CASIM LEBBE MARIKAR *v.* SAMAL DIAS.

1896. September 15.

D. C., Kalutara, 1,502.

Reference to arbitration—Application in writing—Special authority to Proctor—Civil Procedure Code, chapter LI.

A reference to arbitration is bad unless it be made on an application made in writing either by the parties or by the proctors specially authorized in that behalf, and the want of these formalities is not cured by the parties subsequently appearing before the arbitrator.

IN revision. The facts appear in the judgment.

Weinman, for applicant for revision.

Van Langenberg, for defendant, respondent.

15th September, 1896. BONSER, C.J.—

This case has been brought before us in revision upon the application of the plaintiff, who has petitioned the Court. The plaintiff brought his action in the District Court of Kalutara to assert his right to certain cocoanut trees, which right, he alleged, had been infringed by the defendant. In the course of the proceedings it appeared that the only question between the parties was as to what trees constituted the third and fourth plantations respectively, the plaintiff claiming that the fourth plantation consisted of a large number of trees, whereas the defendant alleged that the greater part of the trees claimed by plaintiff did not belong to the fourth, but to the third plantation. It was common ground that the plaintiff was only interested in the fourth plantation.

On the day of trial the District Judge recorded this minute :—

" With regard to the second issue as to the quantity and quality " of the fourth plantation, the parties agree to reference of the " matter to Mr. Proctor H. J. Gunawardena as arbitrator. Let " him be instructed to inspect the land and submit his award as " to number and nature of trees in detail, both of the third and " fourth plantations on the land."

That minute is signed by the District Judge. On the 8th of April it is recorded that Mr. Gunawardena hands in his award, and on the 11th of April judgment is delivered, in which the District Judge says :—

" Mr. Gunawardena's award, dated 8th instant, having been filed " I proceed to give judgment according to the award, which is " confined to the second issue on which the parties have gone to " trial."

And he proceeded to dismiss the plaintiff's action with costs. It has been decided by this Court that the provisions of the law

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with respect to reference by the Court of matters in dispute to arbitration must be strictly construed, and that the provision that a reference should only be made on an application to be made in writing either by the parties or by their proctors specially authorized in that behalf must be strictly observed.

It is not sufficient that the parties, being present in Court, should signify their assent to the District Judge, and that he should make a minute to that effect, which appears to have been done in the present case.

Chief Justice Cayley, in one of the cases cited (D. C., Kalutara, 33,434, *3 S. C. C. 154*) stated that the reason for this was "that "there is so much proneness on the part of the legal practitioners "in this country to refer pending cases on the day of trial to "arbitration, that it is of great importance that the consent of the "parties themselves should be formally, expressly, and deliber- "ately given."

It has also been held that a reference to arbitration made without complying with these formalities was absolutely void, and that the defect was not cured by the parties subsequently appearing before the arbitrator. It is true that these decisions were prior to the enactment of the Civil Procedure Code; but the provisions of Ordinance No. 15 of 1866 have been substantially re-enacted in Chapter LI. of the Code; and it is admitted by Counsel that no distinction could be drawn between the two enactments. That being so, the provisions of Ordinance No. 15 of 1866 will apply to chapter LI. of the Code. We are therefore bound to hold that the reference to arbitration was void, and that the judgment must be set aside and the case remitted to the District Court for trial of the issues raised.

WITHERS, J.—

There is no question on which the natives of this country more desire to have a decision of a court of justice than those involving rights to land, or to the produce of trees growing thereon.

In consequence of this the Legislature insists upon a most deliberate expression of assent to be given to the application that the question be referred for determination, and requires such assent to be specially evidenced by writing distinct from the proxy ordinarily given to a proctor. And although elaborate proxies have been devised to evade this requirement if possible, yet the ordinary litigant seldom reads or understands the proxy he signs. The requirement of a separate special proxy ought therefore to be enforced.