Dec. 20, 1909 *Present:* The Hon. Mr. J. P. Middleton, Acting Chief Justice, and Mr. Justice Pereira.

SOCKALINGAM CHETTY *v.* GUNAWARDENE *et al.*

D. C., Colombo, 29,796.

Partnership deed—Arbitration clause—Action for dissolution—Appointment of receiver.

The arbitration clause in a deed of partnership provided that if at any time during the partnership any dispute, doubt, or question should arise among the partners or their representatives on the construction of the partnership deed, or respecting the accounts, transactions, losses, or profits of the business, then such dispute, &c., was to be referred to the arbitration of two disinterested persons, one to be named by each party in dispute, &c.

Held, that such a clause does not enable a question of dissolution of partnership to be referred to arbitration.

Even where a Court has referred a question of dissolution to arbitration, it has the power to appoint a receiver.

THE plaintiff sued the defendants for the dissolution of the partnership existing between him and the defendants. The 13th clause of the partnership deed was as follows: "That if at any time during the partnership any dispute, doubt, or question shall arise among the said partners or any of them or their or any of their legal representatives, either in the construction of these presents, or respecting the accounts, transactions, losses, or profits of the said business, then every such dispute, doubt, or question shall be referred to the arbitration of two disinterested persons, one to be named by each party in dispute, or in case either of the parties in dispute shall upon the request of the other refuse or neglect to join in such nomination, then both of the said arbitrators to be named by the other, and in case any such arbitrator shall not agree upon an award, then the dispute, doubt, or question shall stand referred to the arbitration of such one person as the two arbitrators shall before they proceed in the reference appoint as their umpire, and the award or determination which shall be made by the umpire shall be final and conclusive on the parties respectively and their respective legal representatives, and it is hereby agreed that this submission to reference shall be made a judgment of the Court in terms of the Ceylon Procedure Code on the application of any of the parties to the reference."

The reasons stated in the plaint for the dissolution were, *inter alia*, the following:—

"It has become impossible to carry on the said business in partnership with advantage to the parties owing to the following among other reasons: The defendants have been unfaithful to the

plaintiff in matters connected with the business, and have been careless in the discharge of their duties, and have misappropriated various sums of money belonging to the partnership, and have without lawful excuse removed from the office the press copy book belonging to the partnership business, and have refused to make and subscribe to a full and correct statement of accounts of all the credits and effects due, owing, and belonging to the partnership, and have been trading in the name of the firm for their private gain, and have not brought into the partnership the profits gained thereby."

The plaintiff applied to the Court that a receiver be appointed pending the action. The defendants opposed, on the ground that the matters in dispute should be referred to arbitration under the arbitration clause.

The learned District Judge declined to appoint a receiver and stayed proceedings in the action, as he thought that the matters in dispute ought to be referred to arbitration under the arbitration clause.

The plaintiff appealed.

Sampayo, K.C. (with *Balasingham*), for the appellant.—The defendants did not move that the case be referred to arbitration, though they opposed the application for the appointment of the receiver, on the ground that the arbitration clause made provision for the settlement of these disputes. The matters involved in this action are not within the arbitration clause (Lindley on *Partnership, pp. 491-493;* Russell on *Arbitration, p. 46 et seq.*). Even if matters involved in this action are within the arbitration clause, there is sufficient reason disclosed in the plaint for not referring the case to arbitration (*Wallis v. Hirsch*,[1] *Barnes v. Young* [2]). In any event the Court was wrong in refusing to appoint a receiver (*Pini v. Rancoroni*,[3] *Senegal v. Woods* [4]).

The arbitration clause is unworkable, as it refers only to two parties.

A. St. V. Jayewardene (with him *Dassanayake*), for the respondents.—The 13th clause practically covers all matters in dispute in this case. It is for the arbitrators to decide whether the matters in dispute come within the arbitration clause (*Willisford v. Watson* [5]). Even where some matters in dispute are outside the arbitration clause, the Courts would refer to arbitration (*Ives and Barker v. Williams* [6]). No facts have been placed before the Court for the appointment of a receiver.

Cur. adv. vult.

[1] *(1856) 26 L. J. C. P. 72.*
[2] *(1898) 1 Ch. 414.*
[3] *(1892) 1 Ch. 633.*
[4] *(1883) 53 L. J. Ch. 166.*
[5] *(1873) L. R. 8 Ch. 473.*
[6] *(1894) 2 Ch. 478.*

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This is an appeal against an order referring the matters in dispute between the parties to arbitration and thereby staying the proceedings in the action. The plaintiff and two defendants were partners under a deed, by which it was agreed to carry on business as fibre merchants in partnership for seven years from July 11, 1908, subject to its being dissolved by six months' notice.

The District Judge, in making the order appealed against, appears to have done so on the ground that as the articles of agreement between the parties provided that any dispute between the parties was to be referred to arbitration, there was no reason why the dispute raised in this action should not be referred.

The plaintiff brought an action against the defendants, however, and in the 3rd paragraph of the plaint claims dissolution on the ground, amongst other allegations, of misappropriation of moneys, unfaithfulness in business, abstraction of a partnership book, and trading in fraud of the partnership agreement.

The 13th clause of the partnership deed provides that if at any time during the partnership any dispute, doubt, or question shall arise among the partners or their representatives on the construction of the partnership deed, or respecting the accounts, transactions, losses, or profits of the business, then such dispute, &c., was to be referred to the arbitration of two disinterested persons, one to be named by each party in dispute, &c.

It is contended by counsel for the respondents that this clause meets all the allegations made in the plaint, and the judgment of Lord Selborne in *Willisford v. Watson*[1] was strongly insisted on as covering the facts of the present case. In that case Lord Selborne said in most of such cases the real question between the parties is whether the matter in dispute is within or without the agreement, and the Lord Chancellor there held it was within the agreement. This is eminently the question here, and having read the judgment relied on by Mr. Jayewardene, I am strongly of opinion that the matters in dispute here do not fall properly within the limits of the 13th clause of the partnership agreement, nor do I think that clause 13 gives the arbitrators power to decide if matters in dispute fall within their power to deal with.

In *Piercy v. Young* [2] Jessel M.R. remarked that the case of *Willisford v. Watson* [1] had been quoted to him to show that the Court would not decide the point whether the matter in question was one which the party proposing the reference has agreed to refer to arbitration, and the Master of the Rolls said that Lord Selborne's decision when it came to be examined appeared to him by inference to show the contrary.

[1] *(1873) L. R. 8 Ch. 473.*

[2] *(1879) 14 Ch. D. 200.*

In the present case there is no general submission of all matters in dispute to arbitration, and the plaintiff seeks a dissolution, and I am by no means clear that the 13th clause enables such a question to be decided by the arbitrators. In my view clause 13 appears to contemplate disputes pending the partnership rather than disputes which might involve a dissolution of it. The clause is not a general submission by partners of all matters in difference between them, but a limited one (*Belfield v. Bourne* [1], *Vawdry v. Simpson* [2]). In both those cases it seems to me that the terms of the clauses of reference were far wider than they are here, where there is no general submission of all matters in difference such as might empower an arbitrator to dissolve the partnership.

There is also an allegation of fraud in the plaint, and in *Wallis v. Hirsch* [3] it was held that where there was an allegation of gross fraud, the matter being in the discretion of the Court under section 11 of 17 and 18 Vict., C. 125, the Court would not grant a stay of proceedings. In *Russel v. Russel*,[4] however, Sir George Jessel, the Master of the Rolls, held that the mere making of a charge of fraud was not sufficient, but that there must be *primâ facie* evidence of fraud to entitle the person charging the fraud to object to arbitration. In *Cook v. Catchpole* [5] the submission clause was similar, but even wider than the terms of clause 13 here, but it was held that the arbitrator would have no power under the submission clause to declare a dissolution in consequence of the conduct alleged there.

In my opinion the order of the District Judge must be reversed, on the ground that the submission clause 13 of the Articles of Partnership is not sufficiently wide to enable the arbitrators to dissolve the partnership.

There is still the further question raised by the appellant of the insufficiency of clause 13 with regard to the number of arbitrators. There are three parties to the agreement, and the 13th clause, although contemplating one arbitrator to be named by each party, only provides for the arbitration of two disinterested persons, one to be named by each party in dispute. It seems to me this makes a further difficulty, and constitutes a sufficient reason under section 8 of the Ordinance, No. 15 of 1866 why the matter here should not be referred to arbitration.

Then there comes the question as to the appointment of a receiver, which the District Judge appeared to think was unnecessary as he had stayed proceedings. In *Compagnie du Senegal v. Woods* [6] Kay J. held that, even pending arbitration, the Court had power to appoint a receiver (see also *Pini v. Rancoroni* [7]). In the present case I have no doubt that a receiver ought to be appointed under chapter L. of the Civil Procedure Code.

[1] *(1893) 1 Ch. D. 521.*
[2] *(1896) 1 Ch. D. 166.*
[3] *(1856) 26 L. J. C. P. 72.*
[4] *(1880) 14 Ch. D. 471.*
[5] *(1864) 34 L. J. N. S. Ch. 60.*
[6] *(1883) 53 L. J. N. S. Ch. D. 166.*
[7] *(1892) 61 L. J. N. S. Ch. D. 218*

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In my opinion, therefore, the order of the District Judge staying proceedings should be set aside and the case sent back, plaintiff being at liberty to apply for the appointment of a receiver pending action; the costs of the appeal and of the order in the District Court to be paid by the respondents.

PEREIRA A.J.—

Mr. Jayewardene argued that the question whether the matters in issue fell within the purview of the arbitration clause of the deed of partnership was itself a question for decision by the arbitrators, and cited, in support of his contention, the case of *Willisford v. Watson.*[1] That case, as pointed out by the Chief Justice, was the subject of comment in the case of *Piercy v. Young,*[2] from which it would appear that the provisions as to reference to arbitration relied on in the former case were so wide that they included not only the construction of the document itself, but also the question as to whether the acts complained of were or were not within the terms of the matters referred to arbitration.

As regards the question as to whether the arbitration clause in this case includes such disputes as are complained of in the plaint, the case of *Cook v. Catchpole* [3] appears to me to be in point. The terms of the arbitration clause relied on in that case were, in parts, material to the present inquiry, almost identical with those of the clause of the deed in this case, and it was there held that the clause applied only to questions arising upon the construction of the articles and to matters of internal disputes thereunder, and not to a case where it was charged that the partnership articles had been broken through, and a dissolution was sought on that ground.

I agree to the order proposed by the Chief Justice.

Appeal allowed; case remitted.

[1] *(1873) L. R. 8 Ch. 473.* [2] *(1879) 14 Ch. D. 200.*
[3] *(1864) 34 L. J. N. S. Ch. 60.*