

APPELLATE CIVIL.

Before Cuming and Cammiade JJ.

GIRIMONI DASI

v.

TARINI CHARAN POREL.*

1927

July 12.

Arbitration—Suit for declaration of plaintiff's title to and recovery of possession of land—Agreement to refer the subject-matter of the suit to arbitration—Reference without intervention of Court—Reference denied and award not accepted by the plaintiff—Civil Procedure Code (Act V of 1908), s. 89 and O. XXIII, r. 3—Whether award can be treated an adjustment or compromise—Whether O. XXIII, r. 3, comes within "any other law for the time being in force" in s. 89.

During the pendency of a suit for declaration of title to land and recovery of possession thereof the parties referred their disputes including the subject-matter of the suit to the arbitration of their zamindar without the intervention of the Court. An award having been given by the arbitrator the defendant sought to have it filed in Court, but the plaintiff denied the reference and refused to be bound by the award. The trial Court treated the award as an adjustment of the suit and passed a decree in terms thereof under Order XXIII, rule 3 of the Code of Civil Procedure. On appeal by the plaintiff the Subordinate Judge remanded the case for trial on the merits holding that having in view the provisions of section 89 of the Code of Civil Procedure (Act V of 1908) the award could neither be enforced under Schedule II of the Code nor be treated as an adjustment or compromise of the suit under Order XXIII, rule 3. On a Second Appeal by the defendant.

Held, that the enforcement of the award as such was barred by section 89 of the Code of Civil Procedure.

Judgment of Fawcett J. in *Manilal Motilal v. Gokaldas Rowji* (1) dissented from, and the judgment of Macleod C.J. followed.

* Appeal from Appellate Decree, No. 164 of 1925, against the decree of H. G. Mitter, Subordinate Judge of Hooghly, dated Aug. 4, 1924, reversing the decree of Bejan Lal Mukherji, Munsif of Serampur, dated Feb. 5, 1923.

(1) (1920) I. L. R. 45 Bom. 245.

Held, further, that the award could not be treated as an adjustment or compromise of the suit under Order XXIII, rule 3 of the Code of Civil Procedure.

Dekari Tea Company Limited, v. India General Steam Navigation Company, Limited, (1) *Amarchand Chamaria v. Banwari Lal Rakshit* (2) and *Shavakshaw D. Davar v. Tyab Haji Ayub* (3) followed.

Manilal Motilal v. Gokaldas Rowji (4) in so far as it laid down that such an award could be enforced as an adjustment or compromise, dissented from.

The consent of both parties to the award not having existed as found by the lower Appellate Court and no decree having been founded on such a consent, a second appeal was not barred under the Civil Procedure Code.

SECOND APPEAL by the defendant.

While a suit for declaration of title to, and for possession of, land was pending the parties, without the intervention of the Court, referred their disputes to the arbitration of Kumar Bhupendra Nath Mukerjee of Uttarpara their mutual *zamindar* who gave his award. The defendant, who had more to gain than lose under the award, petitioned the Court to stay the title suit and to dispose of the case in accordance therewith after calling the same from the arbitrator. The plaintiff denied the reference to arbitration or the award. The trial Court treated the defendant's petition as a suit under Schedule II, paragraph 21 of the Code, and after considering the plaintiff's objections thereto passed a decree in accordance with the award treating the same as an adjustment or compromise under Order XXIII, rule 3 of the Code, relying on the case of *Manilal Motilal v. Gokaldas Rowji* (4). On an appeal by the plaintiff, the Subordinate Judge held that the award could neither be treated as an adjustment or compromise under

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(1) (1920) 25 C. W. N 127.

(3) (1916) I. L. R. 40 Bom. 386.

(2) (1921) I. L. R. 49 Cal. 608.

(4) (1920) I. L. R. 45 Bom. 245.

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Order XXIII, rule 3, inasmuch as the consent of the parties did not exist, nor could it be enforced under Schedule II of the Civil Procedure Code on account of the bar created by section 89 of the Code (Act V of 1908), and remanded the suit for trial on the merits. Against this order of remand the defendant appealed to the High Court.

Dr. Jadunath Kanjilal (with him *Babu Nanilal Dey*), for the respondent, took a preliminary objection. No second appeal lies under Order XLIII, rule 1 (*m*) read with section 96, clause (3) of the Code. The defendant could have appealed under section 104 (*1*)(*f*), but she does not appeal under that.

The Court overruled the objection holding that the consent of the parties did not exist and the provisions of section 96 (3) and Order XLIII, rule 1 (*m*) did not apply.

Babu Shyama Prosad Mukherjee, for the appellant. During the pendency of the suit the dispute between the parties was referred to an arbitrator without the intervention of the Court. The arbitrator filed an award which has not been given effect to by the lower Appellate Court. I contend the arbitrator had jurisdiction to pass the award and at any rate the award was valid under Order XXIII, rule 3, C. P. C. I rely on *Brojodurlabh Sinha v. Ramanath Ghose* (1), and say that the award should be recorded as an adjustment of the matters in dispute in the suit, *vide Manilal Motilal v. Gokaldas Rowji* (2). The award could not be regarded as invalid. *Manilal Motilal v. Gokaldas Rowji* (2) followed *Harakhbai v. Jamnabai* (3) in which it is held that Order XXIII, rule 3, C. P. C., comes within the meaning of the

(1) (1897) I. L. R. 24 Calc. 908, 913. (2) (1920) I. L. R. 45 Bom. 245.

(3) (1912) I. L. R. 37 Bom. 639.

words "any other law for the time being in force" in section 89, C. P. C. The award should have been recorded as an agreement adjusting or compromising the suit. I refer to *Gajendra Singh and another v. Durga Kunwar* (1) and also to *Chinna Venkata Sami Naicken v. Venkata Sami Naicken and another* (2). The dictum laid down in *Manilal Motilal v. Gokaldas Rowji* (3) has been followed in *Gajendra Singh and another v. Durga Kunwar* (1). In *Chinna Venkata Sami Naicken v. Venkata Sami Naicken* (2) the same view has been taken. All the High Courts are agreed that the award can be recorded under Order XXIII, rule 3, C. P. C.

Manilal Motilal v. Gokaldas Rowji (3) is authority for the proposition that even if one of the parties resiles from the award, the award can be given effect to under Order XXIII, rule 3, C. P. C.

Dr. Jadunath Kanjilal, advocate, (with him *Babu Nani Lal Dey*), for the respondent. All references to arbitration during the pendency of the suit are governed by the provisions contained in the Second Schedule of the Code. The parties cannot deprive the Court of its jurisdiction by private reference to arbitration. Section 89, C. P. C., lays down the law on the point. The procedure is laid down in paragraphs 20 and 21 of the Second Schedule. The procedure laid down as aforesaid has not been followed in this case and as such the award is invalid and cannot be recorded. *Amarchand Chamaria v. Banwari Lal Rakshit* (4) and *Dekari Tea Company, Limited v. India General Steam Navigation, Company, Limited* (5), both decisions of Mr. Justice Rankin

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(1) (1925) I. L. R. 47 All. 637. (3) (1920) I. L. R. 45 Bom. 245.

(2) (1919) I. L. R. 42 Mad. 625, (4) (1921) I. L. R. 49 Calc. 608.
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sitting singly on the Original Side are authorities for this contention. In this case the parties referred the matter in suit to arbitration without the consent of the Court. The award that has been made cannot be enforced under Order XXIII, rule 3, C. P. C., as it is not an adjustment or a compromise of their differences by consent. The case of *Amarchand Chamaria v. Banwari Lal Rakshit* (1) follows *Shavakshaw D. Davar v. Tyab Haji Ayub* (2) and the case of *Manilal Motilal v. Gokaldas Rowji* (3) has been dissented from.

CAMMIADE J. This appeal arises out of a suit for declaration of the plaintiff's title to certain lands and for recovery of possession. During the pendency of the suit, a composition was arrived at between the parties in criminal proceedings pending between them, relating, apparently, to the same lands. The parties agreed to refer the matter in dispute to the arbitration of the zemindar. When the zemindar gave his award, the defendant, in whose favour the award was made, filed it in Court and prayed that a decree be passed in accordance therewith. The plaintiff refused to abide by the award, making various allegations against the zamindar. The learned Munsif who tried the suit held that the award was an adjustment of the matters in dispute within the meaning of rule 3' Order XXIII of the Code of Civil Procedure, and he passed a decree in accordance with this award.

On appeal, this decision was reversed on the ground that the above finding on the question of law was erroneous. The learned Subordinate Judge who heard the appeal remanded the suit for trial on the merits.

The defendant has appealed to this Court.

(1) (1921) I. L. R. 49 Calc 608.

(2) (1916) I. L. R. 40 Bom. 386. (3) (1920) I. L. R. 45 Bom. 245.

A preliminary objection is taken on behalf of the respondent that no second appeal lies. This objection is based on sub-section (3), section 96 of the Code, which provides that no appeal shall lie from a decree passed by the Court with the consent of parties. In the present case, the learned Court of appeal below has held that consent of parties did not exist, and has granted no decree. The objection, therefore, is not maintainable.

The only question in the case is whether or not an award made on a reference to arbitration, without the intervention of the Court, during the pendency of a suit, may be recorded as an adjustment of the matters in dispute under the provisions of rule 3, Order XXIII, when one of the parties objects to its being so recorded. This matter has been considered in its various aspects in a series of cases, and no further light can be thrown upon it. There is no judicial pronouncement by a Bench of this Court on the question; but there are two reported decisions of Mr. Justice Rankin, as he then was, sitting on the Original Side of this Court, namely, the cases of *The Dekari Tea Company v. The India General Steam Navigation Company* (1) and *Amar Chand Chamaria v. Banwari Lal Rakshit* (2). In both these cases, the learned Judge held that an award made on a reference to arbitration during the pendency of a suit, neither made under the Second Schedule to the Code of Civil Procedure nor under the Arbitration Act, could not be enforced in the suit. In the second case mentioned above, his Lordship expressed his disagreement with the view taken by the High Court of Bombay in the case of *Manilal Motilal v. Gokaldas Rowji* (3) that

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such a submission could be enforced in the suit under the general law of contract.

There is practically universal agreement that section 89 of the Code of Civil Procedure is a bar to the enforcement of the award as such, although Fawcett J. in the case of *Manilal Motilal v. Gokaldas Rowji* (1) followed the dictum of Davar J. in *Harakhbai v. Jamnabai* (2) that rule 3, Order XXIII came within the meaning of the words "any other law" for the time being in force in section 89 of the Code of Civil Procedure. With all respect to the learned Judge, I agree with the contrary view taken in the same case by McLeod C. J. and the reasons given by him.

As regards the view that, in spite of the provisions of section 89 an award made on a reference to arbitration during the pendency of a suit is enforceable under the general law of contract, it seems to me that there are strong reasons against its acceptance. As has been pointed out by Rankin J. in *Amarchand Chamaria v. Banwarilal Rakshit* (3), and by McLeod, C.J. in *Shvakshaw v. Tyab Haji Ayub* (4), the Code makes elaborate provisions for the control by the Court of proceedings in arbitration held on a reference through the Court, and it is inconceivable that the Legislature intended that it should be open to the parties to cast aside these provisions and carry on the proceedings in any way they choose. Of course, if the parties agree about the result of the proceedings, there is an end of the matter; but, if they do not, the fact that the proceedings are illegal nullifies the award of the arbitrator. If indeed the view expressed in the case of *Manilal Motilal v. Gokaldas Rowji* (1) were correct, an award made in such circumstances should

(1) (1920) I. L. R. 45 Bom. 245. (3) (1921) I. L. R. 49 Calc. 608.

(2) (1912) I. L. R. 37 Bom. 639. (4) (1916) I. L. R. 40 Bom. 386.

be enforced even if both parties objected to it. Such was the case in *Ghulam Khan v. Muhammad Hassan* (1). Their Lordships of the Judicial Committee have laid it down very clearly in that case, that once a suit has been instituted all proceedings in arbitration are subject to the control of the Court. It is not permissible to the parties to deprive the Court of its jurisdiction by private reference to arbitration; and no award made on such reference, unless consented to by both parties, can be enforced in the suit.

The view of the law taken by the learned Subordinate Judge is correct. This appeal is accordingly dismissed with costs.

CUMING J. I agree.

R. K. C.

(1) (1901) I. L. R. 29 Calc. 167. (P. C.)

APPELLATE CIVIL.

Before Cuming and Cammiade JJ.

BHARAT CHANDRA PAL

v.

GAURANGA CHANDRA PAL.*

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July 13.

Attachment before Judgment—Immoveable property—Civil Procedure Code (Act V of 1908) O. XXXVIII, rr. 5, 7—Mode of attachment—Prohibitory order—O. XXI, r. 54—Proclamation.

In order to invoke the aid of section 64 of the Civil Procedure Code on behalf of a decree-holder an attachment of immoveable property under Order 38 must have been made in the manner prescribed in Form 24, Appendix E, as contemplated by Order 21, rule 54, clause 1. A proclamation by beat of drum and affixing on the property a copy of the order in

* Appeal from Appellate Decree, No. 224 of 1925, against the decree of Atul Chandra Das Gupta, Subordinate Judge of Tippera, dated Sep. 22 1924, reversing the decree of Nagendra Kumar Bose, Munsif, Nabinagar, dated Oct. 8, 1923.

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