Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Pestonjee Nusserwanjee v. *D. Manockjee and Co., from Madras; delivered 17th July* 1868.

Present:

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILE.
SIR E. VAUGHAN WILLIAMS.
THE LORD CHIEF BARON.

SIR LAWRENCE PEEL.

THIS is an Appeal from three Orders of the High Court of Judicature at Madras. The question in substance is, whether the award of Mr. Schlunk settling matters in difference between the Appellant and the Respondent is valid and binding on the parties. The facts which raise the question may be stated very shortly.

On the 29th October, 1863, the Appellant and Respondent entered into a partnership in certain farms of taxes imposed on spirituous liquors within certain districts in the Presidency of Madras. The Appellant was to supply the capital required, and the Respondent was to manage the business. Certain differences arose between them; and on the 10th of January, 1864, they agreed that arbitrators should be appointed to settle these differences. Accordingly this was done by an agreement in writing for submission to arbitration, bearing date the 10th of March, 1864. Originally, Mr. Pierce and Mr. Bates were appointed arbitrators, but Mr. Pierce refusing

to act, Mr. Punnett was appointed in his place. The terms of the agreement are to this effect:—

"Know all men by these presents, that we the undersigned, Pestonjee Nesserwanjee, of the firm of Framjee Nesserwanjee and Co., and D. Manockjee and Co., do make, constitute, and appoint R. H. Pierce, Esquire, and W. Bates, Esquire, gentlemen, as arbitrators, chosen by our mutual consent, to inquire into certain controversies and differences existing between us in regard to our copartnery in the transactions of the Akbary Farms of the Calicut, Kurumbranad, Palghaut, and Ponany Taluqs, and Mannur and Payenjanur Amshoons, of the Ernad Taluq, rented from Government, giving, and by these presents granting, unto the abovesaid R. H Pierce, Esquire, and W. Bates, Esquire, full power to substitute or appoint one or more arbitrator or arbitrators, as well as, if necessary, an umpire; and further, to call for and examine the books and papers of the said copartnership, as also any party or parties connected with the farms and others, and otherwise to take all and every lawful means to arrive at a fair and impartial decision, to which we hereby mutually agree and bind ourselves to abide fully and entirely."

It contains the following Memorandum at the foot:—

"N.B.—We the Undersigned, P. N., of the firm of Framjee Nesserwanjee and Co., and D. Manockjee and Co., have executed this power made in conformity with the provisions of section 327 of Act VIII of 1859; and we do hereby accordingly agree and bind ourselves to abide by the decision which the within-mentioned duly empowered arbitrators may give under the aforesaid Act."

On the 15th of July, 1864, the arbitrators made an intermediate award, dissolving the partnership, and giving the business to the Appellant.

On the same day a notice, signed by both parties, was publicly given of this fact, and which stated that all debts due to them by the Akbary farm were to be received and paid by Framjee Nusserwanjee and Co., and that the Respondent had no longer any interest therein.

On the 3rd of October, 1864, the Appellant wrote to the arbitrators, complaining of the conduct of the Respondent relative to the making up of the accounts.

On the 13th May, 1865, the arbitrators came to a resolution, which was a second intermediate award, directing that the farm outstandings due from the Ponany, Chowghaut, and Betatanad divisions should be taken by the Defendant at 50 per cent. discount; it is in these words:—

"Resolved, that the farm outstandings, due from the Ponany Chowghaut and Betatanad divisions, as they stood in the farm

books on the 30th June, 1864, as per balance sheet, be taken over by Messrs. Dhunjeebhoy Maneekjee and Co., or their nominee, at 50 per cent. discount, they receiving credit for all sums since recovered, less any regular expenses and paying the amount as may be hereafter decided by us."

On the 6th July, 1865, Mr. Punnett, one of the arbitrators, published a long written opinion on the subject of the remaining points that remained to be disposed of by the arbitrators under the submission to arbitration.

On the 24th of July, the Appellant wrote to the arbitrators and requested them to make their award in ten days, or that, if they were unable to do so, they would nominate an umpire (p. 4).

This was not done, and, on the 5th of August, 1865, the Solicitor of the Appellant wrote a letter to the Solicitor of the Respondents purporting to cancel the award (p. 7, No. 14); and he also sent in similar letters to the arbitrators. On the same day Mr. Bates, the other arbitrator, gave his written opinion on the remaining points referred to therein, stating, in substance, his differences from Mr. Punnett.

On the 12th August, 1865, a further notice was given by the Appellant requiring the papers to be delivered up to him. Two more written opinions were given, one by Mr. Punnett and another by Mr. Bates, the last on the 7th of September, 1865; and Mr. Schlunk (who was afterwards appointed umpire, but who seems to have been already selected for that purpose by the arbitrators), on the 12th September, 1865, made some written observations founded upon the written opinions of Mr. Punnett and Mr. Bates, the two arbitrators.

On the 22nd September, 1865, the Civil Court ordered the submission to arbitration to be filed under the provision of 326th section of Civil Procedure Code of India.

The Appellant insists that this was wrong, and that the decision of the Court below ought to be reversed, and that the submission to arbitration could not properly have been filed under the Article 326 of the Code of Civil Procedure, as no agreement to file it had been made, contending that it was open to him to revoke the submission to arbitration at any time.

On the 22nd of September, the day on which

this decision was pronounced, Mr. Schlunk was appointed umpire by the arbitrators, by writing signed by them at the foot of the submission to arbitration. This appointment was confirmed by the Civil Court on the 6th of October, 1868, and, on the 17th of October, Mr. Schlunk made his final award in favour of the Respondents. The order of the 22nd of September, of Civil Judge, was appealed from and confirmed by the Order of the High Court of Judicature on 15th January, 1866. The Appellant then presented a petition to set aside the award on five grounds, which are set forth in p. 29 of this Record, which was dismissed on the ground of being too late; and the final award of Mr. Schlunk was confirmed and carried into execution by the Decree of the Civil Judge on 9th October, 1866. The Appellant petitioned for leave to appeal from the decision, which petition was dismissed by Order of the High Court on the 7th January, 1867. On the same day the High Court of Judicature at Madras affirmed the decision of the Civil Judge of the 6th October, 1865, confirming the appointment of Mr. Schlunk as umpire. The present Appeal is brought from all these three decisions of the High Court of Judicature.

The first question is, whether the Court had jurisdiction under the section 326 of the Code of Civil Procedure in India, to direct the submission to arbitration to be filed. Their Lordships are of opinion that, upon a proper construction of the sections of that Code relating to this subject, they had that jurisdiction. The Code, which is one of procedure, and the Act enacting it, must be construed with reference to the constitution of these Courts, and the abiding direction to them to proceed in all cases according to equity and good conscience.

The 326th section is to this effect:—

"When any person shall by an instrument in writing agree that any differences between them or any of them shall be referred to the arbitration of any person or persons named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which it relates, application may be made by the parties thereto, or any of them, that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified,

why the agreement should not be filed. The application shall be written on a stamp paper of one-fourth of the value prescribed for plaints in suits, and shall be numbered and registered as a suit between some or one of the parties interested or claiming to be interested as Plaintiffs or Plaintiff, and the others or other of them as Defendants or Defendant, if the application have been presented by all the parties, or if otherwise, between the applicant as Plaintiff and the other parties as Defendants. If no sufficient cause be shown against the agreement, the agreement shall be filed, and an order of reference to arbitration shall be made thereon. The several provisions of this chapter, so far as they are not inconsistent with the terms of any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court and to the award of arbitration and to the enforcement of such award."

Although this section is not expressly referred to in the submission to arbitration, still their Lordships are of opinion that the submission to arbitration was under and subject to the sections contained in the Code relative to this subject. Their Lordships are of opinion that this submission to arbitration was entered into subject to the provisions of this Code, and that the Memorandum at the foot thereof is introduced for that purpose, and that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them, that it was to be subject to the Act, and that this special notice of section 327 as to the enforcement of the decision of the arbitrators was introduced only *ex majori cautela* for the purpose of expressing what, without such expression, would nevertheless have been implied.

Their Lordships are of opinion that, according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to this agreement can revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority is not permitted.

Their Lordships do not think it necessary to refer to the English law on this subject further than to point out that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer, and the authority thereby conferred, which formerly

enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration on the same footing as all other lawful agreements by which the parties to it are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract.

Their Lordships are therefore of opinion that it was not in the power of the Appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he had concurred.

It remains to be considered whether the circumstances of this case justified him in doing so, and sending the letter of the 5th August, 1865.

This is founded solely on the delay.

On the 24th July, 1865, the Appellant wrote to the arbitrators, and required that in ten days from that date they would make their award and appoint an umpire, and this not being done after waiting for ten clear days he sent the notice of the 5th August, 1865. If nothing whatever had occurred since the appointment of the arbitrators in June 1864, and all matters between the Appellant and the Respondent had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think that this delay of the arbitrators would have justified the course which the Appellant adopted. But in truth the facts disclose a very different course of proceeding. In July, 1864, the arbitrators made their award in a very important part of the matter in difference. They dissolved the partnership and delivered up the business to the Appellant, who has, since that time, carried it on alone, and had done so for a year prior to the letter of the 24th July, 1865.

A second decision of the arbitrators relative to the Ponani farms was made in May 1865, and acquiesced in by both parties, Appellant and Respondent.

A notice to the arbitrators to make their award, and to appoint an umpire in ten days, does not appear to their Lordships to be sufficient time given

to entitle the Appellant to stop all further proceedings, and to cancel all further proceedings.

It is to be observed that a most important part of the matters referred, namely, the determination of the person who was to have the business in future, had already and speedily been determined. After the two decisions of the arbitrators there appears to have been little that remained to be done, except to determine matters of account between the parties. What the intricacy or difficulty of settling them does not appear, and on a question of time this is a matter of importance. It might well be that the time occupied for that purpose was not excessive. On this point, even if it could be availing, their Lordships have no evidence. It might also well be that ten days might be usefully and properly employed by the arbitrator in an endeavour to remove the points of disagreement between them, and only when this was found to be impossible that it would become necessary to refer the matter to an umpire. On the 6th of July, 1865, Mr. Punnett stated his views in a long written opinion. Mr. Bates stated his in a similar document on the 5th of August. This was answered by Mr. Punnett on 25th of August, and on the 7th September Mr. Bates replied. Before this Mr. Schlunk had been selected, though not appointed, to act as umpire, his appointment having been delayed, as it seems, in consequence of the civil proceedings instituted in the Civil Court on the 23rd of August, 1865.

Mr. Schlunk took and considered the expressed opinion of the two arbitrators, and made observation thereon on the 12th of September, 1865. The decision of the Civil Court asserting the jurisdiction of the Code of Civil Procedure over this matter was pronounced on the 22nd of September, 1865. On the same day Mr. Schlunk was appointed umpire, and he made his award between the parties on the 17th October following. No error is pointed out in the award itself; a complaint is made that Mr. Schlunk did not open up the whole matter from the beginning. It is said that he appointed no meeting, that he heard no Counsel, that he took no evidence, their Lordships are of opinion that it was not necessary for him to do so. The parties had agreed to the arbitration of

Mr. Punnett and Mr. Bates, subject to the decision of an umpire on the points where they differed. They agreed on some important points; they expressed their decision in the 1st award of the 15th of July, 1864, and in the 2nd award of the 13th of May, 1865. They differed as to other points. They expressed this difference in writing, and they appointed Mr. Schlunk to be the umpire to decide these points between them. This he did after, as it appears, weighing and considering the facts and arguments adduced by both the arbitrators in the documents laid before him.

Their Lordships are of opinion that the course so adopted was correct, and that the Courts below have acted rightly in upholding the decision of the umpire. Their Lordships do not mean to lay down that in cases of this description, where no time is originally fixed within which the award was to be made, it would not be open to either party to hasten the proceedings by giving notice to the arbitrators that the award must be made and an umpire appointed within a reasonable time. But it is to be observed that here the time which elapsed from the period when the Appellant gave the notice of the 24th of July, 1865, was actively employed. It was obviously of no use to appoint an umpire until the points on which the arbitrators differed were clearly defined. This was done by four papers:—1st, the opinion of Mr. Punnett; 2nd, the opinion of Mr. Bates, delivered on the same day that the notice to cancel the submission were given; 3rd, the further opinion of Mr. Punnett, on the 25th of August, 1865; and 4th, the final opinion of Mr. Bates, on the 7th of September, 1865, and these were adjudicated upon by Mr. Schlunk, the umpire, in his award made on the 17th October, but delayed apparently by reason of the suit and the necessity of obtaining the sanction of the Court to the confirmation of the Order appointing him umpire.

If the object of the Appellant was to accelerate the proceedings by his notice of 24th July, 1865, he certainly succeeded in doing so; but their Lordships are of opinion that he cannot recede from the submission by reason of that notice, followed by the notice of 5th August, 1865, when, in fact, he has for above a year enjoyed the fruits of

the award on various points, and when it is impossible to restore the parties to the position they were in if all the acts of the arbitrators were to be considered null and void.

On the whole, therefore, their Lordships, without thinking it necessary to relate in detail the proceedings in the Courts in India, approve of the decisions there pronounced, viz., the Order of the 22nd September, 1865, of the Civil Court, directing the submission to be filed; the Order of the Civil Judge of October 6, 1865, confirming the appointment of the umpire; the Order of the High Court of January 15, 1866, dismissing the Appeal of the present Appellant from these Orders; and the final Decree of the Civil Judge of the 8th February, 1866, confirming the award of Mr. Schlunk, and directing the same to be carried into execution; and also the Order of the High Court of Judicature of Madras of the 7th January, 1867, dismissing the Petition of the Appellant: and consequently they shall humbly recommend to Her Majesty that this Appeal be dismissed, with costs.