*Present :* De Sampayo J. and Loos A.J. 1920.

HADJIAR *v.* RAHEEM *et al.*

*(The Alim Will Case.)*

*32—D. C. Colombo, 864.*

*Testamentary suit—Reference to arbitration by private agreement—Application to file award in Court—Civil Procedure Code, s. 696—When case is pending, reference to arbitration can only be made by Court—Jurisdiction of District Court—Civil Procedure Code, s. 408.*

An application for probate being refused, an appeal was preferred to the Privy Council. The District Judge, in the meantime, granted letters of administration on the footing of an intestacy to an officer of the Court, and made order that some of the heirs should bring in a certain sum of money which they had into Court or give security. At this stage the parties desired to come to a settlement on all matters, including the appeal to the Privy Council and distribution of the estate, and referred the matters to the arbitration of N by a private agreement. The award was accepted by all the parties on the face of the document, and they signed the same as final and binding on them. The petitioners brought the award into Court in a special case, and applied by petition that the award be filed in Court under the provisions of section 696 of the Civil Procedure Code.

*Held,* that the matters referred to arbitration being already the subject of litigation in the testamentary suit, the award was not such as can be filed under section 696.

Where a suit is pending, a reference to arbitration can only be made by the Court itself in that suit.

1920.

*Hadjiar v. Raheem*

*Held further*, that the District Court had no jurisdiction over the matter in a separate suit as distinguished from the testamentary suit.

"This does not imply that the award is wholly useless, and effect may not be given to it in some other way. The award appears to be binding on the parties as regards the method of distribution of the estate in the testamentary suit and other matters connected therewith, and although the award cannot be dealt with as such under the arbitration sections of the Code, it may, nevertheless, be treated under section 408 of the Code as an adjustment of compromise arrived at by the parties."

THE facts are set out in the following judgment of the District Judge (W. Wadsworth, Esq.):—

This is somewhat novel application, and has no precedent in Ceylon. One Ahamadu Lebbe Marikar Alim died intestate in December, 1917, leaving very large property, and leaving behind him his widow and several children as heirs. Some of the children are minors. Some of the heirs produced a will alleged to have been made by the deceased, but the Court in case No. 6,175 held that the will was not made by the deceased, and refused to admit it to probate. In case No. 6,415 of this Courts letters of administration were issued to the widow and two of the sons of the deceased jointly, and the estate is being administered now.

The present petitioners state that "differences having arisen between the petitioners and respondents in regard to the distribution of the estate of the said deceased amongst the heirs, the petitioners and the respondents referred such differences by two writings (which they produce) to the arbitration of one Naina Marikar, whose decision they agreed to accept as final and binding on them." The petitioners further state that the said arbitrator accordingly made his award, and they produce the said award (in two documents). They move the Court that the award may be filed in Court in terms of section 696 of the Civil Procedure Code. In effect they ask the Court that the award being filed in Court judgment be entered in terms of the award and a decree entered thereon. The fifth respondent, one of the heirs, objects to this award being filed in Court under that section. He has raised several objections. Some very important points of law were raised and were discussed by counsel on both sides with marked ability.

As I indicated at the argument, the chief question appears to be, in the first place, whether an award of this kind can be brought under the provision of section 696, Civil Procedure Code, to form the basis of a decree by itself.

The chapter in our Civil Procedure Code—chapter LI.—which deals with "reference to arbitration" may be classified under three heads:—

1. Sections 676 to 692 deal with reference to arbitration in a pending case, where all the parties to an action desire the matter to be referred to arbitration.

2. Sections 693 to 695 provide for the case of persons agreeing to refer any matter in dispute or difference to arbitration, and seeking the interference of the Court to enforce the agreement.

3. Sections 696 to 698 provide for an award made without the interference of a Court to be made binding on parties thereto.

The three kinds are, in my opinion, distinct, and apply to different circumstances. The first relates to cases pending in a Court, where the subject-matter in dispute or difference is *in custodia legis*, where the Court having jurisdiction had already taken cognizance of the matter and exercised jurisdiction, but where before adjudication all the parties desire to refer the matter to arbitration. The Court has complete control, and the reference is only on the order of the Court. It has power to correct, modify, or return the award, and even to set it aside or make order superseding the reference, and exercise its jurisdiction direct. In such a case of reference to arbitration the jurisdiction of the Court, which had begun to be exercised, is not divested, but a certain mode is prescribed, with many safeguards, to delegate its jurisdiction to a person or persons, at the express desire of all the parties to the action, to decide the matter in dispute without the strict proof of the several matters as required by law of evidence, and without the observance of any rule or procedure. The award of the arbitrator must be made within a prescribed time, and if not set aside or rejected, or if it is not invalid, for any of the reasons prescribed in the different sections, a judgment is entered in terms of the award and decree entered thereon having the same effect of a decree entered after adjudication by the Court itself, and execution of that decree is allowed as in any ordinary decree.

In the second class there is no action pending. The sections relating to this do not relate to any action in which a Court of competent jurisdiction had taken cognizance and exercised jurisdiction. It provides for cases where persons having dispute or difference agree in writing that such difference be referred to arbitration, and then come to Court and seek its interference to enforce the agreement to arbitrate in the exercise of its power and authority as is provided in these sections. The Court thereupon exercises its jurisdiction, and proceeds to order the reference to arbitration. It is thus brought *in custodia legis*, and the Court's powers thereafter are the same as in reference to arbitration under the first heading. The award is subject to the same limitations and control by Court.

In the third class (sections 696 to 698), too, there is no action pending. No matter is in the custody of the Court. The sections do not relate to any reference to arbitration through the intervention of the Court. In fact, the section does not speak of any person or of any party to the reference or the award itself. No form of reference is mentioned. It does not speak of any matter in difference or in dispute between any persons whatsoever. The section provides for a particular circumstance, and that circumstance alone. The section runs as follows: "When any matter has been referred to arbitration without the intervention of a court of justice, and an award has been made thereon, any person interested in the award may within six months of the making of the award apply to the court of jurisdiction over the matter to which the award relates that award be filed in Court."

This section provides for a special proceeding in a particular case and under particular circumstances. It relates to a case not contemplated in either of the two classes mentioned above. The contention that the words "any matter" in this section should be construed to apply also to matters for which provision had been made in the earlier sections is untenable. The fallacy of this argument is clear. Because the section provides for a particular case, therefore all cases can be brought under

1920.

*Hadjiar v. Raheem*

this particular case. Because the section provides for a case where some matter had been referred to arbitration without the intervention of the Court, and therefore, all matters can be referred to arbitration without the intervention of the Court. If matters in dispute in an action already pending may be brought under "any matter" in section 696, there is no necessity for sections 676 to 692 and for the safeguards placed therein in respect of the reference and award and for the exercise of any control by Court. I take it that the Legislature in providing special proceeding for reference to arbitration in a matter which has already been brought *in custodia legis*, and over which the Court has commenced to exercise its jurisdiction, did not want the jurisdiction of the Court to be ousted.

In this case the matter of the administration of the estate of the Alim is pending in this Court. Letters of administration has been ordered to be issued to certain persons. The powers of the administrators are limited by the order. They are answerable to the Court for the assets of estate and for the due distribution thereof. If the heirs among themselves had come to some arrangement as to the distributor of the estate, whether such arrangement had been effected between themselves or by the intervention of a third person called an arbitrator, the jurisdiction of the Court in the testamentary proceeding is not ousted, but the administrators must continue to administer the estate and give an account of their administratorship. If in the distribution of the estate they act in terms of any agreement or settlement, or if, ignoring the settlement, they distribute the estate according to the law of inheritance, the legality of their act can only be adjudicated upon in the testamentary proceeding. There is ample provision in our law for any person interested in the estate to question the distribution or the accounting of an estate by an administrator, either in a judicial settlement of account or by separate action.

To adopt a special proceeding prescribed for a particular case and thereby obtain a decree to bind administrators who had not been parties to any compromise *qua administrators*, and who had not obtained the authority of Court to act in the matter, especially where their powers had been specially limited by Court, will be to oust the testamentary jurisdiction of the Court. In Ceylon there is no provision for the Court in its civil jurisdiction to enter a decree to supersede or vary any decree or order made in its testamentary jurisdiction.

In my opinion the procedure adopted by the petitioners cannot be entertained. Section 696 of the Civil Procedure Code does not apply. Any compromise, agreement, or adjustment as regards the distribution of the estate must be brought up in due course in the testamentary proceedings where the estate is administered. Because the adjustment has taken the form of an award by an arbitrator agreed to by the heirs, it can in law have no more sanction than any agreement entered into by the heirs independently of the intervention of a third person. I find that this application cannot be maintained.

In view of this finding, I do not consider it necessary to go into the other objections raised or to express any opinion, except to mention that the award is on the face of it such that no decree can be entered up in terms of the award so as to be capable of execution, for it is impossible to say against whom such a decree could be entered or enforced, certainly not against the administrators of the estate of the deceased.

I dismiss the application. with costs. Petitioners will pay the costs of the fifth respondent. The other respondents will bear their own costs. The guardians of the minor respondents will bear their costs personally.

*Keuneman* (with him *H. E. Garvin*), for appellants.

*A. St. V. Jayawardene*, for the respondent.

The following cases were cited in the course of the argument:— *Ayyagi v. Desai*,[1] *Kalliandas v. Mandachand*,[2] *Sagurmall v. Mathuradas*,[3] *Chetti v. Chetti*,[4] *Samibai v. Pragji*,[5] *Khan v. Hassan*,[6] *Tincowny Dey v. Fakir Chand Dey*,[7] *Mahades v. Krishna*,[8] *Venkatachala v. Rangiah*,[9] *Amrit Ram v. Dasrat Ram*,[10] *Sheo Dat v. Shankar Singh*,[11] *Doleman & Sons v. Osset Corporation*,[12] *Harakpbai v. Jamnabai*,[13] *and Paramanik v. Mandal*.[14]

*Cur. adv. vult.*

April 26, 1920. DE SAMPAYO J.—

This is the matter of an application under section 696 of the Civil Procedure Code to file an award in Court in connection with the estate of a deceased person. The District Judge refused the application, and this appeal is taken by all the petitioners, except the sixteenth petitioner, who is the widow of the deceased, and by the respondents to the petition, except the fifth respondent, who opposed the application, and is the respondent to this appeal. A preliminary objection was taken to the appeal on the ground that the sixteenth petitioner, the widow, was a necessary party to this appeal. We considered it advisable to give her notice of the appeal and to make her a respondent, and this has been done.

The question involved is one of procedure and is of great importance, and in order to show how it has arisen, it is necessary to state the facts at some length. One O. L. M. Ahamado Lebbe Marikar Alim, who carried on a very extensive hardware business in Colombo, and was possessed of considerable movable and immovable property, died in December, 1917. He was married three times, and left him surviving his widow, the third wife, and several children by all the beds. Shortly after his death the fourth and fifth petitioners, who are two of the sons by the first bed, propounded a document dated October 22, 1917, as Alim's last will, and as executors thereby appointed applied for probate in the testamentary suit No. 6,175. This was opposed by some of the other children and the widow, and the District Court on September 30, 1918, held that the document was not the will of the deceased Alim and refused probate,

[1](1913) 37 Bom. 442.
[2](1879) 4 Bom. 1.
[3](1901) 26 Bom. 76.
[4](1900) 24 Mad. 326.
[5](1895) 20 Bom. 304.
[6](1901) 29 Cal. 167.
[7](1902) 30 Cal. 218.
[8](1914) 38 Bom. 687.
[9](1911) 36 Mad. 353.
[10](1894) 17 All. 21.
[11](1904) 17 All. 53
[12](1912) 3 K. B. 257.
[13](1912) 37 Bom. 639.
[14](1907) 34 Cal. 886.

1920.

DE SAMPAYO J.

*Hadjiar v. Raheem*

and the Supreme Court in appeal affirmed that decision. The fourth and fifth petitioners then preferred an appeal to the Privy Council. In the meantime, in view of the decision of the District Court with regard to the alleged will, an application was made to the District Court in the testamentary suit No. 6,415 for letters of administration to the estate of the deceased Alim as upon an intestacy, and in March, 1919, the Court made order allowing letters of administration to Abdul Majeed, third petitioner and son of the deceased Alim by the first bed; Thassim, fifteenth petitioner and son by the second bed; and Neemath Umma, sixteenth petitioner and widow. But these persons failed actually to take out letters, as they appear not to have been able to supply the necessary stamps and pay estate duty, and the Court accordingly issued letters to its own officer, Mr. Kretser, limited to such time as he might be able to collect sufficient assets and pay the stamp and estate duty. It appears that the deceased's hardware business was, during his life-time, managed by his sons, the fourth and fifth petitioners, and that after his death they continued to carry on the business, as executors or otherwise, on behalf of the estate, and in the same way they were also in possession of some other property of the estate. The official administrator applied in the suit No. 6,415, under section 712 of the Civil Procedure Code, for an order on the fourth and fifth petitioners to hand over to him the moneys and property in their possession amounting in all to over Rs. 500,000. The District Judge made an order to that effect, or in the alternative to give security to the extent of Rs. 600,000. In all these matters the fourth and fifth petitioners were supported by most of the heirs, including Raheem, respondent to this appeal, and were opposed by the others, including the widow. The chief dispute up to that point was as to the question of will or no will. At this stage, however, the parties appear to have desired to come to a settlement, not only as to the main question, but as to how the estate on the footing of an intestacy should be distributed among the heirs, about which they were not agreed, and as to all other matters in difference among them in connection with the estate. Accordingly they, on October 25, 1919, agreed to refer all these matters to the friendly arbitration of Mr. Slema Lebbe Naina Marikar Hadjiar. In view of the position of the parties in connection with the testamentary suit, the sub-mission to arbitration took a double form. One agreement was entered into by the fourth and fifth petitioners and the heirs, including Raheem, the respondent, who agreed with and supported them; and another by the fourth and fifth petitioners and the heirs, who were opposed to them. In both the agreements the reference was as follows: "All matters relating to the estate and effects of the said O. L. M. Ahamado Lebbe Marikar Alim, and to the distribution thereof, are hereby referred to the award and final determination of the said Slema Lebbe Naina Marikar Hadjiar,

whose decision hereto the parties agree to accept as final and conclusive." The only difference is that in the agreement in which the heirs who opposed the application for probate in the testamentary suit No. 6,175 joined the sentence began " all matters in difference between the parties hereto, whether in the said proceedings No. 6,175 or otherwise, in reference to the estate and effects," &c. On November 10, 1919, the arbitrator made an award in respect of each reference in identical terms, except, of course, as to the value of the property, which, according to the award, the parties were to get in the distribution of the estate respectively.

The award in substance was that the appeal to the Privy Council in the testamentary suit No. 6,175 should be withdrawn; that the deceased Alim should be regarded as having died intestate; and letters of administration should be taken out in terms of the order in testamentary suit No. 6,415; that in respect of their shares of the estate, the heirs (named) should each get in property or cash Rs. 80,000, Rs. 40,000, as the case may be, and so on; that the fourth and fifth petitioners and Mohamed Haniffa, the sixth petitioner, who was also one of the executors nominated in the impeached will, should pay and discharge all the debts and liabilities of the estate, and indemnify and keep indemnified the other heirs against all actions, claims, and demands; that they should also pay all the costs of administration, including the estate duty; that as certain house property in Colombo was held in trust by the deceased Alim, they should transfer the same to the persons beneficially entitled; and finally, that, subject to the payments mentioned and the shares of the other heirs as settled, the fourth, fifth, and sixth petitioners should have and take whatever remained of the estate and effects of the deceased Alim.

The award was accepted by all the parties on the face of the document, and they signed the same as final and binding on them. The petitioners, sixteen in number, including the widow, brought the award into Court in a special case and applied by petition, to which they made the remaining five heirs respondents, that the award be filed in Court under the provisions of section 696 of the Civil Procedure Code. The application was numbered as a separate action as intended, and was dealt with as such. Of the respondents, Raheem, who is also the respondent to this appeal, opposed the application, and the District Judge upheld the objection raised on his behalf and refused the application. The petitioners and the first four respondents have appealed.

The objection to the application is two-fold: (1) That the matters referred to arbitration being already the subject of litigation in the testamentary suit No. 6,415, the award is not such as can be filed under section 696 of the Code; and (2) that the Court on its ordinary civil side and apart form the testamentary suit has no jurisdiction over the matter. In my opinion this objection is

1920.

DE SAMPAYO J.

*Hadjiar v. Raheem*

well founded. The appellants rely on the language of section 696, which is as follows:—

> "When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may within six months of the making of the award apply to the Court having jurisdiction over the matter to which the award relates, that the award be filed in Court."

The subsequent sections have the effect of providing that if the application is allowed, a decree shall in terms of section 692 be entered in accordance with it, and shall be enforced in manner provided in the Code for execution of decrees. Emphasis has been laid on the words "any matter" in the above section, and it is contended that they are wide enough to include a matter already in litigation. But, I think, in construing section 696, the whole scope of the provisions in chapter LI. with regard to arbitrations should be considered. As pointed out by the Privy Council in a certain case, which will be presently referred to, these provisions come under three heads: (*a*) Where a litigation is pending, in which case the application as provided in section 676 must be made to the Court itself for an order of reference; (*b*) where any persons agree in writing to refer any difference between them to arbitration without the intervention of Court, in which case the agreement may on application under section 693 be filed in Court, and an order of reference made by the Court thereon; and (*c*) the case provided for in the above section 696, namely, where the arbitration has reached the stage of an award. It has been decided in numerous cases by the Privy Council and by the Indian Courts under the corresponding sections of the Indian Code, and it is not now disputed, that the class of cases coming under head (*b*) (*i.e.*, section 693) cannot be recognized if the matter in dispute is already the subject of litigation, and I am unable to see any distinction between that class and the class under head (*c*). This chapter of the Code is exhaustive, and as the only provision with regard to arbitration in matters involved in a pending litigation is section 676, it follows that the provisions of sections 693 and 696 apply only where no litigation is pending. The only authorities cited to the contrary are *Harivalabdas Kalliandas v. Utumchand Mandachand*[1] and *Sheo Dat v. Sheo Shankar Singh*,[2] in which it was held that where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, the agreement ousts the jurisdiction of the Court to proceed with the suit, and that an agreement under section 523 of the old Indian Code corresponding to section 693 of our Code applied as well to a case in which a reference to arbitration had been made pending the suit as to a reference made

[1] *I. L. R. 4 Bom. 1.*

[2] *(1901) I. L. R. 27 All. 53.*

before any litigation was instituted. This appear to be in direct conflict with the principle fully expounded in *Doleman & Sons v. Ossett Corporation*.[1] There Lord Justice Fletcher Moulton says that " where the Court has *seisin* of the dispute, the private tribunal (constituted by reference to an arbitrator), if it has ever come into existence, is *functus officio*, unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred. There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. In my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted." The judgments of Lord Justices Vaughan, Williams, and Farwell were to the same effect; that is to say, where a suit is pending, a reference can only be made by the Court itself in that suit, in which case what happens is that the Court stays its proceedings, and allows the arbitration to proceed under its own control. I think that the provisions of section 693 and section 696 of our Code should be construed in the light of the principle so enunciated. Even in India the decisions of the Bombay and Allahabad Courts have been disapproved of. In *Ghulam Khan v. Muhammad Hassan*[2] the Privy Council had already analysed the provisions as to arbitrations in the Indian Code under the three heads above mentioned. Head (*a*) (that is to say, section 676 of our Code, where the reference is the order of the Court in the pending case) was taken by itself, and the heads (*b*) and (*c*) (that is to say, sections 693 and 696 of our Code) were grouped together, and with regard to them, their Lordships said that proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer or the award, as the case may be—under the cognizance of the Court. It is thus clear that under section 696 the reference and award must be unconnected with any pending litigation. This has been the view taken by the Calcutta and Madras Courts. See *Venkatachala Reddi v. Rangiah Reddi*,[3] *Tincowny Dey v. Fakir Chand Dey*.[4] Even the Bombay High Court has since adopted the same view: *Harakpbai v. Jamnabai*,[5] in which it was held that the provisions in question did not apply to or contemplate a reference to arbitration by parties to a suit, which was pending outside the suit, and without the intervention of the Court. It was said, however, that these decisions were on the provision of the Indian Code corresponding to section 693 of our Code, and were *obiter* so far as section 696 was concerned. But the reasoning equally applies to the latter section, and I have no hesitation in adopting it, as I am in complete accord with it. The later case, *Vankatesh Mahadeo v.*

[1] *(1912) L. R. 3 K. B. 257.*
[2] *(1901) I. L. R. 29 Cal. 167.*
[3] *(1911) I. L. R. 36 Mad. 353.*
[4] *(1902) I. L. R. 30 Cal. 218.*
[5] *(1912) I. L. R. 37 Bom. 639.*

1920.

DE SAMPAYO J.

Hadjiar v. Raheem

*Ram Chandra Krishna*,[1] bears more directly on the point. It was there held, in the same way as in the English case above cited, that where the Court was seized of a cause, its jurisdiction could not be ousted by the private and secret act of parties, and that if they, after having invoked the authority of the Court and placed themselves under its superintendence, desired to alter the tribunal and substitute a private arbitrator, they must proceed according to the law laid down in the first sixteen clauses of the second schedule of the New Civil Procedure Code; that is to say, they must move in the same suit for an order of reference.

For these reasons I think that the application under section 696 to file the award in Court was rightly rejected. That being so, it is unnecessary to consider the further question whether the decree to be entered on the award would or would not be capable of execution. I may say, however, that in my judgment the District Court had no jurisdiction over the matter in a separate suit as distinguished from the testamentary suit, which is still pending. Testamentary jurisdiction is a special and exclusive jurisdiction with regard to the estate and effects of the deceased, and all matters connected with the administration and distribution thereof. This does not, however, imply that the award is wholly useless, and effect may not be given to it in some other way. The award appears to be binding on the parties as regards the method of distribution of the estate in the testamentary suit and other matters connected therewith, and although the award cannot be dealt with as such under the arbitration sections of the Code, it may, nevertheless, be treated under section 408 of the Code as an adjustment or compromise arrived at by the parties. On this point I may refer to *Vyankatesh Mahadeo v. Ram Chandra Krishna* (*supra*), *Venkatachala Reddi v. Rangiah Reddi* (*supra*), and to *Abir Paramanik v. Jahan Mahmud Mandal*.[2] This is all the more so, because it appears the fourth and fifth petitioners have already performed some of the terms of the award. But for this purpose the appellants' proper course is to move in the testamentary suit, to which they must therefore be referred.

In my opinion the present appeal should be dismissed, with costs.

LOOS A.J.—I entirely agree.

*Appeal dismissed.*

[1](1914) *I. L. R. 38 Bom. 687.*

[2](1907) *I. L. R. 34 Cal. 886.*