1952 *Present :* **Gratiaen J. and Pulle J.**

S. D. A. GUNAWARDENE, Appellant, *and* M. MUTTIAH PILLAI *et al.*, Respondents

S. C. 73—D. C. Colombo, 804/X

Arbitration without intervention of Court—Ex-parte *award—Delay in making award—Validity of award—Effect of regular action filed subsequent to reference to arbitration—Bribery of arbitrator—Strict proof necessary—Arbitration Ordinance (Cap. 83), s. 7—Civil Procedure Code, ss. 386, 691 (2), 696.*

Where parties, without the intervention of Court, voluntarily submitted a matter in dispute to arbitration and the award of the arbitrator was attacked on various grounds under section 691 (2) of the Civil Procedure Code—

Held, (i) that the neglect or refusal of one of the parties to avail himself of the opportunity of presenting his case before the arbitrator did not invalidate the subsequent proceedings or disqualify the arbitrator from exercising his jurisdiction in the matter.

(ii) that delay of the arbitrator in making his award did not constitute " misconduct " on his part because no time limit was fixed in the terms of reference and the delay was largely occasioned by the dilatory and non-co-operative methods employed by the party objecting to the award.

(iii) that a reference to arbitration is not superseded by the institution of a subsequent regular action, unless the subject matter of the arbitration and the subject matter of the regular action are clearly identical.

(iv) that there was nothing improper in an arbitrator accepting from one of the parties, before the date of the award, the fee payable by that party in accordance with an agreement which bound all the parties.

(v) that the Court should not, by reference to affidavits alone, have arrived at a finding of corruption or misconduct against the arbitrator. Before reaching such a conclusion on a disputed allegation the Court should have framed issues of fact and heard oral evidence.

APPEAL from a judgment of the District Court, Colombo.

S. J. V. Chelvanayakam, Q.C., with *P. Colin-Thome*, for the petitioner appellant.

C. Thiagalingam, Q.C., with *C. Manohara*, for the respondents.

Cur. adv. vult.

July 17, 1952. GRATIAEN J.—

It is convenient at the outset to recite the facts regarding which there is no controversy between the parties. The petitioner and the respondents had formed a business association in or about November, 1947, whereby they carried on a commercial venture under the name, style and firm of " Muttiah Pillai and Co. " with a view to their mutual financial advantage. On 4th September, 1948, they agreed to terminate their so-called " partnership " and to submit the disputes which had arisen in connection therewith to the arbitration of a man named

H. E. Weerasinghe. The reference to arbitration, which also incorporates the agreement to dissolve the business, is contained in a document dated 4th September 1948 signed by all the parties in the following terms :—

> " We the undersigned M. Muthiah Pillai, K. Selvadurai and S. D. A. Gunawardene being the three partners of the firm of Muthiah Pillai & Company do hereby give notice to each other of the final dissolution of the abovenamed Partnership and agree unconditionally to the following procedure with regard to the winding up of the said firm :—
>
> (1) That we appoint Mr. Hettiaratchige Edwin Weerasinghe to act as the sole arbitrator in the dissolution of the partnership.
>
> (2) That we submit to him within the fortnight hereof all account or accounts connected with the affairs of the said Muthiah Pillai & Co.
>
> (3) That our individual statements of accounts showing the actual capital outlay contributed and the profits or payments received from the funds of the firm to be submitted to the said Mr. Weerasinghe before the specified date.
>
> (4) That we agree unconditionally to accept as full and final settlement any settlement or decision that the said Mr. Weerasinghe as Arbitrator may bring about after due examination of the accounts and affairs of the said firm. "

The arbitrator duly entered upon his reference but, for reasons which are controversial, he did not make his award for some considerable time. Pending that event the 1st respondent, who had admittedly used the business name of " Muttiah Pillai and Co. " in his own right prior to November 1947, sued the petitioner in action No. 22215 in the District Court of Colombo on 12th December, 1949, praying (*a*) for a permanent injunction restraining the petitioner from carrying on the business name in connection with his own business, (*b*) for damages in the sum of Rs. 25,000 for the fraudulent and improper use of the business name since 4th September, 1948. The plaint in that action alleges that the parties had, during the period November, 1947, to 4th September, 1948, carried on business in partnership under the name of Muttiah Pillai & Co. on the express understanding *inter alia* that after the dissolution of the partnership, which had in fact occurred on 4th September, 1948, the goodwill of the business name was to revert exclusively to the 1st respondent. It was on this ground that the 1st respondent formulated his cause of action based on the alleged improper use by the petitioner of the business name after the partnership had been dissolved. The plaint also recites that the arbitrator had been appointed " to take an account of the partnership assets and liabilities and divide the nett assets (excluding, of course, in the 1st respondent's submission, the business name of Muttiah Pillai & Co.) among the partners ". It also attributed the delay in bringing the arbitration proceedings to a conclusion up to that date to " the failure of the (petitioner) to attend the sittings fixed by the arbitrator ".

On 23rd March, 1950, the arbitrator addressed a letter to the respondents in the following terms :—

" Dear Sirs,

MUTTIAH PILLAI & Co.

With reference to the above arbitration it is regretted that so far you have neither given me any assistance nor furnished the accounts and statements which you undertook to do in spite of numerous reminders by me.

This is to give you notice that unless these documents are submitted to me before the 26th instant I shall give an ex-parte award to the remaining partner.

I would ask you to remit to me Rs. 250 from each of you to cover my arbitration fee."

No reply was sent to this letter nor was any request contained therein complied with. Thereupon, the arbitrator purported to proceed with the arbitration *ex parte* and on 31st March, 1950 he made an award declaring that the petitioner was entitled to receive from the respondents an aggregate sum of Rs. 23,233·59 on account of (*a*) the petitioner's share of the nett profits of the partnership business during the relevant period November, 1947 to 4th September, 1948, and (*b*) the proportionate share payable by the respondents out of the expenses incurred in carrying on the business during that period. These figures were admittedly computed on statements prepared and relied on by the petitioner in the course of the *ex parte* proceedings in which the respondents had, on their own version, declined to co-operate. This circumstance, however, is not sufficient to vitiate an award, because the bare neglect or refusal of a party to avail himself of the opportunity of presenting his case before the arbitrator does not invalidate the subsequent proceedings or disqualify the arbitrator from exercising his jurisdiction in the matter. *Aitken Spence and Co. v. Fernando* [1]. The *ex parte* award is enforceable against all the parties to the dispute unless it is vitiated for one or other of the reasons specified in section 691 of the Civil Procedure Code or unless some supervening circumstance has occurred which the law regards as having divested the arbitrator of the jurisdiction which he had previously assumed. Mr. Thiagalingam has made no submissions to the contrary.

On 1st June, 1950, the petitioner, in an application under Section 696 of the Code, moved the District Court by way of summary procedure to have the award in his favour filed of record, and he asked for a decree in terms thereof against the respondents. An interlocutory decree as prayed for was entered on 19th June, 1950, and on 29th June, 1950, the respondents filed a joint affidavit setting out their objections to the petitioner's application. The matter was then fixed for inquiry under section 384 of the Code.

The affidavit of the respondents is an unsatisfactory document because it contains many allegations and argumentative submissions which clearly offend the imperative requirements of section 181 of the Civil Procedure

[1] *(1903) A. C. 200.*

Code. Be that as it may, the main grounds on which the arbitrator's award was attacked in the lower Court may be summarised as follows :—

(1) that the arbitrator's delay in making an award was such as to constitute " misconduct " on his part within the meaning of section 691 (2) (*a*) of the Code ;

(2) that the petitioner, by submitting certain false and fabricated documents in support of his case at the *ex parte* arbitration proceedings, had " wilfully misled or deceived the arbitrator " within the meaning of section 691(2) (*b*) ;

(3) that the institution of the regular action by the 1st respondent on 12th December, 1949, operated automatically to supersede the arbitration proceedings and to divest the arbitrator of jurisdiction to make an award thereafter ;

(4) that the arbitrator had been guilty of " corruption " and/or " misconduct " within the meaning of section 691 (2) (*a*) by accepting from the petitioner a sum of Rs. 250 during the pendency of the arbitration proceedings.

The inquiry held by the learned Judge into these grounds of objection proceeded entirely upon a consideration of the respondent's affidavit the petitioner's contra-affidavit dated 18th November, 1950, certain statements of fact (unauthenticated even by affidavit) contained in the arbitrator's award, and the arguments of counsel. The learned Judge rejected the 1st and the 3rd grounds of objections which I have enumerated above and ignored the 2nd ground on the assumption, presumably, that it was not very seriously pressed before him. He, however, upheld the fourth ground of objection and refused the petitioner's application to have the award made a rule of Court. The present appeal is from this decision.

Mr. Thiagalingam has urged that the learned Judge should have upheld each of his clients' grounds of objection, and it is convenient therefore to consider them in the order in which I previously have set them out.

I find it impossible to differ from the learned Judge's view that the delay in making the award could not, in the circumstances of this case, be attributed to " misconduct " on the part of the arbitrator. No time limit had been fixed in the terms of reference, but he was nevertheless under a duty to discharge his functions with reasonable diligence. In the present case, however, there was ample material upon which the learned Judge could accept, as he did, the explanation that the delay was largely, if not entirely, occasioned by the dilatory and non-co-operative methods employed by the respondents themselves. The present case is therefore clearly distinguishable from *Purshottam v. Amrittal* [1] where an arbitrator's " unconscionable and unexplained delay " in making an award was held to constitute legal misconduct and indeed a virtual abandonment of the judicial functions which he had undertaken to exercise.

The only evidence on which the respondents relied in support of the second ground of objection is contained in certain vague averments in their affidavit. These allegations were denied by the petitioner in

[1] *A. I. R. (1928) Bom. 49.*

his counter-affidavit, and were, in the absence of more precise proof, insufficient by themselves to substantiate grave charges of fraud and deceit. Mr. Thiagalingam argued that the petitioner had misled the arbitrator into the belief that the partnership agreement had been reduced to writing and was therefore enforceable. It seems to me that, as far as the arbitration proceedings were concerned, the respondents must be deemed to have waived any defence which they had the opportunity of basing on the provisions of section 18 (c) of the Prevention of Frauds Ordinance. Besides, they do not deny even now that the basis of the *de facto* partnership was that the profits, if any, should be distributed in equal shares between the three partners. The award gives effect to this basis of computation, and no fraud or deceit is alleged against the petitioner in that respect.

The third ground of objection raises an interesting question of law, and was strenuously pressed before us by Mr. Thiagalingam. In my opinion the learned Judge came to a correct conclusion on this point. The principle to be applied is clear enough, and has been authoritatively laid down in the majority judgments of Fletcher Moulton L.J. and Farwell L.J. in *Doleman and Sons v. Ossett Corporated* [1]. Once a regular action has been instituted by a party to a dispute in a Court of Law, the Court has sole seisin of that particular dispute. If, prior to the institution of the action, the parties had mutually agreed to refer the same dispute to the arbitration of a private tribunal—or, *a fortiori*, if such arbitration proceedings had already commenced and were still pending—the defendant may invite the Court, in the exercise of its discretion, to stay the action and to compel the dispute to be decided by the private tribunal previously selected by the parties. *Section 7 of the Arbitration Ordinance* (*Cap. 83*). But unless such order be obtained within the period fixed by the Ordinance, the reference to arbitration is superseded by the regular action, and any award made thereafter by the arbitrator would be invalid for want of jurisdiction.

The validity of the present award which was made after the proceedings in D. C. Colombo No. 22215 were instituted necessarily depends on the question whether the arbitrator's award or any part of it purports to adjudicate on any right which is identifiable with the subject matter of the 1st respondent's claim over which the District Court of Colombo was vested with exclusive jurisdiction in the pending action. Applying this test, I would say that the subject matter of the award and the subject matter of the action are demonstrably distinguishable. The award, on the one hand, declares the petitioner entitled to receive from both respondents a sum of money representing his share of the net profits of the business up to the admitted date of the dissolution of a *de facto* partnership between the parties ; the subsequent regular action, on the other hand, is concerned only with a claim which is based on an alleged infringement by the petitioner of the 1st respondent's rights *after* the dissolution of the partnership had occurred. It follows that there was no usurpation by the arbitrator of the jurisdiction vested in the Court, and that the learned District Judge was perfectly correct in rejecting

[1] (*1912*) *3 K. B. 257.*

the third ground of objection. With respect, I would adopt the *ratio decidendi* of the High Court of Lahore in *Jai Narain v. Nain Ras* [1] on this issue.

There remains for consideration the final ground of objection which relates to the alleged impropriety on the part of the arbitrator in receiving from the petitioner a sum of Rs. 250 pending the proceedings. The arbitrator's award expressly states that the three partners had agreed that he should receive a fee of Rs. 750, payable by them in equal shares, and the terms of his letter R6 dated 23rd March, 1950 (to which no reply was apparently received), are consistent with that position. Admittedly, the petitioner paid a sum of Rs. 250 to the arbitrator before the date of the award, but paragraphs 15, 16 and 17 of the respondent's affidavit of objection unambiguously allege that this payment represented a bribe. If that allegation could be established, the award would clearly be vitiated on the grounds of corruption and misconduct; but if the version of the arbitrator and the petitioner be substantially correct, there would certainly be nothing improper in an arbitrator receiving from one of the parties the fee payable by that party in accordance with an agreement which bound them all; indeed, Mr. Thiagalingam concedes that the subsequent failure of the other parties to implement their part of the agreement could not taint such a payment with illegality. The facts which arose for consideration in *Shepherd v. Brand* [2] and in *Fernando v. Migel Appu* [3] are distinguishable, and we are not called upon to deal with Mr. Chelvanayagam's argument that the rulings in those decisions should, in the light of modern conditions, no longer be regarded as good law.

The learned District Judge upheld the fourth ground of objection and, by reference only to the affidavits and to certain documents which were read in evidence at the inquiry he decided that the arbitrator's award was vitiated by "misconduct". With great respect, I do not see how any Court of law, either in a regular action or in summary proceedings under Chapter 24 of the Code, could without hearing oral evidence arrive at such a definite conclusion upon issues involving disputed charges of corruption and dishonesty. This was essentially a case in which the learned Judge, after consideration of the allegations in the respondent's affidavit and the denials in the petitioner's counter-affidavit, should have framed issues of fact, to be tried by oral testimony, upon the allegations of "corruption" and "misconduct" in relation to the acceptance by the arbitrator of a sum of Rs. 250 from the petitioner. Section 386 expressly provides for such a procedure, and in my opinion the case should now be sent back for a fresh inquiry before another District Judge upon this ground of objection. If, after framing appropriate issues upon the specific allegations in the respondent's affidavit with reference to the payment and receipt of this sum of Rs. 250 the learned Judge decides that the arbitrator, in accepting this sum, was guilty of corruption or misconduct within the meaning of section 691(2) (*a*) of the Civil Procedure Code, he must make order refusing the petitioner's application to have the award made a rule of Court. If, however, the

[1] *A. I. R. (1922) Lah. 369.*

[2] *(1734) 94 E. R. 620.*

[3] *(1913) 16 N. L. R. 357.*

issues on this ground of objection are answered against the respondents, the petitioner's application must be allowed in terms of paragraphs (*a*) and (*b*) of the prayer of the petitioner dated 1st June, 1950. The parties will, of course, be entitled to appeal against the order made by the learned Judge in the fresh proceedings, but I desire to make it clear that the respondents should not be permitted at this late stage to attack the award on any fresh grounds.

For the reasons given by me, I would set aside the judgment under appeal and send the case back for fresh proceedings to be held for the limited purpose indicated in my judgment. The petitioner is entitled to his costs of appeal, but all other costs will be costs in the cause.

PULLE J.—I agree.

Sent back for further inquiry.