

APPELLATE CIVIL

Before Sen J.

TRAILOKYA NATH BANERJI

v.

SUKUMAR BASU.*

1940

May 30, 31;
June 7.

Appeal—*Appeal against appellate order—Appeal from order filing award—Decree upon award—Code of Civil Procedure (Act V of 1908), s. 104.*

Where the Court neglects to pass an explicit order filing an award and passes a decree upon it, a party complaining against the award may appeal from the whole decision and such an appeal must be treated as an appeal from an implied order filing the award, even though a decree upon the award has already been passed.

Jagat Pande v. Sarwan Pande (1) followed.

Although an appeal will lie from a decree upon award, which is in accordance with the award, where the submission or reference to arbitration is challenged as being invalid, it does not follow that a Second Appeal will lie from an order filing or refusing to file an award merely because the validity of the reference to arbitration is challenged.

Rai Charan Purkait v. Amrita Lal Gain (2) distinguished.

APPEAL FROM APPELLATE DECREE preferred by the plaintiff.

The facts of the case and arguments on behalf of the parties appear sufficiently from the judgment.

Shambhu Nath Banerji for the appellant.

Rajendra Bhusan Bakshi and *Ram Mohan Bhattacharjya* for the respondent.

Cur. adv. vult.

SEN J. The facts giving rise of this appeal are as follows:—

There was a dispute regarding land between the appellant and the respondent and two others. The

*Appeal from Appellate Decree, No. 813 of 1938, against the decree of Jnanendra Nath Ghosh, Subordinate Judge, Jessore, dated March 14, 1938, reversing the decree of Enayetur Rahaman, Munsif, Narail, dated Sept. 30, 1937.

1940
 Trai Chandra Nath
 Banerji
 v.
 Sukumar Basu.
 Sen J.

dispute was referred by the parties to the arbitration of three gentlemen, who are pleaders of Jessore. They made an award.

The appellants applied under para. 20 of Sch. II of the Code of Civil Procedure to the Court of a Munsif at Narail in the District of Jessore for an order that the award be filed. The respondents alone objected. His objections broadly were :—

- (i) that there was no valid reference to arbitration and
- (ii) that the award was liable to be set aside on the ground of misconduct on the part of the arbitrators.

The learned Munsif held that the reference was valid and that there was no misconduct. He then passed the following order :—

Ordered that the suit be decreed in terms of the award with cost on contest against defendant No. 1 and *ex parte* against the rest. The award do form part of the decree.

The defendant No. 1 it may be noted is the respondent.

Against this decision an appeal was taken to the District Judge by the respondents and was heard by the Subordinate Judge, First Court, Jessore. The appeal was treated by the learned Subordinate Judge as an appeal from an order directing an award to be filed. Three points were taken by the respondents in challenging the decision of the learned Munsif. They are :—

- (i) That the award determined matters not referred by the submission to arbitration.
- (ii) That the award was indefinite.
- (iii) That the award was liable to be set aside on the ground of misconduct on the part of the arbitrators.

The appellants took the point that the appeal was barred by limitation.

The learned Subordinate Judge held against the respondents on the first two points; but he found that the arbitrators were guilty of misconduct and that

the appeal was not barred by limitation. On these findings he allowed the appeal in the following terms :—

Ordered that the appeal be allowed with costs. The order of the learned Court below directing the award to be filed is set aside.

Against this order the appellant has filed the present appeal.

A preliminary objection is taken by the respondent that no Second Appeal lies. The argument in support of this objection is as follows :—

The appeal before the Subordinate Judge was an appeal against an order filing an award passed in an arbitration without the intervention of the Court. An appeal against such an order is permitted by s. 104 (i) (f) of the Code of Civil Procedure, but a Second Appeal is prohibited by sub-s. (2), which says that no appeal shall lie from any order passed in appeal under this section.

The objection is met by the appellant in this way. Learned advocate for the appellant says, first, that the appeal before the Subordinate Judge was not an appeal against an order filing the award, but an appeal against the decree passed upon the award and that, therefore, a Second Appeal would lie, as the prohibition against Second Appeals contained in s. 104 (2) is restricted to appeals from orders and can have no application to decrees. Secondly, he says that, as the validity of the reference to arbitration was questioned by the respondent, a Second Appeal would lie, even though the appeal be held to be one not against the decree upon the award but against the order filing the award.

I shall now take up for consideration the first branch of the argument urged on behalf of the appellant. When an award is made without the intervention of the Court, the party who wishes to enforce the award must apply to the Court having jurisdiction over the subject matter of the award for an order filing the award. The Court must give notice of this application to the other parties and

1940

*Trailokya Nath
Banerji*

v.

*Sukumar Basu.**Sen J.*

1940
Trailokya Nath
Banerji
 v.
Sukumar Basu.
 Sen J.

they may come and object to the filing of the award. The Court will decide the question and pass an order filing the award or refusing to file it. Any party dissatisfied with this order has the right to appeal from it, but there is no Second Appeal from such an order. This is quite clear from the provisions of s. 104 (1) (f) and s. 104 (2) of the Code of Civil Procedure.

Now, if the Court passes an order filing the award, it shall pronounce judgment in accordance with the award and upon that judgment a decree shall follow. No appeal shall lie from this decree except in so far as the decree is in excess of and not in accordance with the award. If the decree is of this nature an appeal as well as a Second Appeal will lie.

There is a clear and fundamental distinction between an appeal from an order filing an award and an appeal from a decree passed on an award. The former is directed against the award itself, while the latter accepts the award and attacks the decree on the ground that it is in excess of the award or inconsistent therewith.

Bearing this distinction in mind, I proceed to decide whether the appeal of the respondent was from an order filing an award or from a decree passed thereon. In the present case, the learned Munsif has not followed the procedure laid down in para. 21 of the Second Schedule of the Code. He passed no distinct order filing the award. He expressed the opinion that the award should be enforced and passed an order "decreeing the suit in terms of the award". The respondent could not frame his appeal as being one from an order filing the award, inasmuch as there was no such order passed formally. He did the only thing that he could do,—he appealed against the whole decision of the Munsif. He directed his appeal, however, not against the decree, but against the award. The objections urged in the appeal were all directed against the award and not against the decree. The learned Judge has described the appeal

as being one "against the order directing an award "to be filed under para. 21 of Sch. II, Civil Procedure "Code". With this description I entirely agree. The appeal was not against the decree, but against the implied order filing the award. In circumstances like these, where the Court neglects to pass an explicit order filing the award and passes a decree upon the award, what is an aggrieved party to do? He can only appeal from the whole decision. Such an appeal must be treated as an appeal from an implied order filing the award even though a decree upon the award has already been passed. If one were to treat such an appeal as an appeal from the decree it would result in serious prejudice to a party complaining against an award. The result would be that a Court, by failing in its duty to record an order filing the award, would be able to deprive the complaining party of all opportunity of contesting the validity of the award. The party would be relegated to the very limited right of appealing from the decree on the award, a right which can be exercised only if the decree is in excess of or not in accordance with the award. In the case of *Jagat Pande v. Sarwan Pande* (1) the position was exactly similar. It was held that, as there was no separate order passed filing the award, the appeal from the decision of the Court passing a decree upon the award should be treated as an appeal, which was in substance an appeal from an order filing the award. I entirely agree with this view and hold that the appeal before the Subordinate Judge was not an appeal from the decree, but an appeal from the implied order filing the award. That being so, the order passed in the appeal by the Subordinate Judge is governed by s. 104 (2) of the Code of Civil Procedure, which says that no appeal will lie therefrom.

1940
Trailokya Nath
Banerji
 v.
Sukumar Basu.
 Sen J.

The next point urged was that a Second Appeal will lie because the validity of the reference itself was challenged by the respondent before the Munsif.

1940

*Trailokya Nath
Banerji*
v.
Sukumar Basu.
Sen J.

My attention was drawn to paras. 16 and 21 of Sch. II of the Code of Civil Procedure, which prohibit any appeal from a decree upon an award except in so far as the decree is in excess of or not in accordance with the award. Learned advocate for the appellant next referred me to certain cases, where it was held that, although an appeal from a decree passed on an award was so prohibited, nevertheless, if the reference itself was challenged as being invalid, an appeal would lie against the decree, even though it be in accordance with the award. Learned advocate argues that, if the prohibition against an appeal from a decree upon an award contained in paras. 16 and 21 of Sch. II of the Code of Civil Procedure is removed, if the validity of the reference is questioned, then the prohibition against a Second Appeal from an order filing or refusing to file an award contained in s. 104 (2) of the Code of Civil Procedure should likewise be held to be removed when any party questions the validity of the reference.

It would serve no useful purpose to deal with all the cases cited before me where it has been held that an appeal will lie against a decree upon an award, if the validity of the reference is challenged, even though the decree is in accordance with and not in excess of the award. Some of the cases are under the old Code and, in view of the important changes made in provisions of the Code dealing with the subject of arbitration, they cannot have any direct application. There is also a divergence of opinion on this point both in this Court and in the Courts of other provinces. Most of these cases are referred to and dealt with very fully by Mukerji J. in the case of *Golenur Bibi v. Abdus Samad* (1). He gives a very elaborate and lucid history of how the view that an appeal lay from a decree upon an award on the ground that the submission was invalid came to be held and, although he held a contrary opinion, he

(1) (1930) I. L. R. 58 Cal. 623.

felt constrained to follow that view in the case under consideration, as the weight of decision in this Court was in support of it. I am bound by this decision and shall, for the purposes of this case, accept the position that, although a decree upon an award which is in accordance with the award is normally not appealable, nevertheless an appeal will lie from such a decree where the submission or reference to arbitration is challenged as being invalid. From this, however, it does not follow that a Second Appeal will lie from an order filing or refusing to file an award, when the validity of the reference to arbitration is challenged. The status of a decree and an order so far as appealability is concerned is fundamentally different. When a decision amounts to a decree, it is invariably appealable, unless it is expressly provided that no appeal shall lie from it. This is the effect of s. 96 of the Code of Civil Procedure. An order, however, is invariably non-appealable, unless it is expressly provided that an appeal shall lie from it. This is the effect of s. 104 of the Code of Civil Procedure. If this important difference between a decree and an order is borne in mind the fallacy in the argument of learned advocate for the appellant will become apparent. The decree passed on an award would ordinarily be appealable were it not for the provisions of paras. 16 and 21 of Sch. II of the Civil Procedure Code, which prohibit an appeal, if such a decree is in terms of the award. Now this prohibition is based on the fact that the decree is founded upon an award. If the validity of the reference to arbitration is challenged successfully and the decree is shown to be one which was not based on any award, its appealability will be unaffected by the prohibition contained in paras. 16 and 21, which apply only to a decree based on an award. This I consider is the ground on which it has been held that an appeal would lie from a decree on an award even though it is in accordance with the award when the very reference to arbitration was challenged as being invalid.

1940

*Trailokya Nath
Banerji
v.
Sukumar Basu.*
Sen J.

1940

*Trailokya Nath
Banerji*
v.
Sukumar Basu.
Sen J.

An order filing an award or refusing to file it is in quite a different category. It is not a decree. Section 2 of the Code wherein a decree is defined says that "any adjudication from which an appeal "lies as an appeal from an order" is not a decree. Now an order filing or refusing to file an award is an adjudication from which an appeal lies as an appeal from an order. Section 104 (1) (f) makes this quite clear when it treats such an adjudication as an order and makes it appealable as such. Whatever may have been the view held under the old Code, where there was no provision corresponding to s. 104 (1) (f) of the present Code, under the law as it stands at present it must be held that an order filing or refusing to file an award is not a decree. Now, if it is not a decree, but an order, it is appealable only to the extent allowable by any express provision in the Code, *i.e.*, to the extent allowed by s. 104 of the Code and, as pointed out before, that section prohibits a Second Appeal. Learned advocate for the appellant referred me to the case of *Rai Charan Purkait v. Amrita Lal Gain* (1) where there was a Second Appeal entertained by this Court from an order refusing to file an award made in a private reference. The case was under the old Code, where there was no provision for an appeal from an order filing or refusing to file an award. Under the old Code, such an order was treated as a decree and it was appealable as such. Under the present Code, s. 104 alters the position as I have indicated above. The case of *Rai Charan Purkait v. Amrita Lal Gain* is, therefore, of no assistance to the appellant.

In view of what I have said above, the preliminary objection must prevail. The appeal is dismissed with costs. There is an alternative application under s. 115 of the Code of Civil Procedure; that will be dealt with by the Court empowered to deal with such application.

Appeal dismissed.

S. M.