

Present: Wood Renton C.J. and De Sampayo A.J.

1915.

MENIKE v. UKKU AMMA.

210—C.R. Kurunegala, 22,023.

Reference to arbitration—Agreement of parties during trial entered of record by Judge and signed by parties—Civil Procedure Code, s. 676.

At the trial parties agreed to refer the matter in dispute to the arbitration of U, and the Commissioner made an entry to that effect. This was signed by the Commissioner and the parties.

Held, that the provisions of section 676 of the Civil Procedure Code were satisfied, and the order of reference to arbitration was not bad.

THE facts are set out in the judgment. This case was reserved for argument before two Judges by De Sampayo A.J.

E. T. de Silva, for the appellant.—The reference to arbitration was signed by the parties. A separate document applying for an order of reference to the Court is not necessary. The provisions of

¹ (1913) 17 N. L. R. 67.

² (1906) 9 N. L. R. 231.

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section 676 have been satisfied by the parties signing the entry on the record.

Even if the reference is bad, the parties are estopped from disputing its validity, as they appeared before the arbitrator and called evidence. The decisions on this point are conflicting.

July 12, 1915. WOOD RENTON C.J.—

This is an action for declaration of title. Various issues suggested by the pleadings were drawn up, and then we come to an entry by the Commissioner of Requests in these terms:—

The parties agree to refer all matters in dispute between them to the arbitration of Mr. J. W. Udulagama, Interpreter Mudaliyar of this Court, whose award shall be final.

This agreement was "allowed" by the Commissioner of Requests, and the whole entry is authenticated by his signature and by the marks of the parties, to whom the entries are stated to have been explained by Mr. Udulagama, the Interpreter Mudaliyar. At the arbitration proceedings the defendants, as well as the plaintiffs, appeared before the arbitrator, who in due time made his award. The defendants thereupon took exception to the award, on the ground that the reference was irregular, inasmuch as there had been no application for a reference within the meaning of section 676 of the Civil Procedure Code. The Commissioner of Requests upheld this objection, set aside the award, and fixed the case for trial. The plaintiffs appeal, and urge two points upon us: in the first place, that there is no irregularity in the reference itself, and in the next place that, even if there were, the defendants having appeared before the arbitrator are estopped from relying upon it. There is no need to consider the latter point, which has formed the subject of numerous decisions of this Court, collected in *Pitche Tamby v. Fernando*,¹ although in that case the Court expressed the opinion that it might be necessary at some later date to consider how far the doctrine of estoppel was capable of being applied, with a view to curing irregularities in arbitration proceedings. I am of opinion that the appeal is entitled to succeed on the first point. The present case appears to me to be distinguishable from the entire group of authorities, of which *Casim Lebbe Marikar v. Samal Dias*² may be taken as an instance, and in which it was held that a reference to arbitration is bad unless it be made upon an application in writing, either by the parties themselves or by their proctors specially authorized in that behalf. The allowance by the Commissioner of Requests of the agreement of the parties, and the authentication of that agreement, not merely by his signature but by the marks of the parties themselves, seem to me to constitute good evidence that there was here such an application to the Court

¹ (1910) 14 N. L. R. 73.

² (1896) 2 N. L. R. 319.

as will satisfy even the letter, and certainly the spirit, of section 676 of the Civil Procedure Code. But I would desire to call the attention of the courts of first instance to the importance of seeing that there is on the face of the record affirmative evidence of the assent of both sides to a proposed reference to arbitration, which it is the main object of the provisions of section 676 of the Civil Procedure Code to secure. I would set aside the order under appeal and send the case back for whatever further inquiry and adjudication may be necessary in regard to any outstanding objections to the award. After these have been disposed of, the Commissioner of Requests will enter up the judgment which the circumstances of the case require. The plaintiffs are entitled to the costs of the appeal; all other costs should be in the discretion of the Commissioner of Requests.

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DE SAMPAYO A.J.—I agree.

Set aside.

