APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J., Mookerjee and Fletcher JJ.

LADURAM NATHMULL

v.

NANDALAL KARURI.*

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Dec. 4.

Arbitration—Award—Consent of parties—Insolvent defendant—Civil Procedure Code (Act V of 1908), Sch. II, r. 1.

In a redemption suit by a mortgagor, the insolvent mortgagee was made a party along with the Official Assignee. The matter was referred to arbitration by consent of parties other than the insolvent mortgagee, who did not appear:

Held, that the Court had no jurisdiction to make the order of reference without his consent, consequently the award was invalid.

APPEAL by Laduram Nathmull, the defendant, from the judgment of Rankin J.

On 9th April 1918, Nandalal Karuri, a mortgagor, brought a suit for redemption (No. 430 of 1918) against Nilmoney Das, his mortgagee, who was then an insolvent, the Official Assignee and a firm of Laduram Nathmull, who were the sub-mortgagees. On 1st June 1918 Laduram Nathmull brought a mortgage suit against the Official Assignee and Nandalal Karuri over the same properties. On 17th March 1919 by consent of the parties other than Nilmoney Das, who did not appear, all matters in dispute in both the suits were referred to the arbitration of Mr. A. N. Chaudhuri, Barrister-at-Law, who made his award on 10th April 1919 and filed it on 22nd April 1919.

* Appeals from Original Civil. Nos. 65 and 66 of 1919, in Suit No. 430 of 1918.

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Thereupon applications were made to set aside the award. Full facts will appear from the judgment of the Court of the Original Jurisdiction, which was as follows :—

RANKIN J. This suit No. 430 of 1918 brought by Nandalal Karuri is in the nature of a redemption action. The defendants to it are Laduram Nathmull, the Official Assignee in his capacity as trustee of the property of the insolvent, and the insolvent. Those are the three defendants. At the time that this action was being dealt with, there was another action No. 739 of 1918 in which Laduram Nathmull sought to enforce two mortgages which they claimed to have and which were sub-mortgages made to them by the insolvent of his rights against Karuri, who was the ultimate mortgagor. Both suits were brought after the adjudication order, which is dated 8th February 1918.

The questions in dispute were, first : whether the ultimate mortgagor had paid off the total amount for which he had charged the property to the insolvent, secondly : whether Laduram Nathmull had these valid charges and was entitled to recover whatever was unpaid upon the mortgage which had been sub-mortgaged to them.

Now, what happened in that matter was this :—The Official Assignee appeared in neither action ; the insolvent who was party to the action No. 430 of 1918 did not appear either ; and on the 7th March (after an order had been made, not being a consolidation of them, but being an order which directed the two suits to come one after the other), the two matters were mentioned in Court together, and it was stated to the Court with regard to those two matters that agreements had been come to to refer them to the arbitration of a single arbitrator, *viz.*, to Mr. A. N. Chaudhuri. The matter was postponed in order that proper formal petitions might be put in and on the 17th a separate petition was put in in each of the two suits asking that it be referred to the arbitration of Mr. A. N. Chaudhuri. Now, the Official Assignee consented to the order being made in both these actions ; he was, therefore, a party agreeing to the submission of the matter to Mr. Chaudhuri. The insolvent was not there at all, and nobody consulted him, and he in no way had expressed at the time his assent as regards No. 430 of 1918, still less as regards the other action. Now that having been done, it appears now that confessedly so far as the Official Assignee is concerned, and from the point of view of the creditors, manifestly, this consent by the Official Assignee was a mistake. It was a mistake in the sense that the Official Assignee as between himself and the bankrupt, as between himself and the creditors, had no right to enter into that agreement or to consent without obtaining the leave of the Court, and

the award which has been based upon the order to refer, is now attacked before me by a creditor and also much less meritoriously by the party who has lost under the award and who really did consent to the order to refer, *viz.*, Karuri. Mr. Sircar for the creditor says this: that it is now clear by the decision of the Court of Appeal of this Court that all the parties interested in an action, so far as regards the matters to be referred to arbitration, must consent or the order is bad, and the award in consequence is bad. So far as the Official Assignee is concerned he says there is no agreement to refer because the Official Assignee had no right to refer without obtaining the leave of the Bankruptcy Court for the purpose. He says that by the Contract Act it was a case of defeating the object of a Statute when the Official Assignee purported to agree. On that point I confess that I am against Mr. Sircar all the way and all the time. The Official Assignee is a person in whom there is vested by law all the property of the bankrupt; it is his property, of course not that he may deal with it for himself, but that he may deal with it as a trustee for the benefit of the creditors, but in law it is his property; and it seems to me to be settled now by the authorities, that those provisions which have come into our Insolvency Act from the English Act, and which require the leave of the Court, are administrative provisions only; they are matters between the Court and the Trustee; they are matters which may give creditors personal rights of action against the Trustee; they are not matters which can be set up when the Trustee as the person in whom the bankrupt's property is vested is meeting his enemy in the gate and is at arm's length with the third party outside the bankruptcy altogether. That seems to be the result of *Lee* v. *Sangster* (1), the other case (which was decided by Sir George Jessel) *Leeming* v. *Lady Murray* (2), and the last case before Mr. Justice Horridge *In re Branson* (3), I do not think it is a matter with which the other party to an action has any concern at all, whether the trustee has behaved himself *vis-a-vis* his Court, *vis-a-vis* his constituents the creditors, or whether he has done that which he is not strictly entitled to do. They are entitled to look to the Trustee just as they would be entitled to look to the insolvent had he never been adjudicated, and I am, therefore, against Mr. Sircar's contention that the Official Assignee having assented to this submission on his own authority the award is invalidated by reason of that fact. When it comes to the question of the insolvent I think Mr. Mitter for Laduram Nathmull is in a more difficult position. The position was this: the insolvent had been made a defendant in suit No. 430 of 1918 which is

(1) (1857) 2 C. B. N. S. 1. (2) (1879) 13 Ch. D. 123.
(3) [1914] 2 K. B. 701.

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really a redemption action. So far as it appears the redemption action was not a matter which raised any issues to which the insolvent was a necessary party. An insolvent may sometimes be a necessary party to an action even although he is an insolvent, but in mere matters of property and administration he is not in general a necessary party at all. When there is no question of his having been a trustee for other parties or having been party to any fraud he is not a necessary party. However this particular plaint claimed some relief against him, it made him a defendant, and this fact gave him whatever rights a defendant has, either to assert that he has got an interest and ask to have it enforced, or to deny that he has got an interest and have himself dismissed from the Court with an indemnity as regards his costs. The insolvent was a defendant at the instance of the plaintiff, Karuri; and having made him a defendant Karuri knew that the insolvent had not appeared.

The petition in suit No. 430 of 1918 states that "the defendant Nilmoney Das being an insolvent has no interest in this suit," apparently not even as to costs, though the suit was brought against him after adjudication; para. (*c*) of the prayer of the plaint claimed relief against him. He was not dismissed from the suit, nor was any other amendment made of the plaint. How an existing defendant can ever have no interest in the suit I confess I cannot myself comprehend. There is the further point that an insolvent is an unnecessary party in such suits, not because he has no interest (his interest may be great) but because he is not allowed to interfere in the administration of his own affairs even though the matters in question may make all the difference as to whether there is a surplus of assets, or whether he will even be able to get his discharge. I do not myself agree with the decision in *Sabta Prasad* v. *Dharam* (1). I think the decision in the Court of Appeal here does not allow me to follow it—*Seth Dooly Chand* v. *Mamuji* (2).

Now, in this case the action was not an action which referred as to part only. Rule 1 of the Second Schedule is directed in its wording to the possibility of referring by an agreement made in the suit certain of the matters in difference, not necessarily them all; and therefore the latest version of the Code says, it may be by consent of all the parties interested: "where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration." In this case all matters in difference in this suit (430 of 1918) including the question of costs of this suit were referred to arbitration; I think in view of the decision of the Court of Appeal, *Seth Dooly Chand* v. *Mamuji* (2) and as it seems clear that appearance or non-appearance makes no difference at all,

(1) (1912) I. L. R. 35 All. 107. (2) (1916) 25 C. L. J. 339.

it would not be possible for me, if the matter is for me, to hold that this particular action No. 430 of 1918 was validly referred to the arbitration of Mr. Chaudhuri by the consent which was given without including the insolvent.

It is said that in the other action (No. 739 of 1918) the action which is brought by Laduram Nathmull, the insolvent was not a defendant that this was the wider action and covered all the points. So far as that is concerned I am quite satisfied that all the parties who did agree to these two submissions agreed to them, the one in consideration of the other. The two things are formally separated because they have to be formally separated. Nobody in his right mind will ever suppose that the parties in a dispute of this sort would have agreed to go to an arbitration as to the one action without the other being included so as to have two fights before different tribunals over the same thing.

I think the position created as to suit No. 739 of 1918, if the order of reference in suit No. 430 of 1918 is invalid, is that the consent order in suit No. 739 of 1918 was founded upon a consent which must have been given by all parties to it under a mistake.

In these circumstances I adjourn all the various motions now before me for further argument as to the extent to which and the manner in which effect can be given to my opinion on points which I have now dealt with, and as to the proper orders to be made on those motions.

Then, after further argument, the following judgment was delivered on 9th June 1919 :—

RANKIN J. In suit No. 430 of 1918 I came to the conclusion that it was not possible under rule 1 of the Second Schedule to the Code to order a reference of "all matters in difference in this suit including the question of costs of this suit" as the order of 17th March 1918 purported to do save by and with the consent of all existing parties to the suit regardless of whether any of them had or had not entered appearance. If an improper or unnecessary party has been impleaded and it is desired to proceed without his consent he must either be dismissed from the action or the order of reference must be more guarded in its terms.

The award which has resulted under the order must be set aside if the order was without jurisdiction, and it is irrelevant to consider whether the arbitrator has or has not purported to affect the party who did not consent.

If in the present case I could be satisfied that the learned Judge who made the order of 17th March 1918 had considered and intended to decide the point of law arising from the absence of consent by the insolvent, I should think it my duty to follow that decision. But though the fact that

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this consent was absent was placed before him I feel sure that the point of law was not ; if only for the reason that, had it been present to anybody's mind, the difficulty would have been surmounted by the simple process of dismissing the insolvent from the action. It does not seem to have been present to the mind of anyone until it was taken by Mr. Sircar and adopted by other counsel in the same interest at the hearing of these motions. The point having been taken, my duty is I think laid down on me and I must make the same order as was made by Fletcher J., and held to be right by the Court of Appeal in *Seth Dooly Chand* v. *Mamuji* (1). That case prevents me from holding that the parties have agreed to treat the insolvent as having no interest and that they cannot go back upon this agreement as between themselves. The question is one of jurisdiction and the conditions of jurisdiction. If these are not satisfied I cannot refuse to notice the defect nor will I accept something less as sufficient. These conditions are simple and clear and should be kept so. Technicality will in the end be less troublesome, if they are exacted firmly and in all cases, than if they are tempered or modified in the hope of avoiding technicality. Rule 1 of the 2nd Schedule is to be obeyed, not merely to be placated.

As regards suit No. 739 a motion has, since I gave judgment on the main points, been launched by the Official Assignee and Karuri asking me to set aside the order of reference dated 17th March 1918, which was made at the same time as the order which I am setting aside in suit No. 430. The affidavits in opposition to that motion stoutly deny that there was any mistake and emphasise the fact that these orders were made on separate petitions in the two suits. They also contend that the mistake, if any, was one of law and not of fact. I still think it perfectly clear that the only intention in the mind of any of the consenting parties was to dispose by reference to one and the same arbitrator and once for all of the entire subject-matter which was being litigated in the two actions. This intention fails altogether—not in part only but entirely—if the order in suit No. 430 be set aside. This failure is because the parties thought that suit No. 430 was being referred when it was not being referred. The distinction between mistake of law and mistake of fact is of no service to the parties who desire to uphold the award. The agreement in question was about legal proceedings and the present position is not that the parties have done what they intended to do as regards these proceedings—to send them all to arbitration—and have discovered that this has a different legal consequence from what they thought. The position is that they have not sent them all to arbitration : as regards one suit the

(1) (1916) 25 C. L. J. 339.

gentleman named was not arbitrator at all, thinking that he was, the parties referred to him the other.

It is further objected that as I cannot now make an order of review, I cannot in any proceedings in this suit (No. 739) set aside the order of reference, and that a separate suit must be brought for that purpose.

It is contended in reply to this objection, first, that apart from an order of review I can discharge the order of reference; and secondly that in any case I can refuse to confirm the award. In my opinion, the Court can in the same action in which an interlocutory order has been made by consent, set aside that order on the ground of mistake vitiating the agreement upon which the order was based: *Mullins* v. *Howell* (1), *Ainsworth* v. *Wilding* (2). This doctrine was affirmed by the Lord Chief Justice in *Neale* v. *Gordon Lennox* (3) in the case of an order for reference The Court of Appeal which reversed that decision expressly agreed with the principle of the cases above cited. In the House of Lords, where the judgment of the Lord Chief Justice was upheld, Lord Lindley expressed himself in terms which certainly cover the same principle if they do not go further: *Neale* v. *Gordon Lennox* (4).

The Indian cases satisfy me that independently of the statutory right to apply for a review the Court has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties, *Aushootosh* v. *Tara Prasanna* (5), *Nistarini* v. *Nundo* (6), *Biraj Mohini* v. *Srimati Chinta Moni* (7), *Bhutnath* v. *Ram Lall* (8), *Fatmabai* v. *Sonbai* (9). This jurisdiction is part of the ordinary law, the authority for it is to be found in English cases, and the limitations which in England have been set to its exercise have been adopted here. The English cases cited and followed are, *e.g.*, *Flower* v. *Lloyd* (10), *Gilbert v. Endean* (11), *Huddersfield Banking Co.* v. *Henry Lister and Son* (12), *Ainsworth* v. *Wilding* (2). Now these cases were none of them concerned with merely interlocutory orders and I have found no Indian case in which such orders were being challenged. In many of the Indian cases, the English rule has been affirmed that a separate suit is necessary. But the Courts in India have never purported to vary the English rule and has never so far as I can find applied it where it is not applicable or considered it with special reference to interlocutory orders. *Flower* v. *Lloyd* (10) and *Gilbert*

(1) (1879) 11 Ch. D. 763.
(2) [1896] 1 Ch. 673.
(3) [1902] 1 K. B. 938.
(4) [1902] A. C. 465, 473.
(5) (1884) I. L. R. 10 Calc. 612.
(6) (1899) I. L. R. 26 Calc. 891.
(7) (1901) 5 C. W. N. 877.
(8) (1900) 6 C. W. N. 82.
(9) (1911) I. L. R. 36 Bom. 77.
(10) (1877) 6 Ch. D. 297.
(11) (1878) 9 Ch. D. 259.
(12) [1895] 2 Ch. 273.

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v. *Endean* (1) were decisions to which Sir George Jessel was a party and the latter was cited to him in *Mullins* v. *Howell* (2) where he held the rule inapplicable to interlocutory orders. I feel on sound ground therefore in holding that the rule in India is the same as the rule in England and in refusing to make it into something different.

If there be any special danger in India of the principle which I have accepted being abused, I think the observation of Lord Halsbury in *Neale* v. *Gordon Lennox* (3) are in point and in any case to shorten the arm of the Court is not the remedy. The Court is not bound to act on motion where a more formal proceeding is desirable, though *Doe d. Lord Carlisle* v. *Bailiff of Morpeth* (4) (*c.f.* Russel on Arbitration, 9th Ed., p. 66) seems to show that this is no new application of the general power of the Court to act on motion in proper case.

Now I have before me, apart from the two awards set down by the officers of the Court for confirmation, the following applications :—

First, a motion brought by notice dated 24th April 1919 in insolvency of Nilmoney Das (No. 20 of 1918) on the part of Provasankar & Co., as Creditors asking for directions to be given to the Official Assignee. I make an order on that motion that upon giving a proper indemnity to the Official Assignee to the satisfaction of the Registrar in Insolvency these creditors be given the conduct of all subsequent proceedings in suits Nos. 430 and 739, so far as the Official Assignee is concerned, with liberty to act for him and in his name subject to any further order of the Judge in Insolvency : provided further that no new proceedings, whether by way of appeal or otherwise, shall be instituted by the creditors in the name of the Official Assignee without the leave of the Judge in Insolvency. The creditor Provasankar & Co., must pay the cost of this motion to Laduram Nathmull, but there will be no order as to costs, save that after both suits have been finally settled or decided the creditors are to be at liberty to make applications in insolvency to recoup themselves for their own costs of this motion out of the insolvent's estate.

Secondly, I have a motion (30th April 1919) by Karuri asking to have the award in suit No. 430 set aside. I propose to make that order. There will be no order as to costs. I direct the award to be taken off the file but stay this portion of the order pending any appeal.

Thirdly, in suit No. 739 I have a motion by the Official Assignee and Karuri asking me to set aside the consent order of reference dated 17th March 1919. That motion was brought on 22nd May 1919 as a result of my previous judgment. I propose to make that order but

(1) (1878) 9 Ch. 259.
(2) (1879) 11 Ch. D. 763.
(3) [1902] A. C. 465, 470.
(4) (1811) 3 Taunt. 378.

without costs. I direct the award in this suit also be taken off the file but stay this portion of the order pending any appeal.

On the other two motions to set aside the awards, one brought by the Official Assignee dated 30th April 1919 in suit No. 430 and the other by Karuri dated 25th April 1919 and instituted in both suits I make no order as to costs or otherwise.

Thereupon, four appeals were filed by Laduram Nathmull, being appeal No. 65 of 1919 against the judgment on award in suit No. 430 of 1918, No. 66 against the order in the application in that suit, No. 67 against the order in the Official Assignee's application in suit No. 739 of 1918, and No. 68 against the judgment on award in that suit.

Mr. B. L. Mitter (with him *Mr. S. N. Banerjee*), for the appellant. Nilmoney was improperly made a party. He had no estate. The only claim against him was the return of title deeds. The appellant admitted the title deeds were with him. He was not an interested party under Rule 1 of the 2nd Schedule of the Code of Civil Procedure at the date of reference. On that day the only dispute was the matter of accounts. *Lloyd* v. *Lander* (1), *Weise* v. *Wardle* (2), *Ishar Das* v. *Keshab Deo* (3), *Subta Prasad* v. *Dharam* (4) was cited. *Seth Dooly Chand* v. *Mamuji* (5), distinguished.

Mr. N. N. Sircar and *Mr. D. N. Basu*, for Nandalal Karuri.

Mr. S. R. Das for the Official Assignee.

Sir Binod Mitter, for Nilmoney Das.

The respondents were not called upon.

SANDERSON C. J. This is an appeal from an order of my learned brother Mr. Justice Rankin by which it was ordered that the award of the arbitrator

(1) (1821) 5 Madd. 282.
(2) (1874) L. R. 19 Eq. 171.
(3) (1910) I. L. R. 32 All. 657.
(4) (1912) I. L. R. 35 All. 107.
(5) (1916) 25 C. L. J. 339.

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appointed in the suit, by reason of the order made in the suit and dated the 17th of March 1919, be set aside and taken off the file. The learned Judge came to his conclusion on the ground that the conditions of the jurisdiction, which is given by clause (*1*) of the 2nd Schedule to the Civil Procedure Code, had not been complied with.

The suit was brought by one Nandalal Karuri against the Official Assignee of Calcutta, Nilmoney Das, who was then an insolvent, and a firm called Laduram Nathmull. It appears that Nandalal Karuri was a mortgagor, Nilmoney was the mortgagee and Laduram Nathmull was sub-mortgagee from Nilmoney.

The prayers of the suit are set out at page 30 of the paper book in Appeal No. 66 of 1919 and were as follows: "(*a*) That the said premises Nos. 84A, 84-1A, "84-2A and 84-3A, Bowbazar Street, in the town of "Calcutta, be declared redeemed and discharged from "the mortgage or charge effected by virtue of the "deposit of title deeds made on the 7th day of Feb- "ruary 1915: (*b*) That, if necessary, all accounts be "taken and enquiries made as to the Hon'ble Court may "seem fit or necessary and the usual redemption "decree be passed in this behalf: (*c*) That the defend- "ants Laduram Nathmull, Nilmoney Das and the "Official Assignee or whoever amongst them are or "is found to be in custody of the title deeds and "deposited as aforesaid on the 7th day of February "1915 be directed to return the same to the plaintiff "and do also make over the said memorandum of "agreement dated the said 7th day of February 1915 "duly cancelled.

"A further prayer was that the defendants Laduram "Nathmull and the Official Assignee or either of them "do pay to the plaintiff his costs of this suit."

Now, the petition was by the plaintiff Nandalal Karuri and he prayed by that petition that all matters in difference in this suit including the question of costs be referred to the sole arbitration of Mr. A. N. Chaudhuri, Barrister-at-Law. The petition alleged that the defendant Nilmoney Das being an insolvent had no interest in the suit inasmuch as all his interest in the aforesaid property vested in the Official Assignee by operation of law. The order followed the petition and provided that with the consent of all the parties as aforesaid all matters in difference in this suit including the question of costs of the suit and of the reference be referred to the final decision of Mr. A. N. Chaudhuri, Barrister-at-Law. "The parties as aforesaid" were the Official Assignee, Laduram Nathmull and the plaintiff, and the consent of Nilmoney Das, one of the defendants, was not obtained.

The learned Judge has held that in this case, inasmuch as the consent of Nilmoney Das had not been obtained and inasmuch as all the matters in difference in the suit including the question of costs were referred, the Court had no jurisdiction to make the order of reference. I cannot help feeling in this case that the upholding of this order may involve some hardship upon the appellant and that if proper steps had been taken at the time of the application for reference, either to strike out the name of Nilmoney Das as a defendant in the suit or to modify the terms of the application, the result which has now been obtained might have been different. But this is a matter of importance as it relates to a question of jurisdiction, and inasmuch as our decision in this case may affect other cases in the future, it is impossible to allow any consideration of hardship to influence our decision. I agree with what the learned Judge has said upon that point. It is this: "The

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"question is one of jurisdiction and the conditions "of jurisdiction. If these are not satisfied I cannot "refuse to notice the defect nor will I accept some- "thing less as sufficient. These conditions are simple "and clear and should be kept so. Technicality will "in the end be less troublesome if they are exacted "firmly and in all cases, than if they are tempered "or modified in the hope of avoiding technicality. "Rule 1 of the 2nd Schedule is to be obeyed, not "merely to be placated." I think it is obvious from the terms of this clause that it was contemplated that in certain cases all matters in difference in the suit might not be referred; and that when only some matters in difference in the suit were referred, the consent of the parties who were interested in those matters, would be sufficient. That, however, is not this case, because, as I have already pointed out, the order of reference was that all matters in difference in this suit including the question of costs should be referred. Having regard to the allegations in the plaint, the relief asked for therein and the form of the order of reference to which I have just referred, in my judgment, it is impossible to say that Nilmoney Das was not a party interested in the matters which were referred. Even though he did not appear, the Court had no jurisdiction to make the order of reference without his consent. Consequently, inasmuch as the Court had no jurisdiction to make the order of reference, the whole proceedings were invalid from the beginning, and the award itself was invalid; and, therefore, the order of the learned Judge was right and the appeal therefrom should be dismissed with costs.

MOOKERJEE J. I agree that this appeal must be dismissed.

I desire to add that when the Court is called upon to decide a matter of jurisdiction, no question of hardship, no consideration of technicality can be permitted to affect our judgment. The foundation of jurisdiction here is the agreement amongst all the parties interested that the matters in difference between them shall be referred to arbitration. If all the parties interested do not apply and yet an order of reference is made, the order is illegal because made without jurisdiction. If an award follows on the basis of that reference, it is equally illegal, because it is founded upon a reference made without jurisdiction. In my opinion, the rules relating to jurisdiction should be strictly construed and the Court should not be astute to permit litigants to circumvent such provisions of the Code, for otherwise parties will be encouraged to evade these statutory directions. On the facts stated by learned counsel, it is plain that we cannot hold that the insolvent had no interest within the meaning of the first paragraph of the Second Schedule of the Code of Civil Procedure; indeed, he frankly admitted that his consent to the reference could not be obtained because he had disappeared in view of the bankruptcy proceedings.

FLETCHER J. I agree.

N. G. *Appeal dismissed.*

Attorneys for the appellant: *Pugh & Co.*
Attorneys for the respondents: *B. N. Basu & Co.*