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Hukoomut Raiji (1), the Judicial Committee of the Privy Council, after referring to the rule of construction adopted by the Bombay High Court in the two cases cited above, observe (p. 50): "To the application of this rule within proper limits, their Lordships see no objection. The question must, in every case, be whether the subject of the suit is in the nature of immovable property or of an interest in immovable property; and if its nature and quality can be only determined by Hindu law and usage, the Hindu law may properly be invoked for that purpose."

In this case "the nature and quality" of the property in suit can be only determined by Hindu law, because it is not recognized as property in any other system of law.

Adopting this principle of construction, therefore, we must come to the conclusion that the present suit falls under article 148 and not under 145.

We reverse the decision of the lower Appellate Court, and remand the case to that Court for the determination of the other question arising in it. Costs to abide the result.

Appeal allowed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

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HURRONATH CHOWDHRY (DEFENDANT) *v.* NISTARINI CHOWDRANI AND OTHERS (PLAINTIFFS).*

Appeal—Arbitration—Application to file award, Objections to—Civil Procedure Code (Act XIV of 1882), ss. 525, 520 and 521.

When an application is made to a Court to file an award under s. 525 of the Code of Civil Procedure, and an objection is made to the filing of it upon any of the grounds mentioned in s. 520 or 521, the proper course for the Court to pursue is to dismiss the application, and to leave the applicant to bring a regular suit to enforce the award in which all the objections to its validity may be properly tried and determined.

Where no such ground of objection is made to the filing of the award,

* Appeal from Appellate Decree No. 281 of 1882, against the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of Mymensingh, dated the 15th December 1881, reversing the decree of Baboo Tara Prosunno Ghose, Second Munsiff of Attia, dated the 1st March 1880.

(1) L. R. 1 I. A., 34; 13 B. L. R., 254.

and the Court consequently orders it to be filed, no appeal lies against that order.

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Baboo *Sreenath Das* for the appellant.

Baboo *Saroda Prosono Roy* for the respondents.

THE facts of the case sufficiently appear in the judgment of the Court, (GARTH C.J. and MACPHERSON J.) which was delivered by

GARTH, C.J.—This appeal comes before us under rather peculiar circumstances.

A dispute arose between the parties to the suit with regard to the boundary of their respective properties. The dispute was referred privately, (without the intervention of a suit) to three arbitrators.

These arbitrators, having taken evidence and made a local investigation, made an award in favor of the plaintiffs on the 7th of Srabun 1286 (22nd July 1879.)

The plaintiffs then petitioned under s. 525 of the Civil Procedure Code that the award should be filed in Court.

To this petition objections were made on the part of the defendant, stating various reasons why the award should not be filed, and, amongst others, that the arbitrators had been guilty of partiality and other misconduct, which would be grounds for impugning the award under ss. 520 and 521 of the Code.

Upon these objections being made, the first Court (apparently with the full consent of both parties) fixed an issue for trial in this general form: "Whether the award could be filed and enforced?" Under this issue all the questions raised between the parties with regard to the validity of the award appear to have been fully discussed and tried. Evidence was called by both sides, and in the result a decree was made, that the suit should be dismissed, and the application disallowed, the Munsiff being of opinion that the arbitrators had proceeded to decide the matters in dispute in a manner not warranted by their authority, and that all the arbitrators were not present at the time when the Ameen made a measurement of the land. This decision was appealed to the Subordinate Judge, and it appears that he also has again heard the whole case, and has come to the conclusion

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(for reasons which in point of law appear to be unobjectionable) that the award is good, and that it ought to be enforced.

He, therefore, reversed the decree of the first Court, and ordered the award to be enforced; and he gave the plaintiffs their costs in both Courts with interest at 6 per cent.

The case now comes up to this Court on second appeal; and it has been contended by the appellant that, as the arbitration was a private one, and as the objections to the award, or some of them, were such as are mentioned in s. 520 or 521, the Courts below had no right in a proceeding of this kind to try the question as to the validity of the award, and that the proper course for the Court of first instance to have pursued was to have dismissed the application, and left the plaintiff to bring a regular suit to enforce the award.

It was further contended that no appeal could in that case have been preferred from the order of the Munsiff rejecting the application, and that the lower Appellate Court has acted without jurisdiction in entertaining an appeal at all.

Our attention has been called to a good many authorities, and specially to *Sashti Charan Chatterjee* v. *Tarak Chunder Chatterjee* (1); *Rajchunder Roy Chowdhry* v. *Brojendro Coomar Roy Chowdhry* (2); *Mudhusudan Das* v. *Adaita Charan Das* (3); and *Boonad Mathoor* v. *Nathoo Shahoo* (4).

The result of these decisions is not very clear, but we are disposed to think that when an application is made to the Court to file an award under s. 525, and an objection is made to the filing of it upon any of the grounds mentioned in s. 520 or 521, the proper course for the Court to pursue is to dismiss the application, and to leave the applicant to bring a regular suit to enforce the award, in which all the objections to its validity may be properly tried and decided.

We also think, that where no such ground of objection is made to the filing of the award, and the Court consequently orders it to be filed, no appeal lies against that order.

(1) 8 B. L. R., 315; 15 W. R. F. B., 9.
(2) 21 W. R., 182.
(3) 8 B. L. R., 316 note; 12 W. R., 85.
(4) I. L. R., 3 Calc., 375.

If either of the parties in this case had taken exception in proper time to the course which was pursued by the Munsiff, and had applied to this Court under s. 622, it is probable that we should have stayed the proceedings.

But what has really taken place is this: Instead of dismissing the application, as he ought to have done, the Munsiff has proceeded to try the questions at issue between the parties, precisely as if this had been a regular suit brought to enforce the award.

Both parties, so far as we can see, have consented to that course and have brought forward all the arguments and evidence on both sides which they could have brought forward in a regular suit.

Moreover, the decision of the Munsiff has been appealed to the Sub-Judge without any objection on the part of the respondents, and the case has been again heard on appeal before him, with the result that the Munsiff's judgment has been reversed, and the award has been ordered to be enforced.

We are now asked on second appeal to say, that both the lower Courts have acted without jurisdiction, and to reverse the lower Appellate Court's judgment on that ground.

Now it appears to us in the first place, that if both Courts have acted without jurisdiction, and if this proceeding is not a suit at all, we have no more right to try the case on second appeal than the lower Courts had to try it. We ought, therefore, in that case to dismiss the appeal for want of jurisdiction to hear it.

But then it is argued that, if we cannot deal with it on second appeal, we ought at any rate to allow the appellant to apply to set the proceedings aside under s. 622 of the Civil Procedure Code. The answer to that is, that we have at present no application before us under s. 622; and if we had, I for one should certainly not be disposed to help the appellant, inasmuch as both parties have consented to try the cause as it has been tried; and I see no reason to believe that any injustice has been done.

But the proper view to take of the matter we consider to be this: it is clear that both parties have treated these proceedings, from first to last as a regular suit to enforce the award. Both the Judges who have tried the case, and the parties themselves, have all dealt with it upon that footing; and the appellant is

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wholly unable to suggest that, if these proceedings were set aside and the cause were tried again, it would be tried in any other way, or upon any other materials, than those on which it has been tried.

He has himself brought the case here on second appeal, as he could only have done in a regular suit, and the only difference which we can see from first to last between this proceeding and a regular suit, is that the plaintiff's application to the first Court is called *a petition* instead of a *plaint*, and that the case has been allowed to proceed without the payment of an institution fee.

The revenue is really the only sufferer. The error, if any, is a mere matter of form, which has not affected the trial of the case upon the merits, and which, therefore, (under s. 578 of the Code) we consider ourselves bound to disregard.

We find no reason to suppose that there is any error of law in the lower Court's judgment, except this informality, and we, therefore, think it right to entertain the appeal, and to dismiss it with costs. *Appeal dismissed.*

Before Mr. Justice Mitter and Mr. Justice Pigot.

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October 2.

IN THE MATTER OF OBHOY CHANDRA MOOKERJEE.
OBHOY CHANDRA MOOKERJEE *v.* MOHAMED SABIR.*

Possession, Order of Criminal Court as to—Dispute likely to cause breach of the Peace—Duty of Magistrate—Criminal Procedure Code (Act X of 1882), *s.* 145.

It is the duty of a Magistrate, before taking proceedings under s. 145 of the Criminal Procedure Code, to satisfy himself whether there is any dispute likely to cause a breach of the peace, and that the suggested apprehension of a breach of the peace is not merely colourable, and made to induce him to deal with matters properly cognizable by the Civil Court.

Mr. *Bell* for petitioner.

Mr. *Gregory* for opposite party.

THE facts of this case sufficiently appear from the judgment delivered by

MITTER, J.—I am of opinion that the basis on which the jurisdiction of Criminal Courts under s. 145 of the Code of Criminal Procedure is founded does not exist in this case.

* Criminal Motion No. 243 of 1883, against the order of Baboo Dwarkanath Roy, Deputy Magistrate of Burisaul, dated the 16th July 1883.