APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Phillips, Mr. Justice Ramesam and Mr. Justice Madhavan Nair.

1928, April 17.

SUBBARAJU (PETITIONER-DEFENDANT), APPELLANT,

v.

VENKATRAMARAJU (COUNTER-PETITIONER-PLAINTIFF), RESPONDENT.*

Civil Procedure Code (V of 1908), O. XXIII, r. 3—Private arbitration in a pending suit, without intervention of Court—Award, whether an adjustment of suit.

Where in a suit parties have referred their difference to arbitration without an order of the Court and an award is made, a decree in terms of the award can be passed by the Court under Order XXIII, rule 3, Civil Procedure Code, although the parties do not accept the award.

APPEAL against the Order of the Court of the Subordinate Judge of Narasapur, dated the 28th day of March 1927, and passed in C.M.P. No. 633 of 1927 in O.S. No. 16 of 1926.

The facts are given in the Order of Reference.

This appeal coming on for hearing, the Court (RAMESAM and JACKSON, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This is an appeal against the order of the Subordinate Judge of Narasapur, refusing to pass a decree in terms of an award. The petition was filed by the defendant under Order XXIII, rule 3 of the Civil Procedure Code. The Subordinate Judge observes: "There is no written order of reference to arbitration. Parties made no reference through Court. Petition is dismissed." The order of the Subordinate Judge shows that he thought that a decree in terms of an award could be passed only if a reference is made through Court. It is not the defendant's case that there was a reference through Court.

*Appeal Against Order No. 209 of 1927.

His case is that there was a reference without the intervention of the Court and an award was passed and that a decree can be passed on such an award under Order XXIII, rule 3. The respondent denies such a reference, but the matter was not enquired into by the Subordinate Judge. The petitioner in the lower Court is the appellant before us and he asks that the matter may be enquired into, that is, whether a reference was, as a matter of fact, made.

The learned vakil for the respondent argues that Order XXIII, rule 3, should not be applied to a case like this where a reference is made to arbitrators and an award is passed without the intervention of the Court. There is great conflict of opinion on this question in all the Indian Courts. The latest decision of this Court is in *Ayyannamma* v. *Ramaswami*(1) where it was held that Order XXIII, rule 3, applies, following earlier decisions of this Court. The earliest decision of this Court, *Lakshmana Chetti* v. *Chinna Thambi Chetti*(2), was prior to 1908, but all the other decisions are on the new Code. Some of these can be distinguished on the ground that the parties have accepted the award and therefore they were acting practically on the footing of a compromise, but others cannot be distinguished on this ground. In *Bodachari* v. *Muniyachari*(3) the award dealt with matters which were the subject-matter of a pending suit and other matters which were not the subject-matter of the suit. That decision may be distinguished on the ground of this difference in the facts, but it must be noted that the learned Judges who decided the case, KRISHNAN and ODGERS, JJ., were inclined to follow the decision in *Shavakshaw* v. *Tyab Haji Ayub*(4) to be presently referred to. It was also conceded in *Ayyannamma* v. *Ramaswami*(1) that there is great force in the argument based on section 89 of the Civil Procedure Code.

Coming now to the Bombay High Court, MACLEOD, C.J., originally held in *Shavakshaw* v. *Tyab Haji Ayub*(4) that Order XXIII, rule 3, would not apply to a case of this kind, but he departed from this view in *Mani Lal Moti Lal* v. *Gokal Das*(5). The matter came before a Full Bench in *Chanbasappa*

(1) (1927) 53 M.L.J., 444. (2) (1901) I.L.R., 24 Mad., 326.
(3) (1921) 14 L.W., 666. (4) (1916) I.L.R., 40 Bom., 386.
(5) (1921) I.L.R., 45 Bom., 245.

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v. *Basalingayya*(1). MARTEN, C.J., in his final judgment relies on the definition of the term "compromise" given in Murray's Dictionary as including a reference to arbitrators, but, as observed by my learned brother in the course of the arguments, even then, the term "compromise" may not apply to the actual award in which it ends. In the Allahabad High Court, the matter went up to a Full Bench in *Gajendra Singh* v. *Durga Kunwar*(2) and it was held that Order XXIII, rule 3, applies, but in a later decision of the same Court in *Baijnath Prasad* v. *Narain Prasad*(3) a Bench of two Judges, MUKERJI and BOYS, JJ., held that Order XXIII, rule 3, did not apply on the facts of that case. The same view was taken in Lahore, the latest decision being *Hari Parshad* v. *Soognidevi*(4). In Calcutta, the latest decision is *Amarchand Chamaria* v. *Banwari Lall Bukshit*(5), where RANKIN, J., takes the same view as in *Shavakshaw* v. *Tyab Haji Ayub*(6) following an earlier decision of his.

In these circumstances, it seems to be desirable that the matter should be referred to a Full Bench. We observe that there is great force in the argument based on section 89 of the Civil Procedure Code. There is no doubt that it is the intention of the legislature that, in all cases of arbitration and awards, the procedure in schedule II should be observed. The only difficulty arises on account of the fact that sub-clause (2) of clause 20 of the second schedule contemplates that the application to file the award should be registered as a suit. Where there is already a pending suit, this means that there will be two parallel suits covering the same matter. Obviously, it is inconvenience of this kind that has induced Judges to apply Order XXIII, rule 3, in cases where there is a reference to arbitration and an award is made without the intervention of the Court, where a suit is pending. This difficulty can no doubt be met by suitably amending sub-clause (2) of clause 20 of schedule II, but until such an amendment is made, to apply Order XXIII, rule 3, seems to be going in contravention of the provisions of section 89, Civil Procedure Code.

We refer the following question to a Full Bench :—

"Where in a suit parties have referred their difference to arbitration without an order of the Court and an award is made,

(1) (1927) I.L.R., 51 Bom., 908 (F.B.).
(2) (1925) I.L.R., 47 All., 637.
(3) (1927) 102 I.C., 608.
(4) (1920) 3 Lah.L.J., 162.
(5) (1922) I.L.R., 49 Calc., 603.
(6) (1916) I.L.R., 40 Bom., 386.

can a decree in terms of the award be passed by the Court under Order XXIII, rule 3, or otherwise, the parties not accepting the award?"

ON THIS REFERENCE

P. Somasundaram for appellant.—An award out of Court in a pending suit without the intervention of Court is an adjustment of the suit within the meaning of Order XXIII, rule 3, Civil Procedure Code. Section 89, Civil Procedure Code, saves this kind of arbitration and award by the words "or by any other law for the time being in force". I rely on *Ayyannamma* v. *Ramaswami*(1), *Venkatachala* v. *Rangiah*(2), *Chinna Venkatasami Naicken* v. *Venkatasami Naicken*(3), *Chintalapalli Chinna Dorayya* v. *Chintalapalli Venkanna*(4), *Alagu Pillai* v. *Mayilappa Pillai*(5), *Belagoduhal Virabhadra Gowd* v. *Kalyani Gangamma*(6). Even in such cases any misconduct of the arbitrator can be questioned when adjustment of the suit is sought to be effected, because Order XXIII, rule 3, speaks of "lawful compromise". Even if the parties afterwards refuse to abide by the award, it can be enforced by the Court as an adjustment and a decree can be passed thereon. This is a matter of procedure and our High Court has uniformly held awards in such cases to be lawful adjustments. See to the same effect *Chanbasappa* v. *Basalingayya*(7), *Gajendra Singh* v. *Durga Kunwar*(8).

T. M. Krishnaswami Ayyar (with *V. Suryanarayana*) for respondent.—This is not merely a point of practice or procedure. It is governed by statutory rules in the Civil Procedure Code. The words "or any *other* law for the time being in force" in section 89, Civil Procedure Code, cannot include Order XXIII, rule 3, which finds a place in the Code itself. Moreover, section 89 and clause 20 of the second schedule to the Civil Procedure Code must be deemed to be exhaustive of all cases of reference to arbitration without the intervention of Court and this case is not therein provided for. On the filing of a suit, the Court is seized of the cause and the parties cannot thereafter meddle with the same, except with the consent of the Court. Even if there is an agreement to

(1) (1927) 53 M.L.J., 444.
(2) (1913) I.L.R., 36 Mad., 353.
(3) (1919) I.L.R., 42 Mad., 625.
(4) (1923) 76 I.C., 502.
(5) (1923) 45 M.L.J., 76.
(6) (1926) 97 I.C., 465.
(7) (1927) I.L.R., 51 Bom., 908 (F.B.).
(8) (1925) I.L.R., 47 All., 637 (F.B.).

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refer disputes and then there is a suit in respect of the same matter it has been held that a subsequent award is a nullity and cannot be filed; see rule 18 of second schedule, Civil Procedure Code. The suit must go on unless the defendant gets it stayed on the ground of the existence of the agreement and unless the parties agree to refer the *lis, de novo* to arbitration and the action itself is referred to arbitrators; for otherwise the arbitrators become *functus officio* as soon as the suit is filed and there cannot be two tribunals side by side over the same cause; see *Ram Prosad Surajmull* v. *Mohan Lal Lachminarain*(1), *Amarchand Chamaria* v. *Banwari Lall Rakshit*(2). It is opposed to public polic to youst the jurisdiction of the Court; *Doleman & Sons* v. *Ossett Corporation*(3).

[PHILLIPS, J.—If so, parties cannot also compromise a pending suit.]

The Madras decisions are most of them obiter.

OPINION.

PHILLIPS, J.

PHILLIPS, J.—The question referred to us for decision is "where in a suit parties have referred their difference to arbitration without an order of the Court and an award is made, can a decree in terms of the award be passed by the Court under Order XXIII, rule 3, or otherwise, the parties not accepting the award?".

This question has frequently come up for decision in this Court and has almost invariably been answered in the affirmative.

In *Nanjappa* v. *Nanjappa Rao*(4), it was held that an award in such circumstances was a lawful agreement, compromise and adjustment within the meaning of section 375 of the Civil Procedure Code, 1882, which is the section corresponding to Order XXIII, rule 3. In that case the previous decisions of this Court were

(1) (1920) I.L.R., 47 Calc., 752.
(2) (1922) I.L.R., 49 Calc., 608.
(3) [1912] 3 K.B., 257.
(4) (1912) 23 M.L.J., 290.

referred to and followed. The subsequent cases in which the decision was under the Code of 1908 have held that Order XXIII, rule 3, can be applied in such circumstances—*Chinna Venkatasami Naicken* v. *Venkatasami Naicken*(1) *Belagodukal Virabadra Gowd* v. *Kalyani Gangamma*(2), *Alagu Pillai* v. *Mayilappa Pillai*(3), *Chintalapalli Chinna Dorayya* v. *Chintalapalli Venkanna*(4), and *Ayyannamma* v. *Ramaswami*(5).

The only cases in which a different opinion has been expressed are—*Venkatachala* v. *Rangiah*(6), and *Bodachari* v. *Muniachari*(7). In the former case there was a mere agreement to refer, but no award in pursuance of that agreement, and it was held that that was not an adjustment within the meaning of the Code. In the latter case, KRISHNAN and ODGERS, JJ., were inclined to hold that section 89 of the Civil Procedure Code was a bar to the application of Order XXIII, rule 3, in such cases but did not definitely decide the point. It will be seen therefore that so far as this Court is concerned the view taken almost unanimously has been that Order XXIII, rule 3, is applicable in such circumstances; but this reference has been made because the Calcutta High Court and the Lahore High Court have held to the contrary. In Calcutta the leading case is *Amarchand Chamaria* v. *Banwari Lall Rakshit*(8), a decision of RANKIN, J., sitting as a single Judge, in which he followed an earlier decision of his own. This was followed by a Bench in *Guimoni Dasi* v. *Tarini Charan Porel*(9). The Lahore High Court took the same view in *Hari Parshad* v. *Soogni Devi*(10), and based

(1) (1919) I.L.R., 42 Mad., 625.
(2) (1926) 97 I.C., 466.
(3) (1923) 45 M.L.J., 76.
(4) (1923) 76 I.C., 502.
(5) (1927) 53 M.L.J., 444.
(6) (1913) I.L.R., 36 Mad., 353.
(7) (1921) 14 L.W., 666.
(8) (1922) I.L.R., 49 Calc., 608.
(9) (1927) 104 I.C., 360.
(10) (1929) 3 Lah. L.J., 162.

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their decision on the provisions of section 89 of the Civil Procedure Code. In Bombay, MACLEOD, C.J., agreed with the Calcutta view in *Shavak Shaw* v. *Tyab Haji Ayub*(1). but in a subsequent case, *Manilal Motilal* v. *Gokaldas Rowji*(2), he came to the opposite conclusion. The question was referred to a Full Bench and in *Chanbasappa* v. *Basalingayya*(3), it was held that Order XXIII, rule 3, was applicable. The Allahabad High Court (Full Bench) have taken the same view in *Gajendra Singh* v. *Durgakunwar*(4), although in a subsequent case, *Baij Nath Prasad* v. *Narain Prasad*(5), a Bench of two Judges held that Order XXIII did not apply in the particular case they were considering, which was a case where the requirements of clause 20, Schedule 2, Civil Procedure Code, had been complied with, and it was held that the award should be treated as an award and not as a compromise of the suit. The main body of opinion is therefore clearly in favour of an affirmative answer to the question before us, but it will be advisable to consider the matter in its legal aspects.

In the first place, is Order XXIII, rule 3, in terms applicable to the case before us? Rule 3 provides

> "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful arrangement or compromise . . ."

If an agreement to abide by the decision of an arbitrator can be held to be a compromise, the section is clearly applicable. It has been suggested that a mere agreement to be bound by a future award is not a compromise, whereas an agreement to accept an award that has been made is a compromise. It is difficult to see on what principle parties who agree to accept a certain

(1) (1916) I.L.R., 40 Bom., 386. (2) (1921) I.L.R., 45 Bom., 245.
(3) (1927) I.L.R., 51 Bom., 908. (4) (1925) I.L.R., 47 All., 637.
(5) (1927) 102 I.C., 608.

fixed sum in satisfaction of a claim can be said to compromise that claim, whereas if they agree to accept a sum which is to be fixed by some one else that does not amount to a compromise. The meaning of the word "compromise" has been elaborately discussed by MARTEN, C.J., in *Chanbasappa* v. *Basalingayya*(1), and, with respect, I entirely agree with him that the agreement to abide by the decision of an arbitrator is a compromise of the claim.

The main objection that has been taken to the application of Order XXIII, rule 3, is that it is opposed to section 89 of the Civil Procedure Code. That section runs as follows :—

> "Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second schedule."

Two arguments are advanced in support of this proposition, firstly that the words "any other law for the time being in force" cannot include Order XXIII which finds a place in the schedule to the Civil Procedure Code itself, and secondly that section 89 is exhaustive and provides that all references to arbitration shall be governed by the second schedule of the Code. The first argument does not appeal to me, for if the whole of the provisions of the Civil Procedure Code are excluded by the words "any other law for the time being in force" it would mean that the provisions of the second schedule were exhaustive and self-contained and the various rules of procedure laid down in the other parts of the Code would be inapplicable. The words "any other law" are very general and there seems to be no reason for interpreting them as excluding the law

(1) (1927) I.L.R., 51 Bom., 908.

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laid down in other parts of the Civil Procedure Code. The second argument that section 89 makes the second schedule exhaustive and therefore excludes the provision of Order XXIII in cases of award has more force. If an award comes within the meaning of compromise in rule 3, as I have found that it does, a certain right is conferred on parties by that section and that right cannot be taken away except by a specific enactment. Unless it is necessary to read section 89 as having that effect it should not be so read. In the first place, the second schedule, Civil Procedure Code, is not mandatory, but provides for reference to arbitrators at the will of the parties and also provides that certain procedure must be followed if they take action under that schedule. It does not, however, say that there shall be no arbitration other than what is dealt with by the second schedule, and if parties to the suit choose to refer to arbitration it is open to them to adopt the provisions of the second schedule or not as they please. In the present case the parties have agreed to decide a pending litigation in accordance with the award of an arbitrator. Under clause 20 of the second schedule they could apply to have the award filed in Court and then the procedure provided by that clause would be followed. If, however, the award satisfies the provisions of Order XXIII, rule 3, there is no provision in the Civil Procedure Code which expressly takes away the right of the parties to proceed in accordance with the section; and unless the right is clearly taken away by law, it must be enforceable in Court, and certainly there is no express provision of law which takes away such right nor any provision which necessarily has that implication. I am therefore of opinion that Order XXIII, rule 3, can be applied in the circumstances of the present case, although I am not prepared to hold

that in appropriate circumstances the parties would be precluded from taking action under clause 20 of the second schedule.

Another argument has been adduced by Mr. T. M. Krishnaswami Ayyar for the respondent, namely, that when parties engage in litigation and give the Court jurisdiction to decide that dispute it is not open to them to oust that jurisdiction by an agreement among themselves; and reliance is placed on *Doleman & Sons* v. *Ossett Corporation*(1), which was followed in *Ram Prosad Surajmull* v. *Mohan Lal Lachmi Narain*(2), and *Appavu* v. *Seeni*(3). That case is not, however, at all applicable to the present question, for there it was held that, when there was, what is called an arbitration clause in an agreement and in contravention of that clause a suit had been filed, it was not open to plead an award given after suit as a bar to the action. There, however, the agreement to submit the disputes for arbitration was made before the suit was filed and on this ground the case is distinguishable. FLETCHER MOULTON, L.J., observed at page 269 :

"It follows, therefore, that in the latter case the private tribunal, if it has ever come into existence, is *functus officio* unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred."

FARWELL, L.J., also observed :

"When the defendant has submitted to the jurisdiction, he cannot withdraw without the leave of the Court, or the consent of his opponent."

From these observations it is clear that the learned Judges distinguished the case they were considering from one in which the parties make a reference to arbitration after the suit had been filed and that the latter

(1) [1912] 3 K.B., 257. (2) (1920) I.L.R., 47 Calc., 752.
(3) (1918) I.L.R., 41 Mad., 115.

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was not governed by their decision. I am, therefore, of opinion that the question referred to us must be answered in the affirmative.

RAMESAM, J.—I agree.

MADHAVAN NAIR, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Devadoss.

1928, February 27.

RAMACHANDRA DIKSHITAR AND THREE OTHERS (DEFENDANTS 5 TO 8), APPELLANTS,

v.

NARAYANASWAMI REDDIAR (PLAINTIFF), RESPONDENT.*

Mortgage—Sec. 95, Transfer of Property Act (IV of 1882)—"One of several mortgagors", meaning of—Two successive mortgages of two properties to two different persons—Decree in suit by second mortgagee and purchase by him in execution, of one property, effect of—Right to contribution against mortgagor.

The words "one of several mortgagors" in section 95 of the Transfer of Property Act, which enables one of them to redeem a mortgage and claim contribution from others, mean not only one of the original mortgagors, but also his heirs or assigns, such as purchasers of his interest in execution; *Nainappa Chetti* v. *Chidambaram Chetti*, (1898) I.L.R., 21 Mad., 18, followed.

If two properties are jointly mortgaged first to one person and then to another, and the second mortgagee buys the equity of redemption in one of them in execution of a decree on his mortgage, he becomes a co-mortgagor as regards the first mortgagee; if he thereafter buys the rights of the first mortgagee, he cannot sue the mortgagor to enforce the payment of the money due on the first mortgage but can only sue him for contribution, under section 95 of the Transfer of Property

* Appeal 150 of 1924.