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Present : Drieberg and Garvin JJ.In the Matter of an Application for *restitutio in integrum*.

312—D. C. Kurunegala, 10,003.

Arbitration—Reference on application of some parties—Award—Validity—Civil Procedure Code, ss. 693.

A reference to arbitration in the course of an action can only be made on the application of all the parties to it.

An award on a reference by some of the parties only is not binding even on those who have consented to the reference.

A PPLICATION for *restitutio in integrum* by the second, third, and fourth defendants in the action. The facts are fully stated in the judgment.

H. V. Perera, for petitioners.

N. E. Weerasooriya, for respondents.

November 13, 1928. DRIEBERG J.—

This application is by the second, third, and fourth defendants in the action; the fourth respondent is the first defendant and the other respondents are the plaintiffs.

The action was for declaration of title. The survey made for the case shows the disputed area to be lots D, E, and F. Lot G belongs to the defendants, and lots A, B, and C, for which decree was entered for plaintiffs, was apparently not claimed by the defendants. The petitioners and the fourth respondent are the children of Punciappuhamy Vederale and claim the land by inheritance from him.

The plaint does not state that any of the defendants were minors, though the plaintiffs must have been aware of the fact, for the first plaintiff made a formal application in the testamentary proceedings to have this land excluded from it. This, however, must have been brought to the notice of the Court, for after issue of summons the first defendant appeared and the Court ordered that the minors should be produced. The petition states that the first defendant was appointed guardian *ad litem* of the second, third, and fourth defendants; the typed certified copy of the proceedings annexed to the petition reads: "Of consent first defendant appointed guardian *ad litem* of the second, third, and fourth defendants." The statement on this point in the petition was not questioned at the argument in appeal. Stamps were supplied on July 3 and 13 for

the guardian *ad litem* appointment, but I cannot find this in the record. I believe, however, that the appointment was over the third and fourth defendants only, and this appears to be so from the journal entry.

On July 18, 1924, Mr. R. O. Felsing, for the defendants, filed a proxy dated July 15 ; this purports to be by the first, second, third, and fourth defendants, the first acting as guardian *ad litem* of the third and fourth defendants, not of the second, whose name appears as a signatory to the proxy. The second, third, and fourth defendants deny all knowledge of this proxy.

I have sent for and examined the record of the case in which the estate of Punchiappuhamy Vederale, the father of the defendants, was administered (D. C. Testy. Kurunegala, No. 1,998). The second defendant, on August 31, 1921, was appointed guardian *ad litem* of the third and fourth defendants and of another son of the intestate, Podihami, who is not a party to this action. The petitioners state that when the plaint in this action was filed the second defendant was of full age, and that when the appointment of guardian *ad litem* was made the third defendant had attained majority ; there is no counter affidavit challenging these allegations. There was no application supported by affidavit for this appointment, and it cannot be ascertained from this record or that of the testamentary case what the ages of the second, third, and fourth defendants are.

The case was partly heard on December 15, 1926, and then it was noted that of consent all matters be referred to the arbitration of Mr. Walter de Silva, and a consent to reference was submitted on the same day signed by the plaintiffs and their Proctor, by Mr. R. O. Felsing, Proctor for the defendants, and by the first defendant for himself and as guardian *ad litem* of the third and fourth defendants. Provision was made for the signature of the second defendant, but he did not sign it.

On March 11, 1927, an order of reference to arbitration was issued to Mr. Walter de Silva of all the matters in dispute in the action, the second defendant being named a party. The consent to arbitration should not have been submitted to Court by the Proctors when it was not signed by one of the parties, and the Court should not have referred the matter to arbitration. A reference to arbitration in the course of an action can be made only on the application of all the parties to it. I shall deal further with this feature of the case.

On May 13, 1927, the arbitrator applied for an extension of time on the ground that the defendants had failed to see him. On June 17, 1927, the second defendant, stating that he was acting on behalf of himself and " the three minors," submitted to the District Court an affidavit objecting to the case being decided by an arbitrator, and asking that it be tried by the District Judge of Kurunegala

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1928. or the Police Magistrate of Dandagamuwa, and that they had not consented to arbitration. One of the three minors must be Podihamy. The Judge directed that the affidavit be referred to Mr. Felsinger for attention. On June 29, 1927, Mr. Felsinger replied, explaining that the case was referred to arbitration by consent of the plaintiffs and of the guardian *ad litem* of the minor defendants. On June 30 the arbitrator made another application for an extension of time, giving the same reason, that the defendants had not come to see him. This was allowed and then follows an entry: "second defendant waived;" an endorsement to this effect also appears on the plaint against the name of the second defendant. I do not know how this came to be done, and I can find no motion paper or application relating to it; the journal entry has no reference to any Proctor being present, and I do not know whether it was on the application of the Proctors or by the Court on realizing from the affidavit of the second defendant and Mr. Felsinger's explanation that the second defendant had not joined in the consent to arbitration.

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The arbitrator began his inquiry on October 25, 1927, noting that the parties with their witnesses were present save the second defendant, who had been waived. He did not record which of the defendants were present. On December 12, 1927, he gave an award in favour of the plaintiffs against the first, third, and fourth defendants for lots A, B, C, D, E, and F, for costs, and for damages at Rs. 100 a year from July, 1923; the decree entered on the award does not specify the month, and awards damages "from 1923."

On January 21, 1928, a motion paper in these terms was presented by Mr. Wijeykoon: "I move to withdraw the proxy granted to Mr. R. O. Felsinger in the above case;" this is not signed, but Mr. Felsinger endorsed on it his consent. Mr. Wijeykoon at the same time submitted to the Court a statement of objections to the award by the first defendant personally—no mention is made of the third and fourth defendants—and a proxy by the first defendant alone in favour of his firm. This left the minor defendants unrepresented in fact; Mr. Felsinger ceased to act though strictly his authority to act, at any rate for the minor defendants, continued, for his proxy had not been revoked by the unsigned revocation and Messrs. de Silva & Wijeykoon could not claim to act for them; they were thus left unrepresented at a very important stage of the action, for the inquiry into the first defendant's petition was fixed for February 27, 1928, and on that day the first defendant being absent judgment was entered in terms of the award. For this reason alone the judgment entered against them cannot stand.

On March 12, 1928, the plaintiffs' Proctor applied for execution by issue of writ to recover Rs. 100 and writ of possession for the land. The execution was applied for against the first defendant only, no

mention being made of the third and fourth defendants. The writ for the delivery of possession issued to the Fiscal states the defendants as "Dingiri Banda Appuhamy and others" and a copy of the decree accompanied the writ. The Fiscal reported that the first defendant had no objection to the plaintiff being placed in possession, but that Ukku Banda Appuhamy and Herat Hamy armed with a knife and a catty threatened to resist by violence the plaintiffs being put in possession; these were the second and fourth defendants.

The plaintiffs' Proctor on April 9, 1928, applied to the Court under section 345 of the Civil Procedure Code. In the caption he named as respondents the first and the second defendants though in the body of it he stated that the "defendant Ukku Banda Appuhamy and the defendant Herathami (the respondents above named) came at the Fiscal's officer" and resisted the plaintiffs being put in possession. He asked that the "respondents" be cited and dealt with under section 326. No action was taken, no order was made on this application, and no entry of it appears in the journal. On the motion accompanying the application is an endorsement, apparently by the Secretary, that the application was out of time; this is so, for it was made more than a month after the resistance.

On May 29, 1928, Mr. Madawala, for the plaintiffs, moved that the defendant, judgment-debtors, having resisted the Fiscal's officer and having prevented him from delivering possession of the land, the writ of possession be extended and reissued to the Fiscal for execution. This was allowed on fresh stamps being supplied. This was done, and the Fiscal reported that he put the plaintiffs in possession of the land on June 13. The affidavits of the second and third defendants, on which the application for restitution is made, are dated June 2, before this execution of the writ, and only refer to the previous attempt to execute it.

Now, the plaintiffs' Proctor should have known when he reissued writ that the third and fourth minor defendants were not properly represented, if they were represented at all, after January 21, 1928. Apart from the fact that Mr. Felsingier discontinued representing them on a revocation of his proxy not signed by their guardian, the plaintiffs' Proctor had the duty laid on him not to take any step in the action against the minor defendants without satisfying himself that they were properly represented. Further, it was for the Court to see that the minors were properly represented. The Court is not, by the appointment of a guardian *ad litem*, relieved completely from the duty of watching the interests of minors who are parties to an action (see *Segu Nadar v. Howumma et al.*¹).

Now the decree cannot possibly bind the third and fourth defendants; the irregular attempt to cancel Mr. Felsingier's proxy and the grant of a fresh proxy in favour of Messrs. de Silva &

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Wijeykoon occurred on January 21, within the fifteen days allowed to them under section 687 of the Code to object to the award, and the decree, as I have observed before, was entered when they were in fact unrepresented. It is therefore not necessary to deal with Mr. Perera's contention that the agreement by the first defendant on behalf of the third and fourth defendants to refer the matter to arbitration was an agreement or compromise which under section 500 of the Code required the special leave of Court ; nor need I deal with another grave irregularity, which is that the appointment of the first defendant as guardian *ad litem* was made without a written application and unsupported by an affidavit as required by section 493 of the Code, for these proceedings are altogether void for another reason.

Once an action is before it a Court has no jurisdiction to refer the matter to arbitration except with the consent of all the parties, and an award on a reference by some only of the parties is not valid even between those who have consented to the reference (*Seth Dooly Chand v. Mamuji Musaji ei al.*¹) in which reference is made to the judgment in the Judicial Committee in *Ghulam Jilani v. Muhamed Ahmed*² of Lord Macnaghten explaining the difference between this and other forms of submission to arbitration. The corresponding section of the Indian Code requires the consent of all parties "interested" in the suit. The second defendant in this action is such a party.

The second defendant, though not bound by the decree on the award and though in the position of advantage of being free from another action by the plaintiffs, for no leave to reinstitute was obtained when he was waived, joins the third and fourth defendants in asking that the proceedings be set aside and a trial of the action ordered.

We set aside the order of reference to arbitration and all proceedings thereunder and direct that the action be tried as between the plaintiffs and the first, second, third, and fourth defendants ; the plaintiffs will pay to the second, third, and fourth defendants the costs of this application.

I cannot conclude this judgment without a note of disapproval of the very unsatisfactory way in which the interests of the minor defendants were treated by the Proctors concerned and the inadequate control by the Court over most important steps in the action which affected them.

GARVIN J.—I agree.

Set aside.

¹ (1916) 21 C. W. N. 387.

² I. L. R. 29 Cal. 167.