

1916.

January 17.

ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*SHAVAKSHAW D. DAVAR, PLAINTIFF *v.* TYAB HAJI AYUB,
DEFENDANT.*

Civil Procedure Code (Act V of 1908), section 89, Order XXIII, Rule 3, Second Schedule, paragraphs 14, 15, 20 and 21—Civil Procedure Code (Act XIV. of 1882), section 375—Indian Arbitration Act (IX of 1899)—Reference to arbitration without intervention of Court, while suit pending—Procedure to enforce award—Award, not adjustment of suit under Order XXIII, rule 3.

The plaintiff sued on the 11th of June 1915, to recover a sum of Rs. 5,353-9-6 as the price of goods sold to the defendant. The defendant in his written statement pleaded *inter alia* that the goods supplied by the plaintiff were not of the quality agreed upon by the parties. On the 21st of August 1915, the parties without the intervention of the Court agreed to refer the matters in dispute between them concerning the contract referred to in the plaint in respect of which the suit had been filed in the High Court, to the arbitration of M. D. and R. M. The arbitrators made their award on the 28th of October 1915 whereby they awarded to the plaintiff a sum of Rs. 4,001-4-0 with interest at 6 per cent. till the date of payment. The award was filed by the arbitrators on the 10th of December 1915. On the 10th of January 1916 the plaintiff took out a notice of motion, for an order that the adjustment of the suit arrived at between the plaintiff and the defendant as stated in the plaintiff's affidavit should be recorded under Order XXIII, Rule 3 of the Civil Procedure Code, and a decree in accordance therewith should be passed. The defendant disputed the legality of the award on two grounds, first, that the arbitrators exceeded their jurisdiction and decided something which was not within their power to decide and secondly, that they refused an opportunity to the defendant to call witnesses, or that after they had given him to understand they would adjourn the matter to enable him to call evidence, they published the award without giving him any such opportunity.

Held (1) the plaintiff had adopted a wrong procedure in applying for a decree on an award under Order XXIII, Rule 3 ;

(2) that the defendant was entitled to be heard on the objections raised by him under paragraph 21 of the Second Schedule of the Civil Procedure Code.

Pragdas v. Girdhardas⁽¹⁾ and *Ghellabhai v. Nandubai*⁽²⁾, considered.

Per MACLEOD J.:—No application can be made to obtain a decree on an award except as provided in section 89 of the Code of Civil Procedure, Act V

* O. C. J. Suit No. 631 of 1915.

(1) (1901) 26 Bom. 76.

(2) (1896) 21 Bom. 335.

of 1908.....Under that section the provisions of the Second Schedule govern all arbitrations in a suit, or otherwise, except such arbitrations as are specially excluded. An arbitration between the parties to a suit without an order of the Court has not been excluded and must, therefore, come under the provisions which deal with arbitrations without the intervention of the Court.

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MOTION :

Application under Order XXIII, Rule 3.

The plaintiff was a flour merchant carrying on business in Bombay under the name and style of Boyce Spice and Flour Mills. The defendant was also a flour merchant.

On the 17th of March 1915 the defendant agreed to purchase 758 bags of flour called Atta No. 3 at Rs. 11 per bag of 196 pounds net, Bombay, all other expenses to be paid by the defendant, and the payment of the price was to be made within eight days from the delivery which was to be taken by the defendant at the Boyce Spice and Flour Mills. On the 22nd of March 1915 the plaintiff delivered to the defendant 486 bags out of the said 758 bags of Atta No. 3 at the aforesaid Mills and the price was calculated at Rs. 5,353-9-6.

The defendant having failed to pay the aforesaid amount, the plaintiff filed the present suit on the 11th of June 1915. The defendant in his written statement pleaded that the flour supplied by the plaintiff was not in accordance with the quality agreed upon and that the stuff was rotten and relied upon a report made by his own surveyor.

After the written statement was filed, the parties came to an arrangement whereby the matters in dispute between the parties were referred to the arbitration of two gentlemen, by name Motilal Dayaram and Ramji Meghji, appointed by the defendant and the plaintiff, respectively.

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The arbitrators made and published their award on the 28th day of October 1915 whereby they awarded to the plaintiff the sum of Rs. 4,001-4-0 being the value of 486 bags at Rs. 8-4-0 a bag together with interest at the rate of 6 per cent. till the date of payment; each party to bear his own costs. The arbitrators filed their award in Court under the Indian Arbitration Act on 10th of December 1915.

The plaintiff subsequently took out a notice of motion on the 10th of January 1916 and applied for a decree on the award on the basis of the adjustment of the suit under Order XXIII, Rule 3.

The defendant disputed the award on two grounds—(1) that the arbitrators exceeded their jurisdiction and decided something which was not within their power to decide, viz., that they erred in allowing Rs. 4,001-4-0 when the plaintiff had claimed Rs. 5,353; they not having the power to reduce the amount; (2) the arbitrators refused an opportunity to the defendant to call witnesses or that after they had given him to understand that they would adjourn the matter to enable him to call evidence, they published the award without giving him any such opportunity. The defendant accordingly resisted the plaintiff's application and claimed to be heard on his objections contending that the right procedure should be that laid down in the Second Schedule to the Civil Procedure Code.

M. R. Jardine (Advocate-General), for the plaintiff.

Strangman, for the defendant.

MACLEOD, J.:—This is a motion taken out by the plaintiff for an order that the adjustment of the suit arrived at between the plaintiff and the defendant, as stated in the plaintiff's affidavit, should be recorded and that a decree in accordance therewith should be passed.

The suit was filed on the 11th of June 1915, the plaintiff praying that the defendant might be ordered and decreed to pay to the plaintiff the sum of Rs. 5,353-9-6 as the price of goods sold. On the 21st of August 1915, the parties without the intervention of the Court agreed to refer the matters in dispute between them concerning the contract referred to in the plaint, to the arbitration of Motilal Dayaram and Ramji Meghji. The arbitrators made their award on the 28th of October 1915. The award was filed on the 10th of December. In my opinion, a wrong procedure has been adopted. Order XXIII, Rule 3 of the Civil Procedure Code of 1908 under which the application is made only refers to the adjustments of suits wholly or in part by any lawful agreement or compromise. No application can be made to obtain a decree on an award except as provided for in section 89 of the Code. That was entirely a new section. It runs as follows —

“Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.”

If it had been intended that a party might apply for a decree on an award under Order XXIII, Rule 3, that Rule would have been mentioned in section 89 along with the provisions of the Second Schedule.

It is suggested that Order XXIII, Rule 3, comes under the description of ‘any other law for the time being in force’, but there is no reference in Order XXIII, Rule 3 to arbitration proceedings. I am aware of the decision in *Pragdas v. Girdhardas*⁽¹⁾ but since the Civil Procedure Code of 1908 came into force, I do not think that decision can be any longer binding on me. It seems that

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the opinion formerly held good as stated by Farran C. J. in *Ghellaibhai v. Nandubai*⁽¹⁾, that there was no section of the Civil Procedure Code of 1882 which specially enabled a Court to take cognizance of a submission to arbitration of a matter in issue in a suit made pending the suit other than a submission through the Court, or of an award made upon such a submission, and that such a submission and award could only be taken cognizance of in the same suit as an adjustment under section 375 of the Civil Procedure Code of 1882 now represented by Order XXIII, Rule 3. However that may be, it seems clear that under section 89 the provisions of the Second Schedule govern all arbitrations in a suit or otherwise except such arbitrations as are specially excluded. An arbitration between the parties to a suit without an order of the Court has not been excluded and must, therefore, come under the provisions which deal with arbitrations without the intervention of the Court. I do not see myself why the words "without the intervention of the Court" should not refer to cases where the agreement of reference is made out of Court although the parties to the agreement are already parties to a suit, and in my opinion section 89 is now conclusive on the question.

It seems obvious that if an application for a decree on an award could be made under Order XXIII, Rule 3, as soon as it has been proved to the Court that there has been an agreement to refer and an award, the Court would be bound to order the award to be recorded as an agreement or compromise, and would be bound to pass a decree in accordance therewith, excluding all the provisions of the Second Schedule relating to the powers of the Court when an application is made for a decree on an award. Paragraph 20 and the following paragraphs of the Second Schedule refer to arbitration

⁽¹⁾ (1896) 21 Bom. 335 at p. 341.

without the intervention of the Court, and under paragraph 21 where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, *and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved*, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Paragraph 14 gives the Courts power to remit the award under certain circumstances to the arbitrator. Paragraph 15 gives the Courts power on certain grounds to set aside an award. Therefore, in my opinion, there is no other law at present in force except the Arbitration Act of 1899 and a party applying to the Court for a decree on an award is bound, if the case does not come within that Act, to apply to the Court under the Second Schedule.

The defendant now disputes the legality of the award on two grounds : first, that the arbitrators exceeded their jurisdiction and decided something which was not within their power to decide, and secondly, that they refused an opportunity to the defendant to call witnesses or that after they had given him to understand that they would adjourn the matter to enable him to call evidence, they published their award without giving him any such opportunity. I think the defendant is entitled to raise those objections and be heard upon them. Therefore, the application by consent is now to be treated as an application under paragraph 21 of the Second Schedule and can be set down for hearing on præcipe in order to decide those questions. Costs to be costs in the application.

Attorneys for the plaintiff: Messrs. *Vachha & Co.*

Attorneys for the defendant: Messrs. *Mulla & Mulla.*