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incumbrance covers the probable value of the property, is not sufficient to sustain a plea that the person whose property is sold, has no saleable interest in the property under s. 313. There is always the equity of redemption remaining. What I understand that section to contemplate is, that either the judgment-debtor had no interest at all, or that the interest was not one he could sell. The fact that the property may fetch little or nothing, if sold, does not affect the question.

We have been referred to *Naharmul v. Sadut Ali* (1) but that case is not on all fours with the case before us, which is more in accord with a subsequent case—*Protap Chunder Chuckerbutty v. Fanioty* (2), which the Judges distinguish from *Naharmul v. Sadut Ali* (1).

For these reasons I would dismiss this appeal with costs.

BRODHURST, J.—I concur.

Appeal dismissed.

1886,
 December 17.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

SHEOAMBAR AND OTHERS (DEPENDANTS) v. DEODAT (PLAINTIFF)*.

Arbitration—Agreement to refer—Order under s. 506 of the Civil Procedure Code to refer matters in dispute in action then pending—Order under s. 373, pending the reference, granting plaintiff permission to withdraw with liberty to bring fresh suit—Act I of 1877 (Specific Relief Act), s. 21.

The wording of s. 21 of the Specific Relief Act (I of 1877) is wide enough to cover contracts to refer any matter which can legally be referred to arbitration, and one of such matters is a suit which is proceeding in Court.

The parties to a suit, while it was pending, agreed to refer the matters in difference between them to arbitration, and for this purpose applied to the Court for an order of reference under s. 506 of the Civil Procedure Code. The application was granted, arbitrators were appointed, and it was ordered that they should make their award within one week. Before the week had expired, and before any award had been made, one of the parties made an *ex parte* application under s. 373 of the Code for leave to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject-matter. The application was granted, the suit struck off, and a fresh suit instituted in pursuance of the permission thus given by the Court. In defence to this suit it was pleaded that the suit was barred by s. 21 of the Specific Relief Act (I of 1877).

* Second Appeal No. 246 of 1886, from a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Gorakhpur, dated the 11th January, 1886, confirming a decree of Munshi Raj Nath Prasad, Munsif of Basti, dated the 24th September, 1885.

(1) 8 Calc. L. R., 463.

(2) I. L. R., 9 Calc. 506.

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Held, that the Court in the former proceedings had no power to revoke the order of reference prior to award except as provided by s. 510 of the Code; that consequently the Court's order under s. 373 was *ultra vires* if involving such revocation, or, if not involving it, left the order of reference still in force; that in either alternative the suit was barred by s. 21 of the Specific Relief Act; and that it was immaterial that the period within which the award was to be made expired before the bringing of the second action.

Per TYRRELL, J., that the suit was barred by the second clause of s. 373, the Court having had no jurisdiction to pass the order under that section, or, having referred the suit to arbitration, to restore the suit to its file and treat it as awaiting the Court's decision.

THE plaintiff in this case claimed possession of a one anna share of a village on the allegation that it formed part of the joint family property of himself and the defendants, who were his first cousins, and had dispossessed him of the share. The defendants denied these allegations, and asserted an exclusive right to the property in question. They also pleaded that the suit was barred by the provisions of s. 21 of the Specific Relief Act (I of 1877).

This plea arose out of the following circumstances. The plaintiff had, previously, in December, 1884, instituted a suit against the defendants in respect of the same matter and upon the same grounds as the present, in the Court of the Munsif of Basti. While the suit was pending, the parties agreed to refer the matters in difference between them to arbitration, and for this purpose applied to the Court, on the 31st January, 1885, for an order of reference under s. 506 of the Civil Procedure Code. This application was granted, and arbitrators were appointed, and it was ordered that they should make their award within one week. Before the week had expired, and before any award had been made, the plaintiff made an *ex parte* application under s. 373 of the Code, for leave to withdraw from the suit, with liberty to bring a fresh suit in respect of the same subject-matter. This application was granted on the 3rd February, 1885, and the suit was struck off, and the present suit was instituted by the plaintiff in pursuance of the permission thus granted to him.

The Court of first instance (Munsif of Basti) was of opinion that the suit was not barred by s. 21 of the Specific Relief Act, on the ground that the Court in the former suit had power to grant the plaintiff permission to withdraw from the suit with liberty to sue again, and had properly exercised such power, and that the result of

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its order was to cancel the suit, and consequently the arbitration proceedings, which formed part of it. Upon the merits of the case the Court gave the plaintiff a decree. The defendants appealed to the Subordinate Judge of Gorakhpur, who dismissed the appeal, agreeing with the reasons stated by the Munsif. The Court observed :—" I am of opinion that an agreement to nominate arbitrators was entered into between the parties during the pendency of the former suit. This application was made to the Court in which that suit was instituted, but when the suit, on the application of the plaintiff under s. 373 of the Code of Civil Procedure, was withdrawn, the arbitration proceedings were nullified, and the agreement to nominate the arbitrators fell through. In my opinion such applications, which are made to the Court under s. 506 of the Code, form part of the original suit ; and when, on the plaintiff's application, the suit itself is cancelled, the application for nomination of arbitrators also becomes null and void.....I hold that the order of the Court in the former suit, giving the plaintiff permission to withdraw from the suit, is final. Whatever this order might have been, it cannot be questioned in the subsequent suit. In the case of *Abdul Rahman v. Lal Behari* (1), the High Court has ruled that in a subsequent suit no argument regarding the exercise of the power under s. 373 of the Code of Civil Procedure, when such former order has become final, can be discussed."

The defendants preferred a second appeal to the High Court, on the ground that the order passed under s. 373 of the Civil Procedure Code had not avoided the agreement to refer the matters in difference between the parties to arbitration; that the plaintiff had, by his conduct, refused to perform the agreement, and that the suit was therefore barred by s. 21 of the Specific Relief Act.

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal* for the appellants.

Munshi *Sukh Ram* for the respondents.

EDGE, C. J.—The first question in this case is whether s. 21 of the Specific Relief Act applies to a contract to refer to arbitration an action already pending. It appears to me that the wording of the section is wide enough to cover contracts to refer any matter which

(1) Weekly Notes, 1895, p. 151.

can legally be referred to arbitration. One of such matters is a suit which is proceeding in Court. That being my view of the scope of s. 21, the next question is, was there in this case a contract to refer a matter to arbitration which the plaintiff has refused to perform?

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. This question depends to some extent upon the facts of this case. The first suit was brought in December, 1884. Before it came on for trial, the parties agreed or contracted to refer the whole action to arbitration, and on the 31st January, 1885, in pursuance of that agreement, applied for and obtained from the Munsif an order for reference. We have been informed that it was a part of this order that the arbitrators should make their award within one week. However, before the week expired, the plaintiff made an application, not by consent but adversely, for leave to withdraw the action under s. 373 of the Civil Procedure Code, and to bring a fresh one. The Munsif, on the 3rd February, 1885, granted the application, and made an order to the effect that the plaintiff might withdraw, and bring a fresh action, so far as the law allowed. The fresh action has now been brought. The Court below have held that s. 21 of the Specific Relief Act does not apply, that there is and was no agreement to refer, and that the effect of the Munsif's order was to cancel the order of reference. We asked Munshi *Sukh Ram* to point out any power which the Court has to revoke an order referring an action or matter in an action, except in the events referred to in s. 510 of the Code, but he has admitted that he cannot do so. The Court had, no doubt, power to deal with cases of partiality or other misconduct; but this power would only arise after the award had been made. Why this should be so, I cannot say. It would appear advisable that the Court should be able to revoke a submission before award, if satisfied that the arbitrators were acting corruptly, though of course strong evidence of this would be required. Munsi *Sukh Ram* cannot show any power to revoke a submission to arbitration in a case of this kind, and we can find nothing in the Civil Procedure Code enabling the Munsif to revoke the order of reference in this case. If there is no such power, it appears to us that there must be one of two results: either the Munsif had no power to act under s. 373 of the Code, if the effect of such action would be a revocation of the order of reference, or, if the permission

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to withdraw would not involve such revocation, then the order to refer the action is still in force: so that the Munsif's order was either *ultra vires* or else inoperative as a revocation. In either alternative, the case falls within s. 21 of the Specific Relief Act. But Munshi *Sukh Ram* contends that the period of time within which the award was to be made expired before the bringing of the second action. To my mind that does not answer the defendant's point. S. 21 is in positive terms, and provides that "save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has made such a contract, and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." Now, this refers to a person refusing performance of a contract while it is still operative. In this case, within the prescribed week, and while the agreement was still in force, Munshi *Sukh Ram's* client did refuse performance, and showed such refusal effectively by applying for leave to withdraw.

Under these circumstances, I am of opinion that s. 21 of the Specific Relief Act applies to the case, and affords an answer to the suit, and that this appeal must be allowed with costs.

TYRRELL, J.—I concur with the learned Chief Justice, and would only add that, in my opinion, this suit is barred by the second clause of s. 273 of the Civil Procedure Code, as it appears to me that the Munsif had no jurisdiction to give the plaintiff permission to withdraw from the former suit and bring a fresh one for the same subject-matter. Under the circumstances which have been stated by the learned Chief Justice, the Munsif had delegated his authority in connection with the suit to an arbitrator appointed by him on the nomination of both parties; and under the circumstances described in the plaintiff's *ex parte* application, the Munsif was not competent to restore the suit to his file, and treat it as one awaiting his decision. The action of a Court referring a suit to arbitration under Chapter XXXVII of the Code is limited expressly by the provisions of that chapter to dealing with the award. It may remit or otherwise interfere with the award, but it may not otherwise treat the suit as one which has remitted upon its own file.

I concur with the learned Chief Justice in decreeing this appeal with costs.

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Appeal allowed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Brodhurst.

1886
December 20.

GANGIA (PETITIONER) v. RANGI SINGH (OBJECTOR)*

Act XXVII of 1860 s. 6—Grant of certificate by District Court—Petition to High Court by objector for fresh certificate—Supersession of certificate granted by District Court.

S. 6 of Act XXVII of 1860 contemplates two different proceedings which may arise under different circumstances. One of these proceedings is an appeal, which has the effect of suspending the "granting," i.e., the *issuing* of the certificate; and the intention of the Legislature was that, upon an adverse order being made, the person objecting to it might thereupon appeal, and the effect of this would be to oblige the District Judge to hold his hand, and not to issue the certificate until the decision of the appeal. The other proceeding is by way of petition to the High Court, after the certificate has been granted by the District Court, to grant a fresh certificate in supersession of the first; and the latter portion of s. 6 shows that the person who obtains the fresh certificate need not be the person who obtained the first, and there is nothing to limit the powers of the Court on petition to grant a fresh certificate to any person, including the person who opposed the granting of the original certificate, who may prove himself entitled thereto, or to confine the exercise of such powers to cases where the first certificate was defective in form.

THIS was an application to the High Court under s. 6 of Act XXVII of 1860 for the grant of a certificate for the collection of the debts due to a deceased person in supersession of a certificate granted by the District Judge of Mirzapur. The facts are sufficiently stated in the judgments of the Court.

Lala Juala Prasad for the petitioner.

Munshi Hanuman Prasad for the opposite party.

OLDFIELD, J.—The matter before us relates to the grant of a certificate for collection of debts under Act XXVII of 1860. There were two parties who applied, namely, Musammât Gangia, the petitioner before us, and Raugi Singh, the respondent. The Court below refused to grant a certificate to the petitioner, and granted it to the respondent. Musammât Gangia has filed an

* Application No. 172 of 1886 under s. 6 of Act XXVII of 1860, for supersession of certificate granted by W. T. Martin, Esq., District Judge of Mirzapur, dated the 7th July, 1886.