

BOMBAY HIGH COURT

Dinkarraai Lakshmiarasad

Vs.

Yeshwantraai Hariprasad

(Rangnekar, J.)

27.03.1929

JUDGMENT

Rangnekar, J.

1. The applicant Dinkarraai Laxmiarasad prays that the agreement in writing dated 2nd August 1927 between him and the respondent Yeshwantraai referring matters in dispute between them to arbitration be filed in Court, and that an order of reference to the arbitrators appointed in accordance with the provisions of the said agreement or to such other arbitrator or arbitrators as the Court may deem fit be made, The application is made under Para. 17, Schedule 2, Civil Procedure Code

2. The material facts are that the applicant and the respondent carried on business in Bombay in the name of Y.H. Desai & Co., and were secretaries, treasurers and agents of the Barsi Spinning and Weaving Co. The applicant alleges that in December 1922, taking advantage of his absence from Bombay the respondent with the fraudulent intention of depriving the applicant of any benefit in the agency agreement and to secure the same for himself wrote to the company that Y.H. Desai & Co. resigned their position as secretaries and treasurers and agents from 31st December 1922. He further alleges that the respondent who was the ex-officio director of the company got a resolution passed in an extraordinary general meeting whereby the agency agreement was determined and the firm of Desai Sons & Co. was appointed as secretaries, treasurers and agents in place of Y.H. Desai & Co. According to the applicant this firm nominally consisted of the respondent's sons and two of his nominees, but really the respondent was the sole owner of the firm.

3. In August 1923, the applicant filed a suit being Suit 3579 of 1923 in this Court against the respondent for winding up of the partnership business of Y.H. Desai & Co. and for other consequential reliefs.

4. The partnership agreement dated 28th September 1917, contained a clause for arbitration in case of differences or disputes between the applicant and the respondent regarding the affairs of the partnership. Belying on the said clause the respondent took out a chamber summons under Section 19, Arbitration Act, for stay of the suit. The summons was heard by Kemp, J. who, on 19th September 1923, made an order staying the suit. It appears that the parties did nothing after

this and nothing happened until 2nd August 1927, when the parties entered into another agreement, whereby all matters in dispute and differences in Suit 3579 of 1923 including the costs thereof were referred to the arbitration of two arbitrators.

5. On 5th August 1927, the suit came on before Davar, J. The parties appeared, and it was stated to the learned Judge that all matters in dispute and differences in the suit were referred to arbitration. Thereupon, the learned Judge dismissed the suit. There is some dispute as to what actually took place before Davar, J. but in view of the contentions of the parties on this petition it is unnecessary to refer to the same.

6. The agreement of 2nd August 1927, provided that before the arbitrators entered upon the reference they should by writing under their hand appoint an umpire. The arbitrators held a meeting on 22nd October 1927, but as they could not agree as to the appointment of the umpire, nothing was done. The arbitrators extended the time for making the award from time to time with the consent of the parties. The last extension expired on 1st November 1928. The respondent's attorneys thereafter refused to consent to any further extension. The applicant says that he was always ready and willing for the matters in dispute being decided by arbitration under the agreement of 2nd August 1927, but as the arbitrators could not agree as to the umpire, the reference could not be proceeded with.

7. The position, therefore, is that the partnership agreement of September 1917 contains a clause for arbitration. The applicant filed his suit for dissolution and winding up of the partnership which was stayed under Section 19, Arbitration Act, and thereafter the parties entered into an agreement of reference on 2nd August 1927. The suit filed by the applicant was then pending and was dismissed on 5th August 1927. The only question therefore which arises on these facts is whether the agreement of reference pending the suit between the parties made without the intervention of the Court can be allowed to be filed in accordance with the provisions of para. 17, Schedule 2. Civil Procedure Code It is unnecessary in my opinion to examine the merits of the case or causes which led to the delay in the arbitration proceedings or to attempt to apportion the blame between the parties to the same.

8. The Code of Civil Procedure deals with arbitration under three heads: Firstly, where the parties to litigation desire to refer to arbitration any matter in differences between them in the suit. Secondly, where the parties without having recourse to litigation agree to refer their difference to arbitration and it is desired that the agreement of reference should have the sanction of the Court thirdly, where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court, and the assistance of the Court is only sought in order to give effect to the award. In cases falling under head A.I.R. 1915 P.C. 76 all proceedings from first to last are under the supervision of the Court. In cases falling under heads (2) and (3), the 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 cognizance of the Court. Once the agreement to refer or the award as the case may be, is filed, all further proceedings are under the supervision of the Court and the provisions relating to arbitration under head 1 are to be observed so far as applicable.

9. This classification was made and emphasized by their Lordships of the Privy Council

in the leading case of *Ghulam Jilani v. Muhammad Hassan*¹ This was a decision under the old Code of Civil Procedure of 1882. Prior to this decision there was considerable conflict in the decisions of the Indian High Courts as to the true construction and effect of the provisions of the Code relating to arbitration. To set the conflict at rest, their Lordships carefully examined the provisions of the Code in Ghulam Jilani's case. I cannot do better than quote what Lord Macnaghten said on this point (p. 56 of 29 I.A.):

The question appears to their Lordships to turn upon the true construction and effect of the provisions of the Code of Civil Procedure relating to arbitration. The decisions of the Indian Courts on those provisions are so conflicting that it may be useful to state generally the conclusions at which their Lordships have arrived on some of the disputed points brought to their attention in the course of the argument.

10. It is clear therefore to me, with all deference to the eminent Judges who have or appear to have taken the contrary view, that their Lordships laid down what in their opinion was the law as to arbitration contained in the Civil Procedure Code, and that is the law which I think ought to be followed. Unfortunately, even after the pronouncement of the Privy Council, the Courts in India have attempted to get round the same by exercise of legal and judicial ingenuity. I venture to think that most of the difficulties with regard to the law of arbitration under Schedule 2, Civil Procedure Code would disappear if only the clear and unambiguous pronouncement of Lord Macnaghten in Ghulam Jilani's case A.I.R. 1915 P.C. 76 and the subsequent legislation in the Civil Procedure Code is adhered to, and the plain meaning thereof given effect to.

11. Lord Macnaghten's classification as to the three heads of arbitration and the true construction of the provisions of the Code in Schedule 2 has been given legislative effect by the Code of 1908. Thus now we have in the present Code three headings given in relation to the three kinds of arbitration referred to by Lord Macnaghten. The first heading is "Arbitration in suits" which appears over para. 1, Schedule 2. The second heading which occurs above para. 17, is "Order of reference on agreements to refer." The third heading appears over para. 20 and is "Arbitration without the intervention of the Court."

12. Section 89, Civil Procedure Code, is a new provision and runs as follows:

Save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Schedule 2.

13. This is a new section. There was no such section in the Code of 1882. Here again, in my opinion, it would be better to construe the section as it stands rather than speculate as to the intention of the legislature as to its true scope and intention and necessity. The words "by any other law for the time being in force" must mean any law as to arbitration other than the Arbitration Act. The plain meaning of the section therefore is that if a case is governed by the Arbitration Act or by any other law relating to arbitration, then

¹[1901] 29 Cal. 167

Schedule 2 will not apply; otherwise it does. If Schedule 2 applies then I think the classification made by Lord Macnaghten as to the three heads of arbitration would apply, and the cases falling within the Code must be governed by the provisions contained in Schedule 2. The parties can go to arbitration in a proper case under the Arbitration Act if it applies or under any other law of arbitration applicable. It is well known that there are statutes which deal with arbitration other than the Arbitration Act or the Civil Procedure Code such as for instance the Companies Act, the Dekkhan Agriculturists' Relief Act, or the Co-operative Societies Act, etc. If then the case is one to which the Civil Procedure Code applies then it is clear that if the parties want to go to arbitration they must follow the provisions of Schedule 2. If they do not, they take the consequences. In this sense the Code is exhaustive notwithstanding the use of the word "may" in para. 17 or 20.

14. After all what is arbitration? The rule of law is that any contract by which the parties agree to oust the jurisdiction of the ordinary Courts is void. This is the principle of Section 28, Contract Act. But to this principle there is an exception and it is that parties may settle their disputes by arbitration instead of litigating them in the ordinary tribunals. But after all this is an exception. As pointed out in *Dolemau & Sons v. Ossett Corporation*² by English Law the Courts are the recognised machinery for settling disputes between the parties to contracts. A complainant by taking out a writ can cause his opponent to be ordered to appear before the Court, and the parties must accept its decision. That arbitration as a method of settling the differences between the parties to contracts is only a recognized exception is established by the fact that even in the case of a contract containing an arbitration clause the jurisdiction of the Court is not ousted. On this point, I may perhaps refer to the observations of Fletcher Moulton, L.J., in the case above referred to. The learned Lord Justice says (p. 267):

Very early in the history of arbitration there arose the question whether a party to a contract containing an arbitration clause was precluded thereby from appealing to a Court of law to enforce his rights under the contract. The answer which the Courts gave to this question admits of no doubt. They decided that no provision in a contract which ousted the jurisdiction of the Courts of law could be valid, but that a clause agreeing to refer disputes to arbitration was valid because it did not oust the jurisdiction of the Courts. In other words, they decided that the jurisdiction of the Courts to compel a defendant to appear before them, and their jurisdiction to pronounce finally and conclusively on the rights of the parties after due hearing, were left untouched by such a clause, or by the appointment of a specific arbitrator to decide the matter, or even by proceedings having been commenced under such a submission. Neither a general agreement to submit disputes to arbitration, nor the submission of the dispute in question to a particular arbitrator, nor even the pendency of an arbitration thereon, could be pleaded in answer to a claim in an action.

15. The authorities show that if a person files an action in breach of an agreement to refer, the other party has a remedy and that is to apply for a stay of the action. But the Court is not bound to stay the action. The Court has a discretion and may well refuse to stay the action. If the Court in the exercise of its discretion stays the action the plaintiff has no remedy left but to proceed with the arbitration. If the Court refuses to stay the action, the

Court has seisin of the disputes and it is by its decision and its decision alone that the rights of the parties are settled. The observations of Fletcher Moulton L.J., are in point. The learned Judge observes (p. 268):

The present position, therefore, of agreements to refer to private tribunals may be shortly expressed thus. The law will not enforce the specific performance of such agreements, but, if duly appealed to, it has the power in its discretion to refuse to a party the alternative of having the dispute settled by a Court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action, or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows, therefore, that in the latter case the private tribunal, if it has over 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.

To my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. Their jurisdiction is to hear and decide the matters of the action, and for a private tribunal to take that decision out of their hands, and decide the questions itself, is a clear ouster of jurisdiction. Therefore to hold that the private tribunal is still effective after the dispute has come before the Court would be to say that, in all cases in which Section 4, Arbitration Act, 1889 applies, the defendant may still force on an arbitration and, by obtaining an award from the arbitrators, oust the jurisdiction of the Courts to decide the question they have in hand. In each case where the Court has decided that it will retain in its own hands the decision of the case, there would thus be a race between it and a private tribunal which should be the first to give a decision in the matter.

16. As pointed out by the learned commentators of the Contract Act at p. 222 there are three remedies open to a party to a reference for breach of the agreement; he may sue for damages for the breach; or he may have the agreement specifically performed in the manner provided by the Code of Civil Procedure; or he may plead the agreement in bar of any suit that may be brought against him in violation of the terms of the agreement as provided by the Specific Relief Act, Section 21. But the provisions of the Code and of the Specific Relief Act have no operation wherever the Arbitration Act applies. Both these remedies, however, are still available, but in a somewhat different form, under the provisions of the Arbitration Act.

17. Further remedies are pointed out by Sir Norman Macleod, C.J., in *Manilal Motilal v. Gokaldas Rowji*³ According to the learned Chief Justice if an award is made and both the parties accept it, they can apply for a consent decree in terms thereof, and there will be no need to apply for an order regarding the terms of adjustment. Secondly, if the plaintiff disputes the award for any reason and wishes to proceed with the suit, the defendant may plead the award and have the case set down for hearing on the issue, whether the award is binding as an adjustment. If the defendant disputes the award the plaintiff may have the case set down for trial on the issue

whether the adjustment could be recorded, Thirdly,

³ A.I.R. 1921 Bom. 810

either party can file a suit to enforce the award and apply for stay of the original suit. According to Fawcett, J., in the same case, the defendant can, under Order 8, Rules 8 and 9 with the leave of the Court, plead the award in bar of the action on the original demand. I am not concerned with the question whether the remedies pointed out in Manilal's case (3) are right or wrong. So long as the authority of the case is followed--it has been followed in a recent Full Bench case, *Chanbasappa v. Basalingayya*⁴ there are these remedies open to a party where there has been an agreement of reference pending a suit and an award has been made.

18. That being the position, by what law are the rights of the parties in this case governed? As stated above, the suit was pending on 2nd August 1927, when the parties entered into an agreement whereby all matters and differences in the suit were referred to arbitration. If, therefore, the parties wanted to oust the jurisdiction of the Court they could only have proceeded about it in the manner laid down by Schedule 2, Civil Procedure Code

19. I cannot conceive of any hardship by a rigorous insistence on the provisions of Schedule 2. Every person is presumed to know the law, and if with their eyes open the parties seem to have adopted a course contrary to law, it is their misfortune and they must take the consequences.

20. If the suit is pending, Civil Procedure Code will apply. It is then within the discretion of the parties to apply for an order of reference under para. 1, Schedule 2. If they do, then the provisions of paras. 1 to 16 would apply. Clearly, the Arbitration Act does not apply. That Act does not contemplate a reference to arbitration out of Court by the parties to a suit. I see no hardship or any insuperable difficulty in insisting on this rule. Even if one of the parties to an agreement of reference made in a pending suit backs out of it what happens. The suit will go on. The Court has seisin of it. Where is the hardship? In any case, there is always the remedy for damages. Under the proviso to Section 21, Specific Relief Act, where a person who has made a contract of reference, and has refused to perform it, and sues in respect of any subject which he has contracted to refer, the existence of such contract will bar the suit. As pointed out by the learned commentators of Pollock and Mulla's Contract Act, the wording of this section is wide enough to cover a contract to refer any matter which can legally be referred to arbitration. One of such matters is a suit proceeding in Court. It was held in *Sheo Dat v. Sheo Sharkar Singh*⁵ that where the parties to a suit refer the matters in differences between them in such suit to arbitration, the further hearing of the suit will be barred under this section.

21. It is true that in *Chanbasappa v. Basalingayya*⁶ it was held that where in a suit parties have referred their differences to arbitration without the order of the Court and an award is made, a decree in terms of the award can be passed by the Court under Order 23, Rule 3, Civil Procedure Code but not otherwise. Here the position is quite different. Nothing happened in this case beyond the agreement of reference, and the reference was not proceeded with. Although the Full Bench case of *Chanbasappa v. Basalingayya*⁷ decides that where an award is made under an agreement of reference entered into by the parties to a pending suit, such an award can be regarded as an adjustment of the suit and a decree passed thereon, the Bombay authorities

⁴A.I.R. 1927 Bom. 565

⁶A.I.R. 1927 Bom. 565

⁵[1904] 27 All. 53

⁷A.I.R. 1927 Bom. 565

including Chanbasappa's case (4) show clearly that a mere agreement of reference cannot be recognized. No case has gone to the extent of holding that a mere agreement of reference can be

recognized as an adjustment of a suit.

22. Then what happened in this case? Whilst the suit was pending the parties entered into an agreement of reference. In view of the conclusion to which I have come, I am not concerned with the question whether the agreement of reference was a fresh agreement as contended by Mr. Mulla or it was the same old agreement as argued by Mr. Taraporewalla. The fact remains that it is an agreement of reference to arbitration, and the only question with which I am concerned is whether it can be filed under the provisions of para. 17, Schedule 2.

23. It is argued by Mr. Mulla that the suit had terminated and therefore the agreement fell under para. 17 and can be filed thereunder. The heading under which para. 17 occurs is "Order of reference on agreements to refer." The wording of this paragraph makes it quite clear that the agreement which is contemplated is one entered into outside the Court before any suit was filed. Thus Sub-Clause (1) says:

Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

24. The important words are "apply to any Court having jurisdiction in the matter." How then can this clause apply to the case where a suit is already pending in a Court of proper jurisdiction. These words by implication exclude the idea of a suit already pending. Then again Sub-Clause (2) requires that an application must be in writing and has to be numbered and registered as a suit between the applicant as plaintiff and his opponent as defendant. Then comes para. 18 under which a party to any agreement of reference to arbitration can apply to the Court to stay a suit filed by his opponent in breach of the agreement of reference to arbitration. This, in my opinion, clearly shows that the agreement contemplated under para. 17 must be one entered into prior to the institution of a suit. If Mr. Mulla's argument is good the position would be the same with regard to a suit which is pending. It is difficult to see how the legality or the enforceability of an agreement of reference depends on the mere accident of the suit having terminated. If in a suit parties enter into an agreement of reference, the suit does not terminate, say, for five years after the agreement, what then? Is the agreement of reference suspended until the suit terminates and can only be enforced after it has terminated? Are the parties to wait all the five years, and would such an agreement of reference be enforced after the period of limitation is over? Then again, if there is an agreement of reference in a pending suit, the agreement is registered as a suit under para. 17, can there be two suits with regard to the same subject matter? Can an application be made for stay of the first suit under para. 18? The answer to the questions, in my opinion, is clearly in the negative.

25. In my opinion, therefore, an agreement to refer to arbitration matters in differences between the parties in a pending suit without the order of the Court under paras. 1 to 3, Schedule 2 is illegal and cannot be filed under para. 17, Schedule 2. This view is not without support. In *Venhataahala v. Rangiah*⁸ it was held that para. 17, Schedule 2, Civil Procedure Code applies only to cases where parties without having recourse to litigation agree to refer their differences to arbitration and the agreement to refer to arbitration in a pending

litigation made without the intervention of the Court cannot be filed under para. 17, Schedule 2. In *Amar Chand Chamaria v. Bansicari Lall*⁹ it was held that where in a pending suit the parties go to private arbitration without an order of the Court and an award is made, the award cannot be enforced either under Order 23, Rule 3, or Schedule 2, Civil Procedure Code or the Arbitration Act. It was further held that if a submission to arbitration of matters in differences in a pending suit is to take place, there is no provision for it other than the provisions of Schedule 2, to the Civil Procedure Code. In *Hari Par shad v. Soogni Devi*¹⁰ the Lahore High Court has taken the same view. Even the other High Courts, which have gone the length of holding that an award made under an agreement of reference in a pending suit without the order of the Court can be regarded as an adjustment of the suit under Order 23, Rule 3, have stopped short of holding that a mere agreement of reference where no award has been made can be treated as an adjustment under Order 23, Rule 3, Civil Procedure Code

26. In the recent Pull Bench decision in *Chanbasappa v. Basalingayya*¹¹ the question referred to the Full Bench was where in a suit parties have referred their differences to arbitration without an order of the Court and award is made can a decree in terms of the award be passed by the Court under Order 23, Rule 3, or otherwise? The Pull Bench answered the first part of the question in the affirmative and the second part in the negative. Dealing with this question the learned Chief Justice held that the better view was that para 20, Schedule 2 Civil Procedure Code, did not apply to arbitration in a pending suit. Crump, J., observed (p. 949 of 51 Bom.):

In a pending suit the parties may apply for a reference under para 1. It is within their discretion to do so or not, a point which is not without significance in considering how far the schedule is intended to be exhaustive. If they do, their proceedings are within the schedule. If not, they are outside it. The other class of arbitration is where there is no pending suit. Here they may make the reference an order of the Court under para 17, or they may proceed to an award and then apply under para 20. The words "any Court having jurisdiction" in para 20 appear to me to support this view. Those words by implication exclude the idea of a suit already pending between the parties, nor is it easy to believe that the legislature intended that in such a case a Court other than the Court in which a suit was already pending should become seized of the matter. That would be contrary to the general principle to be found in Section 10 of the Code, and might lead to many practical inconveniences. The weight of judicial opinion certainly favours the construction, which I suggest and I am content to follow the second decision of Macleod, C.J., in *Manilal Motilal v. Gokaldas Rowji*¹², which to this extent has the concurrence of Rankin, J., (at p. 611) in *Amar Chand Chamaria v. Banwari Lall Balcihit*¹³

27. Blackwell, J., was also of a similar opinion.

28. The Full Bench followed an earlier decision of our High Court to which I have

⁸ [1911] 36 Mad. 353

¹⁰ A.I.R. 1921 Lah 232

¹² A.I.R. 1921 Bom. 810

⁹ A.I.R. 1922 Cal.404

¹¹ A.I.R. 1927 Bom. 565

¹³ A.I.R. 1922 Cal. 404

already referred, namely, Manilal's case (3). It was held in that case that where parties to a suit refer their disputes to arbitration without the intervention of the Court and an award is made,

an application to pass a decree in terms of the award is an application to record a compromise within the meaning of this rule. With regard to this decision the learned commentator of Mulla's Code of Civil Procedure observes:

This decision dissents from the Calcutta decision according to which in such a case the Court should not take any notice of the award and the suit may be proceeded with on the application of either party. It is submitted, with respect, that the view taken by the Calcutta High Court is correct an opinion in which with due respect I concur. In my opinion it is far more consistent and logical to hold that Section 89, makes it obligatory that all references to arbitration whether by an order in suit or otherwise and all proceedings thereunder are governed by the provisions contained in the second schedule except where the Arbitration Act or any other law of acbitration applies and that notwithstanding the use of the word "may" in the second schedule. After all, parties are not bound to go to arbitration. But if they want to do so and to that extent seek a decision of a private tribunal then they must proceed in the manner indicated in Section 89, Civil Procedure Code If they do not, the arbitration is bad. What is the hardship?

29. A case decided by the Patna High Court has been referred to and it is *Kokil Singh v. Ramasray Prasad*¹⁴ In that case, the parties came to an agreement to arbitration in a pending suit and applied the same day to the Court to withdraw the suit. The suit was accordingly dismissed and an award was made and filed under paras. 20 and 21. This case is inapplicable to the facts of the present case. But if that decision means that an agreement of reference to arbitration in a pending suit by itself is a valid agreement and can be filed under para 17 then with all respect to the learned Judges I am unable to agree with it. The judgment, however, proceeds upon the ground that the suit was at an end but the agreement to rifer to arbitration stood, and it was open to the parties to get their suit dismissed by consent. That being done the whole matter was at large. With regard to this decision I may say that it can only be supported on the ground pointed out by the learned commentator of Mulla's Code of Civil Procedure. Says he for the agreement was virtually conditional and the Court surrendered its jurisdiction by allowing the suit to be withdrawn.

30. This caso is one more illustration of the state of doubt and uncertainty in which the law of arbitration undoubtedly lies. The framers of the Code in dealing with Section 83 observed that the provisions of the Code of 1882 relating to arbitration had been transferred with certain modifications to a separate schedule (Schedule 2) "in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act." Unfortunately that hope has not yet been realized. I think it is high time that those responsible for legislation in this country should seriously consider the advisability of taking early steps to revise the law of arbitration. In my opinion the summons must fail and must be discharged with costs. Counsel certified.

¹⁴ A.I.R 1942 Pat. 48