ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

WALJI MATHURADAS (ORIGINAL PLAINTIFF), APPELLANT, v. EBJI UMERSEY AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1901. December 14.

Civil Procedure Code (Act XIV of 1882), sections 521, 522—Award—Allegations of arbitrator's misconduct—Decree following award—Appeal from the decree.

The plaintiff filed a suit for the dissolution and winding up of a partnership. The matters in dispute were referred to arbitration by an order of the Court; an award was made; an application was made by the appellant to set aside the award on the ground of alleged misconduct of the arbitrator; the application was refused; judgment was given according to the award; upon the judgment so given a decree was passed.

From this decree the appellant preferred an appeal.

Held, unless it is shown that the award is illegal *ab initio*, or in other words where there is no award in law, no appeal lies from a decree, following a judgment given according to an award.

Nandram Daluram v. *Nemchand Jadavchand* (1), approved.

Kali Prosanno Ghose v. *Rajani Kant Chatterjee* (2), referred to.

MOTION to file an appeal from a decree following an award.

The plaintiff filed a suit praying that the partnership between him and the defendants "be wound up and its assets including the goodwill be realized . . . the accounts of the said partnership be taken," and for other incidental reliefs.

On the 17th February, 1903 the Court with the consent of both the parties to the suit referred the suit to the arbitrament of Mr. Pestonji Kavasji, "the arbitrator or referee chosen by and between the said parties to this suit."

The arbitrator made and published his award on the 29th July, 1904.

To this award the plaintiff objected "on the ground of misconduct of the said arbitrator"; such alleged misconduct consisted of the following acts and omissions on his part: (1) the said arbitrator did not give reasonable opportunity to the plaintiff to prove his whole case before him; (2) he did not give

* Appeal in suit No. 869 of 1901.

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reasonable facility to the plaintiff in the matter of inspection of the books of account in the possession of the defendants; (3) he misconducted himself in not calling upon the defendants to produce for the inspection of the plaintiff the several books of account which the defendants had suppressed; (4) he misconducted himself in not putting the defendants to the strict proof of the non-existence of the said books of account and in not taking any steps whatever to compel them to produce the same; (5) he misconducted himself in proceeding with the inquiry *ex parte* from and after the 2nd of May, 1904, notwithstanding the protest of the plaintiff.

TYABJI, J., overruled the plaintiff's objection, and passed a decree in terms of the award on the 24th November, 1904.

On the 26th November, 1904, the plaintiff presented a memorandum of appeal from the decree; but the Prothonotary refused to accept it, being of opinion that "the appeal cannot be filed." The grounds of his opinion were:—

"This is an appeal from a decree passed in terms of an award. In the last clause of section 522 of the Civil Procedure Code, it is enacted that no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award. In the present memorandum of appeal it is not alleged that the said decree was in excess of, or not in accordance with, the award. In support of his contention that this appeal does lie, the appellant's attorney cites the case of *Ibrahim Ali* v. *Mohsin Ali* (I. L. R. 18 All. 422). In that case it was held that an appeal from such decree will lie, on the ground of the so-called award, upon which the judgment and decree are based, is from one cause or another, no award in law. It was further held that no appeal will lie from decree, when it is in accordance with, and not in excess of, the award upon grounds, similar to those urged under section 521, on an application to set aside the award. In the case of *Nundram* v. *Nemchand* (I. L. R. 17 Bom. 357) it was held that, where a decree has been passed in terms of the award, an appeal lies *only* when the question is whether the award was illegal, being void *ab initio*. In this appeal, the grounds of appeal appear to be almost the same as those which must have been urged on the application to set aside the award."

Upon this, the appellant applied to the appeal Court (Jenkins, C. J., and Batchelor, J.) for admission of the appeal.

Robertson, for the appellant:—We wish to appeal from a decree which purports to follow an award: but, really speaking the decree is not one in terms of the award, because the award itself

was not valid. We objected to the award in the lower Court chiefly on the ground of misconduct of the arbitrator—which consisted in refusing to give us proper facilities to put our case before him, in refusing to give defendants an opportunity to explain the documents and in accepting as true fraudulent entries without making any inquiry. These objections of ours were overruled by the lower Court, who in face of our protest passed a decree in terms of the award. We contend that the arbitrator has misconducted himself: and this by itself forms a substantial ground of appeal.

Raikes (acting Advocate General), for the respondent:—After the case was, with the consent of both parties to the suit, referred to the arbitrator, plaintiff caused delay on every possible occasion so much so that after many months the parties had to go before the Court to have the time extended. The arbitrator was then asked by the Court to make the award at once. The arbitrator then proceeded with the suit, but the plaintiff immediately after withdrew from the suit saying he would not appear any more. Thereupon the arbitrator proceeded *ex parte* and made his award. One of the objections raised by the plaintiff before the arbitrator was that certain books belonging to the firm which were in the custody of the defendants should be directed to be produced and allowed to be inspected by the plaintiff. The defendants stated that there were no such books in their custody: and the arbitrator believed their statement. When the award was certified to the Court, the plaintiff applied to the Court to set aside the award on the ground of misconduct under section 521, clauses (*a*) and (*b*), Civil Procedure Code. The lower Court held that the plaintiff had no case to show misconduct and dismissed the motion on the 19th October, 1904. Subsequently, a motion was made on notice to the plaintiff for decree in terms of the award. The counsel who then appeared for the plaintiff stated to the Court that he did not oppose the application for a decree on the award. Accordingly, a decree was passed in terms of the award. What the plaintiff seeks to do now is to come to this Court and to ask for leave to appeal against the order dismissing the motion of the 19th October, 1904, his counsel having that day admitted before the Judge that he really had no case to prove

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misconduct on the part of the arbitrator. Now an appeal from the judgment passed on the motion would be out of time. If any appeal does lie from such an order it must be an appeal from the judgment, and the party cannot wait until a decree has been passed and has become final under section 522, Civil Procedure Code. If ever there was a case in which a decree following an award passed by an arbitrator is to be treated as final, it is this case.

Cur. adv. vult.

JENKINS, C. J.:—The point for our decision is whether an appeal lies from a decree, following a judgment given according to an award.

It has been stated before us, and is not disputed, (*a*) that the matters in dispute between the parties were referred to arbitration by an order of the Court: (*b*) that an award was made: (*c*) that an application was made by the present appellant to Tyabji, J., to set aside the award on the ground of alleged misconduct of the arbitrator: (*d*) that the application was refused by the learned Judge: and (*e*) that judgment was given according to the award, and upon the judgment so given a decree followed.

It is from this decree that the present appeal is preferred, and the grounds of appeal are as follows:

1. The appellant-plaintiff abovenamed appeals against the decree of the Hon'ble Mr. Justice Tyabji passed on the 24th November, 1904, on the following grounds:—

2. That the learned Judge erred in confirming the award of the sole arbitrator Mr. Pestonji Kavasji, a Solicitor of this Honourable Court, duly made and published by him on the 29th July, 1904, in suit No. 869 of 1901.

3. The learned Judge ought to have set aside the said award on the ground of misconduct of the said arbitrator.

4. The learned Judge erred in not considering the misconduct of the said arbitrator, which consisted of following acts and omissions on his part as under:—

(*a*) The said arbitrator did not give reasonable opportunity to the appellant-plaintiff to prove his whole case before him.

(*b*) The said arbitrator did not give reasonable facility to the appellant-plaintiff in the matter of inspection of the books of account in the possession of the respondent-defendants.

(*c*) The said arbitrator misconducted himself in not calling upon the respondent-defendants to produce for the inspection of the appellant-plaintiff the several books of account which the respondent-defendants had suppressed.

(*d*) The said arbitrator misconducted himself in not putting the respondent-defendants to the strict proof of the non-existence of the said books of account and in not taking any steps whatever to compel them to produce the same.

(*e*) The said arbitrator misconducted himself in proceeding with the inquiry *ex parte* from and after the 2nd of May, 1901, notwithstanding the protest of the appellant-plaintiff.

5. That the learned Judge erred in discharging the first defendant, Ebji Umersey, who had been appointed receiver herein by an order of the Court, dated the 18th day of February, 1902, without passing his accounts and in directing the Prothonotary to return him the title-deeds deposited with him as security.

6. The learned Judge erred in not setting aside the said award and proceeding with the case himself.

7. The said decree of the learned Judge is contrary to equity and good conscience.

It is agreed that the fifth paragraph in the grounds of appeal should be left out of consideration, and that we should deal with the present appeal as though the decree had been sealed, and contained no such direction as would give rise to the objection contained in the fifth paragraph; but that this should be without prejudice to the appellant's right to appeal from any order in which that direction may be contained.

The procedure in reference to arbitration is contained in Chapter XXXVII of the Civil Procedure Code. Section 508 enacts that "when once a matter has been referred to arbitration the Court shall not deal with it in the same suit except as hereinafter provided." Section 522 provides that no appeal shall lie from a decree under the Chapter, except so far as it is in excess of, or not in accordance with, the award. There is no suggestion that the decree has this vice: all that is alleged is misconduct of the arbitrator.

But on this allegation of misconduct Tyabji, J., has adjudicated adversely to the appellant, and on the words of the Chapter therefore I should have thought it clear that no appeal lies.

Is there then anything in the cases which compels us to a different conclusion?

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To induce us to answer this question in the affirmative, Mr. Robertson has referred us to *Nandram Daluram* v. *Nemchand Jalavchand*(1), and *Kali Prosanno Ghose* v. *Rajani Kant Chatterjee*(2).

But the Bombay case only decides that an appeal lies where the award is illegal *ab initio*, or, in other words, where in law there is no award. Obviously if there is no award, there is no basis for the decree.

The Calcutta case too professes to proceed on the same principle, and we are not concerned with the application by it of the principle to the particular circumstances of that case.

Here there clearly is an award according to law, and all that can be said against it is that it is open to attack by reason of the arbitrator's alleged misconduct.

But section 521 prescribes how an allegation of misconduct is to be dealt with, and by section 508 the Court is forbidden to deal with the matter in this suit except as therein provided.

If we were to accede to the appellant's contention we should be running counter to "the principle of finality, which finds expression in the Code." See *Ghulam Khan* v. *Muhammad Hassan*(3).

We must, therefore, refuse the application with costs.

Application rejected.

Attorneys for appellant: *Messrs. Raghavayya & Bhimji.*

Attorneys for respondent: *Messrs. Pestonjee, Rustim & Kola.*

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(1) (1892) 17 Bom. 357. (2) (1897) 25 Cal. 141.

(3) (1901) 29 Cal. 167, at p. 183.