1936 *Present :* **Abrahams C.J. and Fernando A.J.**

SATHASIVAM *v.* ATHARIYA

87—D. C. Colombo, 48,002.

Agreement—Settlement between debtor and creditors—Agreement by third party to pay the deficit—Decision as to amount of deficit—Binding on obligor.

O. L. M. was indebted to several creditors and a settlement was arrived at by which it was agreed that the plaintiff respondent should receive his assets and realize the proceeds for the benefit of his creditors. The first defendant gave a mortgage bond to cover any deficit between the sum realized and O. L. M's debts, the liability on the bond not to exceed Rs. 15,000. It was *inter alia* agreed under the terms of the bond that the statement rendered to the defendant by the plaintiff as receiver aforesaid of the amounts realized by the conversion of the assets and book debts of O. L. M. shall be final, binding, and conclusive on the defendant.

***Held*, that the agreement was valid.**

An agreement to submit to the decision of one party to a contract any dispute arising out of that contract is an exception to the doctrine that a party ought not to be judge in his own cause.

APPEAL from a judgment of the District Judge of Colombo.

Chelvanayagam (with him *Muttucumaru*), for defendants, appellants.

N. Nadarajah (with him *J. R. Jayawardana*), for plaintiff, respondent.

September 4, 1936. ABRAHAMS C.J.—

The facts which led to this appeal are as follows. One O. L. M. Majeed, a hardware merchant, was indebted to various creditors, and a settlement was arrived at by which it was agreed that his stock-in-trade should be handed over to the plaintiff-respondent who should receive it, sell it, and realize the proceeds for the benefit of the creditors. The first defendant-appellant gave a mortgage bond to the plaintiff-respondent to cover any deficit between the sum realized and Majeed's specified debts, but her liability was limited to Rs. 15,000. The plaintiff-respondent was the obligee of this mortgage bond. It is material to this appeal that the final clause of the bond ran as follows :—

> "And I hereby expressly agree that I do hereby expressly waive all privileges and exceptions to which sureties are by law entitled and that the statement rendered to me by the said obligee as receiver as aforesaid of the amounts realized by the calling and conversion of the said assets and book debts of the said Oduma Lebbe Marikar Abdul Majeed shall be final, binding, and conclusive on me and shall not be open to question by me on any ground whatsoever."

Subsequently, the proctors for the plaintiff-respondent wrote the first defendant-appellant to the effect that the total gross receipts realized by the sale of the aforesaid assets, and from recoveries made, totalled Rs. 134,972.89. The latter added that, in addition to this sum, the receiver "has one lot of steam flanges of the value of

Rs. 2,000 which are practically unsaleable". A demand for Rs. 15,000 due on the bond was made in the letter, to which apparently no reply was received. Judgment was given against the first defendant-appellant for the amount claimed.

It is argued in this appeal that the final clause of the mortgage bond is not binding on the first defendant-appellant. Counsel, so far as I can understand the submissions, contended that the obligor of the bond had to all intents and purposes agreed to consent to judgment on what might be mere assertions of the obligee, and that she thereby, bound herself not to raise any defence that might be open to her. Counsel was unable to give any authority for the proposition that such a clause in an agreement does not bind. He appeared to think that it ought not to be binding, and therefore was not binding. Counsel for the plaintiff-respondent, on the other hand, submitted that this clause was tantamount to a submission to the arbitration of one party to an agreement by the other party, and he cited a passage from *Hudson on Building Contracts, 6th ed., p. 238,* and *Russell on Arbitration, 1906 ed., p. 95,* both of which, on the authority of the ancient case of *Matthew v. Ollerton*[1], state that if there is an agreement to that effect the submission to the decision of one party to a contract of any dispute arising out of that contract is an exception to the doctrine that a party ought not to be a judge in his own cause. There is also direct authority for the proposition that an agreement to the effect that in case of a dispute between the parties to a contract the decision of one of them shall be accepted by the other, is good. In *Ranger v. The Great Western Railway Co.*[2], a contract between a railway company and a building contractor stipulated that payments should from time to time during the progress of the works, be made by the company to the contractor, such payments to be made on certificates granted by the Principal Engineer of the company or his Assistant Resident Engineer. In case of dispute between the contractor and the Assistant Resident Engineer the decision of the Principal Engineer of the company was to be final. After differences had so arisen between the contractor and the company, it was discovered by the former that the Principal Engineer was a shareholder in the company. In giving judgment, the Lord Chancellor said, "A judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other. In ordinary cases it is a just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent. But here the whole tenor of the contract shows it was never intended that the engineer should be indifferent between the parties.

"When it is stipulated that certain questions shall be decided by the engineer appointed by the company, this is, in fact, a stipulation that they shall be decided by the company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The company reserved the decision to itself, acting however, as from the nature of things it must

[1] *4 Mad. 226.*

[2] *5 H. L. C. 72.*

act, by an agent, and that agent was, for this purpose, the engineer. His decisions were, in fact, those of the company".

It might, I think, be argued that the respondent in this appeal was merely a nominal party to the agreement between himself and the first appellant, and therefore could have had no interest in the agreement itself. However, in view of the case just cited, it is not necessary to try to make stronger what is already strong enough.

It has also been argued for the first appellant that the respondent ought to have proved that he had failed to find a market for the steam flanges referred to in his letter of demand, and that even if the first appellant was bound to accept the statement as to the amounts realized by the sale, her obligation to do this did not extend to accepting the statement on his part that it was not possible to dispose of certain other items of stock. I think this is interpreting the obligation too narrowly, and that that obligation extended as much to his declarations regarding impracticability of sale as to declarations regarding the amounts realized by the sale of his stock, since if that were not so, the first appellant would have been bound to accept the statement that he was only able to obtain a most trivial price for the whole of the stock but would have been entitled to dispute the fact that he found it impossible to sell a few articles. Moreover, the first appellant has not disputed at any time, and in fact does not dispute now, that these steam flanges were unsaleable. She merely says that she is agnostic about the matter, so that even if the agreement permitted her to dispute any declaration as to the impracticability of sale, she has not availed herself of that right.

I would dismiss the appeal, with costs in both Courts.

FERNANDO A.J.—I agree.

Appeal dismissed.