Present : Bertram C.J. and Garvin J.

1923.

GOONEWARDENE *v.* GOONEWARDENE.

141—D. C. (Inty.) Negombo, 14,894.

Arbitration—Misconduct—Arbitrator declining to arbitrate on some matter included in the reference.

Where the arbitrators in their award state that they decline to arbitrate upon some matter which was included in the reference, this is misconduct; such an award is bad.

BERTRAM C.J.—" I do not consider that sections 690 and 691 of the Civil Procedure Code are mutually exhaustive. I think the Court has a discretion whether it will set aside the award, or whether it will remit the award for consideration."

" The expression misconduct does not necessarily involve personal turpitude on the part of the arbitrator. The term does not really amount to much more than such a mishandling of the arbitration as it likely to amount to some substantial miscarriage of justice, and one instance that may be given is where the arbitrator refuses to hear evidence upon a material issue."

THE facts are set out in the judgment of the Chief Justice.

Bawa, K.C. (with him *Samarawickreme* and *F. de Zoysa*), for the plaintiff, appellant.

Pereira, K.C. (with him *Soertsz*), for the defendant, respondent.

February 21, 1923. BERTRAM C.J.—

This is an application to set aside an award on the ground of misconduct on the part of the arbitrators. I would confine myself only to one of the grounds of misconduct suggested; that is, the only one which is material, and, moreover, that ground is sufficient to dispose of the case. It is recognized that the imputation of misconduct to an arbitrator in arbitration proceedings does not in the least involve anything in the nature of moral turpitude. That has been laid down in the case of *Williams v. Wallis*, [1] were Atkin L.J., then Atkin J., says: " That expression does not necessarily involved personal turpitude on the part of the arbitrator. The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice, and one instance that may be given is where the arbitrator refuses to hear evidence upon a material issue." It has been expressly held in the case of *Bowes v. Fernie* [2] that,

[1] *(1914) 2 K. B. D. 478.*

[2] *(1838) 4 My. and Cr. 59.*

1923.

BERTRAM C.J.

Goonewardene v. Goonewardene

where the arbitrators in their award state that they decline to arbitrate upon some matter which was included in the reference, this is misconduct, and that such award is bad. This is the law on the matter.

The facts are as follows:—The action was between two brothers, and the plaintiff claimed, among other things, an account from his brother of the income of certain mills, part of the property of their father. The plaint was filed, but before answer was filed the whole matter was referred to arbitration and it was referred in the very widest terms. I will refer to those terms presently. Upon the arbitration proceedings beginning, the arbitrators, in view of the absence of an answer, called upon the defendant to give them a statement of his case. He accordingly prepared a full statement in which he contested the right of his brother to call for an account of the mills, on the ground that, though the legal title to those mills was in his brother, equitably they belonged to himself, and that the brother in fact held his legal ownership in trust for the defendant. The basis of that claim was that, in consideration of the defendant quitting Government service at Batticaloa and returning home, his father promised to convey the land on which these mills are situated to him, and to work the mills. This promise is contained in a letter, and the intention of the father was to carry out the promise, but he died before this could be done. The statement goes on to allege that questions arising about the distribution of the family property, which under an old will of the father had been bequeathed to the mother alone, at the instance of his brother the defendant refrained from putting forward any claim he might make, based upon his father's promise, and the plaintiff suggested that the simplest course would be to ask the mother to transfer all the properties to both the sons jointly, and the plaintiff promised that he would make no claim to the mills and the house attached thereto, but would reconvey the same to the defendant. That is clearly an equitable claim which required consideration.

But when the arbitrators came to frame issues, and the proctor for the defendant put forward a suggested issue to the effect that the defendant was entitled to a declaration that the mills and the residing house belonged to him entirely as from the date of his father's letter, counsel for the plaintiff objected to that issue, on the ground that the claim so set up was in the nature of a claim in reconvention, and that it could not be considered in an arbitration based upon the plaint. Unfortunately, the arbitrators were misled by that ingenious contention. They upheld that contention, and declared that the issue suggested by the defendant's proctor did not come within the scope of the reference in the case; in other words they declined to adjudicate upon an important point which was included in the reference. Was that point included in that

reference ? Of that, I think, there can be no doubt. It is not necessary to consider any technical questions with regard to plaint, answer, and reconvention. The terms of the reference could scarcely have been wider. That embraced matters in difference between the parties in the action, "including all dealings and transactions between all parties." This point was in fact the defendant's substantial defence.

I do not see how it can be contended that it was not one of the questions at issue between the parties. An attempt was made to prove that the defendant had never put forward this contention until the present case. But I can scarcely believe that the defendant would have sat down to write his case for the purpose of the arbitration and put this point in the very forefront of his statement, unless it had been a matter really at issue between the parties. These then are the facts in regard to the alleged misconduct. Much as I regret that such careful work as has been done by the arbitrators in the case should be wasted, it seems to me impossible not to uphold the contention of the defendant.

This judgment might have stopped there. But certain points were raised upon subsequent proceedings. The history of the subsequent proceedings is as follows:—

The case went on, and, notwithstanding the rejection of the issue referred to, the plaintiff in his evidence was fully cross-examined with regard to the arrangement alleged in the defendant's statement. His examination extends to several pages, and nine of these pages are occupied with questions relating to this arrangement. At a certain stage of the proceedings, however, while the plaintiff was being cross-examined about certain matters of account, the arbitrators made an order that the defendant on his side should furnish a statement of the accounts of the mills, and that the plaintiff on his side should furnish a statement of amounts received. This order was certainly made without any idea of prejudging the question whether the defendant ought to be called upon for an account. But the defendant took upon himself to treat it as such, and the proctor withdrew from the arbitration.

I have great doubts myself as to whether that award was sincere, or whether it was not rather of a diplomatic nature. The arbitrators elected to proceed with the reference, and, having fully considered the question, gave a judgment in which, in spite of their disallowance of the issue put forward by the defendant, they thoroughly examined such evidence as they had of the alleged arrangement, and found against the defendant. On the basis of this cross-examination to which I have referred, and on the basis of this finding of the arbitrators, Mr. Samarawickreme asks us to rule that, even supposing there was any legal misconduct in the exclusion of the issue, that misconduct had been cured.

1923.

BERTRAM C.J.

Goonewardene v. Goonewardene

I cannot adopt this proposition. It is quite true that evidence has been given by the plaintiff of that arrangement and that he has been cross-examined; and it is suggested that, if he had not diplomatically withdrawn from the case, the defendant would have been allowed, when called upon for his evidence, to have put forward his whole case with regard to that arrangement; that he must take responsibility therefore for all the facts not being before the arbitrators, and that the arbitrators must be considered as having given a definite judgment on the issue which they had rejected.

As I have said, I am not able to adopt this proposition. As the case stands, the finding on this issue is of an *ex parte nature*. It is based solely upon the examination and cross-examination of the plaintiff. It is said that the plaintiff ought to have gone on to the end, and that, if he had gone on to the end, the whole case would have been presented. I do not think that this accurately states the facts. Why was the plaintiff cross-examined with regard to this arrangement? Why did the arbitrators not rule out any question sought to be asked in cross-examination on this issue? The explanation appears to be this: The plaintiff claimed an account, not only on the ground of co-ownership which would have been quite sufficient, but also on the ground of a special agreement by which the defendant was made the agent of the two brothers.

Mr. Samarawickreme says, that though this evidence was irrelevant to the issue of co-ownership, it was relevant to the other question of agency, and that in this way both sides should have presented their case with regard to the defendant's claim to an equitable right based upon a trust. I do not think that this is sound. It would not have helped the defendant to have succeeded on this issue of agency. There was another issue in the case, issue No. 5, which was: "Did the mills and the residing house belong to the defendant solely"? The arbitrators had deliberately shut out the defendant's issue in which he asked them to determine whether he was entitled to a declaration that the mills and the residing house belonged to him entirely from December, 1918. He was precluded, therefore, by that decision from setting up his equitable rights, and the issue No. 5 would necessarily have gone against him. I do not think that, the fact that the arbitrators would probably have listened to him if he had stated his case with regard to the supposed trust in order to determine whether or not there was an agreement between the brothers which made the defendant the manager of the property, in any way cures the misconduct which the arbitrators have unfortunately committed. The truth is that the defendant might well have retired from the arbitration at the time when this issue was rejected. He would have been well advised to do so. The fact that some evidence of

a one-sided nature was given, between the time that he might have withdrawn and the time that he actually withdrew, does not, I think, affect the question.

Mr. Samarawickreme has pressed upon us one other consideration, namely, that the trust alleged in the defendant's statement was on the face of it a trust to which effect could not be given in law, even though it was proved. He contended that the principle that the law will not allow Ordinance No. 7 of 1840 to be used as a protection against fraud in cases where a person obtains property in his own name, subject to a trust and claim to hold it free from that trust, applies only to cases in which a trust results from the circumstances, and does not apply to an express trust. I have nothing to add to what I have said on this question in the case of *Nanayakkara v. Andris* [1] and also in *Ranasinghe v. Fernando.*[2]

Mr. Samarawickreme made one further point. He contended that, with regard to this particular form of misconduct, our only power was to remit the matter to the arbitrators under section 690 of the Civil Procedure Code. I do not consider that sections 690 and 691 of the Civil Procedure Code are mutually exhaustive. I think the Court has a discretion whether it will set aside the award, or whether it will remit the award for re-consideration. In the present case, the arbitrators having made up their minds on a partial statement of facts, I do not think they would be free to consider the whole matter if the defendant placed his whole case before them.

In deciding as I do, I do not wish to say that I have formed the opinion that a trust has been established in this case. It is quite possible that had the whole matter been fully gone into, the claim that a trust existed would have been rejected. There is obviously much to be said on both sides. With regard to the present appeal, it must, in my opinion, be dismissed, with costs.

GARVIN J.—I agree.

Appeal dismissed.

[1] *(1921) 23 N. L. R. 193.*

[2] *(1922) 24 N. L. R. 170.*