**1930**

*Present :* **Macdonell C.J. and Garvin S.P.J.**

PEIRIS *v.* PEIRIS.

203—*D. C. Kalutara,* 14,379.

*Arbitration—Extension of award—No minute on record—Oral evidence—Wilfully misleading arbitrator—Civil Procedure Code, s.* 691.

Where, upon a reference to arbitration, the period for making the award has been extended and there is no minute on the record to that effect, the Court may take oral evidence to prove that the extension was, in fact, made.

The fact that the arbitrator accepted evidence which he should not have accepted does not amount to "wilfully misleading the arbitrator" within the meaning of section 691 of the Civil Procedure Code.

APPEAL from an order of the District Judge of Kalutara.

*De Zoysa, K. C.* (with him *Ameresekere*), for defendant, appellant.

*Weerasooria* (with him *D. E. Wijeyawardana*), for plaintiff, respondent.

November 12, 1930. MACDONELL C.J.—

This appeal seeks to invalidate a certain arbitration award and several points were raised before us. The first point was that there had not been a proper submission to arbitration as required by section 676 of the Civil Procedure Code, but that point was abandoned. The next point was that the award had not been made within the period allowed by the Court under section 691 and the argument addressed to us was this, that a previous date in July having been given and the award not having been delivered till November 28, there was no proof that the time for delivering the award had been extended from July 4 to a later date. The learned trial Judge took evidence from the arbitrator that he did apply on July 4 and duly obtained an extension. It was argued to us that the learned trial Judge ought not to have admitted the oral evidence of the arbitrator. It was argued

that this would be contradicting the record and that the omission from the record of any mention of a motion being made to extend the time, was conclusive that no such motion had been made. With all respect to the very forcible way in which it was put to us, I really must say that that argument answers itself. It was not a contradiction of the record. The oral evidence was to supplement something which was lost from the record but to which there was some kind of reference in writing on the record itself. Surely, then, the learned trial Judge was perfectly justified in admitting the evidence of the arbitrator that he did make this appliaction on July 4 and got his extention of time. It was urged that by section 91 of the Civil Procedure Code such a motion for an extension of time must be in writing. That procedure being so well-known, we surely must presume that if an application was made it was made in the proper form, viz., in writing. On this ground, if the learned trial Judge admitted the oral evidence of the arbitrator as to this motion and if having admitted it he believed it, we cannot say that he did wrong. Then, that ground of appeal must be dismissed.

Then, there is a further ground of appeal which is split up into two parts, first, that one of the parties, viz., the plaintiff, wilfully misled or deceived the arbitrator and that consequently the award should be set aside under section 691 (*b*), and, secondly, that a petition to that effect having been put to the learned trial Judge, he never considered it. The first sub-heading of part one of this ground for appeal had to be abandoned in argument because an inspection of the record showed that there was no material whatever for it. The other sub-headings of part one really seem to amount to nothing more than this, that the arbitrator believed evidence which he ought not to have believed. The arbitrator was the judge of the facts and having given his decision on the facts, it is certainly not open to any Court to go behind his finding on those facts, and if the other instances that are alleged as showing wilful misleading or deceit amount merely to this, that the arbitrator believed evidence which he ought not to have believed, then there was no material upon which the learned trial Judge could have intervened, and the second part of the objection that he did not apply his mind to this point falls to the ground.

Apparently from the decided cases, a by no means extended view has been taken of these words " wilfully misleading or deciving " as grounds for setting aside an award. We have in *Russel on Arbitration and Award, 9th edition, at page 373*, a short note of *Scales v. East London Waterworks*,[1] the report of which is not available. It reads as follows :—" On one occasion the Court refused a motion to set aside an award, on the allegation that a witness had wilfully and corruptly given false evidence before the arbitrator, saying that proceedings might be taken against the witness for perjury, and that it would be setting a mischievous example to interfere at that time. " In the same volume at page 374 there is a note as to the case of *Pilmore v. Hood*[2] (this report also is not available) as follows :—" When in the third term after the award had been made the plaintiff (who swore that he had not until then discovered the facts) moved to set aside, on an affidavit of a witness, who stated that before the arbitrator he had sworn falsely, the Court refused the application, partly on account of the delay, but also on the ground that the witness might have been cross-examined before the arbitrator, and that to allow such an affidavit to be sufficient would open the door to innumerable frauds. " If this is a correct statement of what these cases decided, it certainly shows the very narrow limits within which Courts have restricted this portion of section 691

Reverting to the second part of the above ground for appeal, viz., that the learned trial Judge did not apply his mind to this objection, I certainly would

[1] 14 *L. J.* (*N.S.*) *C. P.* 195. [2] 8 *Dowling* 21.

not wish to be understood as saying that he did fail in that respect. If one examines his order at page 37 of the record it will be found that he did consider this point and that he came to the same conclusion as we have come to, viz., that it was merely a question of the arbitrator accepting oral evidence which he ought not to have accepted, and that therefore the objection did not come within the scope of section 691.

For these reasons, I am of opinion that the appeal should be dismissed.

GARVIN J.—I agree.

*Appeal dismissed.*