

Before Mr. Justice Mitter and Mr. Justice Maclean.

1881
March 12.

WAZIR MAHTON AND ANOTHER (DEFENDANTS) v. LULIT SINGH
AND ANOTHER (PLAINTIFFS).*

Arbitration—Award—Finality of Decree—Civil Procedure Code (Act VIII of 1859), ss. 318, 323, 324, 325.

A case was referred by consent to arbitration, and after having been recalled into Court was again referred. An award was made by the arbitrator and filed in Court. The defendants then objected, on the ground that they had no notice after the second reference, and that they were not heard, and that the arbitrator had otherwise misconducted himself. These objections were disallowed by the Subordinate Judge, who gave a decree in the terms of the award. This decree was upheld by the Judge on appeal, who, however, found that the arbitrator had been guilty of misconduct.

Held, that if the decree of the first Court was not final under s. 325, Act VIII of 1859, all that the lower Appellate Court could do, was to remand the case to be dealt with on its merits; but inasmuch as there had been an award and a decree thereon, which was final within the terms of that section, the lower Appellate Court had no jurisdiction to hear the appeal or to express any opinion on what had passed in the first Court.

THIS was a suit to recover Rs. 1,811-4-9, the value, with interest, of the product of 49 bigas 12 cottas of land, appropriated by the defendants from the commencement of the year 1281 to the end of the year 1283 F., corresponding with the years 1873 to 1875, after deducting the ryot's share.

The case was referred to arbitration at the request of both parties, on the 17th September 1877, the arbitrator being selected by them, and the Subordinate Judge fixed a week, as the time within which the record with the award was to be brought into Court. On the 26th September, however, the record was recalled, and on the 28th it was brought in by the arbitrator, no award having been made, and the 15th November was fixed for hearing the case. Before any order to that effect was drawn up or signed by the Subordinate Judge, a second order

* Appeal from Appellate Decree, No. 1614 of 1879, against the decree of Moulvie Syed Muazem Hossain, Additional Judge of Patna, dated the 10th May 1879, affirming the decree of Baboo Aubinash Chunder Mitter, Subordinate Judge of that District, dated the 19th December 1877.

was passed at the request of both parties, sending the record back to the arbitrator and directing him to complete his award and bring it into Court within the Dussehra vacation. The award was accordingly submitted on the 12th November, and on the 16th, the defendants filed a petition, protesting against it, on among other grounds, that the issues had been altered by the arbitrator, and neither they nor their witnesses heard. The Subordinate Judge, on the 19th December, holding that the arbitrator had power to alter or amend the issues, that the allegation as to the award being made without his having heard the defendants or their witnesses, was false, and that, consequently, there was no misconduct on his part, rejected the application, and passed judgment according to the terms of the award.

From that decree the defendants appealed to the Judge, who found as a fact, that the arbitrator had not given notice to the defendants on the record being sent back to him; that they were not present at the proceedings; and that so far from confirming the award, the Subordinate Judge should have held that the arbitrator had been guilty of gross misconduct and partiality. Inasmuch, however, as the judgment of the lower Court was in conformity with the award, he held, that it was final under s. 325, Act VIII of 1859, and the faults to be found in the award not being amongst the grounds under which such a judgment could be disturbed, he felt compelled to dismiss the appeal, but did so without costs.

The defendants then specially appealed to the High Court.

Mr. C. Gregory and *Mr. M. L. Sandel* for the appellants.

Baboo Mohesh Chunder Chowdhry and *Moonshee Mahomed Yusoof* for the respondents.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—This is a second appeal against a decree in conformity with an award made by an arbitrator. The first Court held that the objections raised by the defendants should be dis-

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allowed, and passed a decree in conformity with the award. The second Court expressed its opinion that the faults, which it found with the award, were not such as would allow it to disturb the judgment.

It has been strenuously contended before us, that the proceedings in the first Court were such as to make it incumbent on the lower Court to hear the appeal on the merits. This objection, we may say at once, cannot be supported. If the decision of the first Court, for any reason, was not final, the second Court could do no more than remand the case to that Court for disposal on the merits.

The case being governed by the old Code of Civil Procedure, we have to determine whether there was an award and a judgment in conformity therewith. If so, by s. 325 of that Code, the second Court had no jurisdiction to hear an appeal or to express any opinion on what had passed in the first Court.

It has been contended that there was no award at all, on the ground that the Court in which the suit was pending superseded the award and recalled the suit under s. 318, Act VIII of 1859. Apparently such an order was made on the 26th September 1877, but it did not take effect, because, as we understand the proceedings, the case was again returned to the arbitrator at the request of the parties expressed through their pleaders on the 28th September. Moreover, this objection, if it was taken, was not one of those urged before the first Court, and although it was taken in the second Court, no opinion seems to have been given upon it.

We must, we think, take it that the case was duly left in the hands of the arbitrator, who made an award on the 12th November 1877.

Objections were urged to the award, which, in the opinion of the Court, did not justify it in remitting it under s. 323, or in setting it aside under s. 324, Act VIII of 1859. Judgment was, therefore, given according to the award.

A number of cases have been referred to, as supporting the appellants' contention, that an appeal will lie, notwithstanding the provision of s. 325 that a judgment according to an award shall be final. But the only cases in which an appeal has been

allowed are *Maharaja Jaimangal Sing v. Mohanram Marwari* (1), *Gunga Narain Ghose v. Ram Chand Ghose* (2), and *Boonjad Muthoor v. Nathoo Shahoo* (3). In the first of these cases *Maharaja Jaimangal Sing v. Mohanram Marwari* (1), the decree on the award had, on previous occasions, been set aside on account of an informality in the proceedings of the arbitrators, and then on rectification of the informality, the second decree was held to be final.

In the other two cases there were such irregularities patent on the face of the proceedings in the case, that the judgments were held not to be judgments under s. 325.

In the present case we are not able to say that there are any grounds for holding that there has not been an award and a judgment in conformity therewith. We, therefore, think that no appeal lay to the second Court, and we dismiss this appeal with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

GOBIND MOHUN CHUCKERBUTTY (DEFENDANT) v. SHERIFF
(PLAINTIFF).*

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March 10.

Res judicata—Limitation—Account—Principal and Agent.

In the mofussil, if a principal in a suit against his agent prays merely that the defendant be ordered to render accounts to the plaintiff, a second suit brought by him for the recovery of the money found due by the defendant on examining the accounts will not be barred as *res judicata*.

Discussion as to form of plaint in suits for an account.

In this case the plaintiff, who had been manager of an indigo factory at Balleakandi, in the District of Furrirdpore, employed the defendant, in January 1873, to collect certain debts due to the

Appeal from Appellate Decree, No. 2628 of 1879, against the decree of Baboo Promotho Nath Mookerjee, Subordinate Judge of Furrirdpore, dated the 16th June 1879, affirming the decree of Moulvi Mohabut Ali, Munsif of that district, dated the 3rd July 1878.

(1) 8 B. L. R., 319a; S. C., 23 W. R., 429.

(2) 12 B. L. R., 48.

(3) I. L. R., 3 Calc., 375.