

ent: De Sampayo J. and Loos A.J.

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FERNANDO *v.* DE MEL *et al.*

143—D. C. Colombo, 47,785.

*Surveyor appointed arbitrator in action for definition of boundaries—
Payment of half of survey fee by one party before commencing
work—Misconduct.*

An action for definition of boundaries was referred to a surveyor for arbitration. When referring the matter to the arbitrator, the Court ordered that the costs of arbitration should, in the first instance, be paid by both parties in equal shares. Before he commenced his work, the arbitrator wrote to the proctors on both sides to pay Rs. 75 for survey fees. The plaintiff paid Rs. 37.50. The defendants promised to pay, but did not do so.

Held, that in the circumstances the receiving of the fee from the plaintiff only did not amount to misconduct.

*Fernando v. Migel Appu*¹ considered.

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *Cooray*), for plaintiff, appellant.

Bawa, K.C., for defendants, respondents.

March 20, 1919. DE SAMPAYO J.—

The plaintiff and the first defendant (the wife of the second defendant) are the respective owners of two houses which adjoin each other. There being some dispute between the parties as to the line of division, the plaintiff brought this action for the definition of boundaries. In the course of the trial the parties agreed that the case should be referred to the arbitration of Mr. S. Sabharatnam, who is a licensed surveyor, and the Court issued a commission to Mr. Sabharatnam accordingly.

The arbitrator entered upon the arbitration and made his award, which happened to be in favour of the plaintiff. On notice being issued of the filing of the award, the defendants applied, by petition, that the award be set aside on the ground that the arbitrator had visited and surveyed the lands on July 27, 1918, without notice to the defendants and in their absence, but in the presence of the plaintiff and his witnesses; that the plaintiff had misled the arbitrator by giving him wrong data, and by pointing out wrong boundaries, and that they accordingly refused to take part in the subsequent arbitration proceedings on August 17, 1918.

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The Court inquired into these allegations, and in the course of the proceedings it transpired that the arbitrator had asked for and obtained from the plaintiff a moiety of the expenses of the survey before he commenced the work. The arbitrator admitted that he asked both the parties to pay Rs. 75 for survey fees and not for fee as arbitrator, that the plaintiff had paid his share of Rs. 37.50, and that the defendants promised to pay their share when some money was drawn from the Savings Bank. The District Judge accepted the surveyor's statement, and was satisfied that the arbitrator was in no way influenced by the receipt of part of the survey fee from the plaintiff, but he said that he felt himself bound, though reluctantly, to follow the decision in *Fernando v. Migel Appu*,¹ and to hold that the receipt of the money from the plaintiff constituted "legal misconduct." On this ground, and not on the grounds put forward by the defendants in their petition, the District Judge set aside the award.

Before dealing with the law applicable to the matter, I should like to say that it is quite clear that the arbitrator acted in perfect good faith, and his award was not tainted by any bias in the plaintiff's favour. His survey and the proceedings were very elaborate, and showed very careful work on his part. The Court when referring the matter to the arbitrator had ordered that the costs of arbitration should, in the first instance, be paid by both parties in equal shares. It is difficult to say what it means by "in the first instance" as regards time of payment. The arbitrator, however, appears to have considered he was entitled to ask for payment at least of the expenses of the survey before making his award, and so he wrote a letter to the proctors of both parties in the following terms:—

"I have received the commission in case No. 47,785, D. C. Colombo. Please send me a cheque for Rs. 75 to enable me to survey the land for the purpose of this commission. This includes survey fees and for disbursements, but does not include arbitration fees, which will be Rs. 52.50."

It is on this letter that the plaintiff paid half the amount mentioned, viz., Rs. 37.50. The defendants promised to pay, but did not. It is impossible to hold, whatever may be meant by "legal misconduct," that there was any element of bias on the arbitrator's part.

In *Fernando v. Migel Appu*¹ the facts were that the arbitrator received his full fee as arbitrator from one party before he made the award, and that the other party refused to be responsible for his fee, and Lascelles C.J., who decided the case, thought that although there was no imputation of dishonesty against the arbitrator, nor any allegation that he was in fact influenced in the award by the fee he received, there was legal misconduct, because any act would amount

¹ (1913) 16 N. L. R. 157.

to a legal misconduct if it gave rise to a reasonable probability that the arbitrator would be subjected to any improper influence. Then, the question is one of fact, and I need only say that *Fernando v. Migel Appu* ¹ is distinguished from the present case in respect of facts, because the circumstances here show no reasonable probability that the arbitrator would be influenced in his award by the plaintiff paying his share of the survey fees which both parties agreed to pay in advance. I also venture to think that the decision goes beyond what has been laid down by the English Courts, whose rulings on such a subject are a guide to us. In *re Hopper* ² one of the parties had given a dinner to the arbitrators and the umpire, at which the umpire enjoyed himself, not wisely, but too well, and the award of the umpire in his favour was impeached on the ground of misconduct and partiality. Lord Chief Justice Cockburn said: "If it could be made clear that the object of Wrightson, one of the parties, in inviting the arbitrators and umpire to go and partake of the hospitalities at his house, had been to corrupt the umpire, or if we could see that the hospitalities thus bestowed upon the umpire had that effect and had in any way influenced the award he made, I quite agree that would be a very sufficient reason for setting aside the award, but I cannot believe, looking at all the circumstances, that the object and intention of Wrightson was to corrupt the umpire, and I do not see the slightest reason for supposing that the umpire was in any way influenced by the hospitality he had received. The award for this reason was upheld." *Mosley v. Simpson* ³ was also a case where one of the parties had given luncheons to the arbitrators. Vice-Chancellor Malins quoted the above case with approval, and also *Crosley v. Clay*,⁴ where the Court had said: "Nothing is alleged here to sustain the charge of misconduct. To induce the Court to interfere on such a ground there must be something more than mere suspicion," and Vice-Chancellor proceeded to deal with the facts and said: "It is clear from their statement in the evidence they were not corrupted. Therefore, there has not been any corruption in that respect, and consequently, on that ground, I am unable to set aside the award." In the present case it is obvious, and it is the District Judge's own view, that the payment of half the survey fees was not made with the object of influencing the arbitrator in his award, and that the arbitrator was, in fact, not so influenced, and consequently there was no misconduct which justifies setting aside of the award upon that ground. I may add that the expression "reasonable probability" occurring in *Fernando v. Migel Appu* ¹ appears to come from *Eckersley v. The Mercy Docks and Harbour Board*,⁵ where it was quite relevant, because the objection was to the very reference to the arbitration of a person named in a contract who was said to be

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*v. De Mel*¹ (1913) 16 N. L. R. 157.² L. R. 16 Eq. 326.³ L. R. 2 Q. B. 367.⁴ 5 C. B. 581.⁵ (1894) 2 Q. B. 667.

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likely to be prejudiced. But I do not think it is quite applicable to a case where reference has already been made and award filed.

I would set aside the order appealed from, and send the case back, in order that the District Judge may consider any other ground of objection to the award and dispose of the action accordingly. The appellant is, I think, entitled to the costs of the day in the Court below and of this appeal.

Loos A.J.—I entirely agree.

Sent back.
