APPELLATE CIVIL.

Before R. C. Mitter J.

MAHAMMAD MIYA PANDIT

v.

OSMAN ALI.*

1934

Aug. 2, 6.

Arbitration—Agreement to abide by decision of a nominee on certain issues in a pending suit, if a compromise—Decree—Revision by High Court—Code of Civil Procedure (Act V of 1908), s. 89; O. XXIII, r. 3.

Where, in a suit for possession, the parties, without an order of the court, agree to nominate a certain person, who is to measure the land, and agree that, in case he finds that the lands in suit were in possession of the defendant, the plaintiff would get a decree, the agreement amounts to a reference to arbitration without intervention of the Court.

The determination by the nominee of the point under reference is an award and cannot be recorded as a compromise or adjustment of the suit, and the court has no jurisdiction to pass a decree in accordance with his decision under the colour of exercising the powers under Order XXIII, rule 3 of the Code of Civil Procedure.

Himanchal Singh v. *Jatwar Singh* (1), *Basdeo Singh* v. *Ram Raj Singh* (2) and *Khobhari Sah* v. *Jhaman Sah* (3) distinguished.

Chinna Venkatasami Naicken v. *Venkatasami Naicken* (4) dissented from.

Rohini Kanta Bhattacharjee v. *Rajani Kanta Bhattacharjee* (5), *Ramadhar Rai* v. *Subedar Pathak* (6) and *Laljee Jesang* v. *Chander Bhan Shukul* (7) referred to.

No appeal lies against a decree passed in accordance with the decision of the nominee.

Amir Ali v. *Inderjit Koer* (8) and *Bahir Das Chakravarti* v. *Nobin Chunder Pal* (9) referred to.

Dwarka Nath Chakrabarti Chowdhury v. *Atul Chandra Chakrabarti Chowdhury* (10) distinguished.

Gurcharan Singh v. *Shibdev Singh* (11) followed,

Such a decree is, however, open to revision by the High Court.

*Appeal from Appellate Decree, No. 259 of 1932, against the decree of Makhanlal Mukherji, Second Additional Subordinate Judge of Noakhali, dated Aug. 13, 1931, affirming the decree of Mateeshchandra Banerji, Munsif of Hatiya, dated Aug. 19, 1930.

(1) (1924) I. L. R. 46 All. 710.
(2) [1932] A. I. R. (All.) 166; 137 Ind. Cas. 263.
(3) (1915) 23 C. L. J. 482; 34 Ind. Cas. 220.
(4) (1919) I. L. R. 42 Mad. 625.
(5) (1934) 38 C. W. N. 648.
(6) (1931) I. L. R. 11 Pat. 237.
(7) (1930) I. L. R. 9 Ran. 39.
(8) (1871) 9 B. L. R. 460; 14 M. I. A. 203.
(9) (1901) I. L. R. 29 Calc. 306.
(10) (1927) 46 C. L. J. 353.
(11) (1921) I. L. R. 3 Lah. 175.

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SECOND APPEAL by the plaintiffs.

The facts of the case are stated in the judgment.

Bhagirathchandra Das for the respondents. I have a preliminary objection to this appeal. The order being one under Order XXIII, rule 3, section 104 (*2*) of the Civil Procedure Code is a bar to a Second Appeal. Secondly, the decree must be taken to be passed by consent, and so an appeal is barred under section 96 (*3*) of the Code. *Amir Ali* v. *Inderjit Koer* (1), *Bahir Das Chakravarti* v. *Nobin Chunder Pal* (2) and *Gurcharan Singh* v. *Shibdev Singh* (3) support my view.

Mahendrakumar Ghosh (with him *Mahendranath Mitra* and *Nakuleshwar Som*) for the appellants. The observations of Roy J. in *Dwarka Nath Chakrabarti Chowdhury* v. *Atul Chandra Chakrabarti Chowdhury* (4) are in my favour, even if no appeal lies. The lower court had no jurisdiction to pass an order under Order XXIII, rule 3, and, this is a fit case in which the High Court should exercise its powers of revision.

Bhagirathchandra Das for respondents. The decision of Shyamacharan in this case does not amount to an award and was rightly recorded as an adjustment under Order XXIII, rule 3. I rely on *Himanchal Singh* v. *Jatwar Singh* (5), *Basdeo Singh* v. *Ram Raj Singh* (6) and other cases.

Cur. adv. vult.

MITTER J. This appeal is on behalf of the plaintiffs and arises out of a suit for possession. There are seven plaintiffs. Of them, plaintiffs Nos. 1 and 2 are adult males, Nos. 3, 4 and 7 are ladies and Nos. 5 and 6 are minors. The minors were represented in the courts below by plaintiff No. 1, who also represents them in this appeal. At the instance of plaintiffs there was a local investigation by a pleader commissioner

(1) (1871) 9 B. L. R. 460; 14 M. I. A. 203.
(2) (1901) I. L. R. 29 Calc. 306.
(3) (1921) I. L. R. 3 Lah. 175.
(4) (1927) 46 C. L. J. 353, 356.
(5) (1924) I. L. R. 46 All. 710.
(6) [1932] A. I. R. (All.) 166; 137 Ind, Cas. 263.

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who submitted a report in their favour. The defendants filed an objection to the said report. At the date of the hearing of the suit, which was the 15th August, 1930, defendant No. 2 filed an application stating that the parties had agreed to the lands being measured by one Shyamacharan and that if it was found by him that the lands in suit were in possession of the defendants, the plaintiffs would get a decree, otherwise the suit would stand dismissed, but the plaintiffs would be entitled to get Rs. 50 from the defendants. The said defendant further alleged that Shyamacharan had measured the lands and had found that no part of the lands in suit was in the possession of the defendants. He, accordingly, prayed for the said adjustment to be recorded under the provisions of Order XXIII, rule 3, of the Code of Civil Procedure. The plaintiffs denied the said agreement, but the learned Munsif, after taking evidence, found that the agreement was as alleged by the defendant No. 2 and dismissed the suit on the findings of Shyamacharan. The attention of the court does not seem to have been drawn to the fact that some of the plaintiffs were minors. Admittedly no leave of the court was taken under rule 7 of Order XXXII of the Code. On appeal from the decree made by the trial court, the point urged by the plaintiffs, as the appellate court puts it, was—

> Whether the suit was adjusted between the parties out of court and whether the compromise should be recorded.

The court of appeal below, however, only applied its mind to the question of the *factum* of the agreement, but did not consider whether the alleged compromise was lawful or could be recorded under the provisions of Order XXIII, rule 3 of the Code. It did not even advert to the fact that there were minors whose interest it was the duty of the court to safeguard and protect. The appellate court agreed with the first court and remarked that the "Munsif was "justified in recording the compromise under Order "XXIII, rule 3 of the Code of Civil Procedure."

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The appeal was accordingly dismissed, hence the Second Appeal by the plaintiffs. A preliminary objection has been taken to the competency of the appeal. Mr. Das, who appears on behalf of the respondents, urges, firstly, that the appeal, being really against the order recording the compromise under Order XXIII, rule 3, a Second Appeal is barred under the provisions of section 104 (*2*) of the Code. Secondly, he urges that, even if the appeal be regarded as an appeal from the decree, after the findings of the court of appeal below, the decree must be taken to be a decree passed with consent of parties and section 96 (*3*) of the Code bars the appeal. In the course of the argument, I indicated that possibly the preliminary objection was a sound one. On that the advocate for the appellant asked me to interfere in revision in case I held that no appeal lay. As I considered that the case was a fit one for interference under the revisional jurisdiction, I heard the learned advocates at length who presented their cases from all aspects and I must acknowledge the great assistance I have derived from them in the case which has engaged my anxious consideration. After having heard the learned advocates, I have come to the conclusion, though not without hesitation, that no appeal lies. But I am at the same time quite convinced that I have power to interfere in revision and should so interfere in this case.

My reasons for giving effect to the preliminary objection are as follows:—

(i) The Code provides for one appeal when the *factum* or legality of a compromise or adjustment of a suit is questioned. The court of appeal below has arrived at a finding that there was a compromise as pleaded by defendant No. 2. To allow the same matter to be re-agitated in an appeal from the appellate decree would be to allow two appeals when the Code gives one.

(ii) A decree passed is still a decree passed by consent, whether the compromise is admitted by both the parties or disputed by one of them and the court finds that there was one.

(iii) Where the parties say that the determination of their disputes by a person is to be final as between them, that is to be regarded either as an undertaking not to appeal and an appeal preferred would, as Lord Justice James observed in *Amir Ali* v. *Inderjit Koer* (1), be in violation of good faith and ought not to be entertained where the real merits of the case have been withdrawn from the court. The same principle has been formulated, though in different language, by Rampini and Pratt J.J. in the case of *Bahir Das Chakravarti* v. *Nobin Chunder Pal* (2) where they observe that parties "are equitably estopped" from resiling from and impugning the decree which was given by the court in accordance with the finding on the issue which they agreed to refer to the decision of a third person.

In the case of *Dwarka Nath Chakrabarti Chowdhury* v. *Atul Chandra Chakrabarti Chowdhury* (3), there is an observation, which apparently seems to militate against the view I am taking, but an examination of the case leads me to think that the point, which I have been called upon to decide, did not really arise in that case. The observation is of Roy J. and occurs at page 356. It is as follows:—

> Certain preliminary objections were taken by the learned vakil for the respondents. They are not serious; one was that no appeal lay from a decree which is based on a compromise. The contention of the plaintiff is that the whole compromise has been struck out. The dispute is over the nature of the compromise and the plaintiff has a right in appeal to show what the compromise was.

I must first of all remark that the said case came up on first appeal to this Court, but I am not placing much importance on the said fact for distinguishing the said case. From the report, it appears that the plaintiff claimed a share in two villages appertaining to *touzi* No. 1760/28. The contesting defendants denied the title of the vendors of the plaintiff and the vendor challenged his conveyance to the plaintiff.

(1) (1871) 9 B. L. R. 460; 14 M. I. A. 203.

(2) (1901) I. L. R. 29 Calc. 306.

(3) (1927) 46 C. L. J. 353, 356.

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Issues were framed and the plaintiff was being examined on commission. At that stage, a petition of compromise was presented to the commissioner. By the compromise, the plaintiff gave up his claim on the basis of his purchase; the said two villages were to be partitioned between the plaintiff and his co-sharers (not parties to the suit) on the one hand and the defendants on the other according to the shares recorded in the record-of-rights by an arbitrator, Sharatchandra Bhattacharjya, and that, after the division by him, the plaintiff was to withdraw the suit. No order was obtained from the court for appointing Sharatchandra as arbitrator. Sharatchandra later on refused to act and, on the application of the plaintiff, the Subordinate Judge appointed another person as arbitrator under the provisions of paragraph 5 of the Schedule II of the Code of Civil Procedure. This person made the division and submitted an award and, in spite of the objection of the defendants that there was no reference to arbitration under paragraph 2 of the said schedule, the Subordinate Judge made a decree in conformity with the award. His successor, however, deleted the so-called award from the decree and the final decree that was made was one simply allowing the suit to be withdrawn without liberty to the plaintiff to bring a fresh suit. It was pointed out by this Court that the compromise between the parties was not simply that the suit was to be withdrawn but was to be withdrawn on the happening of certain contingencies, *i.e.*, the division of the lands by Sharatchandra. The final decree, therefore, was one that was not passed in accordance with the consent of the parties and hence section 96 (*3*) was out of the way. The question raised before me has, however, been considered by Lahore High Court in *Gurcharan Singh* v. *Shibdev Singh* (1). The said Court held, in circumstances somewhat similar to the present case, that the appeal was incompetent and I agree with the said judgment.

(1) (1921) I. L. R. 3 Lah. 175.

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But, as I have said before, my decision on the preliminary point does not dispose of the case. I am still to see if the courts below had jurisdiction to pass an order under Order XXIII, rule 3 of the Code. My view is that the agreement, which both the courts below have found to be established, amounts to a reference to arbitration without the intervention of the court of the subject matter of a pending suit and the decision of Shyamacharan really amounts to an award on such a reference. Mr. Das, who appears for the respondent, has contended before me that the decision of Shyamacharan does not amount to an award, but is to be considered as an adjustment of the suit which the courts below have rightly recorded under Order XXIII, rule 3 and, in support of his contention, he has referred me to the cases of *Himanchal Singh* v. *Jatwar Singh* (1) and *Basdeo Singh* v. *Ram Raj Singh* (2).

Before I examine these cases, I may observe that, so far as our Court is concerned, it is now settled law that an award made on a reference without the intervention of the court during the pendency of a suit, cannot be recorded as a compromise or adjustment of the suit under Order XXIII, rule 3. The Bombay, Madras, Patna and Rangoon High Courts have, however, taken a different view. The divergence of opinion is due to the different interpretation put upon the words "any other law for the time being "in force" occurring in section 89 of the Code [see the cases collected in *Rohini Kanta Bhattacharjee* v. *Rajani Kanta Bhattacharjee* (3), as also *Ramadhar Rai* v. *Subedar Pathak* (4) and *Laljee Jesand* v. *Chander Bhan Shukul* (5)]. I am bound to follow the course of decisions of our Court and, if the decision of Shyamacharan is an award, the courts below had no jurisdiction to record the decision of Shyamacharan as an adjustment of the suit under Order XXIII, rule 3.

(1) (1924) I. L. R. 46 All. 710.
(2) [1932] A. I. R. (All.) 166; 137 Ind. Cas. 263.
(3) (1934) 38 C. W. N. 648.
(4) (1931) I. L. R. 11 Pat. 237.
(5) (1930) I. L. R. 9 Ran. 39.

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This leads to the question whether the said decision is an award. The cases of the Allahabad High Court cited by Mr. Das (1) and (2) are distinguishable. In those cases the parties to the suit agreed to be bound by the statement of a person named by them. The nominee made a certain statement and the question raised was whether the suit could be disposed of in accordance with the statement so made. Sulaiman and Kanhaiyalal JJ. (1) base their decision, firstly, on section 20 of the Evidence Act and, secondly, on the judgment of the Madras High Court in *Chinna Venkatasami Naicken* v. *Venkatasami Naicken* (3). The Madras case proceeds on the view that an award in a pending case made by an arbitrator appointed without the intervention of the court can be recorded under Order XXIII, rule 3, a view, which, as I have said, is against the decision of our Court, and section 20 of the Evidence Act cannot have any possible application to the case before me. Nor does the case of *Khobhari Sah* v. *Jhaman Sah* (4) support the contention of the respondent. There no judicial or quasi-judicial work had to be done by the person nominated who was only to see with his own eyes a certain state of things, *e.g.*, existence of furnace, bellows, *etc.*, in the defendant's house and make a statement in court. I hold that Shyamacharan had to do some work which was in the nature of judicial work and that his determination is an award and that the courts below had no jurisdiction to pass a decree, which is in accordance with the decision of Shyamacharan under the colour of exercising the powers under Order XXIII, rule 3. In the view I have taken, it is not necessary to consider the other contentions raised by the appellants. If I had held that the case came under Order XXIII, rule 3, I would not have set aside the decree of the courts below so far as the minors are concerned, seeing that they are appearing even in this Court by plaintiff No. 1 as their

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(2) [1932] A. I. R. (All.) 166; 137 Ind. Cas. 263.
(3) (1919) I. L. R. 42 Mad. 625.
(4) (1915) 23 C. L. J. 482; 34 Ind. Cas. 220.

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next friend, but would have made the same reservations in their favour as were made by the Acting Chief Justice in *Golenur Bibi* v. *Abdus Samad* (1). The result is that the appeal is dismissed but the decrees of the courts below are set aside and the learned Munsif is directed to proceed with the suit. I make no order as to costs.

Appeal dismissed; *decree revised.*

A.A.

(1) (1930) I. L. R. 58 Calc. 628.