

1875

QUEEN
v.
THAKUR
PARSHAD.

empowered the Sessions Judge to admit to bail, and the order was altogether *ultra vires*. But if, on the other hand, it could be shown that the section does apply to such a case as this, the order was equally invalid, for (as I have already pointed out in my referring order) the Judge having no revisional authority, his admitting these convicts to bail was inoperative for any judicial purpose or effect and therefore futile.

APPELLATE CIVIL.

1876
March 13.

(*Mr. Justice Spankie and Mr. Justice Oldfield.*)

HUSSAINI BIBI (DEFENDANT) v. MOHSIN KHAN (PLAINTIFF).

Act VIII of 1859, s. 327—Arbitration—Award—Appeal.

The plaintiff sought to file and to enforce a private award, under the provisions of s. 327, Act VIII of 1859. The defendant objected that he was no party to the award. The Court to which the plaintiff's application was made, after inquiry into the matter, over-ruled the objection, and directed that the award should be filed, but made no decree enforcing the award under the provisions of ch. vi, Act VIII of 1859. *Held*, that the order was not open to appeal as it did not operate as a decree (1). *Jokhun Rai v. Bucho Rai* (2) followed.

Per SPANKIE, J.—S. 327 intended to provide for those cases only in which the reference to arbitration is admitted and an award has been made. Where the defendant denies referring any dispute to arbitration or that an award has been made between himself and the plaintiff, sufficient cause is shown why the award should not be filed. The plaintiff should be left to bring a regular suit for the enforcement of the award.

In this case there had been a reference to arbitration, without the intervention of a Court, and an award had been made. The plaintiff applied under s. 327, Act VIII of 1859, that the award

(1) *Contra* see *Lakshman Shivaji v. Rama Esu*, 8 Bom. H. C. Rep., A. C. 17. As to whether an appeal lies from a decree enforcing the award, see *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee*, 8 B. L. R., 315; S. C., 15 W. R., F. B. 9.

(2) H. C. R., N.-W. P., 1868, p. 353—The Court also held in that case that the order rejecting an application for the filing of an award was not appealable. The Calcutta High Court has

also held so—see *Chintamun Singh v. Roopa Kooer*, 6 W. R., Mis. 83; *Digamburee Dossee v. Poornanund Dey*, 7 W. R., 401; *Raj Kumar Singh v. Kah Charan Singh*, 2 B. L. R., App., 20; S. C., 11 W. R., 58; *Roy Priyanath Chowdhry v. Prasanna Chandra Roy Chowdhry*, 2 B. L. R., 249. So also the Bombay High Court—see *Vyankatish Ramchandra Jogekar v. Balajeerao*, 1 Bom. H. C. Rep., 184; *Petition of Balakrishna Bhaskar Gupte*, 2 Bom. H. C. Rep., 96.

might be filed in Court and enforced. The original defendant, who was represented after his death by his widow, denied referring the matter decided by the award to arbitration, or giving his consent to the reference, or that he had any knowledge of the arbitration proceedings.

The first Court framed the following issue for determination, viz., "Whether the agreement to refer was made by an agent of the original defendant, duly empowered in that behalf, with the original defendant's knowledge and consent, and the award made in pursuance of that agreement should be enforced or not." After taking evidence both oral and documentary, it decided that the reference was made by an authorised agent of the original defendant, with his knowledge and consent, and that the award must be filed. It concluded its decision in these terms:—"I therefore decree the plaintiff's claim to file the arbitration award under s. 327, Act VIII of 1859, with costs and interest at six per cent., to be paid by the answering defendant."

The defendant appealed, taking the same objections to the plaintiff's claim as were taken in the first Court. The lower Court of appeal relying on the case of *Jokhun Rai v. Bucho Rai* (1) held that there was no appeal.

Against this decision the defendant filed a special appeal to the High Court.

Mr. *Mahmood* (with him Mr. *Conlan*), for the appellant, contended that the order of the first Court was appealable. It is unjust and inexpedient that the judgment of the first Court deciding that the original defendant was a party to the award should be final. He referred to *Sashli Charan Chatterjee v. Tarak Chandra Chatterjee* (2); and *Hurlodhar Sungiree v. Ganesh Santhal* (3).

Mr. *Colvin* (with him *Munshi Hanuman Parshād*), for the respondent, contended that there was no appeal. He referred to *Jokhun Rai v. Bucho Rai* (1); *Bhugwan v. Purnmeshree* (4); and *Sarbooree Kanto Bhattacharjee v. Anadya Kanto Bhattacharjee* (5).

(1) H. C. R., N.-W. P. 1868, p. 353.

(3) 6 W. R., 60.

(2) 8 B. L. R., 315; S. C., 15 W. R.,
F. B. 9.

(4) H. C. R., N.-W. P., 1873, p. 179.

(5) 12 B. L. R., App., 10.

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 HUSSAINI
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 v.
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SPANKIE, J.—The prayer of the plaintiff in this case was to be allowed to file a private award of arbitrators in Court, and for the enforcement of the award. The defendant (since deceased) denied that he had authorised his agent to refer any matter to arbitration, and repudiated the whole transaction. The Munsiff after going into the merits admitted the award in the following terms:—"I therefore decree the plaintiff's claim to file the arbitration award under s. 327, Civil Procedure Code, with costs and interest at 6 per cent., to be paid by the answering defendant (the widow of the original defendant, deceased)." It does not appear that he made any decree enforcing the award under the provisions of ch. vi of the Act.

The defendant appealed. The Subordinate Judge treating the order as a judgment under s. 325 of Act VIII of 1859 held that it was final, and that there was no appeal. The Subordinate Judge cites as his authority the Full Bench decision of this Court in the case of *Jokhun Rai* (1) and others, appellants.

It is contended in special appeal that, as it was urged in both the lower Courts that the original defendant was no party to the award, the Subordinate Judge was bound to determine whether this was so or not.

For respondents the Full Bench ruling of this Court (1) and other precedents of the Presidency Court are cited as ruling that there was no appeal.

I am of opinion that we are bound by the decision of the Full Bench of this Court (1), and that we must hold that there is no appeal from the order of the Munsiff allowing an award to be filed. At the same time it appears to me that s. 327 intended to provide for those cases only in which a reference to arbitration is admitted, and in which an award has been made. Where one of the parties denies that he had referred any dispute to arbitration, or that an award had been made between himself and the other party, it seems to me that sufficient cause has been shown why the award should not be filed. The applicant for its admission should be left to bring a regular suit for the enforcement of the award.

Such, I may add, would appear to be the opinion of the dissenting Judge in one case decided by the Full Bench of the Presidency Court on the 23rd May, 1871 (1). But the Full Bench judgment of this Court (2) must, I think, be followed by us as being applicable to this case, and I would therefore dismiss this appeal with costs.

OLDFIELD, J.—I concur in dismissing the appeal with costs. I think we are bound by the Full Bench ruling of this Court (2) and must hold that the order of the Munsiff under s. 327, Act VIII of 1859, for filing the award does not operate as a decree and is not appealable.

1871

 HISSAIN
 FISH
 MOHSEN
 KHAN

BEFORE A FULL BENCH.

1876

April 2nd

(Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Oldfield.)

KALI PARSHAD (PLAINTIFF) v. RAM CHARAN (DEFENDANT)

Hindu Law—Undivided Hindu Family—Ancestral Immoveable Property—Partition.

In an undivided Hindu family the son has, under the Mitakshara, a right to demand in the lifetime, and against the will, of his father, the partition and possession of his share in the ancestral immoveable property of the family.

The facts of the case, so far as they are material for the purposes of this report, were as follows:—

The plaintiff, his father the defendant, and his brother, Lachman Parshad, were members of an undivided Hindu family. The plaintiff claimed to establish his right to a one-third share of certain shares in certain villages forming the ancestral immoveable property of the family, and to obtain possession of the same. He alleged that he was excluded from inheritance, inasmuch as the defendant, describing him as an outcast, had made over possession of a portion of the property to Lachman Parshad and a portion to the wife of a deceased son. The defendant pleaded that, under Hindu law, such a claim by a son in the lifetime of his father was invalid. The Court of first instance overruled this plea and gave the plaintiff a decree. The lower appellate Court held that the plaintiff was only entitled, under Hindu law, to a one-fourth share of the

(1) 3 B. L. E. 315-S. C. 15 W. R., that case expressed opinion to the effect that the order of the Judge had the same effect.

(2) H. C. R., N.-W. P., 186 P. 353.