1885

THAKUR DAS v. SHADI LAL.

of Farukhabad) rejected the application on the ground that it was barred by limitation. The Court was of opinion that the decree-holder should have applied for execution within three years from the date of the decree, as provided by art. 179, sch. ii of the Limitation Act, inasmuch as the decree could have been executed against the judgment-debtor personally from its date, although it could not have been executed against the mortgaged property till the expiration of four months from its date, and no such application having been made, the present application was barred.

On appeal by the decree-holder the lower appellate Court (District Judge of Farukhabad) affirmed the order of the Court of first instance.

The decree-holder appealed to the High Court, contending that the application was not barred by limitation.

Munshi *Kashi Prasad*, for the appellant.

The respondent was not represented.

BRODHURST and TYRRELL, JJ.—The Courts below were wrong in applying the provisions of art. 179, sch. ii of the Limitation Act to this case. The decree made on the 8th December, 1881 provided expressly that the decree-holder might not apply for its execution till after expiry of four months from that date, that is to say, till after the 8th of April, 1882. Therefore the limitation of art. 178 applies to the case before us. The decree-holder has three years from the date when the right to ask for execution accrued to him. His application of the 17th February, 1885, being within three years from the 8th April, 1882, is not barred. The appeal is decreed with costs.

Appeal allowed.

1885

December 11.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

TAHAL (PLAINTIFF) *v.* BISHESHAR AND ANOTHER (DEFENDANTS).*

Agreement to refer to arbitration—Refusal to refer—Suit in respect of matter agreed to be referred—Pleadings—Act I of 1877 (Specific Relief Act), s 21.

One of the parties to a contract to refer a controversy to arbitration brought a suit for part of the subject-matter referred. The defendants pleaded the bar of

* Second Appeal No. 149 of 1885, from a decree of M. S. Howell, Esq., District Judge of Mirzapur, dated the 9th January, 1885, reversing a decree of Shaikh Maula Bakhsh, Munsif of Mirzapur, dated the 23rd August, 1884.

1885

TAHAL v. BISHESHAR.

s. 21 of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract.

Held that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract, in the sense of s. 21 of the Specific Relief Act.

The contract, the existence of which would bar a suit under the circumstances contemplated by s. 21 of the Specific Relief Act, must be an operative contract, and not a contract broken up by the conduct of all the parties to it.

THE plaintiff in this suit claimed possession of a house. He alleged that many years ago he and his brother, the father of the first defendant, Bisheshar, and grand-father of the second defendant, Khannu, had made a division of their ancestral property; that the house in question, which was a part of such property, fell to the plaintiff's share; and that he had been wrongfully dispossessed of it by the defendants. The defendants pleaded—(i) that there had been an agreement between the plaintiff and themselves to refer the matter to arbitration, and that the suit was barred by the last paragraph of s. 21 of the Specific Relief Act; and (ii) that there had been no such division of property as alleged by the plaintiff; and that, assuming that such division had been made, the plaintiff was entitled to one-half of the house only.

Upon the first of these contentions, the Court of first instance (Munsif of Mirzapur) observed as follows:—"I have very carefully considered the objection founded on the concluding paragraph of s. 21 of the Specific Relief Act, and the conclusion to which I have come is adverse to the defendants. To succeed in that plea, the defendant must, in my opinion, prove that the plaintiff has refused to perform the contract to refer to arbitration. This has not been done—not even alleged nor suggested—by the defendants: on the contrary, one of their witnesses, Debi Prasad, gives as a reason why there was no award, that which I think to be equally the fault of the defendants. He says:—'No award has been delivered; since the agreement the parties have quarrelled, and the present suit has been instituted; therefore no award was made.' I understand him to mean that neither party abided by the contract, and therefore there was no award. This appears to me to be the law itself. As an authority, if needed, I refer to *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1). The plaintiff's own

(1) I. L. R., 5 Calc. 198.

explanation why he would not conform to the aforesaid agreement is, that the arbitrators had refused to decide, and that some of them have died since the institution of the suit. The first portion of this statement is disputed, as the pleader for the defendants contends that the arbitrators did not refuse; but whether they did or did not refuse is, I think, immaterial, since it is now admitted that some of them are dead; and, this being so, I hold that the agreement has ceased to be operative between the parties (*Russell On Arbitration*, p. 156). It has been also urged that as the arbitrators, who are stated to be now dead, were alive, and all were willing to adjudicate, at the time the suit was brought, the question of the liability of the plaintiff under the agreement should be determined as it then stood: that, looking at it in that aspect, I should hold the present suit to be barred by s. 21 of the Specific Relief Act, and relegate the plaintiff to a fresh suit. This seems to me a too inequitable view of the matter, and I cannot adopt it. I therefore hold that nothing has been shown to bar the present suit." On the merits of the suit the Court found that there had been a division of the ancestral estate, and that the house in question had fallen to the plaintiff's share, and had been held by him for forty years. The Court accordingly decreed the suit.

The defendants appealed to the District Judge of Mirzapur. Upon the question whether the suit was barred by s. 21 of the Specific Relief Act, the Judge observed:—"The Munsif seems to have drawn the conclusion that both parties agreed to revoke the reference to arbitration; for he says, 'I understand him (Debi Prasad) to mean that neither party abided by the contract, and therefore there was no award.' But I do not think that more can be deduced from the witness's words than that the parties quarrelled in the course of the arbitration, and thereupon the plaintiff rushed into court. Now this, I think, amounted to a refusal to perform his share of the contract. He had contracted to await and abide by the award of the arbitrators. Instead of doing this, he rushed into court before the arbitrators had had time to complete the inquiry upon which they had entered. This case, then, is clearly distinguishable from *Koomud Chunder Dass* v. *Chunder Kant Mookerjee* (1), cited by the Munsif, where the reference to arbitration had been

(1) I. L. R., 5 Calc. 493.

1885

TAHAL v. BISHESHAR.

contingent, but when the contingency arose, the defendants omitted to call upon the plaintiff to carry out his contract to refer the dispute to arbitration, and, in consequence of this omission and of the plaintiff's omission to bring the case before the arbitrator, the case never came before the arbitrator at all. That precedent merely shows that from the mere omission of the plaintiff to bring the case before the arbitrator, it cannot be inferred that he has refused to allow it to go before the arbitrator, and the same rule is laid down in *Atma Rai* v. *Sheobaran Rai* (1). But here the case was actually before the arbitrators, and the plaintiff tried to withdraw it from their cognizance by filing this suit. Under these circumstances, I think the suit is barred. The cause of action is said to have accrued on the 17th January, 1882, and the house in suit was admittedly one of the two houses specified in the agreement of the 18th May, 1883; and it is clear, therefore, that the subject of the present suit is one of the subjects that the plaintiff had contracted to refer. The Munsif assigns another reason for holding that the suit is not barred, namely, that some of the arbitrators being admittedly now dead, the agreement had ceased to be operative. But I think that 'the existence of such contract' in s. 21, means 'the existence of such contract at the time of institution of the suit,' as clearly appears from the context. Whether or not the plaintiff may be entitled to institute a suit after the death of some or all of the persons named as arbitrators, he was not entitled to institute the present suit at a time when all those persons were alive. I reverse the Munsif's decree, and dismiss the suit with costs in both Courts."

The plaintiff appealed to the High Court, contending that the suit was not barred by s. 21 of the Specific Relief Act.

Munshi *Kashi Prasad*, for the appellant.

Babu *Ram Das Chakarbati*, for the respondents.

BRODHURST and TYRRELL, JJ.—It is admitted in this case that the parties agreed to an arbitration on the 18th May, 1883. One of them has brought this suit for part of the subject-matter referred to the arbitrators more than a year after that date. The defendants plead the bar of s. 21 of the Specific Relief Act, but they do not allege in their answer to the plaint that the plaintiff

(1) Weekly Notes, 1882, p. 58.

1885

TAHAL v. BISHESHAR.

refused to perform his contract to submit to arbitration. And one of the arbitrators, a witness in this case, has sworn that the arbitrators did not decide the case because "the parties were contentious among themselves." The Judge, in appeal, held that the mere act of filing this suit on the part of the plaintiff is tantamount to a refusal to perform his contract in the sense of s. 21 of the Specific Relief Act. We cannot take this view; and we hold that the contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract and not a contract broken up by the conduct of all the parties to it. We allow the appeal, and setting aside the decree of the lower appellate Court, remit the appeal for determination on the merits, under s. 562 of the Civil Procedure Code. Costs will be costs in the cause.

Appeal allowed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1885 *December* 12.

DHANAK SINGH AND OTHERS (DEFENDANTS) *v.* CHAIN SUKH (PLAINTIFF).*

Lambardar and co-sharer—Suit by co-sharer for profits—Burden of proof—Act XII of 1881 (*N.-W. P. Rent Act*), *s.* 209.

When a co-sharer claims a dividend on the full rental of the mahál, and the lambardár pleads in reply that the actual collection fell short of that rental, the burden of proof lies on the co-sharer to show that the deficient collection was attributable to the conduct of the lambardár, in the sense of s. 209 of the N.-W. P. Rent Act (XII of 1881), before he can succeed in getting a decree for a sum in excess of the actual collections.

THE plaintiff in this suit, a recorded co-sharer in a mahál, sued the defendant, the lambardár, for his share of the profits, claiming in respect of the full rental of the mahál. The Assistant Collector trying the suit gave the plaintiff a decree for profits calculated on what the defendant and the patwári said had been collected, on the ground that it was for the plaintiff to prove that more was collected, or that the defendant was able to collect more, which he had not done. On appeal to the District Court the plaintiff contended that he was entitled to a share of profits calculated on the full rental of the mahál, and that if the lambardár asserted that he had collected less than the full rental, the burden of proving that fact rested

* Second Appeal No. 160 of 1885, from a decree of C. J. Daniell, Esq., District Judge of Farukhabad, dated the 12th November, 1884, modifying a decree of Pandit Maháraj Narain, Assistant Collector of the first class, Farukhabad, dated the 29th March, 1884.