*Present:* Maartensz A.J.

1926.

ASIA UMMA *v.* ABDULLA *et al.*

*188—C. R. Puttalam, 11,002*

*Arbitration—Action against two defendants—Reference signed by one—Illegality—Estoppel.*

Where an action, in which two defendants were jointly sued, was referred to arbitration on a motion signed by the plaintiff and first defendant,—

*Held*, that the arbitration proceedings were invalid, although the award was against the first defendant only.

APPEAL from an order of the Commissioner of Requests, Puttalam. Plaintiff sued the defendants for the recovery of certain jewellery, or in the alternative a sum of Rs. 177. The defendants filed answer, denying liability. By a motion signed by the plaintiff and the first defendant the dispute was referred to the arbitration of Mr. Strong, who made his award on May 7, 1926. Under the award the plaintiff was entitled to judgment against the first defendant only. The defendants moved to set aside the award on the ground that the reference to arbitration was not signed by the second defendant. The Commissioner of Requests held against them.

*H. V. Perera*, for defendants, appellants.

*K. S. Aiyar*, for plaintiff, respondent.

October 28, 1926. MAARTENSZ A.J.—

The defendants-appellants were sued by the plaintiff for the recovery of two pieces of jewellery, or in the alternative their value Rs. 177. The defendants denied liability, and by a motion dated February 26, 1926, signed by the plaintiff and the first defendant the dispute was referred to the arbitration of Mr. Strong.

Mr. Strong made his award on May 7, 1926. Under the award the plaintiff was entitled to judgment against first defendant only.

The defendants moved to set aside the award on the ground that the motion agreeing to refer the matter in dispute to the arbitration of Mr. Strong had not been signed by the second defendant, and appeal from the Commissioner's order against them.

I entirely agree with the learned Commissioner's observations regarding the character of the application, but I am unable to agree with his reasons for rejecting it. He holds that his predecessor appointed first defendant second defendant's agent by granting the first defendant's application on behalf of himself and second defendant for time to file answer.

1926.

MAARTENSZ A.J.

*Asia Umma v. Abdulla*

The terms of sub-section (*e*) of section 25 of the Civil Procedure Code, 1889, preclude an inference of that nature being drawn from such an entry in the record. According to the terms of the section there must be an application and cause shown for an order under sub-section (*e*) and the application must be specially allowed.

The respondent, however, contends that the order can be supported on other grounds, namely, (1) that the defendants by taking part in the proceedings are estopped from attacking the validity of the reference, and (2) that the award being against first defendant only the objection that second defendant did not sign the motion does not arise. I regret that I do not see my way to accept either of these reasons.

In the case of *Saturjit Pertap Bahadoor Sahi v. Dulhin Gulab Kaor* [1] cited in support of the first ground it was held that the defendant had tacitly ratified his agent's application for a reference to arbitration. The agent's authority as a matter of fact did not extend to the making of such an application. It does not proceed on the ground of estoppel but on the ground of agency, and does not apply in this case as first defendant was not second defendant's agent.

In the Ceylon case of *Pitche Tamby et al v. Fernando et al.*[2] Wood Renton J. said that "it is not necessary for the purposes of the present case to decide—and I do not decide—that there may not be circumstances in which a party to an arbitration who has either duly authorized his proctor to apply for an order of reference, or has himself made in person and signed such an application, and has thereafter appeared before the arbitrator without objection, taken part in arbitration proceedings, and raised no objection to the award in the court of first instance, may not fairly be held to be estopped from challenging the award for the first time in the Appeal Court, on the ground that the application for an order of reference had not been signed by all the parties to the case, provided that what he is decreed to do by the award is something that can be fulfilled in favour of the parties who have, irrespective of those who have not signed the application for a reference." The ground on which he said the plea of estoppel can be raised does not arise in this case, as the objection was taken in the court of trial. At the end of his judgment Wood Renton J. observed—

> "Whether the doctrine of estoppel can ever be applied so as to cure irregularities in arbitration proceedings is a question of judicial opinion both in India and in Ceylon, and which may in regard to which there has been considerable difference some day have to be definitely decided."

That was in 1910, and the point has not been decided yet.

[1] *(1897) 24 Cal. 469.*

[2] *(1910) 14 N. L. R. 73.*

On the contrary, in the case of *Arachchi Appu v. Mohotti Appu* [1] Bertram C.J. followed the decision in the case of *Pitche Tamby et al. v. Fernando et al.* (*supra*), remarking that if the matter had been *res integra* he would have followed the principle of *Andrews v. Ellis*,[2] where it was held that the parties to a cause, having consented that a case should be tried without a Jury by a Judge who only had jurisdiction so to try it by the written consent of the parties, one of those parties could not be heard, after verbally consenting and after taking part in the trial to insist upon the statutory requirement of a written consent.

The plea of estoppel might have been considered in either of the cases I have referred to, but it was not. I do not see how the plea could now be raised in view of the cases I have referred to.

The second ground is based on a quotation in Sarkar from the case of *Bishoka Dasia et al. v. Anunto Lall Pani et al.*[3] In that case A sued B and two of his tenants for possession of certain lands, and the dispute between A and B was referred to arbitration; it was held that the award not affecting the rights of the tenants should be enforced between A and B. Apparently the dispute between A and B was distinct from the dispute between A and the tenants, and so far as the dispute between A and B was concerned all the parties had signed the reference to arbitration. That case is not an authority applicable to this case, where rightly or wrongly the defendants were sued jointly and the issues referred to arbitration were issues arising between plaintiff and both defendants. The fact that an award was made against first defendant only makes no difference, for plaintiff, if he was dissatisfied with it, could have objected to the award on the ground that second defendant had not signed the reference. This was the precise reason why the objection was upheld in the case of *Pitche Tamby et al. v. Fernando et al.* (*supra*). The plaintiffs there had not signed the reference which the defendants had signed, and it was held, that they could not take advantage of an award which they might have objected to if it was adverse to them.

I accordingly allow the appeal, but without costs, and remit the case for trial on the issues in due course. The costs of the proceedings already had and the costs of the subsequent proceedings will be in the discretion of the Commissioner.

*Appeal allowed.*

[1] *(1922) 23 N. L. R. 500*

[2] *25 L. J. Q. B. 1.*

[3] *(1879) 4 Cal. L. R. 65.*