement of all, which is the consideration to each for entering into the agreement." Now there can be no doubt that the arbitrators have proceeded to settle all the affairs in dispute between the partners. The terms of the award are quite clear on that point. All the partners are mentioned. They say we have examined the books of account, documents, &c., in relation to the disputes as to accounts of you the partners and give our award "which you all must acknowledge as the Court's final decision, and you all must act as it is written in the award." It was further held in *Adams* v. *Bankart*[5] that one partner cannot bind another by a submission to arbitration without the assent of

(1) (1825) 3 Bing., 101.
(2) (1835) 1 C. M. and R., 681.
(3) (1825) 3 Bing., 101.
(4) (1812) 15 East, 209.
(5) (1835) 1 C. M. and R., 681.

the latter, not necessarily in any particular form of words. There must be some evidence of actual authority conferred, and such power cannot be inferred from the relation of partnership. The signature on the reference of Virji is stated to be for Jaffer, Nurali, Virji & Co. Now although no evidence is produced to show that Virji was authorized to sign in behalf of his partners, I think the fact that both Jaffer and Nurali did attend the meetings of the arbitrators must be taken as evidence of an implied authority on their part and a ratification of what was done, and the same remark applies to his signature in the same form in the award. So also the award purports to be signed by Yusuf Ali Mahomed for Abdulla Yusuf Ali Mahomed; and defendant No. 3, who is alleged to be the actual partner, does not seek to repudiate the award. The same, however, cannot be said as regards the other partner Cooverji. He says distinctly he was not asked to join in the reference to arbitration when it was made, but long time after when he refused to sign as he said he did not know the arbitrators and had not seen them. He says he has not withdrawn from the partnership, and that he asked on what ground the award had been made against him, as he had not signed the reference paper. In this condition of things it seems quite clear that in the absence of Cooverji's signature the arbitrators were not armed with authority to decide the matters in dispute, that Cooverji cannot be held bound by the award, and, therefore, it must be held null and void as far as the other partners are concerned. With regard to the question of costs, it is quite clear that the costs have been largely increased by reason of the false case set up by plaintiffs. I order, therefore, that the costs, as far as the third and fifth issues are concerned, be borne by the plaintiffs. The third defendant to pay his own costs. The rest of the costs to be borne by defendants Nos. 1 and 2. Delivered on the 14th September, 1899.

The defendants filed an appeal against so much of this judgment as was adverse to them, and the plaintiffs filed cross-objections.

Robertson with him *Rivett-Carnac*, for appellants.

1900.

VULLEY MAHOMED v. DATTUBHOY.

Starling and *Raikes*, for respondents.

JENKINS, C. J.:—On the 25th February, 1895, the plaintiffs and defendants together with Jaffer Gangji (who has since died) entered into a partnership agreement, having for its purpose the undertaking and completion of certain illumination works at Indore on the occasion of a marriage in the family of His Highness the Holkar. This agreement was reduced into writing and is Exhibit I in the case. The contemplated work was duly completed, but disputes arose which resulted in a reference of them to arbitration. An award was made, and on the 27th June, 1898, a suit was instituted at Indore by the defendants Vulley Mahomed Rahimtulla and Ibrahim Rahimtulla against the first three plaintiffs to recover a sum of Rs. 4,799-0-9 on the basis of this award. Thereupon the present suit was commenced, whereby the plaintiffs pray, first, that it may be declared that the award is not binding upon the plaintiffs and is null and void, and, secondly, that the first and second defendants may be restrained by the order and injunction of this Honourable Court from proceeding with the suit in the Court at Indore. The material allegations on which the right to this relief is based, are set forth in paragraphs 5, 7, 11 and 13 of the plaint as follows :—

"5. After the said contract had been carried out, disputes arose between the partners, and the said defendants taking undue advantage of the then temporary residence at Indore of the first and second plaintiffs falsely and maliciously adopted criminal proceedings at that place against the first and second plaintiffs and got them arrested under warrants. This was done in the month of June, 1895. The said plaintiffs got themselves released on bail. While the said criminal proceedings were pending, the defendants put pressure upon the said first and second plaintiffs and got them to consent to refer the matters in dispute to the arbitration of Ghulam Husen Sumar Vira and Fazal Mahomed Raiji. Accordingly a reference paper was drawn up in Bombay and the first and second plaintiffs signed the same at Bombay on the 9th day of September, 1895. The said arbitrators on the same day produced to the first and second plaintiffs a blank stamped paper and asked them to put their signatures at the foot thereof, telling the said plaintiffs that they, the arbitrators, would require the said paper for the purposes of the arbitration, and the first and second plaintiffs put their signatures to the said paper as requested. It was expressly agreed at the time the said reference paper was signed by the first and second plaintiffs that the same should not be of any effect unless it was signed by all the partners in the said partnership business. A copy translation of the said reference paper is hereunto annexed and marked B."

"7. The plaintiffs say that the said reference paper was not signed by any of the other partners, and the reference, therefore, fell through."

"11. The plaintiffs say that the said award was made in collusion with the defendants and is not binding upon the plaintiffs."

"13. The first and second defendants with a view to annoy the first three plaintiffs recently (that is, on the 27th of June last) filed a suit against the said plaintiffs in the Court of the Civil Judge, Residency Indore, (being Suit No. 4 of 1893 of the said Court) to recover a sum of Rs. 4,799 and pies nine relying and founding their claim upon the said award. To the plaint in the said suit, the said defendants have annexed a document purporting to be a copy of a reference paper alleged to have been signed on their behalf and on behalf of the said Abdulla Yusuf Ali Mahomed by one Ghulam Husen Somji authorizing the said arbitrators to do certain matters in connection with the said reference. The plaintiffs say that the said document, if any, was prepared fraudulently and in collusion with the said arbitrators and it is in no way binding on the said defendants to the said reference. A copy translation of the said document is hereunto annexed and marked D."

A written statement was put in, and in due course the case came on for hearing before Mr. Justice Crowe, when the following issues were settled:—

1. Whether this Court has jurisdiction to try this suit, having regard to section 12 of the Civil Procedure Code.

2. Whether, if so, the Official Assignee is not a necessary party to the suit as representing the fourth plaintiff.

3. Whether the first and second plaintiffs, at the request of the arbitrators, put their signatures at the foot of a blank stamped paper on the 9th September, 1895, or 17th September, 1895, as in paragraph 5 of the plaint alleged.

4. Whether it was expressly agreed, at the time the reference paper was signed, that it should not be of any effect unless signed by all the partners as in paragraph 5 of plaint alleged.

5. Whether the award in the plaint mentioned was written on stamped paper signed in blank by plaintiffs Nos. 1 and 2 on the 9th or 17th September, 1895, as alleged.

6. Whether the award in the plaint mentioned is not valid and binding on plaintiffs or any and which of them.

1900.

VULLEY MAHOMED v. DATTUBHOY.

At request of plaintiffs' counsel—

7. Whether, in the event of issue 4 being decided against plaintiffs, the agreement to refer and the award are binding on plaintiffs having regard to the fact that the said agreement is not signed by all the partners.

Evidence was adduced on both sides and, when the case was closed, a considered judgment was delivered by Mr. Justice Crowe, in the course of which he decided adversely to the plaintiffs on all the points raised before him except as to the legal consequences resulting from the absence of Cooverji's signature to the agreement of reference. This omission, he held, invalidated the award and entitled the plaintiffs to the declaration they sought in the first paragraph of the prayer to their plaint.

From this decree the defendants have appealed and, while relying on the findings of the lower Court in their favour, they have combated Mr. Justice Crowe's conclusion as to the consequences that should flow from the fact that Cooverji did not sign the agreement of reference.

The respondents on the other hand have sought to support Mr. Justice Crowe's decree, not only on the point he decided in their favour, but also by endeavouring to establish before us those allegations which the learned Judge held to be not proved.

Though the plaintiffs prayed for an injunction restraining the first and second defendants from proceeding with the suit in the Indore Court, that relief was not granted: the decree simply declared that the award was not binding upon the plaintiffs, and that the same was null and void. Presumably this relief was decreed under the powers vested in the Court by Chapter V of the Specific Relief Act (I of 1877) which treats of the cancellation of instruments. Section 39, which is the leading section of that chapter, provides in paragraph 1: "Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled."

Three points, therefore, must be made good by the plaintiffs: 1st, that the award is void or voidable; 2ndly, that they have

reasonable apprehension that such instrument if left outstanding may cause them serious injury; and 3rdly, that the Court ought under the circumstances of this case in the exercise of its discretion to adjudge the award void or voidable and order it to be delivered up and cancelled.

It is not enough that the award may be void or voidable; the other points must also be established. This aspect of the case, however, does not seem to have been clearly presented to the first Court, for I find no reference to it in the judgment.

Now three grounds have been suggested to us as rendering the award void. 1st, that the reference on which it is based was the result of coercion exercised by the defendants on the plaintiffs other than the fourth; 2ndly, that the consideration for the agreement was unlawful, as being opposed to public policy, for it was a promise to drop a prosecution; and 3rdly, that the absence of Cooverji's signature was contrary, if not to the agreement of the parties, at any rate to the expectation and belief under which the reference was signed by or on behalf of the first three plaintiffs.

Neither the first or the second of these points is raised directly in the issues, so that Mr. Starling, to justify himself in bringing them to our notice, had to rely on the sixth issue. Now it is difficult to suppose that it was intended by the sixth issue to enable these points to be raised because it was suggested by counsel for the defendants, and it is not, as a rule, the object of counsel to suggest an issue whose purpose is to enable his opponent to make a point not otherwise open to him. From the very general form in which the issues have been framed, we are in this unsatisfactory position that we cannot tell whether or not the plea of coercion, as distinct from some vague and shadowy generalities as to pressure, was ever really presented to the first Court.

When we are confronted with a plea of coercion, we have a clear and distinct idea of what we are dealing with; when we are appealed to on the ground of pressure, we are invited to wander, I know not where. I say this, because the Contract Act tells us clearly what is coercion and what are its results: of pressure it says nothing; and it is by the Contract Act, that in this country questions of this kind must be determined, not by the case

1900.

VULLEY MAHOMED v. DATTUBHOY.

law of England. Free consent is the essential basis of all contracts, and consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake—Contract Act, section 14. Of these vitiating circumstances, we are in this case only concerned with coercion, which is defined to be "the committing, or threatening to commit, any act forbidden by the Indian Penal Code or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement." Now the only act that Mr. Starling could suggest amounted to coercion was, the institution of criminal proceedings at Indore, and this, he argued, was coercion as being forbidden by section 211 of the Indian Penal Code, which provides that (His Lordship then read the section and proceeded:—)

While it cannot be said that the sixth issue is not capable of including the plea of coercion, yet it has to be conceded that section 211 of the Penal Code was not so much as referred to, nor can I find even any trace of allusion to section 14 of the Contract Act.

How can we under these circumstances pay any serious consideration to criticisms based on the absence of evidence relevant to a point which can hardly be said to have been alluded to in the course of the proceedings. As a matter of fact Mr. Justice Crowe has held that the first three plaintiffs "acted freely and voluntarily and not under intimidation, and that the agreement come to between the parties was a perfectly reasonable one and was the best possible arrangement for the parties." That conclusion was based on the oral evidence given before Mr. Justice Crowe, as a result of which he considered not merely that the plaintiffs had failed to make out their case, but that the testimony of the defendants' witnesses was to be preferred. I entirely accept that conclusion, and with that the plea of coercion may be brushed aside.

Then I come to the plea that the consideration for the submission was unlawful as opposed to public policy. It was not until the argument before us that this point has even been suggested,

and it might be grave injustice if we were to allow a point of this character to be raised, when from the absence of any allusion to it in the lower Court, no evidence relevant to it was adduced. I, therefore, think this point is not now open to the plaintiffs.

This brings me to the last ground on which it has been argued that the award should be adjudged void,—the absence of Cooverji's signature.

Now it must, at the outset, be conceded that Cooverji is not bound by the award, but it is at the same time equally clear that the defendants have never attempted to treat him as bound, or even suggested that this was the result of the award, for it must be recollected that he is no party to the Indore suit.

It will be convenient to deal with Cooverji first, for, though great store was evidently placed on his coming forward as a plaintiff, it will not, I think, be difficult to eliminate him and his grievance from consideration. The first question I ask myself is "Had Cooverji ever any reasonable apprehension that the award, if left outstanding, might cause him serious injury"? We do not find that hot haste or anxiety on his part which one might have expected this reasonable apprehension to inspire. He had no taste apparently for the worries of a law suit. "Duttu," he tells the Court, "has guaranteed my costs. It is not in writing. Till he did so I refused to be a party plaintiff." And why should it have been otherwise? If one may hazard a guess, his insolvency in August is suggestive of a financial position in July, the date of the suit's commencement, which robbed a threatened litigation of its terrors, and events have justified the absence of apprehension on his part: he never has been sued, and between him and his liability there now rise up the two formidable obstacles of his own insolvency and the bar of limitation. Cooverji has not occupied a prominent place in the argument before us, and I think I may without injustice to him deal for the future with the case without further thought for his imputed apprehensions.

But, then, how stands it with his three co-plaintiffs, whom I will hereafter speak of as the plaintiffs.

A perusal of the evidence does not point to any reluctance on their part to assert on oath all that appeared suitable to their

1900.

VULLEY MAHOMED v. DATTUBHOY.

case; but it is to their credit that they nowhere allege the existence of any reasonable apprehension on their part except as to the suit in Indore. And in this they, like Cooverji, judged aright, as events have proved. But what reason is there to apprehend that this Indore suit might cause these plaintiffs serious injury? None that I can see; for it is not pretended that the Court there is not as competent to do full justice to these plaintiffs' pleas as this Court is. I may, in passing, remark that the apprehension which possessed these plaintiffs of the injury that might accrue if the award was left outstanding, did not suggest to them that they should ask for an order that it be delivered up and cancelled.

But, apart from this, what are the facts on which the plaintiffs rely as entitling them to the favourable consideration of this Court and as demanding that we in the exercise of our discretion should interfere? Now in their plaint they did not hesitate, not only to charge collusion against the defendants, but also to assert that the award "was prepared fraudulently and in collusion with the arbitrators." Mr. Starling refrained, most properly I think, from any attempt to substantiate these serious allegations. We may, therefore, pass over this charge of fraud, though, in view of the readiness with which it is sometimes charged, I must allude to the disfavour with which the Court regards a groundless charge of this class. Though such a charge may not disentitle the plaintiffs to the Court's assistance when independent grounds of relief are alleged, still it cannot be too clearly understood that it may properly attach the penalty of costs.

Leaving fraud, then, out of the question, what has the plaintiffs' conduct been? Nurali was present when Ghulam Husen Sumar was asked to act as arbitrator; Dattu and Virji both actually signed the submission paper, Virji purporting to sign on behalf of his firm of which Nurali was a member (whether Nurali was present on the occasion is not clear). Dattu and Virji both attended the arbitrators between the signing of the reference paper on the 9th September and the making up of the award on the 17th September, 1895; they both signed the document, stating that they had read the award and agreed to the same, and bound themselves to act in accordance therewith, Virji again purport-

ing to act on behalf of his firm and this time doing so in the presence of Nurali: they never raised any objection to the proceedings while they were pending, or to the award when it was made, but they now turn round and say they are not bound. Is that conduct entitling the plaintiffs to claim favourable consideration? Clearly not. These plaintiffs, however, seek to explain away the signature of the agreement to be bound by the award by asserting that the arbitrators produced to them a blank paper, telling them that they, the arbitrators, would require the paper for the purposes of the arbitration, and that thereupon they, the plaintiffs Nos. 1 and 2, put their signatures to the paper as requested. Mr. Justice Crowe has declined to believe this story, and I fully agree with him and with the reasons he advances in support of his conclusions. (His Lordship then having gone through the evidence on the point continued:—) Then plaintiffs say it was expressly agreed at the time the reference paper was signed that it should not be of any effect unless signed by all the parties. (His Lordship went through the evidence on this point also and continued:—) Here again I wholly agree with Mr. Justice Crowe as to the inference to be drawn from the evidence, and I hold that the plaintiffs have failed to make out the agreement they allege.

So then the enquiry is narrowed down to this: Can these plaintiffs claim the aid of the Court merely because Cooverji is not bound by the award? When the exercise of the Court's discretion under Chapter V of the Specific Relief Act (I of 1877) is invoked, it is obviously material to see whether the plaintiffs have acted with promptness, whether any delay on their part has altered the position of the defendants, as well as to consider what is the nature of their claim, a point with which I have already dealt.

Now until they launched this suit on the 7th of July, 1898, nearly two years and ten months after the making of the award, no suggestion is to be found of any objection to it. It is true the Limitation Act allows three years within which to bring this suit, but as against this it has to be remembered it is at least probable that the time they have allowed to elapse would bar any remedy the defendants would have apart from the award.

1900.

VULLEY MAHOMED v. DATTUSHOY

What, too, can one think of the plaintiffs' assertion that they expected Cooverji to sign the reference? How is that to be reconciled with the absence of Cooverji's name from their submission paper with their having proceeded with the reference in his absence without one word of protest, complaint or even of suggestion and with their subsequent signature of the confirmation? Mr. Starling tried to make a certain amount of capital out of the fact that Cooverji's name is mentioned in the award. But he felt he was on dangerous ground: he could not suggest that this fact influenced his clients' views, because they have sworn they did not see the award when they signed. No doubt this is believed neither by Mr. Justice Crowe nor by us, but it would have been difficult to urge an agreement so absolutely inconsistent with the plaintiffs' sworn evidence. All that Mr. Starling could make of the fact was that it showed the arbitrators understood that Cooverji's concurrence was an essential condition of these plaintiffs' assent. But against this we have the positive testimony of the arbitrators.

I have gone at length into these matters for the purpose of seeing what the plaintiffs' conduct has been, but in the view I take it becomes unnecessary to decide as to whether or not the objection to the award urged by the plaintiffs is good; for I hold that in the exercise of its discretion this Court ought not to award the plaintiffs the relief they seek. I fully recognise that this Court will not lightly interfere with an exercise by the first Court of its discretion; but in this case we in no way impinge on this rule. It is clear from his judgment that Mr. Justice Crowe never looked at the case from this point of view: he simply held that the legal objection to the award was good and he apparently thought that the relief followed as a matter of course: he never exercised his discretion in the matter.

I refrain from deciding as to the validity of this objection based on the fact that Cooverji is not bound, because I am anxious in no way to embarrass the Indore Court by any view of mine; and as we neither affirm nor overrule Mr. Justice Crowe's decision on this point the Indore Court need feel in no way hampered by anything that has been determined in this High Court. I will only

say this that I cannot agree with the view expressed by Mr. Justice Crowe that *Antram* v. *Chace* (1) is entirely in point, because there the deed of reference purported to have been made between all the partners though it was only executed by two of them. What was there held was, that as the consideration to each to execute his own submission was the submission of all the others, and as all had not executed, there was a failure of the consideration, and as a result the arbitrators had no authority. But here the defendants' contention is that it was no part of the consideration that Cooverji should be a party to the reference, and, if that be established clearly, the principle enuntiated in that case has no application. I will say no more: the question between the parties when its exact limits are ascertained is a very simple one, and I do not imagine the Indore Court will find any difficulty in dealing with it.

But, so far as we are concerned, it is enough to say that no case has been made out for our special intervention under Chapter V of the Specific Relief Act. The plaintiffs have not shown that they had reasonable apprehension that the award if left outstanding will cause them serious injury, nor has their conduct been such as to call for an exercise of our discretion under section 39 of the Act in their favour.

The appeal, therefore, must be allowed: the decree of Mr. Justice Crowe must be reversed, and the respondents must pay the appellants' costs.

Attorneys for plaintiffs :—Messrs. *Ardesir, Hormusji and Dinsha.*

Attorneys for defendants :—Messrs. *Thakurdas, Dharamsi, Cama and Hormusji.*

(1) (1812) 15 East, 209.