Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Aitken, Spence, and Company v. *Fernando, from the Supreme Court of Ceylon; delivered the 4th March* 1903.

Present at the Hearing:

LORD MACNAGHTEN.
LORD SHAND.
LORD ROBERTSON.
LORD LINDLEY.
SIR ARTHUR WILSON.

[*Delivered by Lord Shand.*]

The facts of this case are clear, and easily stated, and do not admit of doubt or dispute.

In June 1899 the Appellants and their partners raised an action against the Respondent concluding for damages (Rs. 51,254. 19) in respect of the Respondent's alleged breach of contracts to supply them with quantities of plumbago which he had sold and contracted to deliver to them between March and November 1898. After crediting the Respondent with the value of the deliveries made by him under these contracts, which were all in writing and produced, the Appellants claimed the amount of damages just specified as the loss sustained by them through the failure of the Respondent to supply the quantities contracted for, with interest on part of their claim from January 1899.

The Respondent in defence to this action denied liability and claimed in reconvention the alleged unpaid value of plumbago delivered by him to the Appellants.

The parties did not proceed to the trial of the action in Court in the ordinary course, but agreed and requested that an order for reference to an arbitrator should be made by the Court. The mandate to the proctors to apply to the Court for an order of reference was signed by the Appellants, Messrs. Aitken, Spence, & Co. and the partners of that firm, and by the Respondent himself and proceeded on the statement that the parties were desirous "that all matters in dispute "between us in this action should be referred to "the final decision of the arbitrator herein- "below named viz. the Honourable H. L. Wendt "Advocate, Colombo." The application was presented to the Court by the proctors for both parties and followed by a judicial Order in which, to use the language of the Order itself:—"It is "ordered by and with the consent of all parties "that all matters in dispute between Plaintiffs "and Defendant in this case, including all "dealings and transactions between all parties, "be referred to the final determination of Mr. "H. L. Wendt as sole arbitrator who is to make "his award in writing and submit the same to "this Court," and the Order further provided that the arbitrator "shall have all such powers and "authorities as are vested in arbitrators and "umpires under the Code of Civil Procedure." It appears that the Respondent Fernando had himself proposed that Mr. Wendt should be sole arbitrator and that the Appellants agreed to this. At all events Mr. Wendt became so by the Order of the Court and consented to act and went on with the arbitration, taking the necessary evidence, oral and written, and issued his award in the Appellants' favour, which was duly filed in Court.

The Respondent had changed his mind as to desiring the arbitration to proceed before Mr. Wendt, and on the date when the arbitrator

proceeded to take the first part of his enquiry, after notice to both parties that he would do so, the Respondent's proctor sent him a notice that the Respondent "withdraws from the arbitration "and revokes his mandate to you to arbitrate in "the matter;" and although notice of all future meetings for procedure in the arbitration were sent to him, he adhered to that notice and refrained from taking any part in the proceedings or from appearing either himself or by his proctor before the arbitrator.

The short question to be now determined by their Lordships is whether the Respondent was entitled to withdraw from the arbitration to which, and to the judicial Order which was issued, he had so completely agreed, and whether the award was therefore invalid and ineffectual. This question depends entirely on the provisions of the Civil Procedure Code, which apply directly to the case, and render any reference to the authority of Voet unnecessary; and their Lordships have without difficulty come to the conclusion that under the provisions of the Code, the arbitration proceedings having been in all respects regular, the award was effectual and binding on the Respondent, as the learned Judge of First Instance has found in dismissing the Respondent's petition.

The proceedings did not originate from an agreement between the parties for an arbitration in the event of a difference arising between them in the execution of their contracts of sale, in which case the Court might have been applied to under Sections 693, 694, and 695 of the Code, under which the Court might make an order of reference and name an arbitrator in case the parties could not agree as to the nomination. The subject of the arbitration was an action in Court, a judicial proceeding entirely under the control of the Court itself. Accordingly the sections of the Code which apply to the case are the 676th, 677th and 691st. Under Section 676

the parties may by their proctors, specially authorised to do so, apply for an order of reference of the existing action. In that application, which is to be made in writing, the parties are required to state the matter sought to be referred, and by Section 677 the Court is required by order to refer to the arbitrator agreed on the matter in difference which he is required to determine. In such an arbitration of an existing action the Court under Section 682 " shall issue the same processes to the parties and " witnesses whom the arbitrators or umpire desire " to examine as the Court may issue in actions " tried before it;" and when an award in an action has been made, it is provided by Section 685 that it shall be filed in Court. It appears from the whole of these provisions that an arbitration in an action is a judicial proceeding from the beginning to the end, in which the Court is really acting by an arbitrator in conducting the enquiry, and in giving the judgment by award, which is to receive the effect of a judicial decree.

Section 691 of the Code is of much importance as defining the grounds on which an award given under these sections may be impugned, and the only ground on which it is said by the Respondent that under the words of the Code he can challenge the award in this case is "misconduct of the arbitrator." These words are "No award shall be set aside except " on one of the following grounds, namely, " corruption or misconduct of the arbitrator."

Counsel for the Respondent found the utmost difficulty in explaining what could be called misconduct on the part of the arbitrator in this case, and at length put his argument on the single ground that the arbitrator had no right to proceed at all in the arbitration because the Respondent had withdrawn from the arbitration and was entitled to do so. Their Lordships can find no reason for holding that the Respondent could

withdraw from a judicial Order of reference in a pending action granted on his own and the other party's joint application, and no reason has been suggested in argument which could justify or warrant such withdrawal. The Respondent has stated that when he signed the application, he was under the *bonâ fide* belief that it "was a "mere arrangement for Mr. Wendt to suggest "terms of settlement which either party would "be free to refuse to accept," and that had he known of the effect of the reference he would not have agreed to it. Their Lordships agree with both Courts in thinking that this statement is not worthy of belief; but even if it were true, the terms of the application for the Order of reference are so clear and simple as to admit of no dubiety or contradiction, or of being in any way thus explained away. It follows that the Judgments of the Supreme Court ought to be reversed, with costs to be paid by the present Respondent, and the Judgment of the District Court restored, and their Lordships will humbly advise His Majesty accordingly. The Respondent must pay the costs of this Appeal.