AITKEN, SPENCE & CO. *v.* FERNANDO.

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D. C., Colombo, 12,706.

Arbitration—Special authority to proctor under s. 676 of the Code to refer a matter to arbitration—Stamp thereon—"Recognized agent"—Necessity of filing power of attorney in Court—When to be filed—Effect of an arbitrator proceeding ex parte*—Setting aside award—Misconduct of arbitrator under s. 691 (a) of the Code—Cost of successful appellant refused for perverse conduct—Entering decree after appeal filed against previous order.*

The special authority under section 676 of the Civil Procedure Code to a proctor to refer a matter to arbitration need not be stamped.

The requirement of section 25 (*b*) of the Civil Procedure Code, that the power of attorney in favour of a "recognized agent" or a copy thereof should be filed in Court, is complied with by such power or copy being filed at any stage of the case, and not necessarily when the recognized agent takes his initial step therein.

An arbitrator cannot, under the Roman-Dutch Law, proceed in the absence of one of the parties; and where he hears a case *ex parte* he is guilty of misconduct under section 691 (*a*) of the Civil Procedure Code and his award will be set aside.

The costs of a successful appellant will be disallowed for discreditable and perverse conduct on his part.

Where an appeal has been filed against an order of the District Judge refusing to set aside an award, he ought not to enter up a decree in terms of the award, but should wait till the Supreme Court decides whether the award should stand or not.

THE plaintiffs sued the defendant for the recovery of Rs. 51,254.19, being damages alleged to have been sustained by the plaintiffs by reason of failure on the part of the defendant to deliver to the plaintiffs certain plumbago sold to them by the defendant. The defendant pleaded that he was not liable to deliver the plumbago, inasmuch as the sale had been cancelled by the two parties; and the defendant counterclaimed from the plaintiffs a sum of Rs. 17,750.87, being balance value of certain plumbago sold and actually delivered by him to the plaintiffs.

On the joint application of the parties, the matters in dispute in the case were on the 1st February, 1900, referred to the arbitration of Mr. H. L. Wendt, Advocate. He was required to make his award on the 1st March, 1900. The due date of the award was on the 27th February, 1900, extended by the Court with the consent of both parties to the 15th March, 1900. After notice to both parties, the arbitrator began the hearing on the 28th February, 1900, and adjourned it to the 3rd March, 1900, and again on the latter day to the 10th March, 1900, when the hearing was concluded, and the arbitrator took time to consider his award. Although due notice was given of the hearing on the 28th February, 1900, and of each of the adjournments, the

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defendant did not appear before the arbitrator. His proctor wrote to the arbitrator that his client "withdraws from the "arbitration and revokes his mandate to you to arbitrate in the "matter," as he wanted his case to be heard by the District Judge in open Court with the aid of assessors, in view of the conflict of evidence that was sure to arise in the case. The arbitrator replied: "I should be most happy to discontinue proceedings in "the arbitration, if both parties agreed. Without such agreement, "I consider it entirely out of my power to do so." The proctor for plaintiffs replied: "I have been advised by defendant's counsel "to point out that an arbitrator has power, under section 679 of "the Procedure Code, to refuse to act under the reference, and "that the unwillingness of my client would be good ground for "such refusal. With regard to any hardships that may be "occasioned to the plaintiffs by reason of the arbitration being "dropped at this stage, I undertake on behalf of my client to "make good all expenses and costs of the plaintiffs as well as your "fee as arbitrator, and leave it to you to determine what sum "should be paid to the plaintiffs as such expenses and costs." The arbitrator, nevertheless, continued his proceedings and filed his award.

The defendant applied to the Court to set aside the award. That application being refused, the defendant field an appeal against the order refusing his application.

Thereafter the plaintiff moved, after notice to the defendant, that judgment be entered in favour of the plaintiffs in terms of the award. Judgment was accordingly entered for plaintiffs.

The defendant appealed against the order entering up judgment.

W. Pereira (*H. J. C. Pereira* and *C. Brooke Elliott* with him), for defendant, appellant.—The reference to arbitration is signed by the proctors and not by the parties themselves, and the special authority under section 676 of the Civil Procedure Code to plaintiffs' proctor is not signed by all the plaintiffs, but by some of them and the attornies of the rest; but the powers of attorney in favour of these attornies have not been filed of record as required by section 25 (*b*) of the Code. Under that section, a recognized agent is not to be regarded as such until he has filed in Court the power of attorney in his favour or a copy of it. As this has not been done, the special authority in favour of the plaintiffs' proctor under section 676 cannot be said to be an authority conferred by the plaintiffs or their recognized agents.

Then, the special authority under section 676 is in the nature of a new proxy, and must be stamped as a proxy, but the authority in question has not been so stamped. [BONSER, C.J.—It is not the

same as an appointment of a proctor. It is merely a further authority to a proctor already appointed.] The special authority appears to be independent of the proxy granted for the initial steps of a case. It is not necessarily to be granted to the proctor whose proxy is already on record, but may be granted to another proctor. It is, in other words, an appointment of a proctor for a special purpose, a purpose other than that for which a proctor was originally appointed, and should therefore be stamped in the same way as the proxy already filed.

BONSER, C.J., after conferring with MONCRIEFF, J., intimated that their lordships were of opinion that a special authority under section 676 need not be stamped, and that the power of attorney or copy of it might, under section 25 (*b*), be filed at any stage of the case.

W. Pereira, continuing.—Before the arbitrator entered upon the arbitration, the defendant withdrew the authority he had given. His reason for doing this was that he had until then been under the impression that Mr. Wendt had been appointed, not an arbitrator, but merely a sort of mediator between the parties to suggest to them terms of settlement, which they might accept or not. [MONCRIEFF, F.—Is it likely that a party to a case would think of appointing a person for a purpose like that?] It cannot be said that the defendant acted with a knowledge of the law on the subject, but such appointments were not uncommon under the Roman-Dutch Law. Van Leeuwen, for instance (*Kotze's Trans., vol. II., p. 413*, and *Ceylon Trans., p. 554*), speaking of elected judges, says they are either arbiters or arbitrators. Arbitrators or good men, anciently called *Kersluden*, are friendly mediators who decide according to the best of their knowledge and judgment, and satisfy parties in an amicable manner. Arbiters of old correspond to the arbitrators of the present day. The *bonâ fide* belief alluded to, however, was the defendant's excuse for revoking the authority unwittingly granted to Mr. Wendt. [BONSER, C.J.—Is it open to a party to a suit to revoke, without the intervention of the Court, a reference to arbitration made by the Court on the motion of both parties to the suit?] It appears to have been a common practice under the English Common Law. In the case of a voluntary reference, the fact that it was made through the Court did not deprive either party of his right to revoke the reference independently of the Court. The case known as *Vynior's Case* and the other cases cited in *3 Campbell's Ruling Cases 357 et seq.* are authorities in point.

Apart from the fact of revocation of authority, no award has been duly made by the arbitrator, and it is only an award duly

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made that can be given effect to by the Court. The arbitrator has acted in contravention of a material requirement of the law in making this award. The whole law of arbitration is not to be looked for in the Civil Procedure Code. While the Code makes provision for a reference to arbitration, it is silent as to how the arbitration is to be conducted, and as to that the Common Law of the land applies. Under the Roman-Dutch Law, an arbitrator cannot proceed *ex parte*. That is clear from what Voet says in *lib. 4, tit. 8, section 15, of his Commentaries*. It is there laid down that where an award is given in the absence, although properly summoned, of either party, it is *ipso jure* null and void.

Van Langenberg (with *Bawa*) for plaintiff, respondent.—The reference was made by order of Court, and it was not open to the defendant to revoke the authority of the arbitrator so long as the order of reference stood uncancelled. Either party might have moved with notice to the other side to cancel the order of reference. but he could not act independently of the Court. Section 691 of the Code specifies the grounds on which an award may be set aside. None of these grounds can be said to be present in this case. The Code does not limit an arbitrator's powers as to the conduct of the arbitration; and where either party after due notice keeps away from an arbitration, it is quite competent to the arbitrator to proceed *ex parte*, and the authority conferred on an arbitrator cannot be revoked except for such cause as is contemplated by section 679. O'Kinealy's *Ind. Civil Pr. Code, 4th ed., p. 493*, note to section 513, and *Halimbhai v. Shanker* (*I. L. R. 10 Bom. 381.*)

Then, as to the Roman-Dutch Law, the passage cited shows not that the arbitration should be conducted in the presence of both parties, but that the award must be given in the presence of both parties. The word used in the passage in this connection is *sententia*, meaning not the arbitration, but the award, and here it cannot be said that the award was not delivered in the presence of both parties. The award, according to our procedure, was filed in Court with notice to both parties.

W. Pereira, in reply.—It is no doubt true that what is said in the passage cited from *Voet* is that the award must be made in the presence of both parties, but what is really intended appears to be that the arbitrator should proceed with the arbitration in the presence of both parties. The delivery of the award was an essential part of the arbitration, and in the olden time it was possibly done the same day. Even supposing the passage meant that the bare delivery of the award, and not necessarily the whole arbitration, should take place in the presence of the parties, it is clear that it referred to delivery by the arbitrator and not by the

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Court,—in other words, the pronouncement by the arbitrator of his decision: that has not been done, in this case, in the presence, at any rate, of the defendant.

Cur. adv. vult.

4th July, 1900. MONCRIEFF, J.—

The plaintiffs in this action sued the defendant in the District Court of Colombo (No. 12,706) for certain sums which they declared to be due to them on various transactions set out in the plaint. On the 31st January, 1900, the parties agreed to authorize their proctors to apply to the Court for an order submitting all matters in dispute between them in the action to the final decision of the Hon. Mr. H. L. Wendt. That order was obtained no the 1st February, 1900, and on the 15th May the arbitrator filed his award. On the 28th February, when the arbitrator began his inquiry, he received notice from the defendant to the effect that he (the defendant) withdrew his mandate to the arbitrator. A similar notice was sent to the proctor for the plaintiffs. The arbitrator, however, proceeded in the absence of the defendant, and eventually, as I have said, filed his award. Thereupon the defendant applied to the District Judge to set aside the award and fix a day for the hearing of the case. The application was refused, and the defendant appealed to this Court. The defendant excuses his conduct on the ground that " he was " under the *bonâ fide* belief that it—the arbitration—was a mere " arrangement for Mr. Wendt to suggest terms of settlement which " either party would be free to refuse or accept." I do not believe in this *bonâ fide* belief. Men of business do not indulge in academical discussions as to their legal rights. They have no time for such futilities. I think that the defendant's excuse should be dismissed from our further consideration.

But it was argued for the defendant that he had a right to recall his consent to the submission, and the argument was supported by reference to a number of decisions of the English Common Law Courts. We are not concerned with the English Common Law, and there are no such decisions under our Common Law. There is no principle involved in those decisions. The reason for them is not apparent; and I suspect that, like many other decisions of the Common Law Courts, they were due to considerations which cannot operate now. So little did they depend on principle that the 1st section of the Arbitration Act of 1889 enacts that the submission shall be irrevocable.

Then the defendant complained that " the inquiry appeared to " have been proceeded with *ex parte*, notwithstanding the peti- " tioner's objection thereto." Therefore we must hold that he

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raised, although he may not have realized the full value of this point, the objection that the arbitrator proceeded in the absence of one of the parties. In support of this contention a passage was quoted to us from *Voet* (*4, 8, 15*) to show that, when an arbitrator proceeds in the absence of one of the parties—although that party may be liable to a penalty (*poena*)—the award (*sententia*) is *ipso jure* void. What takes the place of the penalty in our practice of to-day it is not for me to say, but I think we could not refuse, unless we are forbidden, to apply the principle conveyed by this passage to the present case. The arbitrator heard the case referred to him in the absence of the defendant, who was not represented at the hearing, and the award is apparently void.

Our attention was however drawn to the provisions of section 691 of the Civil Procedure Code, which enacts that " no award shall be set aside " except on one of certain grounds which are enumerated in the section. The section runs thus: " No award shall be set aside except on one of the following grounds." If the action of the arbitrator in proceeding in the absence of the appellant does not come within the compass of the " grounds " specified in the section, I should infer that the section had abrogated the law laid down in the passage in *Voet*. Such abrogation would be within the immediate scope and objects of the enactment—in fact, the section deals with that very subject. Moreover, the provision is negative in form, and may be taken to exclude all grounds not mentioned. But among the grounds are " corruption or *misconduct* of the arbitrator." Certainly there was no misconduct in the ordinary sense of the word, but it seems that an unusual meaning is put upon it both in England and under the 521st section of the Indian Civil Code. It appears from *Gunga Sahai v. Lekhraj Sing* (*I. L. R. 9 Alla. 253*) that the word is to be understood in the sense put upon it by the English Courts. That sense is well illustrated by *Phipps v. Ingram* (*3 Dowl. 670*), in which a coach-builder, to whom a question regarding the construction of a carriage was referred, contented himself with inspecting the carriage and refused to hear the plaintiff's witnesses. There was no imputation of improper conduct, but the award was set aside.

Upon this footing the arbitrator in the present instance has been guilty of misconduct. He has done nothing deserving of blame, but he has misconducted the arbitration by disregarding a principle of law which has been exhumed from *Voet*. He has supplied one of the grounds upon which, according to section 691 of the Civil Procedure Code, an award may be set aside. I think that the judge should have set aside the award, and that therefore this appeal should be allowed.

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BONSER, C.J.—

I agree. Having regard to the law of arbitration, I am of opinion that the arbitrator misconducted the arbitration. His conduct was not blameable, still it was legal misconduct. I also agree that there was no mistake on the part of the defendant as to the meaning of his agreement. It was a mere disingenuous attempt on his part to shuffle out of the agreement. When the case goes back to the District Court, the District Court will insist on the defendant's carrying out his agreement, and if he does not he will find himself in a very unpleasant predicament. The time for submitting the award will be extended for such time as the District Judge may think fit.

My brother's judgment is silent as to the costs of the appeal. We consider the appellant's conduct to have been discreditable and perverse, and therefore give no costs.

Then there was a cross-appeal, and in my opinion that appeal should be dismissed without costs. The District Judge ought not to have entered up a decree after an appeal had been filed against his decision refusing to set aside the award, but should have waited until it had been finally decided whether the award was to stand or not. I should have wished to allow the appeal, but the words of section 692 of the Code are too clear to be disregarded, and provide that there is to be no appeal from such a decree as this. No doubt the parties are in some difficulty owing to entry of the decree, for the District Court has apparently no jurisdiction to set it aside when it has once been entered up. Possibly there may be some means, as by an application in revision, by which the matter may be set right.