

[IN REVISION.]

1920.

Present : Loos A.J.KONAR *v.* GOVINDAN.*C. R. Colombo, 71,836.*

Arbitrator refusing to act at the outset—Motion by Court to fix case for trial—Appointment of another person as arbitrator by Court, Civil Procedure Code, ss. 676 and 679.

By agreement of parties the matter in dispute in this case was referred to the arbitration of A. A refused to act as arbitrator at the outset, and the parties asked that the case be fixed for trial. The Commissioner without the consent of the parties referred the matter to the arbitration of B.

Held, that the order was irregular. Section 679 of the Civil Procedure Code applies only in cases where, in fact, an arbitrator has assumed the duties of arbitrator and has subsequently died or refused to act or become incapable of acting, and not to a case where the arbitrator, nominated, has at the outset refused to act.

THE facts appear from the judgment.

Nagalingam, in support.—In appointing a new arbitrator against the wishes of the defendant, the learned Commissioner purports to act under section 679, Civil Procedure Code. This section only applies where the arbitrator has once begun to act and then refuses, and not to a case where the arbitrator refuses to act from the very outset. See *Pugardin Ravutan v. Modinsa Ravutan*¹ and *Bepin Behari Chowdbhoy v. Annoda Prosad Mullick*.² The same principle is to be found in the English law. See *Crawshaw v. Collins*.³

March 16, 1920. Loos A.J.—

In this action the parties agreed to refer the matter in dispute to the arbitration of Mr. Advocate Retnam and, when a reference was accordingly made to him, Mr. Retnam appears to have been unwilling to act as arbitrator, having, it is stated, appeared against one of the parties to the action. The parties then informed the Court that Mr. Retnam refused to act, and apparently asked that the case be fixed for trial. The learned Commissioner has refused to fix the case for trial, as the parties had already agreed to refer

¹ I. L. R. 6 Mad. 414.

² I. L. R. 18 Cal. 324.

³ 3 Swanst. 90.

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the matter to arbitration, and, purporting to act under section 679 of the Civil Procedure Code, he appointed Mr. J. Obeysekera, Advocate, arbitrator, apparently without any reference to or the consent of, the parties.

The defendant has brought the order up in revision, and asks that the order be set aside, and the case remitted to trial by the Court. Section 679 of the Civil Procedure Code would appear to apply only in cases where, in fact, an arbitrator has assumed the duties of arbitrator and has subsequently died or refused to act or becomes incapable of acting, and not to a case where the arbitrator, nominated, has at the outset refused to act. So that the learned Commissioner was not justified in making the appointment under section 679 of the Code in this case. Section 676 of the Code provides, *inter alia*, that the Court shall nominate an arbitrator, if the parties cannot agree with regard to the person to be nominated, or if the person nominated refuses to accept the arbitration, but only in the event of the parties desiring the Court to make the nomination. In this case, so far from the parties desiring the Court to make the nomination, the parties have declined to accept the nomination made by the Court and have asked that the case be fixed for trial. I think the order of the Commissioner must be set aside, and the case remitted for trial in due course by the Court.

Set aside.